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# THE CONSTITUTION OF EQUAL CITIZENSHIP FOR A GOOD SOCIETY

## CITIZENSHIP TALK: A REVISIONIST NARRATIVE<sup>1</sup>

*T. Alexander Aleinikoff\**

Discussions of citizenship—now widespread in both legal and non-legal academic literature—come at a time when many wonder whether the concept is anachronistic. Linked with a quickly fading notion of “nation-state sovereignty,” the idea of citizenship is under attack from supra-, trans-, and post-national forces, from high rates of immigration in Western states that have led to multicultural and multi-ethnic societies, and from sub-national demands of indigenous groups and ethnic minorities for some forms of autonomy or self-determination.

It is not surprising that we are continuing to talk about citizenship at the very time the world appears to be evolving past it. It still has real appeal as a political matter. The left, in a post-Thatcher/post-Reagan world, remains interested in a politics of redistribution and empowerment; and these goals, it is thought, are best pursued within a national construct.<sup>2</sup> The right sees citizenship as a response to multiculturalism, providing a basis for national unity that resists demands for group-based rights (frequently characterized as “special rights” that go against the idea of common, and equal, citizenship). Citizenship also appeals to political moderates in search of a kind of neutral social glue<sup>3</sup> that can hold together a multi-ethnic society. The concept is identified with a set of shared values—liberty, equality, and tolerance—that stand above racial, economic, and social groups.

American constitutional law has an implicit and powerful narrative that portrays citizenship as a core concept in a liberal democratic

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1. This presentation is a brief summary of themes developed in T.A. Aleinikoff, *Semblances of Sovereignty: The Constitution, the State and American Citizenship* (Harvard Univ. Press forthcoming 2002).

2. E.J. Hobsbawm, *The Future of the State*, 6 J. Int'l Dev. 267, 272 (1994).

3. Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 Mich. L. Rev. 1504, 1505-06 (1986).

state. The narrative begins with the opening words of the Constitution, "We, the People." It recognizes that, in ante-bellum America, the Constitution defined a *herrenvolk* democracy—made most palpable in Chief Justice Taney's opinion in *Dred Scott v. Sandford*<sup>4</sup> declaring that free blacks were not citizens of the United States. But citizenship came home in the Fourteenth Amendment, which defined United States citizenship in its first clause. It again falls on hard times in *Minor v. Happersett*,<sup>5</sup> *Elk v. Wilkins*,<sup>6</sup> and under Jim Crow. The concept is ultimately redeemed, however, by the work of the suffragists, the NAACP, the "Second Reconstruction" Congress, and the Warren Court. Back on track (again), the future looks rosy. From a liberal perspective, the guarantee of "equal citizenship" can identify and invalidate forms of discrimination now deemed to impose a second-class citizenship (such as sexual orientation, disability, and maybe even poverty). And neo-republicanism promises a (re)invigoration of citizenship-as-participation—from robust political involvement to bowling together. These two perspectives—somewhat in tension—unite in an alliance for progress, breaking down barriers to full participation in public spheres, and drawing us out of our private groups toward public concerns.

I believe the narrative gets it wrong, both in its objects of analysis and its teleology. A narrative of citizenship that focuses on equality and adopts race discrimination as its central case misses the point that citizenship is fundamentally a status that connotes membership in a polity, and it fails to see that the story of non-members and members of "quasi-polities" may be as significant as the story of disfavored full members. A broader narrative would look beyond the concept of second-class citizenship, examining membership through the eyes of immigrants, Indians, and residents in United States territories.

This revisionist narrative takes full note of late nineteenth century Supreme Court decisions involving federal power over immigration,<sup>7</sup> Indians,<sup>8</sup> and newly acquired territories.<sup>9</sup> In each instance, the Justices concluded that Congress possessed "plenary power" to regulate in the area; the Court would apply virtually no constitutional limitations on congressional authority. Behind these cases—which I will jointly label "the sovereignty cases"—lay a vision of the United States as a *nation-state*: a *state* endowed with the power to control its

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4. 60 U.S. (19 How.) 393, 399 (1857).

5. 88 U.S. (21 Wall.) 162, 178 (1874) (holding constitutional a statute denying the franchise to women).

6. 112 U.S. 94, 109 (1884) (holding that Indians born in tribes are not U.S. citizens under the Fourteenth Amendment).

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

8. See *United States v. Kagama*, 118 U.S. 375 (1886).

9. See *Downes v. Bidwell*, 182 U.S. 244 (1901). See also *In re Ross*, 140 U.S. 453 (1891).

territory and take its place as an equal among other foreign states; and a *nation* that defined itself in ethno-racial terms as Anglo-Saxon. The sovereignty cases reflect the imperialism and racism of their day. Immigrants, Indians, and residents of the territories are portrayed as the “white man’s burden,” not ready for participation in Anglo-Saxon institutions of governance. Policies regulating these groups shifted back and forth between exclusion and assimilation, based on prevailing assumptions about whether the members of the groups could be “civilized.”

These are unappealing cases to read, containing language harsh to today’s sensibilities. Nonetheless, they continue to define the Court’s approach to congressional power over immigration, Indian tribes, and the territories.<sup>10</sup> How have these areas of constitutional law remained immune from the constitutional evolution (and revolution) of the twentieth century? Should not mature and benevolent norms of equal citizenship and individual rights apply? My claim is that the idea of citizenship has been as much a problem as a solution. This is apparent in a place where we might least expect to find it: the collected works of the Warren Court.

Powerful pieces have been written about the Warren Court’s interest in citizenship. Kenneth Karst identified a norm of “equal citizenship” implicit in the Warren Court’s Fourteenth Amendment cases.<sup>11</sup> Karst’s analysis provides an important insight into the Court’s work on race and fundamental rights. But I would place these cases in a context broader than equality. The Warren Court acted to protect the status of citizenship as well as to ensure that citizens were equal in the rights they possessed. Thus, in *Afroyim v. Rusk*,<sup>12</sup> the Court held that Congress had no power to unilaterally terminate the citizenship of United States citizens.<sup>13</sup> And in *Reid v. Covert*,<sup>14</sup> the Court imposed constitutional restrictions on military trials of civilian dependents of overseas military personnel.<sup>15</sup> These cases, in combination with the equality cases and the further incorporation of the Bill of Rights against the states, lead me to describe the Warren Court’s agenda as guaranteeing *full* citizenship. If the United States saw itself as a *nation*-state at the close of the nineteenth century, the Warren Court completed America’s transformation to a *citizen*-state.

Identifying citizenship as a special concern of the Warren Court offers an explanation for its unwillingness to rethink the plenary

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10. *E.g.*, *Fiallo v. Bell*, 430 U.S. 787 (1977).

11. Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 5 (1977). See also Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3, 8-9 (1970).

12. 387 U.S. 253 (1967).

13. *Id.* at 267-68.

14. 354 U.S. 1 (1957).

15. *Id.* at 5.

power cases. By defining insiders, the concept of citizenship necessarily defines outsiders; and by guaranteeing full and equal rights for those within the charmed circle, it supports fewer rights—or at least less attention—for those outside the circle. This result is not compelled: it might be plausible, for example, to characterize aliens as a “discrete and insular” minority, thereby justifying an active, protective role for the courts on their behalf.<sup>16</sup> Yet, significantly, the Warren Court’s equality campaign was not waged on behalf of aliens. *Graham v. Richardson*,<sup>17</sup> which applies strict scrutiny to state laws discriminating on the basis of alienage, is a Burger Court decision.<sup>18</sup>

The only major immigration case of the Warren Court is its decision in *Boutilier v. INS*,<sup>19</sup> which involved a challenge to a provision in the immigration code mandating the exclusion of any alien from the United States who was “afflicted with a psychopathic personality.”<sup>20</sup> The statutory term had been interpreted by administrative authorities, based on an accurate appreciation of congressional intent, to encompass homosexuals, and the exclusion ground was challenged as unconstitutionally vague.

The Court rejected the claim, stating that “[t]he constitutional requirement of fair warning has no applicability to standards . . . for admission of aliens to the United States.”<sup>21</sup> It followed with a reaffirmation of Congress’ plenary power doctrine, nailed down by a cite to the 1889 decision in the *Chinese Exclusion Case*.<sup>22</sup> (The offensive provision was not removed from the immigration law until 1990.)

The situations of Indians and residents in United States territories present different problems for citizenship. Both groups are citizens by virtue of federal statutes passed in the late nineteenth and early twentieth centuries. From the start, however, citizenship meant less here than might be expected. The federal laws imposing citizenship were largely unilateral decisions of Congress, and they were enacted with no thought that they would materially advance the rights of the beneficiaries. Thus, shortly after Puerto Ricans were granted United States citizenship, the Supreme Court ruled that the Sixth Amendment’s right to a jury trial did not apply to criminal prosecutions brought in Puerto Rico.<sup>23</sup> The Warren Court left the territories cases where it found them.<sup>24</sup>

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16. See John Hart Ely, *Democracy and Distrust* 161-62 (1980).

17. 403 U.S. 365 (1971).

18. *Id.* at 376.

19. 387 U.S. 118 (1967).

20. *Id.*

21. *Id.* at 123.

22. *Id.* at 123-24.

23. *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

24. Three Justices joined Justice Black in *Reid v. Covert*, 354 U.S. 1 (1957), who asserted that “neither [the *Insular Cases*] nor their reasoning should be given any

The Warren Court's citizenship agenda could not be easily applied to the Indian tribes. "Footnote Four" concerns might well have led the Court to be sensitive to assertions of tribal sovereignty, but its promotion of individual rights suggested limits on tribes that could undercut sovereignty. Whatever the reason, Congress' plenary power over the tribes survived the Warren Court.

The Burger Court did not pursue the Warren Court's citizenship agenda.<sup>25</sup> But citizenship makes a comeback with the Rehnquist Court—albeit with a decidedly different emphasis than the Warren Court. For the Warren Court, citizenship was an inclusionary, empowering concept. Claims of sovereignty and group rights did not quite fit the construct, and the Court put them to the side. The Rehnquist Court, however, has used citizenship as a sword, wielded on behalf of individuals to cut down governmental actions on behalf of groups. Color-conscious measures and tribal authority over non-members threaten the formal equality of those within the circle of citizenship. *City of Richmond v. J.A. Croson Co.*<sup>26</sup> is therefore of a piece with *Duro v. Reina*,<sup>27</sup> which denied tribes the power to try non-members for crimes committed on reservation land.<sup>28</sup> Similarly, citizenship figures strongly in the Court's holding in *Rice v. Cayetano*,<sup>29</sup> invalidating on Fifteenth Amendment grounds a Hawaiian statute that limited voters for trustees for the Office of Hawaiian Affairs to Native Hawaiians.<sup>30</sup> Regarding immigration, the Rehnquist Court followed the Warren Court, upholding government action against aliens that would not be tolerated if imposed on citizens.<sup>31</sup>

In sum, my revisionist narrative of citizenship is not one of continued progress (since the Second Reconstruction) on behalf of disempowered groups. While appropriating the Warren Court's emphasis on citizenship, the Rehnquist Court has mobilized the concept in a different manner. The citizen-state idealized by the Warren Court looked to a future of full citizenship for previously excluded groups. It represented a dramatic shift, in both ideology and practice, from the nation-state of the late nineteenth century. The citizen-state of the Rehnquist Court largely affirms existing power

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further expansion." *Id.* at 14. But the *Insular Cases* were not overturned by the Warren Court and apparently remain the law today.

25. The application of strict scrutiny to state laws that discriminated on the basis of alienage provides surprising evidence.

26. 488 U.S. 469 (1989) (invalidating minority business set-aside program for city-awarded construction contracts).

27. 495 U.S. 676 (1991).

28. *Id.* at 679.

29. 120 S.Ct. 1044 (2000).

30. *Id.* at 1057.

31. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999); *Reno v. Flores*, 507 U.S. 292 (1993).

relations in the nation, viewing claims of autonomy or group rights as affronts to the individual equality of citizens.<sup>32</sup> As the nation-state form appears to be weakening, the Court has attempted to hold onto (or reinscribe) nineteenth century notions of sovereignty.

### CONCLUSION

The issues addressed in the plenary power cases are a subset of a larger category of concerns regarding American sovereignty and membership—a category I would label “sovereignty studies.” In constitutional law, sovereignty studies would include additional questions, such as: voting rights for residents of the District of Columbia, representation in Congress of Indian Tribes and territories, the constitutionality of the Louisiana Purchase and the Missouri Compromise, extraterritorial application of United States law, and the rights of United States citizens overseas. These issues are largely ignored in constitutional scholarship and casebooks.<sup>33</sup>

Sovereignty studies can also provide a bridge to new and necessary inquiries for constitutional law in an age of globalization. What role should international norms play in our constitutional law? Should our notions of federalism be reshaped as states become more involved in foreign affairs and subnational regions seek cross-border alliances? How does United States participation in the World Trade Organization affect constitutional understandings of sovereignty? Does an increasing incidence of dual nationality challenge constitutional norms regarding acquisition and loss of citizenship? A constitutional law for a new century must begin to consider understandings of sovereignty and membership more flexible than those propounded by the plenary power cases of the nineteenth century.

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32. *Saenz v. Roe*, 526 U.S. 489 (1999), provides a counter-example. The invocation of the privileges and immunities clause to strike down a California statute restricting the welfare benefits of new residents came as a shock. But it is far from clear that the Court intends to use *Saenz* as a springboard for activism on behalf of citizenship rights. See Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 153-58 (1999). In any event, there is nothing in *Saenz* pertaining to non-citizens (who cannot claim the protection of the privileges and immunities clause), and it arguably undercuts the claims of subnational groups interested in preserving local culture by regulating ingress of outsiders.

33. Scholarship in these areas tends to be field-specific; that is, immigration scholars and Indian law scholars rarely see the connections between their fields. For important cross-cutting contributions, see Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth-Century Origins of Plenary Power over Foreign Affairs* (unpub. ms., on file with author) and Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996). See also Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 Cal. L. Rev. 1943-57 (2000); Sanford Levinson, *Why the Canon Should be Expanded to Include The Insular Cases and the Saga of American Expansionism*, 17 Const. Comment. 241 (2000).