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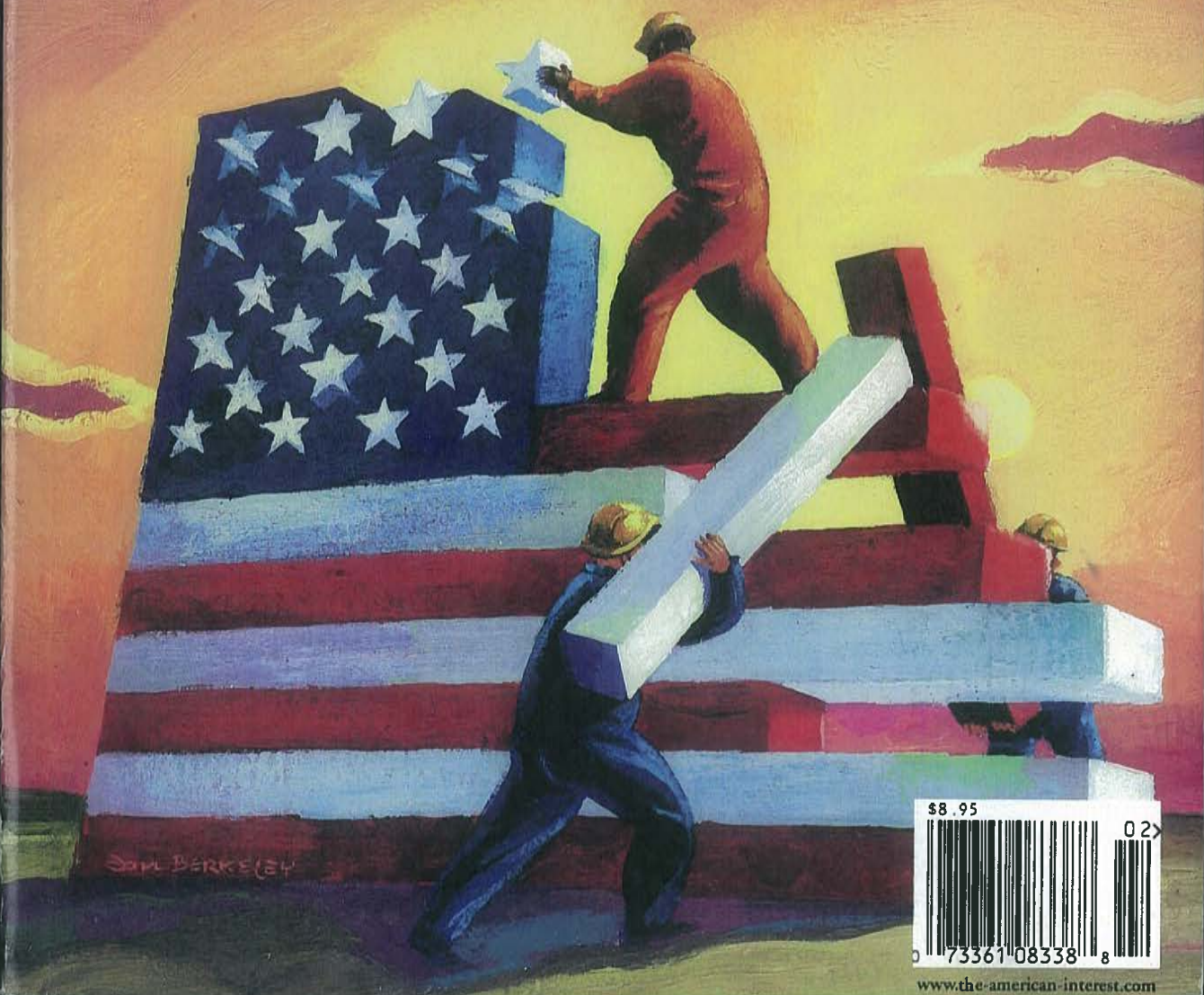
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## On Citizenship

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The law of citizenship is not a subject that figures large in American law schools. Only a handful of legal academics pays much attention to it. One of them is Peter J. Spiro, the Charles R. Weiner Professor of Law at Temple University. His book *Beyond Citizenship: American Identity After Globalization* serves as an extended essay for “the general reader” on the topic. The book engages its subject with a mixture of historical, legal, sociological and policy analysis against a backdrop of “globalization” (a phenomenon he takes for granted and does not define in detail).

Spiro’s main preoccupation is, as he sees it, the decline of American citizenship and the concomitant fading of social solidarity that depends on a shared set of values. “American citizenship no longer reflects or defines a distinctive identity,” he says. For these conclusions he does not offer empirical evidence. Instead he associates changes at “the molecular level of citizenship law” (whatever that may be) with the “irreversibility of citizenship’s decline.” While Spiro seems to be unhappy about this trend, he says his book “is not intended to kindle correctives.” In a rather vague and unsatisfying manner, Spiro simply calls on the reader to train his sights on “alternative locations of community.”

Nevertheless, at the heart of Spiro’s argument is an acceptance of dual citizenship in American law and life. On this point his discussion is lucid and calls attention to a consequential phenomenon that has received curiously little public attention in recent times, despite it having loomed large in legal thinking since the founding of the American Republic.

In an unpublished essay on the need for American neutrality in foreign affairs, Alexander Hamilton, himself an immigrant from the Caribbean island of Nevis, used marriage as a metaphor for citizenship:

A dispassionate and virtuous citizen . . . will scorn to stand on any but purely American ground. . . . To speak figuratively, he will regard his own country as a wife to whom he is bound to be exclusively faithful and affectionate. And he will watch with a jealous attention every propensity of his heart to wander towards a foreign country, which he will regard as a mistress that may pervert his fidelity and mar his happiness.<sup>1</sup>

The ideal citizen, Hamilton averred, owed allegiance to only one state, held only one passport, obeyed only the laws and internalized only the unique values shared by other citizens of that same state, and ultimately was willing to die for the state. Citizenship was part of his or her basic identity and core beliefs.

Spiro argues that the founding ideal of citizenship as identity—in which dual citizenship was once thought “an offense against nature”, an immoral status “akin to bigamy”—has been fading for some time.

Multiple citizenship is sanctioned in American law such that U.S. citizens can vote in other countries, serve in their armed forces, and even hold high office without losing their U.S. citizenship. Many Americans not only hold multiple passports, Spiro notes, but they also have multiple loyalties. In the era of globalization these loyalties extend not only to other states but even to transnational organizations such as Amnesty International. What were in the past distinctly American values (the commitment to individual liberty and democracy) are now widely embraced around the world, so much so that the sense of community for some Americans has followed the export of American ideals, “migrating beyond the state.”

This argument captures a more general anxiety about the changing nature of American society. The weakening of the affective and material ties between citizens and the state, some fear, may have dire consequences for the viability of the American polity. “The impossibility of testing membership in the national community”, Spiro argues, “perhaps more than any other

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**Beyond Citizenship: American Identity  
After Globalization**  
by **Peter J. Spiro**

Oxford, 2008, 208 pp., \$29.95

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<sup>1</sup>Quoted in Ron Chernow, *Alexander Hamilton* (Vintage, 2004).

element of citizenship law, demonstrates the fading of America.” The glue that holds a country together—the sense of identity, loyalty and commitment shared by an exclusive set of citizens—seems to be disintegrating.

There is nothing new about this fear. It was part and parcel of the core agenda of American politics before the Civil War and for a long time afterward. In more recent times we have become accustomed to political epigrams like Robert Putnam’s “bowling alone” and to book titles like *The Disuniting of America* (Arthur M. Schlesinger, Jr.) and *Is America Breaking Apart?* (John A. Hall and Charles Lindholm). Yet Spiro takes a distinctive historio-legal approach to the subject.

Citizenship as identity reflects an understanding of the relationship between the individual and the state that originated in Classical Greece and thus has deep resonance in Western political culture and thought. The Classical view of citizenship—much enhanced during the formation of the nation-state—can be contrasted with an alternative perspective figuring in Western thought that instead sees citizenship as a matter of consent: The good order provided by the state elicits obedience to the law from the individual. This distinction between citizenship as identity and citizenship as consent is at the heart of the difference between *Gemeinschaft* and *Gesellschaft*—between a social order based on identity and community on the one hand and one based on self-interest and objective rules on the other.

Both of these perspectives have informed American debates about citizenship from the founding of the country. Both have been reflected in changing legal doctrines. Neither has definitively trumped the other.

Nowhere is this more clearly reflected than in the discrepancy between contemporary American law and the oath that those aspiring to become naturalized American citizens must take. In *Afroyim v. Rusk* (1968), the Supreme Court held that, under the Constitution, Congress had no power to divest Beys Afroyim of his citizenship for voting in an Israeli election. Providing the citizenship clause of the Fourteenth Amendment with particular significance, Justice Black wrote:

Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country, and the country is its citizenry. . . . 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 . . . 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.

Only through a voluntary and explicit statement of renunciation can American citizenship be ended.

Now contrast the consensual basis for citizenship implied in this law with the naturalization oath that new citizens must take as required by Sec. 337 of the Immigration and Nationality Act:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . . and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.

Many individuals taking this oath may hold dual or even multiple citizenships because the laws of other countries might not provide a mechanism of renunciation. But many others may have diversified their citizenship portfolio and hold multiple passports and participate in the public life of other countries. The legally required naturalization oath—which is, at the very least, in tension with current interpretations of the Constitution—places them in a position of swearing to something they frequently know not to be true, but which they also know will not subject them to charges of perjury.

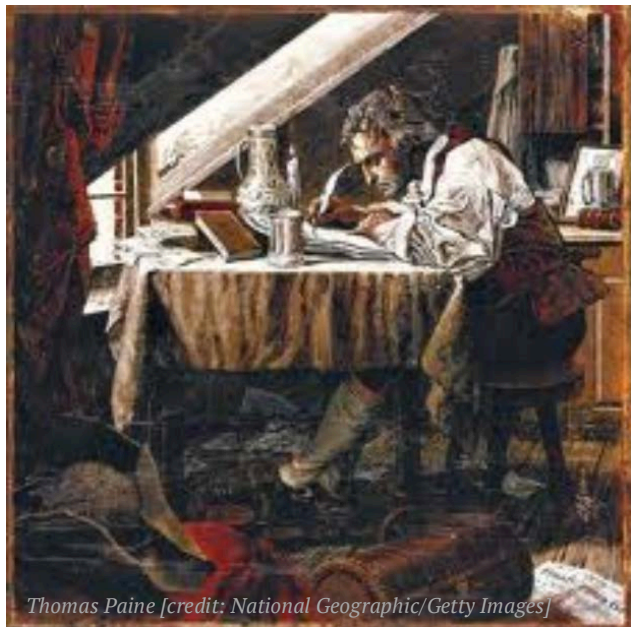
The tension is clear: The current state of American law reflects the view that citizenship is a matter of consent (*Gesellschaft*), but the naturalization oath reflects the Classical view of citizenship as a matter of identity (*Gemeinschaft*). Just as debates about dual citizenship reach back to the founding, so does the source of this tension. Once we understand its origins, we will understand why the tension has endured for so long.

## Citizenship as Consent

Before American independence, British law of subjecthood was summarized by Lord Coke in Calvin's Case. Every subject, as soon as he was born and as a matter of natural law (considered to be part of the laws of England) owed perpetual allegiance and obedience to his sovereign. The sovereign owed a reciprocal duty to protect, a duty "meant to fulfill the most immediate needs of ordinary people: minimal security against conquest, civil war, anarchy, and private violence."<sup>2</sup> The duty of perpetual allegiance followed from the accident of birth within the realm. In British law, the involuntary deal (allegiance for protection) could not be broken. By contrast, in American law the deal can be broken, but only by the citizen. If the citizen prefers another set of institutions or laws, he or she may walk away. Competition among states is in part based on the quality of their institutions. In the words of John Page, a member of the First Congress and later Governor of Virginia:

It is nothing to us, whether Jews or Roman Catholics settle amongst us; whether subjects of Kings, or citizens of free States wish to reside in the United States, they will find it their interest to be good citizens, and neither their religion nor political opinions can injure us, if we have good laws, well executed.<sup>3</sup>

Thomas Paine took a similar position. He saw America as made up "of people from different nations, accustomed to different forms and habits of government, speaking different languages", but, "by the simple operation of constructing government on the principles of society and the Rights of Man, every difficulty retires and all the parts are brought into cordial union."<sup>4</sup> The dynamics of American democracy



Thomas Paine [credit: National Geographic/Getty Images]

would, as it were, take care of the disruptive potential of heterogeneity.

Noah Webster also believed that good laws would make men good citizens. He was skeptical of abjuration oaths, arguing that

'Ten thousand oaths' do not increase the obligation upon [a citizen]. . . . If the government of Pennsylvania is better than that of Great Britain, the subjects will prefer it, and abjuration is perfectly nugatory. If not, the subject will have his partialities in spite of any solemn renunciation of a foreign power. . . . The best way to make men honest, is to let them enjoy equal rights and privileges. . . .<sup>5</sup>

Although Black's reasoning in the *Afroyim* case may have been influenced by a very different set of historical factors—especially anxiety about the costs of statelessness, which had been highlighted by Nazi Germany's treatment of the Jews and other minorities—it echoed the sentiments of some of America's most distinguished early thinkers that citizenship is a matter of consent. A state that has good and well-executed laws will have loyal citizens. Affection, if it is necessary at all, follows from practice and experience.

<sup>2</sup>Judith Shklar, "American Citizenship: The Quest for Inclusion", ed. By Grethe B. Peterson, *The Tanner Lectures on Human Values*, Volume XI (University of Utah Press, 1991), p. 391.

<sup>3</sup>*Annals of Congress*, vol. 1, p. 1149.

<sup>4</sup>Paine, *The Political and Miscellaneous Works*, vol. 2 (Robert Carlile, publisher, 1819), p. 22.

<sup>5</sup>Webster, *A Collection of Essays and Fugitive Writings. On Moral, Historical, Political, and Literary Subjects* (I. Thomas and E.T. Andrews, 1790), p. 153.

## Citizenship as Identity

Citizenship as consent, however, has always been challenged by an alternative perspective that views a state's success as critically dependent on the creation of a *Gemeinschaft* in which citizenship becomes part of the identity of the individual. Unless the individual identifies with the state, good laws will not be enough to sustain the polity. After all, other states may have good laws, as well. A state whose citizens do not emotionally respond to their national anthem is at risk. At a very elemental level, the constitutional provisions requiring that a member of the House be a citizen for seven years, a member of the Senate for nine, and the president a natural-born citizen reflect this view.

The Founding Fathers generally wanted both an oath and a period of residency for naturalized citizens. The 1795 Act to establish a uniform rule of naturalization provided that an alien, in order to become a citizen, had to have been a resident of the United States for at least five years and had to declare, in court, three years before his admission, on oath or affirmation, that "it was bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject." Because the United States has always operated under the rule of *jus soli*, no individual born in the country (other than citizens of Japanese origin during World War II, and those subjected to loyalty oaths at various times) has been obliged to take an oath or any other conditions for affirming citizenship. It is sufficient that you were born within American territory, even if your knowledge of the United States is limited and you speak no English.

It is true that some prominent Founding Fathers were skeptical of the possibility of integrating immigrants while at the same time assuming that those born in the United States would absorb its values through, as it were, their mother's milk. Although Jefferson's views on citizenship were hardly consistent (as with his views on many other issues), he did express concern about those coming to the United States from continental Europe, which knew nothing of republican government. In his *Notes on the State of Virginia* Jefferson argued:

[Our government] is a composition of the freest principles of the English constitution, with others derived from natural right and natural reason. To these nothing can be more opposed than the maxims of absolute monarchies. Yet, from such, we are to expect the greatest number of emigrants. . . . [T]hey will share with us the legislation. They will infuse into it their spirit, warp and bias its directions, and render it a heterogeneous, incoherent, distracted mass.


Alexander Hamilton attacked Jefferson in 1802 for proposing liberalization of the 1798 Naturalization Act but nonetheless echoed the sentiments above. The influx of foreigners, he said, must "tend to produce a heterogeneous compound; to change and corrupt the national spirit; to complicate and confound public opinion; to introduce foreign propensities."<sup>6</sup>

The extent to which American law has focused on exclusive affective identity has varied across time. The first part of the 20th century was the period in which the laws most strongly reflected the view that the citizen had to be part of a *Gemeinschaft* society. The 1940 Nationality Act, for instance, contained a long list of events triggering expatriation. *Inter alia*, they included taking an oath of allegiance to a foreign state, holding office in a foreign government, voting in a foreign election, staying abroad during wartime to evade military service, and, in the case of naturalized citizens, residing for three years in one's country of birth or for five years in any other foreign country. It was the provisions of this Act that were reversed by the *Afroyim* case.

But even in the first half of the war-torn 20th century, expediency, deals and bargains—not just idealized views of the citizen as part of an organic community—governed the ways in which the United States and other states treated those under their authority. All residents of the United States have been subject to military service whether citizens or not. In World War I, Germany conscripted a million aliens, while one million Indian troops served with the British forces. In 1944, 13 percent of the troops serving with the Germany military were aliens.<sup>7</sup>

<sup>6</sup> Hamilton, *The Papers of Alexander Hamilton*, vol. XXV, ed. by Harold C. Syrett (Columbia University Press, 1977), p. 496.

<sup>7</sup> Andreas Fahrmeir, *Citizenship: The Rise and Fall of a Modern Concept* (Yale University Press, 2007), pp. 118–23, 164.

Over time, citizenship has become, in practice, more and more a matter of consent that can be extended to more than one state. Spiro asserts that the decline of an identity-based citizenship is irreversible. The question is how steady this decline has been. Concepts of citizenship have always vacillated between *Gemeinschaft* and *Gesellschaft*. The key to the success of a polity in the modern world, perhaps more than at any earlier time, is to create a well-governed public space. Individuals may hold multiple passports, and their affection may be torn among a number of different polities, but in a globalized society, the most skilled will gravitate toward public spaces in which they can exercise their talents. The South Indian restaurant in Sunnyvale, California, part of an international chain with its headquarters in Chennai whose customers are mostly Indian, is a sign of American strength, not weakness. Many of these individuals are not citizens and many may never become citizens. Their affective associations are no doubt complicated. Some will return to India while others stay in the United States or even move abroad elsewhere. Nevertheless, they add to the strength of the American economy (not to mention the diversity and quality of the country's cuisine). And over time, those who stay will no doubt internalize core American values like individualism, democracy and free markets—values that will have served their own individual self-interest well. 

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