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CITIZENSHIP'S LEGAL FOUNDATIONS: CONVENTION AND NATURAL RIGHTS

Kif Augustine

Citizenship acts as a coordination solution organizing a legal society into members and non-members. Despite this fairly simple definition, the nature of citizenship remains a difficult concept. The primary difficulty in understanding the nature of citizenship resides in the tension between the contractual and the natural rights perceptions of society.

The contractual approach emphasizes the reciprocal duties and rights of individuals and community. The community sets the standard for exclusion or inclusion, terminating or precluding the relationship when it is not beneficial to itself. The citizen also freely terminates the relationship if he finds the particular conditions of membership onerous, but the standards set by the society condition his initial inclusion. As a community member, the individual fulfills duties and participates in the political process. In return, he receives the substantial benefits of community life and government protection. Overall, the community's needs balance against the individual's needs.

The natural rights perception, on the other hand, holds the individual's needs paramount. Man has rights that are inherent in his being and these society cannot violate, no matter the communal needs. Therefore, citizenship carries little weight. The individual does not have any duties to the community; the community exists to benefit the individual.

Whichever theoretical approach one takes, living in a community obviously requires some coordination between individuals. For that matter, any human interaction, however simple, functions on mutual
expectations. The real coordination problem is understanding another's expectations, or rather identifying what that person expects you to expect of him (Schelling 1963, 54). On a societal level, conventional agreements in many forms (laws, traditions, etc.) coordinate individual expectations. As Reynolds points out, coordination solutions in the form of conventions simplify life and reduce uncertainty, thus benefitting the individual (1987, 5). By delineating expectations, coordination solutions provide a practical, conventional framework in which individuals and communities operate.

The consequences of citizenship as a coordination solution will be discussed in light of the contractual and natural rights views of society. In the practical arena, the concept of citizenship developed by the U.S. Supreme Court demonstrates the tension between these two views. Alien participation and expatriation will be two areas of emphasis.

THE NATURE OF PARTICIPATION

For citizenship to be valuable, it must entail certain privileges that are denied the alien. Essentially, these privileges are embodied in a distinction between roles. The citizen fills many formal roles which the alien may not, while they share the informal role of subject.

Most basically, citizenship itself is a role. Citizenship grants the individual a participatory role in the legal community. Citizens define the legal community as they modify and change it; therefore, they are ultimately responsible for its form in ways non-members are not. Citizenship also allows the individual access to more official roles such as juror, legislator, and judge, roles that further develop and define the community. Citizens can participate in the political process.

In addition to his participatory roles, the citizen
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shares the role of subject with the alien. As subject, the individual complies with and supports the conventions of society. He abides by the law, pays taxes, fulfills military duty, participates in the advantages of the system by setting up a business, sends children to school, and is informed on issues. Overall, he contributes to the success of the system. In these instances of everyday life, the alien's actions and duties are indistinguishable from those of a citizen. The citizen, nonetheless, retains a participatory advantage.

While the franchise is often deemed a necessary characteristic of the citizenship role, it is not always a reliable tool for measuring participation. Some citizens are denied the vote while at times aliens are allowed to vote. Children receive protection as citizens but their participation in the political process is severely limited. Convicts retain their membership in the political community--they are still citizens--but not their ability to participate in the political decision-making process because they violate the laws and conventions of that community. Indeed, an ex-felon can be denied the vote even after he has served a prison sentence and completed parole (Richardson v. Ramirez 418 U.S. 24 [1974]).

Historically, women were denied the franchise while still counted as citizens (Minor v. Happersett Sup. Ct. Oct. 1874 162). Likewise, at other times voting privileges were determined by property ownership, not citizenship status. Currently, Puerto Ricans are U.S. citizens but are not represented by a voting member in Congress; nor do they participate in federal elections. Indeed, the recognition of Puerto Ricans as United States citizens was based on the assumption that their citizenship was substantively different (see 33 Congressional Record 2473-74 as quoted in Cabranes, 1979, 37).

Just as the franchise is sometimes denied to citizens, it has at times been granted to aliens.
Currently, a number of Scandinavian countries grant foreign nationals the right to vote in local and regional elections and even hold elective office (Tung 1985, 453). In the United States, a number of states allowed aliens the vote in the mid-1900s (Roseberg 1977, 1099), and aliens were completely excluded from voting in presidential elections only in 1928 (Aylsworth 1931, 114).

The justification for excluding individuals from the vote varies over time, thus reflecting the tension and interplay between the natural rights and contractual theories. Although it seems unfair to a modern mind formed in a tradition of individualism and independence that women were excluded from the franchise, they were represented and considered full citizens in an era where representation and power were wielded by families rather than by individuals. The family filled the participatory role. With the industrial revolution, the concept of a completely independent woman, especially financially, became a possibility. Such a woman was rare if not nonexistent in previous ages. Therefore, a woman, although denied the vote, was fully represented as a citizen through her family, specifically her husband, in the electoral process. The contractual notion prevailed.

The value of citizenship, despite an inconsistent application of the franchise, remains problematic only if a specific definition of citizenship is required and forced upon the past. While the content of citizenship, meaning the privileges and benefits granted to each citizen, changes and may indeed be different for specific citizens at a given time, a citizen is nonetheless an official member of the political community. Citizens are always represented in the political process. They change and modify the legal and political framework that governs their lives even if representation and participation has not always been as specific and directly aimed at the
individual as it is today. The community and the individual define the citizen as an insider. Consequently, he is allowed privileges the community has decided are specifically relevant to membership. The alien is an outsider and denied those privileges, whatever they are.

CITIZENSHIP AS CONTRACT

The mere existence of citizenship supports a contractual approach to society. Citizenship is not even relevant unless there is a society to be a member of; citizenship defines the political community. Furthermore, citizenship has never been considered an absolute right derived from mere existence, not even in an age committed to individualism. Aliens do not have the right to become citizens. Once a member of the group, one's right to remain a member may be paramount; however, obtaining membership is not the right of anyone.

The Immigration Reform and Control Act of 1986 provides amnesty to many illegal aliens but does so only for those individuals who can meet the standards of residency, English language ability and other criteria set by Congress. Not everyone is admitted, and those who are enter the political process at the community's initiative and discretion.

The Supreme Court expressed this notion more explicitly in United States v. Ginsberg (243 U.S. 472 [1917]) and Johannessen v. United States (225 U.S. 227 [1912]). Ginsberg, emphasizing the decisions reached in Johannessen, argues that "an alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications" (243 U.S. at 474). Congress, as representatives of the community, must decide the "terms and conditions"
under which any individual can participate in the political process of the nation. Moreover, "no alien has the slightest right to naturalization unless all statutory requirements are complied with" (243 U.S. at 475). In this case, the Court recognizes that the community decides who will be admitted; the individual has no right to membership unless he complies with the standards set by the community. If the statutory requirements are met, then the individual must be admitted; but as a non-member of the society he has no right and no real way to change the standards the community sets. His membership is dependent on their good will.

STANDARDS FOR EXCLUSION

The potentially discriminatory nature of citizenship becomes almost immediately obvious. Essentially, the definition of members and non-members of a political community is an arbitrary act, a necessary distinction presently governed by little besides the values and decisions of the community itself. Exclusion of some is necessary to the identity, even the existence, of the community. A community is formed by individuals sharing values and traditions, which naturally implies that there are others who do not share the same traditions and values.

In a specific community, rule of law and constructive unanimity provide a metalegal standard for decision-making, a standard specifically designed to prevent discrimination. Rule of law requires generality, that individuals or individual groups be essentially unidentifiable for privileges or punishment. Under the rules and procedures of the legal system, no one is above the law, as all individuals are treated equally. The rules must be prospective rather than retroactive, sufficiently publicized, and clearly stated (Reynolds 1986, 3, 4). Discrimination against community members is thereby prevented.
Constructive unanimity, substituting for complete unanimity, serves as the most important aspect of rule of law. Constructive unanimity implies a coordination solution where certain individuals such as legislators are entrusted with the decision-making power, but rule of law circumscribes their decisions so that any decision they reach is one that could have been reached by the community as a whole. Rule of law and constructive unanimity are simple, effective coordination solutions to the problem of governing a large body.

Rule of law and constructive unanimity do not, however, answer the question of who should and who should not be included in the community in the first place. Rule of law prohibits discrimination among individuals for specific benefits or punishments, but citizenship itself is discriminatory in the drawing of community lines. Constructive unanimity depends upon a definition of insiders and outsiders, a definition of those whose opinion really matters. Such is not the case of course if the community is all-inclusive and the world becomes the unit of decision. But a world community is not a viable coordination solution to the problems of governance; the world divides itself into competing and distinct legal systems. And any unit less than a world community demands a definition of members. Rule of law and constructive unanimity reduce discrimination, but only within an already defined community.

In its discriminatory nature, citizenship is logically bound to the conventions of the admitting society. The community will admit those whose presence it finds beneficial and exclude those who pose a threat economically, medically, even culturally. The contract of citizenship must benefit both the individual and the community. The alien benefits the society and indicates his desire for community membership by complying with its conventions.
The individual's ability to support community conventions, however, rests on his physical location in the community since territorial boundaries are the current solution to jurisdictional problems. Territorial borders are a simple, effective coordination solution as they define parameters for both jurisdiction and membership. The legal alien's presence in the country is consented to by the members of the community as he met certain standards prior to his physical admittance.

Illegal aliens present a unique problem in that they circumvent the consensual process of the community by entering unlawfully. But the alien's very ability to demonstrate his own consent depends on that circumvention. Once here physically, it becomes increasingly difficult to distinguish between illegal aliens, legal aliens and citizens in the performance of duties to the community, if the alien pays taxes and is law abiding. In some ways they may even embody the ideal of the community more than actual members. In a nation built by immigrants such as the United States, the immigrant family "making it" after years of struggle and hard work stands as a testament to the values and opportunities many consider the essence of America.

An immigrant family becomes American, not only because they identify themselves with the American ideal, but also because of the generous tradition of citizenship the United States offers. Any individual born here, with a few diplomatic exceptions, automatically receives American citizenship regardless of the parents' legal or illegal presence, nationality, race, or religion. Whether an individual alien naturalizes or not, in a generation or two his family automatically becomes American. The citizenship conventions in the United States are broadly inclusive.

If the alien can clearly identify himself with the
core values of the community and demonstrate his commitment to that community through performance of specific duties, does the fact that he entered illegally really matter? If one stresses the natural rights perspective, the answer is no; the individual’s right to self-determination weighs heavily. On the other hand, if one applies contract theory, the illegal alien’s violation of community standards for entrance undermines the society itself. The present solution to illegal entry in the Immigration Reform and Control Act of 1986 mixes the two views. It is a very practical solution to a difficult problem. Most importantly, as a congressional act, the solution is conventional and bound by constructive unanimity; the illegal alien may legalize his status but only according to community standards.

A like question centers around consent but not physical presence in the community; should not anyone who agrees to the conventions of a community, a legal society, then be considered a member, no matter where they live? In this case, the answer is no, simply because the benefits traditionally associated with a nation-state would be nearly impossible to provide. Protecting a population from enemy attack when that population is scattered around the world would prove extremely difficult. Governments presently issue warnings against travel in specific areas or evacuate citizens from troublesome areas. Physical protection is limited. Of course, exceptions can be given, but it is obviously more difficult to protect a scattered population than one bound by territorial and therefore relatively controllable borders. Other public goods for which government takes responsibility would also be difficult to provide. Citizenship and territorial distinctions go hand in hand as coordination solutions.

Given the necessarily arbitrary nature of territorial boundaries and the lack of a metalegal
standard for inclusion or exclusion, natural rights and contractual theory place competing demands on citizenship. Within the United States, the contractual approach overrides any natural rights presumption of citizenship. Nonetheless, the natural rights approach strongly influences the granting of civil rights and economic benefits to aliens, making citizenship basically a political designation. Consequently, it is impossible to show a consistent application of either natural rights or contractual theory in the concept of citizenship developed by the U.S. Supreme Court. Even the recent tendency towards individual rights in expatriation cases and civil rights cases is mitigated by a contractual approach in alien participation cases.

CIVIL RIGHTS FOR ALIENS

Although the United States Constitution and Bill of Rights define the nature of the American political community, they are applicable to all those physically present in the United States whether they are official members of the community or not. In 1885, the Supreme Court argued in *Yick Wo v. Hopkins* (118 U.S. 356 [1886]) that

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws (118 U.S. 356 at 369).

Therefore, "all persons," not just citizens, are entitled to the equal protection of the laws of the United States. Even illegal aliens receive equal
rights protection.

In a sense, such a broad application of equal protection seems a denial of a community's distinct responsibility to protect its citizens in return for their strict allegiance, as opposed to all others whose allegiance is limited although they may be present "within the territorial jurisdiction" of the United States government. By its very wording, equal protection becomes the right of the individual, but a right granted to him by a political community that values rights. The right is inviolate but only because the community deems it so. The Fourteenth Amendment grants equal protection to all persons because the American people value such rights.

Given the individual's absolute right to equal protection, what right does the state have when observing its duty to provide equal protection? Is the individual's right to equal protection always trump against the state's needs to define itself? Although Yick Wo v. Hopkins grants broad protection to citizens and aliens alike, it does not obliterate the distinction between the two in terms of their respective roles. An examination of two Supreme Court cases citing Yick Wo demonstrates that equal protection applies to the alien in his role as subject, as a private individual, but not necessarily in his participation in the political arena. Equal protection does not grant political privileges.

Although political participation is not part of equal protection, the Court finds that welfare benefits are. Graham v. Richardson (403 U.S. 365 [1970]) struck down state law denying welfare benefits to aliens since the Fourteenth Amendment applies to all persons, citizens and aliens (403 U.S. 365 at 371). Therefore, the Court held "that a state statute that denies welfare benefits to resident aliens who have not resided in the United States for a specified number of years violates the Equal
Protection Clause" (413 U.S. 365 at 376). Graham further maintains that the community's "concern for fiscal integrity" is not a justification for classifications (413 U.S. 365 at 375). In Graham, the Court fails to recognize that the community granted equal protection rights in the first place. Yick Wo v. Hopkins certainly did not indicate that the community’s needs were unimportant. A community which values rights, such as the United States, will obviously grant more rights to individuals than a community without such values. But rights themselves come as a societal grant, not naturally.

Graham's decision set a new precedent by emphasizing individual rights as it overturned People v. Crane (214 N.Y. 154 [1915]). Previously, as Graham notes, Crane set a standard emphasizing the integrity of the community over the rights of the individual:

To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful . . . . The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike (214 N.Y. 154 at 161, 164).

Graham's concern for the individual overwhelms Crane's concern for the community.
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Nyquist v. Mauclet (432 U.S. 1 [1976]) shows a further emphasis on broad equal protection application for aliens. State financial aids may not be restricted to citizens but must also be available to resident aliens regardless of their intent to become citizens. In a 5-4 judgment, the Court decided that educating the electorate is not a sufficient justification for excluding aliens from student financial assistance. Resident aliens pay their share of taxes and should benefit from contributing to the programs these taxes support (432 U.S. 1 at 11). Lack of citizenship is essentially a political liability: "And although an alien may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role—in other areas of import to the community" (432 U.S. 1 at 12). Participation in all non-political benefits is not limited.

In their dissenting opinions, Justices Burger, Powell, Stewart, and Rehnquist stress contractual theory. The community does have a special interest in providing education to those who will remain to benefit the community (432 U.S. 1 at 14). Powell argues that "states have a substantial interest in encouraging allegiance to the United States on the part of all persons, including resident aliens, who have come to live within their borders" (432 U.S. 1 at 16). Moreover, the community has made it very easy for the alien to remove himself from the excluded category by declaring an intent to become a citizen or by becoming a citizen if he is currently eligible (432 U.S. 1 at 20).

In this case, the community defines a standard whereby an individual may benefit fully from financial aids if he only declares an allegiance to the community. The alien already receives benefits from the community and his ineligibility for additional benefits rests only on his unwillingness to fully commit to the community. Any investment should
yield a profit or benefit to the investor. The State of New York invests in its citizens and resident aliens who demonstrate a desire to become citizens in a perfectly understandable effort to build the community. In the end, the dissenting opinion supports the community, but the individual wins.

ALIEN PARTICIPATION

In contrast to civil rights and equal protection, in the political realm the community retains great power in determining the extent of alien participation. Sugarman v. Dougall (413 U.S. 634 [1973]) allows exclusion of aliens from jobs that precisely relate to the political process even though the decision struck down a state statute limiting permanent civil service employment to citizens. The judiciary recognized that a state has a special interest "in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community'" (413 U.S. 634 at 642). Therefore citizenship can be a qualifier for participation in a number of occupations. Aliens are not members of the community in the same way that citizens are and hold only those political rights that the community grants them.

Sugarman's standard for exclusion of aliens from specific jobs outlines the formal participatory roles. These roles logically reflect the responsibilities of those who define the community and the community's need for self-definition:

And this power and responsibility of the State applies, not only to the qualification of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or
Citizenship review, of broad public policy perform functions that go to the heart of representative government. There, as Judge Lumbard phrased it in his separate concurrence, is "where citizenship bears some rational relationship to the special demands of the particular position" (339 F. Supp. at 911, quoted in 413 U.S. 634 at 647).

Citizenship does bear a rational relationship to the demands of political positions. Sugarman recognizes the persona, the political role, as distinct from the individual, since it does not deny civil rights to aliens while still limiting political participation (413 U.S. 634 at 641). The responsibilities of that political role are distinct from the rights of the individual but explicitly linked to the rights of the citizen. The alien's obligations to obey the conventions of the society in which he lives are similar to those of a citizen (413 U.S. 634 at 646), even while his alienage limits his participation in the political system.

Although he argues for upholding the citizenship requirement for civil service employment in New York in his dissenting opinion, Justice Rehnquist essentially uses the same contractual theory expressed in the opinion of the court. He argues that citizenship is an important classification, far more important than the majority Sugarman opinion expresses. For him, citizenship is "a status in and relationship with a society which is continuing and more basic than mere presence or residence" (413 U.S. 634 at 652). It should have value beyond the political realm (413 U.S. 634 at 659). Ironically enough, in arguing the value of citizenship and the importance of a citizenship requirement for specific activities that greatly affect the community, Rehnquist cites Afroyim v. Rusk and Trop v. Dulles which value citizenship but primarily from a natural
rights view. *In re Griffiths* (413 U.S. 717 [1973]) decided that the legal profession, despite its close link with the political process, was open to aliens. Although lawyers have traditionally been seen as officers of the court with a moral responsibility to uphold and defend the law, *In re Griffiths* reflects the contemporary view that a lawyer's first obligation is to his client. *Griffiths* argues that lawyers are not officials of the government, although they do occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts (413 U.S. 717 at 729). They may be leaders in the community but being a lawyer does not "place one so close to the core of the political process as to make him a formulator of government policy" which is the standard for exclusion set by *Sugarman* (413 U.S. 717 at 729). In this view, lawyers are protected under the Fourteenth Amendment from a citizenship requirement.

In following *Sugarman*, *Foley v. Connellie* (435 U.S. 291 [1977]) places state troopers in the category of individuals whose important nonelective position and broad discretionary powers allow them to act significantly as policy formulators. Police officers act as government representatives in their employment. In allowing a distinction between citizens and aliens, Justice Burger in the opinion of the court notes that membership is relevant to participation:

A new citizen has become a member of a Nation, part of a people distinct from others [omit citation]. The individual at that point, belongs to the polity and is entitled to participate in the processes of democratic decision-making (435 U.S. 291 at 295).

The difference between aliens and citizens lies in
their membership. That difference affects their ability to satisfactorily fulfill the obligations of a state trooper.

In a dissenting opinion, Justice Stevens states that troopers are implementors rather than makers of policy, an opinion shared by Justices Marshall and Brennan. Therefore, political community membership is not relevant, but the individual’s ability to fulfill the job requirements is.

Stevens further dissents by arguing the inconsistency of Foley v. Connellie and In re Griffiths:

The disqualifying characteristic [in Foley] is apparently a foreign allegiance which raises a doubt concerning trustworthiness and loyalty so pervasive that a flat ban against the employment of any alien in any law enforcement position is thought to be justified. But if the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law? (435 U.S. 291 at 308).

Stevens feels that the allegiance of aliens should be as little, or as much, of an issue for police officers as for lawyers.

But allegiance is not what distinguishes lawyers from police officers. The occupations are fundamentally different. The police officer acts as a representative of the government granted specific powers by the community and receives his paycheck directly from its taxes, thereby justifying a citizenship requirement. Jobs that involve public representation such as district attorneys, state prosecutors, and judges could also attach a citizenship requirement, not only because the roles demand the broad public policy formation and implementation of Sugarman, but also because they specifically represent the political community.

In contemporary view, a lawyer is significantly
different since his primary responsibility is to the client, not the community of law. He does not represent the political community. He derives his power from employment by the individual; he can be hired or fired according to the will of the individual; he receives his paycheck from the individual. His activities test and evaluate the rules set down by the political community but he derives little power from that community. Lawyers do not represent the public and therefore should not be subject to a citizenship requirement. By these contemporary standards which stress individual rights rather than community responsibility, In re Griffiths and Foley v. Connellie are not inconsistent.

Ambach v. Norwich (441 U.S. 68 [1979]) serves as another example of the community limiting the participation of aliens in the political process. According to Justice Powell's opinion of the court, public school teachers perform a role that goes to the heart of representative government and in accordance with Sugarman may be subject to a citizenship requirement. In Ambach the intent to become a citizen is sufficient qualification for those who are prevented from becoming citizens due to a length of residence requirement. In furthering Sugarman, Ambach holds that a citizenship qualification for public school teachers does not violate the Equal Protection Clause since "some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government" (441 U.S. 68 at 74). Relying on Foley, Ambach deems public education "a most fundamental obligation of government to its constituency," as fundamental even as the police function. Similarly, the influence of a teacher is "crucial to the continued good health of a democracy" (441 U.S. 68 at 79). Ambach
recognizes the teacher's powerful though not political role in transmitting the values and traditions of the community and deems the community interest sufficient to its exclusion of non-members from that role.

The dissenting opinion offered by Justice Blackmun and joined by Justices Brennan, Marshall and Stevens, once again argues the inconsistency of In re Griffiths and Ambach. Why should a state allow resident aliens to take a bar exam and qualify to practice law if teachers are barred from employment in the public schools? Lawyers are significant role models too (441 U.S. 68 at 88). As in the controversy between Foley and In re Griffiths, the real issue is public versus private roles. The public school teacher acts in a public role, receiving his paycheck from the community, while the attorney does not. Equally important, Ambach places a citizenship requirement only on public school teachers. Private institutions may hire whomever they wish, regardless of citizenship status.

Although sensitive to natural rights arguments about the discrimination that may result from categorizing individuals, like Sugarman, Cabell v. Chavez-Salido (454 U.S. 432 [1982]) recognizes the community's interest in defining itself:

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. . . . Aliens are by definition those outside of this community (454 U.S. 432 at 439, 440).

Through its reliance on Sugarman, Foley, and Ambach, Cabell subjects probation and deputy probation officers to a citizenship requirement because they are bound up in the basic
governmental process; their participatory role belongs to the citizen. Probation and deputy probation officers perform a function essential to the political community.

*Cabell* provides an interesting insight into when aliens may be excluded and when they may not. The distinction between aliens and citizens is suspect when applied to distribution of economic benefits, but "it is a relevant ground for determining membership in the political community" (454 U.S. 432 at 432). The different roles of subject and citizen underlie this distinction.

On the other hand, many significant occupations do not fall within the standard set by *Sugarman* and extended by *Ambach*, *Foley*, and *Cabell*. The community cannot prescribe rules against alien participation in occupations that are not bound up in the very essence of democratic government. The position of lawyer previously discussed is an example. Nor can the government exclude the alien from distribution of many economic benefits. In the private, non-political realm the alien is as free as the citizen. This inclusion of the alien in the non-political roles of life seems fairly consistent with a conventional approach to membership. The community did not want to exclude the alien from all participation or he would not have been allowed within the boundaries of the nation in the first place. His legal presence is the community's consent to some sort of participation on his part. The community only excludes the alien from those roles where membership is important in a political sense.

Starting in 1915 with *Truax v. Raich* (239 U.S. 33), the Court decided that

It requires no argument to show that the right to work for a living in the *common occupations* of the community is of the very essence of the
personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words (239 U.S. 33 at 41).

The reference back to *Yick Wo v. Hopkins* along with the defense of alien participation in common occupations, indicates that the alien is primarily excluded from the community's political self-definition but not from activities that are part of everyday life. The issue of discrimination is important because it impinges "upon the conduct of ordinary private enterprise" (239 U.S. 33 at 40). In the political realm, community desire weighs heavily; in the non-political realm the individual's rights, citizen or not, are virtually invincible.

Like *Truax, Takahashi v. Fish and Game Commission* (334 U.S. 410 [1948]) affirms the right of aliens to participate in the common occupations of the community. Initially, Torao Takahashi was excluded from fishing off the coasts of California because he was an alien. The Supreme Court decided that the ability of a state to "apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits" especially in terms of occupations (334 U.S. 410 at 420). If a compelling state interest (an important and justifiable state need such as self-definition of the political community) could be demonstrated, then exclusion of aliens might be justified. Otherwise, exclusion of individuals lawfully admitted to the political community is not justified.

**EXPATRIATION**

Natural rights and contract theory not only influence the way an individual becomes a member
of a society, but also whether or not that relation can be terminated. If a community grants citizenship based upon its own specific criteria, can it also take it away? Theoretically, the answer is yes, especially if the contractual approach is emphasized. What one grants, one can withdraw. Nonetheless, court cases indicate that in practice once one receives membership, it is the individual rather than the community that retains the right to sever the relationship. In an strong application of natural rights theory, the Court finds that even acts the community has specifically designated as expatriating cannot deprive an individual of his citizenship. The Court’s strong position emphasizes natural rights far more than does the community.

Afroyim v. Rusk (387 U.S. 253 [1967]) sets the current precedent for expatriation issues. In this instance, an individual of Polish descent naturalized as a citizen of the United States voted in a political election in Israel. Section 401 (e) of the Nationality Act of 1940 defines voting in a foreign political election as an expatriating act. Afroyim’s passport renewal request was denied by the U.S. Department of State based on his violation of this statute. The Supreme Court however supported Afroyim’s claim that he was still a United States citizen because he had not expressly renounced that citizenship:

We hold that the Fourteenth Amendment was designed to, and does protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship (387 U.S. 253, at 268).
The Court essentially provides the community no power to sever the relationship of citizenship; the individual's decision is paramount. Just prior to this recognition of the absolute right of the citizen to retain his membership no matter what his actions, the Court emphasizes the communal nature of citizenship in the United States. Ironically, this statement stands in stark contrast with the powerlessness of the community to determine that membership:

Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship (387 U.S. 253 at 268).

If citizenship is a cooperative affair, the individual has a responsibility towards the community. Community and country imply cooperation in ways that Afroyim v. Rusk and its later applications have denied. Furthermore, what this majority opinion does not recognize even in its valuing of cooperation, is constructive unanimity and rule of law. The Court does not use the term rule of law as a metalegal principle, but more as the rule of a particular law. The distinction is of great importance. If a nation is abiding by rule of law as previously defined, it will not set up discriminatory standards against those who are already members of the community. The nation may, however, choose to protect itself against those actions that would be particularly disruptive to the unit, against those individuals who violate the conventions and do not fulfill their responsibility to maintain the system from which
they benefit. By arguing that one group of citizens might deprive another of citizenship based on "creed, color, or race" the Court assumes that the community follows majority rule rather than constructive unanimity. Minorities of whatever kind could be discriminated against under majority rule. They would not be discriminated against under a system of rule of law and constructive unanimity.

If citizenship is a cooperative affair as the Court agrees, then the individual must have some responsibility to cooperate. Abiding by the conventions of the community is a logical demonstration of cooperation. By arguing that the individual's "voluntary renunciation" of citizenship is required before he can be expatriated, the court denies any responsibility of the individual towards the community. Two cases decided prior to Afroyim but following essentially the same logic support the idea that the individual's violation of conventions, or withholding of consent, does not grant the community power to expatriate him.

In *Trop v. Dulles* (356 U.S. 86 [1957]), a native-born American was considered to have expatriated himself by wartime desertion in violation of section 401 (g) of the Nationality Act of 1940. Chief Justice Warren presents his opinion and is joined by Justices Black, Douglas, and Whittaker. He argues that "the duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation" (356 U.S. 86 at 92), and that the citizen who does not fulfill these basic responsibilities, be they tax obligations or the obligation to be honest, may seriously damage the nation. Warren then asks a rhetorical question and bases his further argument on the assumption that the answer is no: "could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship?" Warren's best summarizes his position in "citizenship is not
a license that expires upon misbehavior... citizenship is not lost every time a duty of citizenship is shirked" (356 U.S. 86 at 92).

While granting that citizenship is not revoked for violation of some duties of citizenship, a felony conviction for tax evasion or fraud, severely circumscribes the individual's ability to participate in the political process. He does not lose civil rights but loses all rights of citizenship. Like an alien he cannot participate in the political process, though he retains the title of citizen. Citizenship itself is not lost every time a duty of citizenship is shirked, but the political role is limited to the degree that one has violated the conventions of the community. If a citizen does not violate any conventions or laws, then his participation remains intact.

Since Warren also recognizes that failure to perform the basic duties of citizenship may cause a "dangerous blow" or "serious injury" to the community, one wonders how the community could defend itself against such violence. Warren does grant that "in appropriate circumstances, the punishing power is available to deal with derelictions of duty," but one could hardly imagine a dereliction of duty more serious than the desertion in wartime at issue in Trop. If the community has no right to demand the execution of basic duties from its citizens, such as military service, then the nation hardly has a duty to provide benefits to those citizens, such as defense against an enemy. If no one will serve there can be no defense.

In their dissenting opinion, Justices Frankfurter, Burton, Clark and Harlan support the contractual concept of citizenship by demonstrating the desirability of allowing a nation to protect itself against injury from within as well as from without: "One of the principal purposes in establishing the Constitution was to `provide for the common defense'" (356 U.S. 86 at 120). Moreover,
possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations, of which the most indispensable may well be 'to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense' Jacobson v. Massachusetts, 197 U.S. 11, 29" (356 U.S. 86, 121).

Their argument is essentially a recognition of the duties of the individual that accompany the benefits provided by the community of the Constitution.

In a similar case, Kennedy v. Mendoza-Martinez, military service was once again at issue. Here an individual evaded the draft by living outside of the United States. He then returned to the United States and was convicted of draft evasion pursuant to Section 11 of the Selective Training and Service Act of 1940 and his citizenship was questioned. The Court held that "the Constitution is silent about the permissibility of involuntary forfeiture of citizenship rights" and more importantly that "while it [the Constitution] confirms citizenship rights, plainly there are imperative obligations of citizenship, performance of which Congress in the exercise of its powers may constitutionally exact" (372 U.S. 144 at 159). Just as in Trop v. Dulles, these statements seem to recognize the power of the community to exact duties from the citizens it protects. Nonetheless, the Court affirmed the lower court ruling that Mendoza-Martinez did not lose his citizenship, thus in practice ensuring that the community could not exact obligations from its members.

In Vance v. Terrazas (444 U.S. 252 [1979]), Section 349 (a)(2) of the Immigration and Nationality Act is called into question. This section states specifically that an American citizen who takes an oath of allegiance to a foreign state will
lose his citizenship. Laurencé J. Terrazas, who claimed a dual nationality because of Mexican parentage and U.S. birthplace, took an oath of allegiance whereby he swore "adherence, obedience, and submission to the laws and authorities of the Mexican Republic' and 'expressly renounced) United States citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of the United States of America'" (444 U.S. 252 at 255). While such an explicit oath of allegiance would seem sufficient justification for revocation of citizenship based on the voluntary renunciation requirement of Afroyim, the Supreme Court decided that Terrazas really had not intended to renounce his American citizenship even while voluntarily performing what Congress had defined as an expatriating act. The burden of proof falls upon Congress; there was not a preponderance of evidence to show that Terrazas intended to relinquish his citizenship (444 U.S. 252 at 270). The community has very little recourse if even such an explicit statement does not demonstrate intent.

A final case decided by the New York Federal District Court on the precedent of Afroyim v. Rusk presents a unique example of the individual having it all his own way. Kahane v. Schultz (653 F. Supp. 1486 [1987]), Rabbi Meir Kahane accepted a seat in the Israeli Knesset in violation of several immigration and naturalization codes which define serving in a foreign government as an expatriating act. Kahane argues that while he knowingly committed an expatriating act, he never intended to relinquish his citizenship. He and his lawyers repeatedly wrote letters to the U.S. Department of State affirming his intent to remain a U.S. citizen. In upholding Kahane's U.S. citizenship, even as he sat in the Knesset and had aspirations to the position of Prime Minister of Israel (F. Supp. 1486 at 1489), the District Court cited the precedent of
Afroyim and quoted Terrazas: "In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct" (444 U.S. 252 at 260).

May an individual then do what he pleases with total disregard for the will of the community as defined by Congress, desert in time of war, pledge allegiance to a foreign government while renouncing U.S. citizenship, serve a foreign power, vote in foreign political elections? The Court seems to say yes. Such a decision leaves itself open for abuse and goes far beyond the individual rights conception held by Congress, although according to constructive unanimity and rule of law it is Congress, not the Court, who should decide these issues.

In a perfect society certainly no one would lie about his intentions; certainly no one would have bad intentions in the first place. Nonetheless, society is not perfect. An individual could intend to remain a citizen of the United States, or declare that his intent had been to remain a citizen when it really was not, merely for the benefits received rather than out of a sense of community or allegiance.

Kahane serves as a prime example; he freely admits that his intent to retain U.S. citizenship centers around his desire to lecture in the United States, a freedom that would be circumscribed with Israeli citizenship and his extreme political views (653 F. Supp. 1486 at 1490-1). While recognizing this as a "less than commendable motive" the District Court argues that "Afroyim and Terrazas teach that an intent to retain citizenship for hypocritical or cynical reasons is no less valid--legally--than an intent predicated on the noblest of altruistic motives" (653 F. Supp. 1486 at 1494). Hypocrisy is a lethal tool against the moral character of a nation, no matter how legally valid it may be. The community is forced to underwrite
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and protect Kahane's individualism but can place few if any demands on him.

Although the District Court in Kahane also tries to preempt analogies of citizenship intent with criminal intent, its arguments are less than satisfactory. The court asserts that criminals may lie about their intent in order to avoid punishment but that "an actor who states that he wishes to remain a citizen is making a statement about his own status" and it is therefore impossible for him to lie. The statement "I want to remain a citizen" cannot be a lie (emphasis in original, 653 F. Supp. 1486 at 1492, fn. 7).

Of course the desire to remain a citizen may be true, and from that standpoint the statement not a lie, but if the Court views the intent of the individual as paramount, should not the intent behind such a statement also be examined? Just as the criminal may disguise his intent, so may the citizen. Saying "I am not a murderer" with gun in hand, and "I am a citizen" with expatriating act committed are not that different; in neither case can we know real intentions except as they are communicated to us by the individual. Nevertheless, in the former we allow the community the final decision (manslaughter or murder). In the latter the final decision remains with the individual although his conduct may be as potentially damaging to community integrity as the presence of a murderer is to the community's physical well-being.

The District Court seems to think that either we can know the intentions of criminals by the acts they commit or that intent is at times irrelevant to the fact that a crime has been committed. On the other hand, a citizen's actions do not always reveal intent and intent is absolutely necessary to expatriation. Without intent, nothing has really happened.

Nonetheless, this granting of absolute right of
expatriation to the individual has not always been recognized. Prior to *Afroyim*, the community's demands bound the individual to a much greater degree. Indeed, dissenting opinion in the 5-4 *Afroyim* case cites the majority opinion in *Perez v. Brownell* (356 U.S. 44 [1957]), which was overruled by *Afroyim*. *Perez* recognized the greater ability of the community to define itself and protect itself by requiring allegiance to the laws it established through the legislative process.

*Perez v. Brownell* presents the case of an individual who voted in a political election in Mexico and also remained outside of the United States to avoid the draft. Retention of U.S. citizenship was denied due to his violation of section 401 (c) and (j) of the Nationality Act of 1940 (amended). The Court decided that withdrawal of citizenship was not an arbitrary act but one justified by the "rational nexus" which

must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs" (356 U.S. 44 at 58).

In *Perez*, the Court recognizes the community's need to regulate itself and its members sets a reasonable standard by which the needs of the individual can be balanced with the needs of the community. If Congress has a specific power or responsibility, it must also have a means to carry that power out. In this case, the community's need to carry out foreign affairs coherently justifies the action taken against individuals whose actions threaten the community. The Court's opinion stands in strong contrast to *Trop v. Dulles, Kennedy v. Mendoza-
Martinez, Kahane v. Schultz, and Afroyim v. Rusk where the cooperative nature of the community is recognized, but any means of carrying out community responsibilities is valid only if it does not impinge in any degree on the individual's will.

By setting a reasonable standard, the Court in Perez neither advocates the extreme individualism inherent in Afroyim nor presses an extreme view of community. Rather, the need to balance the two serves as a basic and pragmatic criteria. Voting in a foreign election seems less potentially damaging than the desertion issue in Trop and yet Trop retained his citizenship and Perez lost his. Ironically, Trop v. Dulles and Perez v. Brownell were both decided on the same day, demonstrating the inconsistent and at times confusing application of contractual and natural rights theories to citizenship.

Significantly, Perez cites the precedent set by Mackenzie v. Hare (239 U.S. 299) where individual intent was deemed totally irrelevant to community needs. In this case a native-born American woman married an alien and then tried to register to vote. By reason of her marriage to an alien she ceased to be a United States citizen. The need of the government to avoid international entanglements and embarrassments superceded her interest in remaining a citizen. In contrast to Perez where Warren recognizes the people as the source of sovereignty, the court in this case views the government itself as sovereign. Rather than sympathizing with the community's need to defend itself and then withdrawing all tools of defense, this Court sympathizes with the individual but upholds the community:

We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved
more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. . . (239 U. S. at 311-2).

In this case the rights of the individual are subservient to the greater needs of the community. In contrast to more recent cases even her desire and intent to retain citizenship are irrelevant to those greater needs.

Just as he presented a strong case for the individual in the *Trop* decision, so Chief Justice Warren argues strongly for natural rights in his dissenting opinion in *Perez*. Since the sovereignty of the United States government stems from the people, the "citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government" (356 U.S. 44 at 65). He likewise argues that "citizenship is man's basic right for it is nothing less than the right to have rights. . . . In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens. . . " (356 U.S. 44 at 64). Although retention of citizenship may be a basic right granted to the citizen by the community, citizenship is hardly mankind's basic right; not even Warren extends citizenship privileges to aliens. Moreover, citizenship is really not the right to have rights since the equal protection and due process clauses apply quite broadly to all persons (*Yick Wo v. Hopkins*); rather, citizenship is the right to participate and influence the political activity of the community. Such a distinction between the right to have rights in general and the right to participate politically shows the relevance of citizenship and subject roles in the community.
Luria v. United States (231 U.S. 9 [1913]), decided long before Perez, demonstrates clearly that membership in a community implies reciprocal responsibility on the part of the individual and the community (231 U.S. 9 at 22). Significantly, the Supreme Court expressly recognizes that the granting of citizenship be beneficial for both the individual and the community: "In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself . . . " (231 U.S. 9 at 23). Conventions and coordination solutions come about precisely because they are mutually beneficial to those involved. One would not enter into an agreement if there were no benefits. Mutual benefit is a valid standard by which we include or exclude individuals from participation in a political community. Despite the strong recognition of community in both Perez and Luria, the relative paucity of expatriation cases that expressly support the contractual theory of citizenship reflects the Court’s stronger tendency towards natural rights theory.

CONCLUSION

The inconsistent and contradictory application of natural rights and contract theory in the Court’s development of citizenship reflects its difficult nature. Nonetheless, the essentially conventional aspects of community in general and citizenship in particular ensure an ongoing balance between the two approaches, despite the Court’s recent emphasis on natural rights. Citizenship, as a coordination solution, defines the roles appropriate to insiders and outsiders, in accordance with the values of the community.

In a community that values rights, the conventions of membership will reflect that value, as Yick Wo v. Hopkins demonstrates. Even with an
emphasis on rights, it is the community, not the individual, that determines the extent and nature of those rights.


*Baumgartner v. United States* 322 U.S. 665 1944.


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