OPENING REMARKS

The Tightening Circle of Membership*

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In a justly celebrated essay entitled the "Transformation of the Statue of Liberty," historian John Higham elaborates on a little known fact: that Emma Lazarus' famous tribute to "A mighty woman with a torch"—a "Mother of Exiles"—went virtually unnoticed when composed in 1883 (Lazarus died in 1887). It was not inscribed on the interior wall of the Statue's pedestal until 1903; and, in Higham's words, "the poem rested there for another thirty years without attracting any publicity at all."[1]

The Statue, as all schoolchildren know, was the inspiration of a French sculptor, Frederic Auguste Bartholdi, and a gift from the French people, symbolizing the friendship of the two republics. It was to have been an exhibit at the Philadelphia Exposition of 1876, marking the centennial of American independence, but only the arm and the torch were completed by that time. At the inaugural ceremonies, the theme of immigration received no mention. Rather, again in Higham's words, "President Grover Cleveland discoursed grandiloquently on the stream of light that would radiate outward into 'the darkness and ignorance and man's oppression until Liberty enlightens the world.' . . . The rhetoric . . . concentrated almost exclusively on two subjects: the beneficent effect on other countries of American ideas, and the desirability of international friendship and peace."[2]

The torch that at first represented shining American ideals that would light the world, of course, eventually took on the gloss of the Lazarus poem—as a beacon of welcome, lighting the way to a free and

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1. JOHN HIGHAM, SEND THESE TO ME 81 (1975).
2. *Id.*

democratic land. But this transformation occurred much later; indeed, *after* the great migrations of the early part of the century had ceased. By the 1930s, America could begin to recognize "the contributions of the newer ethnic groups," to celebrate its multicultural origins and attributes.[3] By then, the sons and daughters of the immigrants of earlier years *were* Americans—speaking English, graduating from institutions of higher learning, voting. During the 1940s, Higham reports, "the words of the poem became a familiar litany in mass circulation magazines, children's stories, and high-school history texts."[4] And in 1945, the tablet on which it had been inscribed in 1903 was moved to the main entrance of the Statue. Higham concludes: "Because few Americans now were immigrants, all could think of themselves as having been immigrants. . . . [T]he new meaning engrafted on the Statue of Liberty in the second quarter of the twentieth century worked to close the rift that mass immigration had opened in American society."[5]

What I would like to ruminate upon today is whether the meaning of the Statue is again undergoing transformation—and whether that new meaning is widening rather than closing the new rift that the new mass immigration to the U.S. has opened in our day. I start with the front page of the *Detroit Free Press* on election day 1992. Covering the entire page was a large cartoon of the Statue of Liberty, with the heading (and here I rely on memory): "If you do not vote today, she stands for nothing." This is hardly a message about immigrants; it is, in fact, a statement about *citizenship*. Putting to the side for a moment current legislative proposals to cut legal immigrants off from federal benefits, the franchise remains the single most important distinction between the status of lawful permanent resident and citizen. The editors of the *Free Press* were equating the Statue not with the welcome of new arrivals, but rather with the community of already-arrived full members (citizens): If you (citizens) do not vote today, she (a symbol of liberty, democracy—liberal democracy) means nothing. It is not obvious to me why the Statue was used in this manner. Interestingly, a Canadian law professor has suggested to me that it echoes the use of a replica of the Statue by Chinese students martyred in their protests for democracy in Tienanmen Square.

For the Statue to take on this new meaning—a celebration of citizenship—does, to some extent, return it to its roots. The political lib-

3. *Id.* at 85.
4. *Id.*
5. *Id.* at 87.

erty it initially memorialized—the liberty of the American and French revolutions—was freedom from monarchy and subjecthood, the establishment of the equal democratic liberty of "*citoyen.*" And, of course, there is a natural link between immigrants and citizens. A Statue symbolizing citizenship may also celebrate immigration as the welcoming of persons intent on becoming citizens. It may lead us to put great efforts into naturalization, to encourage all here to become full members.

But today I see a darker side of the emphasis on citizenship—a circling of the wagons more than a invitation to climb on board.

This is a new we/theyness. Think back on academic scholarship on immigration over the past decade or so. In earlier years, academics suggested that the line between legal and illegal immigrants was artificial in that it failed to recognize the invitation the U.S. had historically extended—at least de facto—to undocumented workers and that it did not appreciate the rather full integration of "illegal" aliens into American society.[6] To these scholars—to many of us—"illegal" was a status, a name, a designation by the law that did not mirror the social reality. The legalization programs of the 1986 immigration legislation explicitly sought to resolve the tension between the legal categories and social reality; and *Plyler v. Doe*[7] represented the (somewhat startling) judicial declaration of a constitutional effacing of the line between "legal" and "illegal."

But times have changed. Although perhaps four million aliens in unlawful status reside in the U.S., there is no mood to legalize any portion of them. Proposition 187 could not be clearer in its declaration of non-membership; the Governor and electorate of California have demanded reconsideration of *Plyler.*

So liberals have retreated a bit, choosing a smaller concentric circle: illegals are outside, but legal immigrants and citizens are inside. In words that few would have predicted a year or two ago, immigrant and ethnic advocacy groups are recognizing that enforcement of the border is a legitimate and significant public policy goal. For these groups, perhaps, the idea is that emphasis on border control might lessen concern about interior enforcement. But my guess is that this strategy won't work. While there will continue to be criticism of em-

6. *See, e.g.*, Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (1988); Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

7. 457 U.S. 202 (1982).

ployer sanctions on the ground that they increase discrimination against "foreign-looking" U.S. citizens and lawful immigrants, I think that there is a growing consensus that enforcement of employer sanctions must be stepped up and that state-of-the-art verification systems must be developed and deployed to ensure that illegal aliens already in the U.S. receive neither jobs nor benefits. So too there will be a serious effort at removal of aliens unlawfully here; so long as civil liberties are respected, I don't think there will be much objection.

Will the illegal/legal line hold? Here I return to my opening comments on the Statue of Liberty. There is increasing evidence that yet a smaller circle is taking on primary salience: that of citizen.

As a constitutional matter, we are presented with differing views of the importance of the concept of citizenship in our fundamental law. Alexander Bickel (himself a refugee) opined that "[r]emarkably enough . . . the concept of citizenship plays only the most minimal role in the American constitutional scheme."[8] He finds this a happy fact: "A relationship between government and the governed that turns on citizenship can always be dissolved or denied. . . . It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson."[9] Chief Justice Rehnquist, on the other hand, has concluded that "the Constitution . . . recognizes a basic difference between citizens and aliens," finding that "[t]hat distinction is constitutionally important in no less than 11 instances in a political document noted for its brevity."[10] Most noteworthy for Rehnquist is the fact that the Fourteenth Amendment specifically defines citizenship; in placing a definition in the Constitution, Rehnquist argues, "Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence."[11]

Our constitutional tradition pays homage to both views. It is well established that aliens in the U.S. possess virtually all the constitutional rights with which citizens are endowed. Yet it has never been doubted that, for some purposes, states and the federal government

8. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 33 (1975).

9. *Id.* at 53.

10. Sugarman v. Dougall, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting).

11. *Id.* at 652. In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (plurality opinion), Chief Justice Rehnquist shows ambivalence by stating that the Fourth Amendment only applies to "the people" of the United States, which he construes as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265.

may distinguish citizens and aliens.[12] It is clearly constitutional, for example, to require that voters, jurors, and candidates for high office be U.S. citizens. And the Supreme Court has upheld state laws imposing citizenship requirements for occupations it concludes involve exercises of sovereign power: teachers,[13] police officers,[14] and probation officers.[15]

For years, Congress has taken Bickel's approach when defining eligibility for most federal benefits and opportunities.[16] That is, permanent resident aliens and citizens have been treated alike. The Supreme Court has applied similar rules under the Fourteenth Amendment to the States.[17]

The welfare reform package adopted this month by the House of Representatives represents a dramatic shift in national policy. Under the legislation, lawful permanent residents are fully excluded from five major "safety net" entitlement programs—cash assistance, food stamps, supplemental security income, medicaid, and social services under title XX of the Social Security Act—whether or not they had previously worked in the U.S. and paid taxes. There are some exceptions, for immigrants over 75, veterans and their immediate relatives; but for the vast majority of permanent resident aliens, the bar will last until citizenship. According to its sponsors, the exclusion of immigrants from these programs will save over $20 billion a year.

What justifications are offered in support of this rending of the safety net? One justification might be the need to save funds in order to pay for other parts of welfare reform (or for tax cuts). Is this a permissible justification?

Under general principles of constitutional law, a class of persons may not be carved out from protection or specially burdened without a rational basis. When the burdened group is one that cannot protect itself in the political process, it might be argued that a more substantial justification is required.[18] Thus, the simple desire to save money

12. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989).

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

14. Foley v. Connelie, 435 U.S. 291 (1978).

15. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

16. The one significant exception is eligibility for the federal civil service.

17. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (welfare); Sugarman v. Dougall, 413 U.S. 634 (1973) (state civil service); Nyquist v. Mauclet, 432 U.S. 1 (1977) (higher education financial assistance).

18. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 289-90; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 148 (1980).

cannot be an adequate justification for the exclusion of permanent resident aliens—either in constitutional or public policy terms.[19]

A more tenable justification would be to link the bar to exercise of the federal immigration power: Congress has the power to determine classes of admissible aliens; and for many years, aliens who are "likely to become a public charge" have been excludable. From this perspective, the ban on benefits can be viewed as enforcement of the public charge exclusion ground. During the floor debate, Congressman Roukema expressed it this way:

> While the exclusion for legal aliens has received quite a bit of criticism, I want to make sure that everyone realizes an often-overlooked, but essential component of our immigration laws. For decades, our immigration laws have required immigrants to stipulate that they will be self-sufficient once they arrive in America, as a condition of their being allowed to immigrate in the first place. Consequently, receiving welfare has been grounds for deportation for these very same immigrants for generations.[20]

This is not quite right. The deportation ground for welfare usage mandates removal of an alien who "within five years after the date of entry, has become a public charge *from causes not affirmatively shown to have arisen since entry*."[21] That is, the deportation ground enforces the exclusion ground. Importantly, it does not provide that any immigrant who goes on welfare is deportable. This is consistent with a view of immigrants as "members-becoming," recognizing that they, like citizens, may fall on hard times and need assistance.

These considerations lead me to conclude that the actual justification for the exclusion of immigrants from major entitlement programs turns on a narrowing conception of membership. In the words of Congressman Riggs, "the message that we are sending here, and we are clearly stating to our fellow citizens, [is] that we really are going to put the rights and needs of American citizens first."[22]

Of course, the needs of American citizens come first. But does that necessarily mean that the needs of lawful permanent residents should count not at all? The problem with drawing a hard and fast legal immigrant/citizen line is that the transition from immigrant to citizen is a process, a maturation, an evolution—not an on/off switch.

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19. *Cf.* U.S.D.A. v. Moreno, 413 U.S. 528 (1973).

20. 141 Cong. Rec. H3374 (1995).

21. Immigration and Nationality Act § 241(a)(5), 8 U.S.C. § 1251(a)(5) (1988 & Supp. V 1993) (emphasis added).

22. 141 Cong. Rec. H3412 (1995).

Many immigrants live in families with, and support, U.S. citizens. The majority of immigrants seek and attain citizenship. The vast majority of adult immigrants are gainfully employed, paying taxes to support the benefit programs. Immigrants, to my mind, are appropriately characterized not as outsiders or non-members, but as "citizens-in-training." Heretofore, public policy has generally viewed immigrants this way,[23] recognizing that citizenship-building is a sound investment.[24]

With this perspective in mind, I would suggest another approach to the benefits issue—one proposed by the minority in the House and supported by the Administration—that offers a more direct link to the public charge exclusion ground. As you know, an intending immigrant can overcome the public charge test by demonstrating either that he or she has a job in the U.S. (and is therefore self-supporting) or by submitting an affidavit of support from a U.S. sponsor. The problem has been that courts have found the affidavits of support unenforceable. The minority proposal had two aspects: to make the affidavits of support judicially enforceable and to deem the sponsor's income to an immigrant who applies for needs-based benefits. Unlike the full-scale cut-off, these provisions are more carefully tailored to the manner by which an alien seeks to overcome the public charge exclusion, and they avoid sending the binary message (citizens 1, legal immigrants 0) of the House-passed measure.

To be troubled by a hardening of the legal immigrant/citizen line may lead us not only to resist new measures but also to give closer scrutiny to lines existing in our current law. I am thinking about the different treatment afforded citizens and permanent resident aliens under the preference system. As you all know, immediate relatives of U.S. citizens (parents, minor unmarried children, and spouses) are not subject to a numerical quota, and therefore immigrate to the U.S. in relatively short order. Spouses and minor children of permanent resident aliens (who were not related at time of the permanent resident's entry), however, are subject to the numerical limits of the second preference. Parents of permanent residents are not covered by any entry

23. Ugly, glaring counterexamples were laws prohibiting Chinese and Japanese from naturalizing.

24. *See* ROBERTO SURO, REMEMBERING THE AMERICAN DREAM: HISPANIC IMMIGRATION AND NATIONAL POLICY 112 (1994) (describing policies of "integration": "Immigration should be viewed as an enterprise in which both the immigrant and the host nation bring certain assets to the table and both have an interest in seeing that the enterprise succeeds. Both sides must make investments in each other, and both take risks on the assumption that they will each draw returns" *id.*).

category; they may join a child living in the U.S. only after the child naturalizes. To see the difference consider two unmarried adults—Fred, a citizen at birth, and Lazlo, a permanent resident alien who came to the U.S. two years ago. Now suppose that both spend some time overseas, fall in love and marry a non-U.S. citizen. Not surprisingly, Fred and Lazlo choose to petition for their spouse's entry to the U.S. Fred's spouse will be granted permission to enter in a year or less; Lazlo will wait for four to five years.

What sustains this distinction, arguably trenching on a fundamental constitutional interest protecting family? Perhaps the thinking is that we are more sure that Fred is likely to be with us for the long haul, but Lazlo—just as he has once changed his permanent residence—might decide to leave. Or maybe we recognize that "unification" can occur over there as well as here, and that Lazlo would face less of a hardship than Fred in moving to where his spouse currently resides. Or perhaps the distinction is intended to provide an incentive to naturalization.

The rather straightforward answers to these possible justifications should be apparent, and I will not run through them here. The underlying theme to all is that the classification is woefully under- and over-inclusive, true for some but not all citizens and some but not all aliens.

But there is one justification that fits perfectly—the same one that seems to be at work in the benefits debate. It is the argument that we may, plain and simple, favor citizens over permanent resident aliens.

While the justifications suggested are probably strong enough to withstand the toothless constitutional scrutiny afforded regulations of immigration,[25] Congress is free to go beyond the constitutional minimum. It may soon consider doing so: the Commission on Immigration Reform will issue a report this summer on legal immigration, and Senator Simpson has declared that he will introduce legislation on the matter this session.

I would think that a good case can be made for treating citizens and permanent resident aliens more alike in this regard. The interest here—living with close family members—is undeniably substantial.[26] Furthermore, as is frequently noted, permanent resident aliens pay taxes and are liable to military service to the same degree as citizens.

25. See Aleinikoff, *supra* note 12; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

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

An obvious argument against a change in policy is the numbers. More than one million aliens are on the 2-A waiting list. To make all these numbers, in effect, current would swell immigration at a time when the political winds seem to be blowing strongly in the opposite direction. An answer here would be to take numbers from elsewhere—either reducing or eliminating the "diversity" category or crafting the INA to reflect a tighter definition of immediate family by allocating fourth preference numbers to the second preference.[27] Or perhaps equality could be established over time by slowing increasing admissions until the backlog is cleared.

No doubt there are other proposals to consider here, and I am not recommending—at this point—a particular choice. What I am suggesting is that we should examine more closely what I believe to be the underlying rationale for disparate treatment: the permanent resident/citizen line.

Conclusion

Are we moving toward the smaller concentric circle? Consider the words of Justice White in the 1982 case of *Cabell v. Chavez-Salido*,[28] which upheld a citizenship requirement for the job of probation officer:

> The exclusion of aliens from basic governmental processes is not a deficiency . . . but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.[29]

This seems plainly wrong. Resident aliens are not outside the scope of the community of the governed; and they have, as I have mentioned, well-established constitutional rights. But Justice White's language appears to realize Bickel's worst fears: exclusion by definition.

Without sounding too alarmist, let me suggest that the immigrant/citizen distinction may not be the final resting place in the definition of membership. Suppose that Congress determines that legislation cutting off benefits to immigrants has produced a rush to naturalization and further suppose (1) that this effect means that the requisite dollar savings do not accrue, and (2) that members of Congress con-

27. Unused visa allocations for employment-based immigrants already rollover to the family-based categories the following year.

28. 454 U.S. 432 (1982).

29. *Id.* at 439-40.

clude that the desire to get on the dole is not an appropriate motivation for becoming a U.S. citizen. Is it not conceivable that legislation would be introduced distinguishing naturalized citizens from native-born citizens for purposes of eligibility for federal benefits?[30] Might not some be inclined to make a naturalized citizen's immediate receipt of federal benefits grounds for denaturalization?

We have been proudest of our political history when it has been inclusive: the Fourteenth Amendment rectified the deplorable exclusivity of the *Dred Scott* opinion; the 1965 Immigration Act (belatedly) removed the ignominious National Origin Quota system—eliminating such ugly phrases as "the Asian Barred Zone"; the 1990 Immigration Act deleted outdated cold-war exclusion grounds.

As we pursue the crucial task of restoring credibility to our immigration enforcement efforts—to saying a firm no to illegal immigration—let us continue to celebrate legal immigration. Let us not redefine the Statue of Liberty by narrowing the circle of "we." Let it remain an inclusive symbol, extending to the newest Americans—citizens-in-training—an invitation to join in our experiment in democracy.

30. *Cf.* Immigration Reform and Control Act § 201(h), 8 U.S.C. § 1255a(h) (1988 & Supp. V 1993) (disqualifying legalized aliens from most federal benefits for five years, despite the fact that most would be permanent resident aliens for much of that time period).