

NOTE TO SCHMOOZE PARTICIPANTS:

I have omitted all citations from this draft. An embarrassingly high percentage would have come from my prior work in this and related areas. This draft should be read in the spirit in which it is offered. It is a collection of ever-developing but unvetted ideas that have been spawned from prior research and publications.

Citizenship, Rights and Belonging

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“Home is the place where, when you have to go there, they have to take you in.”
-Robert Frost, *The Death of the Hired Man* (1915)

“Membership has its privileges.”
-American Express advertisement

“In the eyes of government, we are just one race here. It is American.”
-Justice Scalia, concurring, in *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995)

Abstract

American citizenship is a fluid concept that can be defined broadly in two ways. One conceptualization focuses on rights owed to and obligations owed by citizens. Another conceptualization focuses on belonging or being “one of us” as the essence of citizenship. Unfortunately, the Constitution and related case law provide little help in determining which broad conception or combination of the two is the appropriate one. That is a problem particularly because the different conceptualizations of citizenship can lead to very different citizenship experiences for various citizens and can affect the type of society in which we live.

Introduction

The content of American citizenship is elusive. At base, American citizenship is about membership. It is about being a full participant in the American polity. However, membership can be a fuzzy concept because it can be conceptualized in two very different ways. Membership may be structured as a set of rights owed to the member by an organization and a set of obligations owed by the member to the organization in which one has membership. Conversely, membership may be based on the more general notion

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of belonging to the organization in which one has membership. Belonging may bring with it fuzzy rights and fuzzy obligations to the other members in the organization and to the organization itself. Though membership may be a reasonable way to think of citizenship, it does not provide a determinate way to define citizenship. Indeed, though considering membership is a useful way of beginning to think about citizenship, membership does not provide a definition of citizenship. It provides a range of possible definitions of citizenship.

As with membership, citizenship can be defined primarily as the set of rights owed to citizens and a set of obligations owed by citizens to the state. A rights-and-obligations based vision is the least robust, but most definitive version of citizenship. Once the legal rights and obligations of citizenship are defined in a rights-based citizenship regime, citizenship itself is defined. However, the relationship between citizen and country and between citizen and citizen may become an arm's length one that is viewed not as a reinforcing relationship, but as an arrangement of convenience.

Conversely, citizenship as membership can be defined as a mutual relationship between and among the citizen, her fellow citizens and the state. The essence of such a mutual relationship is belonging or being one of us. This belonging-based vision of citizenship is fluid and unclear, but surprisingly is more robust than the rights-based version of citizenship. That is, it is a notion of citizenship that more firmly ties the citizen to the state and the state to the citizen. This stronger bond may trigger fuzzy moral rights and obligations in addition to reasonably clear legal rights and obligations that flow from a rights-based vision of citizenship. The fuzziness flowing from a belonging-based vision of citizenship may not be found in the Constitution or statutes but may be written on the hearts of citizens.

Though citizenship can be defined either as a rights-based or belonging-based relationship, the Constitution and caselaw could provide a definitive definition of citizenship. However, they do not tell us what the nature of citizenship is. Indeed, *Dred Scott v. Sandford*, a notorious case that discussed citizenship, arguably supports both visions of citizenship. In discussing why free blacks could never be citizens, the *Dred Scott* Court relied on the notion that blacks could never belong to the American polity the way that a citizen must belong to the American polity. With respect to naturalization, the Court suggested that citizenship is about belonging and being accepted as a member of the American citizenry by the American citizenry. The Court took pains to explain that Indians and Europeans could become American citizens through naturalization and become part of the "us" that constituted the American citizenry, simply by giving up their prior commitments and aligning themselves with the American people.

Though the *Dred Scott* Court took a belonging-based view of citizenship in discussing those who could become naturalized citizens, it relied on a rights-based vision of citizenship to explain why free and enslaved blacks had never been and could never be citizens. Though Chief Justice Taney was wrong on his history, he relied on rights ostensibly never given to blacks (such as the right to vote) and duties never owed by blacks to the state (such as the obligation to bear arms to defend the state) to explain why

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blacks were not and had never been a part of the body of the citizenry. Taney did not quite adequately explain how his rights-based vision of citizenship meshed with the facts that some non-citizens voted and defend the United States by bearing arms. Nonetheless, Taney focused on rights and obligations as a part of the discussion of why blacks had never become a part of the body of American citizens. In the process, he provides support for both the belonging-based and rights-based visions of citizenship.

Of course, the *Dred Scott* Court had a particularly difficult time discussing citizenship when it discussed women's citizenship. Women were citizens and were clearly part of the body of American citizens. They belonged. However, the Court noted that women did not exercise all of the rights of citizenship or owe all of the duties to the state that male citizens owed. Thus, women could belong to the American citizenry, and clearly did belong to the American citizenry, without having to worry about some of the rights men were owed and some of the obligations that men owed to be considered citizens. Not surprisingly, Taney simply asserted that how women's citizenship was handled was simply the state of the world and was not inconsistent with the notion of women as citizens.

Though we have seen a number of developments regarding citizenship and what it means since *Dred Scott*, it is clear that the nature of citizenship is no more clearly defined today than it was one hundred and fifty years ago. The various constitutional developments of the past century and a half have continued to swing between a rights-based and a belonging-based citizenship. The result is not mayhem, but rather uncertainty regarding what Americans should expect citizenship to mean. Such uncertainty may create confusion regarding what rights Americans should expect as Americans and what obligations Americans should expect to owe as Americans.

This brief essay is organized as follows. Part I of the essay briefly explores different concrete ways of thinking about membership and citizenship. Part II mentions a few sections of the Constitution and a few cases that suggest an indeterminate view of citizenship. Part III notes that the lack of definition is a problem because it can lead to multiple types of citizenship that may appear to trigger different rights and obligations for different citizens and may suggest to citizens that they owe far less or far more to the country than they arguably should.

I. Membership

There are many different ways to conceive of membership. Here are a few. Each type of membership has a rights-based element and a belonging-based element, though each element has a different prominence in each type of membership.

A. Membership on a Faculty

This type of membership is voluntary in that the faculty member almost always seeks the membership. However, the membership is almost purely definitional in that being a

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member of a faculty triggers certain rights as against one's school and certain obligations owed primarily to the institution rather than to members of institution. Of course, on some faculties there are varying firm and fuzzy rights of seniority that can be exercised such as a right to choose offices and preferred scheduling of classes. In addition, there are more serious but still fuzzy rights and obligations that may be owed to fellow members of the faculty, such as the obligation to mentor younger members of a faculty or read their drafts, or to students.

However, the essence of faculty membership arguably is an arm's length relationship that can be temporary or longstanding at the option of the parties to the relationship. When analogized to citizenship, citizenship of this type would be a largely rights-based citizenship that exists merely for the convenience of the citizen and the state. Certainly, the relationship may be valuable to both sides. However, it may be easily broken. Though belonging may be a part of the relationship and may tend to bind the faculty member to the institution, belonging may not be a key component of the relationship.

B. Membership in a Club

Club memberships are voluntary in the same way that membership on a faculty is voluntary. However, club membership tends to be less important to livelihood than membership on a faculty and, thus, the relationship may be viewed as more voluntary. The voluntary nature of the association and the need to want to become a member before becoming a member of a club may suggest that the membership relationship is belonging-based from the member's perspective. Of course, the need for application and acceptance by a significant portion of the club or its leadership also suggests a belonging-based membership. The belonging-based membership may trigger fuzzy obligations in addition to the well-defined obligations. These obligations may include the duty to participate in the life of the club and the duty to seek new members so that they may become "one of us." Certainly, well-defined rights of voting and obligations to pay dues will arise with club membership. However, these rights and obligations may be seen as insignificant in comparison to the less well-defined rights.

In analogizing club membership to citizenship, we see a type of citizenship that stems from a desire to belong to a particular group. The desire to belong may be based merely on the tangible benefits that may flow from citizenship or from the desire to join with a group of like-minded people. This type of citizenship can be likened to a type or vision of citizenship that might be experienced by some naturalized immigrants.

C. Membership in a Church

Church membership often starts at birth with the faith of parents becoming the faith of children until those children can make independent decisions. However, once children become adults, church membership becomes largely voluntary. Nonetheless, inertia and the belief that one's religious views have not changed much over time might be sufficient

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to retain the church membership of one's youth. Yet, church membership is based on belief and affinity. It is about belonging. However, the belonging is not based on acceptance by the group to which the parishioner adheres. Rather, it is based on the intellectual decision to associate oneself with a particular doctrine or belief system.

The rights and obligations that surround church membership can be quite fuzzy. Certainly, a general undefined obligation to support one's church may exist as may an obligation to participate in the life of the church. The obligations that are owed may not be owed to the other members of the church, but only to the church or the religion itself. There also may be few, if any, rights to exercise.

Thinking about citizenship through the lens of church membership is somewhat illuminating. It may trigger a vision of citizenship that is particularly participatory. It suggests the possibility that citizenship can be volitional and can trigger generalized obligations that are not tied explicitly to rights but rather to beliefs. That is a citizenship of belonging that focuses on the individual's willingness to affiliate with the American polity rather than focusing on the American polity's willingness to accept the citizen. This vision of citizenship might describe birthright or naturalized citizens who have fully contemplated why they wish to be or remain American citizens.

D. Membership in a Family

Family membership is arguably the most complex type of membership to discuss. It is often based purely on birth and is involuntary rather than volitional. Exit from the family is possible as a mental or emotional matter. However, exit may be impossible as a matter of biology. There are few, if any, rights of membership that come from family membership, though legal rights and obligations may attend certain familial relationships. Similarly, there are few clear obligations that flow from family membership, though there are fuzzy obligations such as the duty of loyalty to other family members.

Of course, there are other non-birthright types of family membership, such as membership by marriage or by adoption. With membership by marriage, one necessarily becomes a member of the family voluntarily. However, questions of acceptance and belonging do exist. Family membership by marriage, like birthright family membership, triggers unclear rights and obligations. However, exit is possible as a matter of choice.

Family membership by adoption is somewhat of a hybrid between birthright membership and membership by marriage. Family membership by adoption requires the acceptance of the subject based on the decision of the elders of the family. In the case of young children, there may be no formal acceptance of the membership. Once that decision is made, membership by adoption becomes largely like birthright family membership. Of course, exit is possible based on emotional ties or by the breaking of legal bonds. However, even those breaks may not be permanent or effective. That is, the adopted child may always be "one of us" even after explicitly repudiating "us."

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Of course, familial membership is most like birthright citizenship. Such citizenship is not volitional. Rather, it simply is. There is no formal acceptance that must occur and the citizen simply is a citizen. Nonetheless, that form of citizenship does not necessarily suggest that the citizenship is belonging-based. Indeed, one may argue that the automatic nature of the citizenship guarantees that the citizen is a citizen even if she does not really belong or even want to belong in any formal way.

E. Summary of Membership

Membership can take many forms and can be viewed as primarily rights-based, primarily belonging-based or anything in between. There is no necessarily correct view of the nature of membership and citizenship. However, we might expect the Constitution or constitutional doctrine or case law to clarify the core of American citizenship. The next section of the essay notes that this is not the case.

II. The Constitution, Case Law and Citizenship

A. The Constitution

1. Naturalization

Congress' right to fix the rules for naturalization come from Article I, Section 8 of the Constitution: "The Congress shall have Power . . . To establish an uniform rule of Naturalization." However, that provision notes merely that non-citizens can become citizens on whatever terms Congress decides. It does not suggest that citizenship is belonging-based or rights-based. The content of the naturalization procedure may provide clues regarding how Congress views citizenship. However, those views may change significantly over time.

2. Citizenship Requirements for Holding Office

There are various citizenship requirements for holding specific federal offices. United States Representatives must be citizens for seven years before serving. (Article I, Section 2) United States Senators must be citizens for nine years before serving. (Article I, Section 3). The president must be a natural born citizen. (Article II, Section 1) The various limitations on which citizens can hold certain offices suggest a particular vision of belonging. By dividing some citizens from others with respect to who can hold office, the Constitution seems to suggest that mere citizenship does not suggest full belonging. Indeed, the requirement that the president be a natural born citizen suggests that there will always be some limits on the nature of belonging based on birthright citizenship. Using the circumstances of one's birth as a qualification suggests a somewhat intriguing way of determining fidelity to one's country. Undoubtedly, there were considerations

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regarding the leadership of a young country that may no longer exist with respect to our mature Republic. Nonetheless, the limitations suggest that citizenship may not only be belonging-based, but that the belonging is of a certain type.

3. The Reconstruction Amendments (13th, 14th, and 15th Amendments)

The Reconstruction Amendments as a group provided civil and political equality to free blacks and former slaves. However, they did not necessarily provide that citizenship was supposed to be about belonging. Newly freed slaves were explicitly provided the rights of citizens as a result of the Reconstruction Amendments. However, that provision of rights required no more than that citizenship be treated as rights-based. Indeed, that the newly freed slaves and formerly free blacks had to have their citizenship confirmed explicitly by amendment may suggest that such citizenship was grudgingly given by some and was not in the nature of belonging. That is, citizenship arguably was rights-based in that citizenship for such new citizens was to be deemed only as robust as the Constitution. Indeed, the treatment that the new citizens received as a group in the wake of the passage of the Reconstruction Amendments suggests the possibility that the citizenship that such citizens were to enjoy was not going to be belonging-based, but would only be rights-based.

4. Voting Amendments (15th, 19th, 24th and 26th) and the Conundrum of Voting

The Constitution has been amended through the years to eliminate restrictions on the right to vote. Through the 15th, 19th, 24th and 26th amendments, the Constitution has become a backdoor guarantee of voting rights to citizens. Once citizens are provided the privilege of voting, that privilege morphs into a right to vote when the ways in which the right can be restricted are severely limited. However, it is clear that as voting has become the quintessential right of citizenship, voting has not necessarily shaped how citizenship is defined. A citizen is allowed to vote whether or not citizenship is based on belonging. Indeed, the franchise historically has often been provided in situations where it was clear that providing it would have little if any effect on the outcome of elections.

Voting and belonging are quite different. Voting presents a conundrum when it is used as a bludgeon to silence citizens. When voting is used by the majority to end discussion and forestall any attempt to reach consensus because the majority has the votes and wants to get about the business of ruling without the input of the minority, the provision of the right to vote to all citizens does not suggest that citizenship is belonging-based. Indeed, our equal protection jurisprudence as it relates to discrete and insular minorities is a tacit recognition that voting and democratic (majority rule) decisionmaking do not necessarily suggest inclusiveness and the fundamental belonging of all citizens who vote.

When voting was restricted to certain classes of citizenship, those who could vote almost certainly would have been considered to have belonged to the polity. However, as voting has expanded it is unclear that all who can vote belong to the polity in any fundamental

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sense. It is possible that those who can vote are merely those who have been defined as citizens. Of course, voting can be taken away from some citizens, such as felons. However, the disfranchisement of those citizens is not viewed as stripping citizens of citizenship rights, but (rightly or wrongly) as the necessary regulation of the use of voting rights by people who have been shown to be untrustworthy to exercise the franchise appropriately.

B. Cases

1. Dred Scott v. Sandford

As noted above, *Dred Scott* suggests the possibility that citizenship is both rights-based and belonging-based depending on the point that needed to be made regarding why neither free nor enslaved blacks could be American citizens as of the 1850s.

2. Plessy v. Ferguson

In analyzing the 14th Amendment in this forced segregation case, the Court approached citizenship as rights-based with respect to how Black Americans were treated under the Constitution. That is, Black Americans had certain rights triggered by Constitution, but no more. However, in discussing the rights owed to citizens, the Court noted that some groups, such as the Chinese, could not be assimilated and therefore could not become citizens. In this respect, the Court seemed to suggest that even with a rights-based approach to citizenship flowing from the 14th Amendment, citizenship still has a belonging-based element. This is so even if the belonging-based element does not provide support for specific substantive rights that some might have thought flowed from the 14th Amendment.

3. Korematsu v. United States

The Court's decision suggests that that citizenship does not automatically constitute belonging. In that case, the Court found acceptable the government's order excluding American citizens of Japanese descent from their homes and requiring such citizens to report to assembly and relocation centers during World War II. Though the Court suggested that military necessity supported the government's actions, it is difficult to believe that such action would have been taken in this way against other groups that were deemed to be just like "us."

However, some might argue that *Korematsu* does not necessarily suggest that citizenship is rights-based instead of belonging-based. Rather, *Korematsu* may merely suggest that citizenship has little substantive content that flows directly from the 14th Amendment. To the extent that the Court did not deem the equal protection or due process clauses to be violated by the government's actions and suggested that the actions were not race-based,

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one could argue that the case says little about whether citizenship is rights-based or belonging-based. Instead, the case can be thought to suggest merely that the substance of rights owed to citizens will not always be particularly significant.

4. *Brown v. Board of Education*

Brown is about rights-based notions, but that is arguably bound to happen when discussing how equal protection applies in that equal protection is about rights. However, one may argue that *Brown* is quintessentially about belonging in that it seeks to guarantee that rights that might not be deemed to clearly flow from the 14th Amendment do flow in situations where a certain group of citizens is fenced off from another group of citizens. Obviously, reams have been written about *Brown*. The point is that while *Brown* deals in the language of citizenship in interpreting the 14th Amendment – the quintessential citizenship amendment – it does not provide a clear vision of why the nature of citizenship entitles the citizen to receive what the citizen receives.

C. Summary

Undoubtedly, I have chosen a small number of data points to mention. However, this was done in order to make the point that there is not coherent vision of citizenship. Neither the Constitution nor the Court tells us what the nature of citizenship is or what citizenship entails. That is not necessarily a criticism of the Court or the Constitution. It is merely an observation that citizenship can legitimately mean all things to all people. That can be a problem if it means that citizens view the rights owed by and the obligations owed to their country in wildly varying ways.

III. Implications of Undefined Citizenship

There are implications that may flow from undefined citizenship. Without clear guidance regarding what American citizenship is and means, citizenship can become a moveable feast. Problems arise when legitimately different visions of citizenship lead citizens to very different visions of the rights owed by the state to citizens and the duties owed by the citizen to the state. A country full of citizens who view citizenship merely as based on specific rights owed and specific obligations owed may create a polity in which citizens know precisely what they should ask of their government and precisely what they should expect from the government. However, it may also create a country in which citizenship is an arm's length concept that does not afford anything more than minimal fidelity to the country. Simply, the relationship between a citizen and the citizenry as well as between the citizen and the state could be deemed purely voluntary and subject to abrogation whenever either side viewed the relationship as unfulfilling.

Conversely, a citizenship based on belonging may be one that creates a country in which both legal and moral rights owed to citizens and obligations owed by citizens are taken

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seriously. Such a country may be one in which citizens treat their relationship to their fellow citizens and the state as being less defined, but more robust. Concepts of patriotism, self-sacrifice and loyalty may have more currency in such a society. Whether an inflated sense of these concepts is good or bad for society is another question, but their existence in a society where citizenship is belonging-based probably cannot be denied.

The point is not that citizenship should be defined precisely either as rights-based or as belonging-based or as some combination of the two. Rather, the point is the without any definition of citizenship or even much guidance on how to think about citizenship, it is entirely possible that very different visions of citizenship could guide significant portions of the population. Though these portions of the population may well coexist reasonably well, their differing visions could create very different notions of what appropriate public policy may be, particularly in times of war but also in times of relative peace.

Of course, the differing visions of citizenship may well trigger differing visions among policy makers regarding what the state owes to its citizens. Differing visions may or may not significantly affect public policy or legal outcomes. However, they may affect how much society is doing for its citizens over and above what the society has an absolute obligation to provide. This may affect the underclass that needs support from society and may cause more unrest and distress than would accompany a society where all know that obligations are fuzzy, but are meant to reinforce the polity and its citizenry as a whole.

Conclusion

Being an American citizen means being a member of the American polity. To be clear, that may not provide much more in the way of concrete rights than non-citizen residents are owed. A strong vision of the due process and equal protection clauses will guarantee that citizens are not treated fabulously better than non-citizen residents. Nonetheless, citizenship means more than residency, even if we are not quite how much more.

Citizenship can be defined in various specific ways and we all can surmise what the habits of good citizens are. However, without guidance from our Constitution and case law, we are limited merely to surmising what American citizenship is and also surmising what the American polity should look like.