Michigan Law Review

Volume 84 | Issue 7

1986

Community, Citizenship, and the Search for National Identity

Frederick Schauer
University of Michigan Law School

COMMUNITY, CITIZENSHIP, AND THE SEARCH FOR NATIONAL IDENTITY

*Frederick Schauer**

We are black, red, white, and yellow; we are Hungarians, Italians, Lebanese, Jamaicans, Vietnamese, and Scots; we are Elks, Moose, and Sigma Nus; we are bridge players and ship model builders, Vermonters and Virginians, Christians and Jews, New Yorkers and Philadelphians. But are we Americans? Except in times of war, when we feel our sense of national identity intensely, the question is far from silly. For it is the question whether, in a nation of subgroups, in a nation of primary loyalty to some agglomeration of people *less* than the 240 million that is our population, much remains, or ought to remain, of thinking of the nation as a relevant community.

We are all members of many communities, whether they be families, faculties, or whatever. But what *is* a community? The answer to that question may vary depending on the reason for asking it, but here I want to think of a community in terms of some divergence of interest, at least in the short term, between individual and community. For me a meaningful sense of community exists only insofar as the individuals who comprise that community are willing to take actions on behalf of the community not only that they would not take on their own behalf, but that are quite possibly detrimental to their own interests. To think of community is inevitably to think of at least short-term altruism, recognizing that perhaps the major force behind that short-term altruism will be some longer-term payoff for the individual concerned. Nevertheless, as an initial pass at the issues, I want to suggest that we cannot think about a meaningful sense of community without thinking of some sense of sacrifice.

I draw on the notion of community as sacrifice in order to make the question of community a real one. The tension between individualistic and communitarian perspectives on social, political, and legal organization is well known, and the issue is by no means new just because it has only recently been discovered by legal scholars. But when we think about community, as has recently become fashionable, are we doing anything other than using new words to describe our old

* Professor of Law, University of Michigan. — Ed. An earlier version of this essay was presented in December 1985 at the Sholom Hartman Institute, Jerusalem.

intuitions? More specifically, are there situations in which thinking about the world in communitarian terms generates different results than if we thought about those situations in individualistic terms? If there are, will those who think that community is important endorse the consequences of that view if those consequences are different from the consequences generated by an individualistic view of the world? In short, does communitarianism as currently espoused falsify any of the results of individualism? If it does not, then we seem to have little more than a change in terminology, a desire to use today's fashionable language to justify the results we would have advocated even in yesterday's terms.

Perspectives on social organization cannot easily or precisely be divided into individualist and communitarian. These terms are imprecise, but even more, they are relative to the issues that at any time confront us. Few people within the mainstream of American political thought believe that there ought not to be some substantial concern for tolerance, for individual choice, for individual freedom, and for proper recognition of individual differences. Similarly, few people within the same mainstream believe that communities, whether ethnic, social, religious, or political, are unimportant, or that law has no role to play both in recognizing and reinforcing these communities. Individualists are not anarchists, and communitarians are not seeking to create *1984* as utopia. Rather, the differences, if any there are, are differences about how we will look at the close cases within an existing political and legal structure.[1] At the margin, is it important to increase or reinforce our concern for individual choice and individual differences? Or is it instead important, at the margin, to try to increase or reinforce community attachments and the sense of community as itself an entity worth preserving? At the margin we may discover that how we think about these differing perspectives makes a difference. If so, then there may be real differences between individualistic and communitarian outlooks. Otherwise, we may realize that little more is at stake than the use of new words for old ideas.

As a test of this proposition, I want to explore the issue of alienage restrictions. Under what circumstances is it justifiable to draw lines based on whether a person is a citizen? Lines drawn on the basis of citizenship are a useful test of how seriously we take the idea of the nation as a relevant community and, more tangentially, of how seriously we take the idea of community itself. To the extent that we are

1. As a theory of legal and political change, we must recognize that what is today at the margin may tomorrow be in the center, and what is today in the center is substantially determined by previous decisions at the margin.

skeptical of such lines, our concerns are to that extent individual-oriented, primarily focused on the adverse consequences of excluding some people from benefits or privileges available to others. But to the extent that we are preoccupied with these individualistic ideals, we may discover that we weaken a sense of community and dilute the social glue that holds us together. Perhaps as an empirical matter this is untrue. There are no meters to measure the current extent or intensity of community attachment. But I want at least to offer some speculations about such matters, recognizing that the issue is not whether the empirical speculations are true, but whether it is even permissible to speculate about these questions. A good test of whether we remain shackled to individualism even as we talk about communitarianism is in the extent to which we will seriously contemplate communitarian goals that require some sacrifice of individualistic principles.

I

The question of restrictions on aliens is a question of distinguishing the alien from the citizen, and it is natural to see this kind of issue in equal protection terms. But what is it to see an issue in equal protection terms? Much of our equal protection jurisprudence has been cast in terms of levels of scrutiny. Classifications based on race receive "strict" scrutiny,[2] those based on gender receive scrutiny that is strict but not as much so,[3] and so on. Thus, the constitutional validity of a classification turns largely on the initial determination of how courts are going to look at classifications of *this kind,* where "this kind" refers to the admittedly contingent larger groupings under which we choose to assimilate different legislative actions. Although the standard terminology refers to "levels of scrutiny" — distinguishing, for example, the "strict" scrutiny applicable to racial classifications from the "deferential" scrutiny applicable to social and economic regulation not involving race or gender[4] — I would prefer to think of the issue in terms of "attitudes." My attitude toward an article of clothing is likely to be different if I choose it myself than if my mother chooses it for me. A person's attitude toward preferential hiring on racial grounds to remedy past discrimination is likely to vary depending on whether it is characterized as "affirmative action" or "reverse discrim-

2. Palmore v. Sidoti, 466 U.S. 429 (1984); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

3. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

4. *E.g.,* Schweiker v. Wilson, 450 U.S. 221 (1981); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); City of New Orleans v. Dukes, 427 U.S. 297 (1976).

ination." And a lawyer's attitude toward certain facts is likely to vary depending on whether the lawyer's task is to prove them or to disprove them.

In this sense, therefore, a level of scrutiny is a way of talking about the attitude with which not only courts, but the larger society of which the Constitution is a part, will approach certain forms of legislative classifications. Will we be skeptical and inclined to reject, or will we be supportive and inclined to accept?

My specific goal here is to think about the question of attitude, using constitutional levels of scrutiny only as an example, with respect to classifications based on citizenship in some formal sense. How should courts, and how should all of us, think about legislation or other governmental action that distinguishes the citizen from the legally resident alien? Should fundamental constitutional liberties be available to everyone who happens to be lawfully on American soil, or should we protect the speeches of the citizen revolutionary more than those of the alien troublemaker? Should citizens be preferred to noncitizens when the state distributes nonscarce benefits,[5] such as welfare, social security, or library cards? Should citizens have preference when scarce resources are to be allocated, such as places in the entering class of a competitive university, research grants from the National Science Foundation, or space on the walls of the National Gallery of Art? Should citizens be preferred to noncitizens for government employment? Should noncitizens be barred from holding elective office, or even appointive office?

As I have said, I want to address how the United States as a nation thinks about and ought to think about these questions. In itself this is not necessarily a question only of constitutional law, and I do not intend what I say to be so limited. But in the United States questions of political philosophy and public policy merge into questions of constitutional law with remarkable frequency, and thus I do not think there is anything wrong with starting an investigation of attitudes towards classifications based on noncitizenship with an investigation of judicial attitudes towards such classifications.

II

In talking about constitutional law, it is usually a mistake, although a prevalent one, to start by talking about recent cases con-

5. By "nonscarce" I mean those governmental benefits whose current methods of allocation make the benefit available to all qualified people, recognizing that increasing the size of that pool might well result in adoption of new criteria for allocation.

tested in the Supreme Court. The nature of constitutional adjudication is such that Supreme Court cases will invariably be located at the edges rather than at the center of the phenomenon being discussed.[6] Edges may in time become centers, and centers may become edges, but to take what the Supreme Court now spends its time on as an indicator of what the Constitution now does is the same as taking dusk as an indicator of the brightness of the day or the darkness of the night.

Let me be somewhat idiosyncratic, therefore, and start with the text of the Constitution in looking at the question of distinctions between citizens and noncitizens. And in looking at the text, one is struck initially by the lack of importance of citizenship. Although article I requires that members of the House of Representatives and members of the Senate be citizens,[7] and article II requires that the President and Vice-President be natural born citizens,[8] citizenship is noticeably absent throughout the rest of the document. Nothing in article III requires that federal judges be citizens, nor does anything in the Constitution require that ambassadors, federal officials, or governmental employees of any kind be citizens. The Bill of Rights, although written but a few years after the citizenship language was used in articles I and II, consistently protects the constitutional rights not of citizens, but of "the people."[9] When, in order to reverse the effects of *Dred Scott* v. *Sandford,*[10] the fourteenth amendment provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,"[11] and prohibited states from abridging "the privileges and immunities of citizens of the United States,"[12] it also provided fundamental protections in quite different language. In the very same section we see that states are not permitted to "deprive any person of life, liberty, or property, without due process of law" nor to "deny to any person within its jurisdiction the equal protection of the laws."[13] This contrast between what is available to citizens and what is not is highlighted even more by the fact that "citizen" again becomes the operative term in subse-

6. I discuss this extensively in Schauer, *Easy Cases,* 58 S. CAL. L. REV. 399 (1985).

7. U.S. CONST. art. I, § 2.

8. U.S. CONST. art. II, § 1.

9. *E.g.,* U.S. CONST. amend. I ("the right of the people peaceably to assemble"); U.S. CONST. amend. II ("the right of the people to keep and bear Arms"). Similar language also appears in the fourth, fifth, and ninth amendments. The sixth, seventh, and eighth amendments are not quite so explicit, but plainly do not limit their protections to citizens.

10. 60 U.S. (19 How.) 393 (1857).

11. U.S. CONST. amend. XIV, § 1.

12. U.S. CONST. amend. XIV, § 1.

13. U.S. CONST. amend. XIV, § 1.

quent amendments guaranteeing the franchise to all citizens of the United States regardless of race,[14] sex,[15] and age (so long as they are at least eighteen years old).[16]

The text thus provides the initial contours of a plan of government in which citizenship is a prerequisite for voting and for holding a very small number of constitutionally designated positions, but is not a prerequisite for any other form of participation in government nor for benefiting from the individual rights guaranteed by the Constitution. And in terms of being entitled to claim constitutional rights, the courts have consistently held to the view that "any person within the United States, citizen or alien, resident or non-resident, is protected by the guarantees of the Constitution."[17] Thus the noncitizen as well as the citizen is free from arrest for demonstrating in front of the White House, the noncitizen as much as the citizen is entitled to the procedural protections of the Bill of Rights before he can be imprisoned for a crime, and the alien's freedom of religion is as fully protected as is that of the citizen.

Against this background of a paucity of distinctions between aliens and citizens in terms of entitlement to constitutional rights, it may be instructive to take a look at the Supreme Court's doctrinally inelegant history of dealing with classifications drawn by legislatures that distinguish the citizen from the resident alien. Here the issue is not whether the noncitizen can claim *constitutional* rights. Instead, it is whether a statutory or other legislative or administrative action that draws distinctions between the citizen and the alien will be treated, constitutionally, with an attitude of deference or with an attitude of suspicion. The issue here is not whether aliens have determinant rights to some particular treatment. It is whether with respect to allocation of scarce or nonscarce resources, or with respect to government regulation of any kind, a line drawn on the basis of citizenship is constitutionally permissible, regardless of the status or importance of the benefit that is being granted or withheld.

Traditionally the states were constitutionally permitted to impose special restrictions on aliens, and to reserve some benefits exclusively for citizens. Thus, cases from the early part of this century upheld, against constitutional attack, state laws prohibiting aliens from own-

14. U.S. CONST. amend. XV, § 1.

15. U.S. CONST. amend. XIX, § 1.

16. U.S. CONST. amend. XXVI, § 1.

17. Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 749 (9th Cir. 1972). The case law can be traced back to Yick Wo v. Hopkins, 118 U.S. 356 (1886).

ing land,[18] laws barring aliens from working on public construction contracts,[19] and laws allowing only citizens the privilege of harvesting wildlife.[20] And although at about this time the Supreme Court struck down a statute substantially restricting the abilities of noncitizens to obtain private employment,[21] the Court in the same case thought it important to reaffirm that with respect to public employment or anything else that was part of the "public domain" restrictions on aliens would be constitutionally permissible.[22]

More recently, the attitude towards restrictions on aliens has changed. In the late 1940s a number of cases, relying explicitly or implicitly on the specific constitutional mandate to Congress to regulate the naturalization process, prohibited the states from classifying on the basis of citizenship, on the theory that such classifications imposed burdens on aliens not authorized by Congress.[23] But in the 1970s the congressional control rationale was jettisoned, and the Supreme Court was comfortable in saying that a classification based on citizenship was "suspect" and thus to be viewed by the Constitution with extreme skepticism.

This series of developments is traceable to *Graham v. Richardson,*[24] in which the Court struck down a state law denying welfare benefits to aliens: "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority[25] for whom such heightened judicial solicitude is appropriate."[26] Shortly after *Graham,* the Supreme Court applied its rationale to a context less emotionally appealing than the denial of welfare benefits to aliens. In *In re Griffiths,*[27] the Court struck down an exclusion of aliens from the practice of law, and in *Sugarman v.*

18. Frick v. Webb, 263 U.S. 326 (1923).

19. Crane v. New York, 239 U.S. 195 (1915).

20. Patsone v. Pennsylvania, 232 U.S. 138 (1914).

21. Truax v. Raich, 239 U.S. 33 (1915).

22. 239 U.S. at 39-40.

23. Takahashi v. Fish and Game Commn., 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633, 649 (1948) (Black, J., concurring). For commentary on this approach to alienage classifications, see Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 COLUM. L. REV. 1023, 1063-64 (1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis,* 89 YALE L.J. 940 (1980).

24. 403 U.S. 365 (1971).

25. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938): "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

26. 403 U.S. at 371-72 (footnotes and citation omitted, footnote added).

27. 413 U.S. 717 (1973).

Dougall,[28] a statute limiting permanent civil service employment to citizens was similarly invalidated.

The results in these cases followed, doctrinally, from the fact that a judicial attitude of suspicion has overwhelmingly produced the consequence of invalidation.[29] But it seems to have been the very harshness of the doctrine that led to a change in the Court's treatment of alienage. Unwilling to prohibit citizenship from being a factor in, for example, determining whether a person could run for statewide elective office, the Court held that a state may require citizenship not only for elective office, but also for any governmental officer or employee whose function goes "to the heart of representative government" in the sense of being directly involved in the "formulation, execution, or review" of broad public policy determinations.[30] Employing this standard, the Court then adopted an attitude of deference toward state policies restricting to citizens positions such as law-enforcement officers[31] and school teachers,[32] while striking down restrictions on aliens when applied to notaries public[33] and licensed civil engineers.[34]

In deciding these and other cases, the Supreme Court has made the extent of deference turn on the nature of the position or benefit involved, rather than on anything inherent in the alien-citizen distinction regardless of where applied. This is rather at odds with the more traditional methods of equal protection analysis,[35] but parsing the cases and the fine strands of doctrine is not my agenda here. For although many may quarrel with where the doctrinal lines are now drawn, or with the seeming contraction of protection of noncitizens since the early 1970s,[36] it remains the case that a governmental entity,

---

28. 413 U.S. 634 (1973).

29. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) ("scrutiny that was 'strict' in theory and fatal in fact").

30. Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

31. Cabell v. Chavez-Salido, 454 U.S. 432 (1982); Foley v. Connelie, 435 U.S. 291 (1978).

32. Ambach v. Norwick, 441 U.S. 68 (1979).

33. Bernal v. Fainter, 467 U.S. 216 (1984).

34. Examining Bd. of Engrs., Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (striking down an undifferentiated exclusion of aliens from the federal civil service). Although not an employment case, a similar analysis is found in Nyquist v. Mauclet, 432 U.S. 1 (1977), in which the Court invalidated a citizenship requirement for holders of state scholarships. A more deferential approach is taken, however, when the line is drawn between classes of aliens rather than between aliens and citizens. *See* Mathews v. Diaz, 426 U.S. 67 (1976).

35. *See* O'Fallon, *To Preserve the Conception of a Political Community*, 57 U. DET. J. URB. L. 777 (1980).

36. For such commentary, see Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977); Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275; Walter, *The Alien's Right to*

especially one not part of the federal government,[37] must provide some special sort of justification for treating aliens differently. The niceties of doctrine should not detract from the fact that, even under the rather large exceptions of the recent cases, the governmental entity must demonstrate entitlement to an exception that, however broad, is still not without real limits. What emerges is still, therefore, a general attitude that something at least faintly suspicious is going on when a state makes citizenship an important classifying factor. But what is the source of this attitude?

III

The Supreme Court has found its exceptions to the general rule of strict scrutiny for alienage classifications to reside in the notion of a "political community" of citizens.[38] The negative implication of this is, of course, according to the accepted wisdom, that outside of some notion of the political community one's status as citizen does not or ought not matter. Alexander Bickel found it "gratifying . . . that we live under a Constitution to which the concept of citizenship matters very little, that prescribes decencies and wise modalities of government quite without regard to the concept of citizenship."[39] John Hart Ely takes the alien's very exclusion from political participation as a strong reason to grant special judicial solicitude.[40] Yet both of these views, as well as many others, are focused on the status of the noncitizen and on the disadvantages the noncitizen might be under during the (theoretically and generally) limited time that a resident alien remains a noncitizen.

Instead of this, I want to think about purposes the very concept of citizenship may serve in American society. 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. If this is the case, then we may see more clearly the tension between individualism and communitarianism, because a focus on the status of the noncitizen, a concern for those who are disadvantaged, may result in weakening the bonds between existing members of the community.

Work and the Political Community's Right to Govern, 25 WAYNE L. REV. 1181 (1979); Note, *A Dual Standard for State Discrimination Against Aliens,* 92 HARV. L. REV. 1516 (1979).

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

38. Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973).

39. A. BICKEL, THE MORALITY OF CONSENT 53-54 (1975).

40. J. ELY, DEMOCRACY AND DISTRUST 161-62 (1980).

Conversely, it is likely that a concern for those bonds can effectively be put into practice only at the expense of those who are excluded.

By referring to the "political community," the judicial and legal conception of citizenship has been largely conjoined with the idea of government. If active participation in the process of governing is not involved, then citizenship is and should be irrelevant. But why is this so? Is it possible that citizenship can serve other social or symbolic functions? Might not those functions be especially important in a society lacking other, perhaps more natural, forms of social cohesion? I do not want to argue that this *should* be the case, that citizenship should be taken to be more important than it now is. But I do want to argue that there *is* another side to the debate, that treating citizenship as largely inconsequential does have costs, and that the assessment of the consequences of these costs is likely to be proportionate to one's feelings about the very notion of community.

IV

One of the more interesting features of contemporary France is the current redoubled effort to protect the French language from incursions by foreign words, especially English. Although the very existence of the Académie française testifies to the special importance of the French language in the preservation of the community that is France, the more recent phenomenon of a governmental agency — The High Committee for the Preservation and Expansion of the French Language — is even more notable. This committee[41] was followed by ministerial Commissions on Terminology[42] charged with finding out what foreign terms were then in use within the jurisdictions of particular ministries and determining what was to be done with respect to those terms.[43] Thus commissions now determine what foreign words are outlawed in all state documents. They deal not only with trade, but with sports, housing, and virtually all other areas of governmental activity. Although there are the occasional grudging exceptions for words such as "vodka" and "gorgonzola," the contemporary French scene is marked by a vigorous attempt to expunge from French culture not only "le sweater" and "le weekend," but also "le fog dispersal," "le byte," and "le package tour." Some of this may

41. *See* Munday, *Legislating in Defense of the French Language*, 44 CAMBRIDGE L.J. 218, 220 & n.10 (1985) (citing Decree No. 66-203 of Mar. 31, 1966, Journal Officiel de la République Française, Apr. 7, 1966, at 2795, as the government decree that established the committee).

42. *See* Munday, *supra* note 41, at 220 & n.11 (citing Ministerial Order of July 7, 1970 (unpublished), and Ministerial Order of June 16, 1971, 1971 Juris-Classeur Périodique III, 38009, as the orders which created the commissions).

43. *See generally* Munday, *supra* note 41.

undoubtedly seem silly, but it is a reflection of the extent to which France sees the French language as central to the notion of a community.

Parallel forms of community identity exist in other nations. In Israel the Jewish religion seems to fulfill many of the same functions and explains why many Israelis see governmental enforcement of religious law as centrally important. The unacceptability of civil marriage and divorce, as well as attempts to ban the selling of pork or the playing of soccer on Saturdays, are from one perspective extreme but from another perspective merely the embodiment of efforts to entrench Judaism as the organizing symbol of the nation. And perhaps for those Israelis who disagree with many of these policies, or who are not especially religious, it is the Holocaust, or the creation of the state in 1948, or the war in 1967, that serves much the same organizing function in helping to constitute a society.

On the issue of what it takes to constitute a community, the Hart-Devlin debate is instructive.[44] Lord Devlin's view that shared notions of sexual morality are necessary to constitute a community is at the least subject to dispute; to me it is most likely wrong. Nevertheless, his more fundamental and less controversial point is that there must be *something* other than geographic boundaries and a shared jurisdiction under a common legal sovereign that is necessary for the existence of a community. What this *something* is varies from community to community. The French language for the French, Judaism for many Israelis, a soccer team for the depressed cities of Liverpool and Manchester, a football team for the unappreciated cities of Oakland and Pittsburgh, the royal family for the English, and so on; all serve this symbolic bonding function in some way.

I do not mean to say that any of my particular socio-cultural observations are not open to question. Some may doubt the effectiveness of these particular symbols, or suggest that these cultures may have other and more important organizing strands that I have ignored. These quarrels are not central here. Rather, I mention these examples only to focus on the idea of an organizing symbol as a prerequisite for a sense of community, and thus to look at what might serve this function in the United States.

Although the political right in the United States has at the moment focused on the English language as a possible source of social cohesion,[45] this seems more a reaction to recent Spanish-speaking immi-

44. P. DEVLIN, THE ENFORCEMENT OF MORALS (1959) (Maccabaean Lecture in Jurisprudence of the British Academy); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).

45. See former Senator S.I. Hayakawa's initiative to have an English Language Amendment

grants than to something special about language. I mention language use only as an example of the problem of community in a nation that is comprised of numerous different nationalities, numerous different second languages, numerous different religions, and a general reverence for pluralism and tolerance that at least sounds good in an Independence Day parade — even if frightfully few Americans are especially willing to be pluralistic or tolerant with respect to the person next door. But even if pluralism is best when practiced Somewhere Else, it remains the case that neither language, nor religion, nor nationality, nor shared moral or political views, is a likely candidate for the communitarian symbol that seems to be a part of all true communities.[46]

Against this background, consider citizenship as possibly serving precisely this community-bonding function. To some extent symbols may serve important organizing and bonding functions even if they are in many respects artificial. Sports teams are a good example of this phenomenon. But symbols that hold communities together, and that may help to create the environment in which people are willing to sacrifice their own short-term welfare for the good of others, or for the good of the community at large, are likely to be more effective in performing that function if they at least reflect some underlying reality. Thus, the arguments for making citizenship matter become stronger insofar as citizenship indeed reflects something about this country. We ought therefore to think about the extent to which there might be something special about citizenship in the United States that could be said to parallel the place of language, religion, and so on in other societies.

Unlike ethnicity, religion, and even language to some extent, citizenship is technically available to all residents who wish it. And although there may be some economic impediments to becoming a citizen, it remains substantially a club open to all. In terms of the lines commonly and unfortunately drawn between the ins and the outs in this and other countries, citizenship is a remarkably accessible goal. It

---

added to the Constitution of the United States. The amendment, which provides simply that "[t]he English language shall be the official language of the United States," is now pending before both the Senate and the House of Representatives. S.J. Res. 20, 99th Cong., 1st Sess. (1985); H.J. Res. 96, 99th Cong., 1st Sess. (1985).

46. It is tempting to see pluralism and tolerance themselves as our organizing ideal. *See, e.g.*, Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986); *see also* Sherry, *The Gender of Judges*, 4 L. & INEQUALITY 159, 169 (1986). It is ultimately an empirical question whether something other than celebration of our differences is necessary to hold us together as a nation. I do not mean to suggest that tolerance as an organizing ideal is not important. But I do mean at least to open for discussion whether it can perform this function by itself. Perhaps it can, but that proposition is by no means self-evident.

is easier for a noncitizen to become a citizen than for a black to become white, for the poor to become rich, for a woman to become a man, or for Giorgio Bussioni to become George Bush.

If I am correct in supposing that citizenship can be an important symbol in terms of a club that anyone can join regardless of the impediments placed on achieving any other form of social equality, then it follows that citizenship may in some way be the appropriate symbol of the American dream. Indeed, it was to many of our ancestors, and it remains so for many people today. We are rapidly in the process of burying the myth of Horatio Alger. You can't get rich (or even not poor) in contemporary America just by working hard. But this image served in the past as an important source of American social cohesion. What will replace it? One answer is a society in which commitment to that society is the ticket of entry. By having a great deal turn on something that is not a function of your faith, your skin color, your wealth, your old school tie, where your grandfather was born, and who your mother was, the symbol of citizenship does more than merely fill a vacuum created by the death of Horatio Alger. It can provide a positive statement about what is special about the United States, or at least what can be special about the United States.

If it is the case that citizenship, by virtue of its accessibility, may serve important symbolic functions, then how might that symbol be strengthened? Perhaps it is the unfortunate side of human nature that finds it necessary to exclude some in order to form a bond for those included, but little in history or current experience belies this impression. In order for the "ins" to feel better about themselves, to be willing to make individual sacrifices for the group benefit, and to feel a strong sense of community identity, there must, regrettably, be some "outs." The law and other forms of official action can choose to ignore this phenomenon, but in doing so they run the risks that people will find *their* inness and *others'* outness in the more traditional forms of distinctions based on skin color, gender, religion, grandparents' birthplace, wealth, sexual preference, physical appearance, presence or absence of disability, and so on. Or law may help to create a national community that tries to transcend these lines, and citizenship may be a way for this to happen.

But we do not make citizenship more important merely by talking about it. Citizenship is likely to be perceived as important to the extent that it *is* important, and it will in fact be important to the extent that various tangible benefits or entitlements turn on citizenship. The more we make significant economic and social advantages turn on citizenship, the more we will disadvantage, usually temporarily, those

who are noncitizens to the benefit of those who are citizens. We use citizenship to strengthen our sense of national community by making those who are citizens feel especially good about that status, and we do that by investing that status with something real, such as preferences for a wide range of governmental entitlements. In preferring some, we of course do not prefer others, and it is in a way sad and in a way paradoxical that we hold ourselves together by fencing others out. But that it is sad and paradoxical does not make the phenomenon less real.

It is a mistake to think that we do not now draw these distinctions, even though citizenship is largely irrelevant. Rather, the locus has been shifted to the immigration decision, and the desire to make something special out of being an American is reflected in the desire to keep out those whose only crime is having been born too late. But maybe it is not necessary to tear down the Statue of Liberty in order to build a sense of community. 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.

V

The question of citizenship, for which I do not profess to have an answer, thus provides a good laboratory to study the question of community. As I suggested at the outset of this essay, it is easy to espouse communitarian values as long as that espousal does not require relinquishing individualistic results. But the hope of having both may be unrealistic. More likely is a world in which community attachment is a function of something shared by the members of the community, and not shared by others. To the extent that we wish to take community seriously, we will inevitably hurt those who do not share in what the community holds in common.

As a nation we may, therefore, choose to minimize our commitment to the nation as a community, reserving the feeling of being an American for the Fourth of July, and reserving sacrifices in the name of Americanism for April 15 and times of war. But there are costs to this, as we can see by the ineffectiveness of attempts to marshal community support for personal sacrifice during, for example, periods of oil shortage, very high inflation, trade imbalances, or budget deficits. Perhaps our inability to be a national community is just a given. But if it is not, then it is important that we recognize that some set of inclusions and exclusions is necessary to create this sense, and citizenship holds out the possibility of serving this function substantially less invidiously than most other candidates for the task.