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Entwicklungen des Verfassungsrechts im außereuropäischen Raum

I. Amerika

Forswearing Allegiance*

by

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My subject is the requirement that new citizens abjure prior allegiances. It was introduced into federal naturalization law in 1795 and it is still the law of the land.¹ A seemingly small historical topic, it provides cause to reflect about changes in the concept of citizenship that have taken place over time, especially in recent decades.

The 1795 “Act to establish a uniform rule of Naturalization”² 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 States³, 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.”

The actual forswearance of allegiance took place at the time of naturalization and was to be recorded by the clerk of the court that admitted the applicant to citizenship. At that occasion, it had to appear to the satisfaction of the court that the candidate had behaved “as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.”

On oath or affirmation, the applicant had to declare his willingness to support the constitution of the United States and that he did “*absolutely and entirely renounce and abjure all* allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, *whereof he was before a citizen or subject.*” (my emphases)

These are strong words. The dictionary defines “to renounce” in terms of “giving up in a complete and formal manner,” to abandon, cast off, repudiate.⁴ “Absolutely

* Maurice and Muriel Fulton Lecture in Legal History, The University of Chicago Law School, May 1, 2008.

¹ 8 U.S.C. 1448.

² 2 Stat. 414.

³ The requirement to file a declaration of intent was eliminated as recently as 1952.

⁴ Oxford English Dictionary: “renounce.”

and entirely to renounce and abjure” has almost the connotations of the expression “to renounce the world” – and that, in a way, was what was involved: the juror was asked to renounce the old monarchical world in favor of a new order.

The 1795 legislation became a substitute for the 1790 naturalization act, the first of its kind at the federal level, that had required only *two* years of residence, “good character” (not “good *moral*” character) and a simple oath to support the constitution of the United States.⁵ James Madison, the sponsor of the revisions that were introduced in December 1794,⁶ thought that the 1790 law had not duly guarded against “intrusions and evasions”⁷ and that “the progress of things in Europe” was exposing the United States to “very serious inconveniences.”⁸ While we cannot be sure what precisely Madison had in mind when he made these observations, the likeliest explanation is his fear that laws favoring citizens could be subverted by easy naturalization of foreign, especially British, subjects. Earlier in the year, Madison had been engaged in a major, if unsuccessful, effort to promote restrictions on British shipping and trade through sweeping duties on tonnage and imports.⁹

Within three years, the new naturalization act also became the subject of revisions because the progress of “things in Europe” had deteriorated further. In spite of the Jay Treaty of 1794 relations with Great Britain remained tense. The French Directory, relying on a (not even 30-year-old) general named Napoleon Bonaparte, had won the War of the First Coalition in 1797, had taken hundreds of American trading vessels in the Caribbean and the Atlantic and, adding insult to injury, had refused to negotiate with President Adams’ peace envoys.¹⁰ In light of the “distracted state of the world,” Samuel Sewall, the Federalist representative from Massachusetts, in May of 1798, called for remedying what he characterized as the “imprudent liberality” of the 1795 legislation.¹¹

A year earlier, Federalists had already made an attempt to limit naturalizations by levying a \$20 stamp tax on certificates of naturalization.¹² At that occasion, Harrison Otis, the Federalist lawyer from Boston and later overseer of Harvard University, gave the notorious speech in which he said that he did not wish “to invite hordes of wild Irishmen, nor the turbulent and disorderly of all parts of the world, to come here with a view to disturb our tranquility, after having succeeded in the overthrow of their own Governments.” He also expressed his disapproval of the “revolution of manners,” the “subversion of all sound principle and social order” and a “system of profligacy” sweeping Europe.¹³ Otis took a skeptical view of what the naturalization oath could accomplish: “A Frenchman is a Frenchman everywhere. . . . [T]hough he may take his naturalization oath in this country, it does not alter his character.”¹⁴

⁵ 1 Stat. 103.

⁶ See Madison, 153. (Editorial Note).

⁷ Madison, 438.

⁸ *Id.*, 440.

⁹ Elkins and McKittrick, 376.

¹⁰ McCullough, 495.

¹¹ *Annals* 8: 1778.

¹² The duty eventually adopted was \$5; 1 Stat. 527.

¹³ *Annals* 7: 429–30.

¹⁴ *Annals* 8: 2064–65.

In 1798, as the country was supposedly swarming with spies and seditious persons, with *both* Jacobins and French aristocrats, with vagabonds and those wild Irishmen who were reliably voting for the Jeffersonian Republicans,¹⁵ Congress extended the residency requirement for naturalization to 14 years and demanded a formal application 5 years before admission to citizenship.¹⁶ The naturalization legislation of 1798 was part of the package that has become known as the Alien and Sedition Acts.¹⁷ The act supplementing and amending the 1795 Naturalization Act also introduced a system of registering aliens arriving and residing in the United States that, with varying degrees of intensity and reach, has been with us ever since. 1798 introduced, as it were, the concept of a “documented alien.”

However, in 1802, following the “revolution of 1800”, the residence requirements were restored to the length originally set in 1795.¹⁸ The five-year residency is still the law.

The way the political establishment perceived immigration issues in the 1790s must have been greatly influenced by the fact that the seat of the national government, Philadelphia, was also the leading port of the United States.¹⁹ 40% of all transatlantic passages ended in Philadelphia,²⁰ with arrivals concentrated in the May-October sailing season.²¹

The city of Philadelphia, in the decade from 1790–99, saw an influx of about 23,000 immigrants. Almost half of these came from Ireland, about 15% each from Great Britain and German-speaking countries, about 22% from the Caribbean, and 2% from France proper.²² In part as a result of the slave rebellion in the French colony of Santo Domingo, the French Consul at Philadelphia, in 1797, estimated that there were over 20,000 French refugees in the United States²³ – a good number of them in Philadelphia.

As a contributor to overall population growth, European emigration to the United States, however, was not a major factor in the 1790s. While the American population, at the time, expanded considerably, this was primarily due to an extraordinarily high fertility rate and, by comparison to Europe, relatively benign mortality conditions.²⁴ At the time of the Revolution, the population of the United States was approximately 2.5 million (not counting Indians), of whom about half a million came from Africa. By 1790, it had increased to almost 4 million (about three quarters of a million blacks), by 1800, to 5.3 million (with about 1 million blacks).²⁵

¹⁵ Cf. Carter, 180.

¹⁶ 1 Stat. 566.

¹⁷ See Smith, 22–34; also Stone, 25–78.

¹⁸ 2 Stat. 153.

¹⁹ See Zolberg, 63. At the beginning of the decade Philadelphia’s population was about 42,000. Aristide Zolberg’s excellent book on immigration policy from the beginnings to the present has served as a general background reference for me.

²⁰ Grabbe, 192.

²¹ Zolberg, 63.

²² Grabbe, 192, and correction in Errata, 589.

²³ Palmer, 514.

²⁴ Haines, 143–44; also see Benjamin Franklin’s classic paper on the causes and consequences of population growth.

²⁵ Haines, Table 4.1.

In the decade between 1790 and 1799, European emigration to the United States “only” amounted to about 100,000 arrivals, of whom approximately 75% came from the British Isles (and 80% of these, i.e., 60,000, were Irish, most of them Protestants). Germans and Dutch were 5% of the total number of immigrants, the French from France were barely 2%, though the 13% of immigrants, from the Caribbean, many of them refugees, did include a substantial number of French citizens.²⁶

How homogeneous was the white population of the United States in the 1790s? A decisive majority of Americans were of British origin, especially in the Northeast. New York and New Jersey had sizable Dutch populations. Pennsylvania was one third German,²⁷ but, of course, also had significant English, Scottish, and Irish stock. In Georgia, 18% were Scots-Irish.²⁸ The number of Catholics, while in the tens of thousands, was nevertheless tiny as a percentage of the total population.

In spite of his notorious misgivings about Catholics, John Jay, in *The Federalist* No. 2, described Americans optimistically as homogenous, as “one united people, a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government.”²⁹ Others, like Thomas Jefferson or, for that matter, Jefferson’s nemesis Alexander Hamilton, were considerably less confident.

The Jefferson of the *Notes on the State of Virginia* took a dim view of the prospect of integrating immigrants from continental Europe, though what he had to say, while strident, was said in “doubting the expediency of inviting them by extraordinary encouragements”: “If they come of themselves they are entitled to all the rights of citizenship”³⁰

Every species of government has its specific principles. Ours perhaps are more peculiar than those of any other in the universe. It 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. They will bring with them the principles of the government they leave, imbibed in their early youth; or, if able to throw them off, it will be in exchange for an unbounded licentiousness, passing, as is usual, from one extreme to another. It would be a miracle were they to stop precisely at the point of temperate liberty. These principles, with their language, they will transmit to their children. In proportion to their numbers, they 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.³¹

Alexander Hamilton, attacking Jefferson in 1802 for proposing liberalization of the 1798 naturalization act, not only referred to what Jefferson had said in the *Notes on Virginia* but expressed similar sentiments: the influx of foreigners must “tend to produce a heterogeneous compound; to change and corrupt the national spirit; to complicate and confound public opinion; to introduce foreign propensities.”³²

²⁶ Grabbe, 194; Gemery estimates 132,000 immigrants; Gemery, 126.

²⁷ On the Germans in southeastern Pennsylvania, see Elkins and McKittrick, 695.

²⁸ Hodges, 36.

²⁹ Jay, 9.

³⁰ Jefferson, 212.

³¹ Jefferson, 211. These were also the views of Benjamin Franklin, see Zolberg, 54.

³² Hamilton, 496. On Hamilton’s critique of Jefferson, see Frank George Franklin, 97–105.

Thomas Paine, by contrast, while not denying heterogeneity, presented an assessment of the situation that reflected his optimism about the workings of American government. 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 unison.”³³ The dynamics of American democracy would, as it were, take care of the disruptive potential of heterogeneity.

The question of how to deal with the prospect of heterogeneity was not easily answered along partisan lines, though partisan politics clearly played a role not only in 1798 but also in 1802, as can be seen in Jefferson’s support for a liberalization of naturalization rules that benefited his party.³⁴ Aristide Zolberg summarizes: “American leaders varied considerably in their assessment of whether the political community was still safely homogeneous or verged on unsafe diversity, and this indeterminacy meant that the matter was open to debate and could spawn divergent policies.”³⁵ Underlying the debate was the question of what it means to belong to a people, how allegiance is constituted.

Before independence, at the most basic level, the matter was fairly straightforward and nonideological. As summarized by Lord Coke in Calvin’s Case,³⁶ 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 as the sovereign owed a reciprocal duty to protect.³⁷ This duty to protect “was meant to fulfill the most immediate needs of ordinary people: minimal security against conquest, civil war, anarchy, and private violence.”³⁸ The duty of perpetual allegiance followed from a *fact*, the accident of birth within the realm, not an act, such as a fealty oath. Subjecthood was mostly an involuntary personal characteristic.

William Blackstone’s account, published only 11 years before the Declaration of Independence, follows Coke’s dicta but with an important twist.

Natural allegiance is such as is due from all men born within the king’s dominions immediately upon their birth. For, immediately upon their birth, they are under the king’s protection; ... Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled or altered by any change of time, place or circumstance, *nor by anything but the united concurrence of the legislature*. ... For it is a principle of universal law that the natural born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due.³⁹ (my emphasis)

The twist is, of course, the reference to the power of the legislature to alter allegiance – to that, rather limited, extent Lockean notions of consent had influenced

³³ Paine, 22.

³⁴ Jefferson, 508.

³⁵ Zolberg, 82.

³⁶ Calvin’s Case 7 Coke Report 1a, 77 ER 377.

³⁷ For a detailed discussion, see Kettner, 16–28; also Schuck and Smith, 12–22.

³⁸ Shklar, 391.

³⁹ Blackstone, 357–58.

Blackstone's concept of allegiance.⁴⁰ It did, however, not occur to Blackstone that allegiance was a matter of an *individual's* consent. The passage that I just quoted is preceded by another one in which Blackstone discussed express engagements in feudal law and on the part of office holders. He then continued:

But, besides these express engagements the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty, before his coronation; so the subject is bound to the prince by an intrinsic allegiance, before the superinduction of those outward bounds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing his performance. . . . The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason; but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.⁴¹

Oaths of supremacy, allegiance, and abjuration in British constitutional history⁴² are pertinent in the American context because the British oaths provided Americans with models once they came to consider them necessary or desirable.

A typical example is the oath of supremacy that dates back to the first year of the reign of Elizabeth I⁴³ and the taking of which was initially required of ecclesiastical persons as well as office holders and then, by an act of 1562,⁴⁴ also of persons with a university education, lawyers, and the like. The point of the oath of supremacy in the era of the Reformation and ultramontane challenges was the acknowledgment of the Queen's supremacy in all matters temporal and ecclesiastical and therefore the denial of papal and other authority in her realm. Its language stressed lack of jurisdiction on the part of any "foreign prince, person, prelate, state or potentate." The juror "renounced and forsook" "all foreign jurisdictions, powers, superiorities, and authorities" and pledged "faith and true allegiance" to the queen, her heirs, and lawful successors.

In 1606, the Oath of Allegiance demanded recognition of James I as "lawful and rightful King" and acknowledgment that the pope had no power to depose him. The underlying politics were expressed in the further requirement to abjure "the damnable doctrine" that excommunicated princes may be deposed or murdered.⁴⁵ A 1703 statute required an Oath of Abjuration to abjure any allegiance to the pretended Prince of Wales (James Stuart).⁴⁶

At the outset of the American revolution, to quote the preeminent historian of American citizenship, James Kettner, "Americans repudiated the authority of Great Britain not as individuals, but as organized societies."⁴⁷ Following the measures of the

⁴⁰ See Kettner, 55.

⁴¹ Blackstone, 356–57.

⁴² See Maitland, 364.

⁴³ 1 Eliz. c.1 (1558).

⁴⁴ 5 Eliz. c.1 (1562).

⁴⁵ 3&4 Jac. I c.4.

⁴⁶ 2 Ann c.6 (1703).

⁴⁷ Kettner, 175.

various colonies, independence was declared collectively by the “representatives of the United States in general Congress assembled.” After the many “whereases” of the Declaration of Independence (among them one that accused George III of having obstructed the laws of naturalization of foreigners and refusing to pass others to encourage migration to the colonies), its operative terms “solemnly published and declared” “That these United Colonies are, and of Right ought to be Free and Independent States” and “that they are absolved from all Allegiance to the British Crown.”⁴⁸

Immediately the question arose how to deal with individuals who did not want to be part of the new allegiances. It had been one of the features of British oath legislation that individuals who were suspected of being dissidents could be “tendered” the oath, that is they could be asked to take the oath for the purpose of clearing themselves. The same mechanism was employed in former colonies with respect to loyalists. For instance, in 1777, South Carolina passed an “Act Establishing an Oath of Abjuration and Allegiance” for office holders and persons suspected “of holding principles injurious to the rights of this State.” The oath asked the juror to “renounce, refuse and abjure” any allegiance or obedience” to George III and to bear “Faith and true Allegiance” to South Carolina. Those who refused the oath were to be sent off to Europe or the West Indies at the public expense unless they were able to pay their own way.⁴⁹ As far as I know, this is the first American statute providing for deportation at public expense.

Pennsylvania, dominated by Scots-Irish Presbyterians and their Calvinist allies, was particularly extreme in initially conditioning a whole range of pursuits – such as voting, the exercise of various occupations, use of the courts, and so on – on the taking of a loyalty oath. All white male inhabitants had to renounce their former oaths to George III and pledge allegiance to the new state of Pennsylvania.⁵⁰

One German, as if he had read Blackstone, refused on the ground that, given his oath of allegiance to George III at the time of his naturalization, he might be deemed a perjurer, if he renounced it; “moreover,” he added (not unreasonably, in view of the occupation of Philadelphia by the British), “it is very uncertain upon which side the victory will fall therefore I can’t do it for the present time.”⁵¹

In New York, we have the case of Peter Van Schaack who was accused of having maintained an “equivocal neutrality in the present struggles” and who refused to take the oath of allegiance tendered him. When he was ordered to depart for Boston,⁵² Van Schaack appealed this decision to the New York Provincial Convention in a fairly lofty letter in which he individualized the issue of allegiance by arguing (after in-depth study of Locke, Vattel, Montesquieu, Grotius, Beccaria, and Pufendorf)⁵³ that the Declaration of Independence had returned Americans to a state of nature and that *every individual*, before he surrenders any part of his natural liberty, “has a right

⁴⁸ Declaration of Independence. Allegiance was widely perceived as going to the crown, not the realm; LaCroix, 17.

⁴⁹ Cooper, 136.

⁵⁰ See Ireland.

⁵¹ Quoted by Williamson, 120.

⁵² Van Schaack, 70–71.

⁵³ Id., 57–58.

to know what security he will have for the enjoyment of the residue and 'men being by nature free, equal, and independent', the subjection of any one to the political power of a State, can arise only from 'his own consent'.⁵⁴

Van Schaack claimed the right to an individual decision only as to the *formation* of society, for "once the society is formed, the majority of its members undoubtedly conclude the rest."⁵⁵ However, the idea of volitional allegiance could not easily be contained. I quote Kettner:

The founders of the new republican states were aware of the inconsistency between advocating a doctrine of consent and requiring individuals to subject themselves to regimes that they condemned. Yet if allegiance was volitional as well as contractual, then difficult questions ensued with vaguely threatening implications for the stability and continuity of political obligation. Not until well after the Revolution would Americans follow those implications to the logical conclusion that individual men might legitimately choose to change their allegiance even after they had elected membership in and enjoyed the protection of an established society.⁵⁶

Notions of volitional allegiance aside, the most significant aspect of the transformation of subjecthood to citizenship in the new United States was the fact that the latter was ordinarily acquired the same way the former had been, i.e., not by choice, but by birth within the territory.⁵⁷ With the exception of the immediate revolutionary period and its need to sort out the differences between patriots and loyalists through a right to elect one's allegiance,⁵⁸ most citizens came by their citizenship and their allegiance due to the mere fact of having been born on American territory: if they were white, they were "natural-born" or "birthright" citizens; if the children of slaves, they were slaves; if Indians, they were quasi foreigners.⁵⁹

The terms "natural-born" and "birthright" generally referred to citizenship on account of territorial birth (the so-called *ius soli*) but the denotations of these terms, and definitely their connotations, also could cover citizenship by descent or parentage (*ius sanguinis*). A statute from the reign of Queen Anne provided that the children of natural-born subjects born "out of the Ligeance of Her Majesty" shall be deemed to be natural-born subjects to all intents and purposes whatsoever.⁶⁰ The 1790 Naturalization Act introduced an equivalent rule for the United States.⁶¹

In general, citizenship continued to be mostly an involuntary personal characteristic. Lockean views about consent-based allegiance acquired operational significance primarily in the context of naturalization, otherwise Humean empiricism prevailed.⁶² The Constitution maintained silence on birthright citizenship until, after the aboli-

⁵⁴ Id., 73. Van Schaack was especially concerned about insufficient separation of powers in the arrangement of governmental institutions; id., 72. After having removed himself to first Boston and then England, Van Schaack, a lawyer, in 1785, returned to New York and, eventually, became an avid Federalist.

⁵⁵ Ibid.

⁵⁶ Kettner, 189.

⁵⁷ Cf. Schuck and Smith, 50.

⁵⁸ Kettner, 193.

⁵⁹ See Kettner, 287.

⁶⁰ 7 Ann c.5 (1708).

⁶¹ 1 Stat. 103.

⁶² Hume, 462.

tion of slavery by the Thirteenth Amendment and following the 1866 Civil Rights Act,⁶³ the Fourteenth Amendment, with very limited exceptions, codified the *ius soli*.⁶⁴

The very term naturalization, as used in British law, suggests that it places an alien in the same state as a natural-born subject: “an imitation of nature, presumably, in which consent replaces the accident of birth.”⁶⁵ In Great Britain, genuine naturalization (as distinguished from the lesser, royally conferred, status of “denizen” that granted fewer rights) could ordinarily be accomplished only by an act of Parliament and even then ineligibilities, such as for Parliament, remained.⁶⁶

In the colonies, various approaches, often disputed by London, were used in the effort to turn foreigners into members of the community.⁶⁷ While the Declaration of Independence made reference to the prohibition of local naturalization acts (by an Order-in-Council in 1773), Parliament, in 1740, had actually opened an attractive and relatively liberal avenue to naturalization at least for Protestants and Jews: after seven years of residence in America and an oath of allegiance in open court, such foreigners were, Blackstone said, “as if they had been born in this kingdom.”⁶⁸

It is hardly surprising that the newly independent states followed their own and British precedents as they contemplated the need to provide for naturalization. The solutions varied but, restricted to free white persons, had in common a residence and good character requirement, and the taking of an oath of allegiance.⁶⁹

Pennsylvania was generally perceived as the most liberal state when it came to receiving foreigners as citizens.⁷⁰ Sect. 42 of the Pennsylvania Frame of Government of 1776 provided that any foreigner of good character who had first taken an oath or affirmation of allegiance may own real estate and after one year’s residence “shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state,” however, he had to be a resident for two years in order to be elected a representative.⁷¹

The New York Constitution of 1776 left it to the discretion of the legislature to naturalize all such persons, and in such manner, as they thought proper. However, there was one constitutional proviso:

All such ... persons ... as being born in parts beyond sea, and out of the United States of America, shall come to settle in and become subjects of this State, shall take an oath of alle-

⁶³ 14 Stat. 27 (1866).

⁶⁴ Spiro 2008, 12. In 1898, the Supreme Court in the case of *United States v. Wong Kim Ark*, 169 U.S. 649, applied *ius soli* to the United States-born son of Chinese citizens who had returned to China.

⁶⁵ Shklar, 391.

⁶⁶ The number of parliamentary naturalizations was small: 24 a year on the average between 1660 and 1759; Fahrmeir, 12.

⁶⁷ See Kettner, 65 ff.

⁶⁸ Blackstone, 363. Between 1740 and 1773, almost 7,000 people were naturalized under the 1740 legislation, 6400 in Pennsylvania alone; Fahrmeir, 14.

⁶⁹ Kettner, 218.

⁷⁰ See James Winthrop’s famous anti-Pennsylvania comment from 1787 in Bailyn, 628.

⁷¹ Thorpe, 3091.

giance to this state and abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate and State in all matters, ecclesiastical as well as civil.⁷²

This requirement probably originated with John Jay, one of the framers of the New York Constitution. In a letter to Robert Livingston and Gouverneur Morris, dated April 29, 1777, Jay complained that the constitutional convention had failed to adopt an identical abjuration oath for office holders.⁷³ The reference of the oath to ecclesiastical matters suggests an anti-Catholic end of the kind that was pursued by the supremacy oath under Elizabeth I. Also, that supremacy oath may have provided the model for the foreign authorities that New York lists for purposes of abjuration – foreign kings, princes, potentates, and States.⁷⁴

As the newly independent states created new state citizens, the potential of conflict due to different standards led the Constitution to provide for a congressional power “To establish an uniform Rule of Naturalization”⁷⁵ Congress made use of this power within its first year. The main provisions of the 1790 Naturalization Act were straightforward, if starkly discriminatory: an alien who was a free *white* person and had resided in the United States for two years (for one year in the state where he applied) could petition any common law court of record to become a citizen, making proof that he was of good character and taking an oath to support the constitution of the United States.⁷⁶ (my emphasis)

The 1790 Naturalization Act required “taking the oath or affirmation prescribed by law.”⁷⁷ While it was not explained what the act meant by “prescribed by law,” the most plausible interpretation is to see this as a reference to the first piece of legislation ever enacted by Congress, the Oaths of Office Act, which very simply provided, in execution of Art. VI of the Constitution: “I, A. B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.”⁷⁸

The *nature* of the oath that new citizens had to take was noncontroversial in the First Congress. The question that *was* debated was whether “the bare oath” provided enough security for fidelity and allegiance as concerns the participation of new citizens in governance, but also in relation to preferences for American commerce.

The significance of citizenship in the early years was not too clear.⁷⁹ Voting rights were controlled by the states and often a function of owning property or of taxpayer status rather than citizenship. The right to run for state office was, of course, a matter

⁷² Art. 42; Thorpe, 2637–8.

⁷³ The Papers of John Jay. Jay Papers ID: 2819.

⁷⁴ The term “potentate” makes its appearance in English by the end of the 15th century, derived from post-classical Latin and French. Traceable to the same time period, the Italian “potentato” signifies a powerful government or state, a ruler, or powerful person in general. Oxford English Dictionary: “potentate.”

⁷⁵ Constitution of the United States, Art. 1, Sect. 8, cl. 4.

⁷⁶ 1 Stat. 104. For a while, several states continued to naturalize aliens under their own laws; Kettner, 249–50.

⁷⁷ 1 Stat. 104.

⁷⁸ 1 Stat. 23.

⁷⁹ Nor, for that matter was it on the European continent where a hodge-podge of regulations determined subjecthood or citizenship status. In the 19th century, many American immigrants from German states technically would not have had to forswear allegiance, as they had lost their citizenship upon emigration. See Fahrmeir, 64.

of state constitutional law, while the federal constitution imposed not insubstantial waiting periods before new citizens could get elected to the House or Senate (seven and nine years, respectively) and barred naturalized citizens from becoming president. There were, however, various privileges granted citizens by protectionist federal legislation that played a significant role in the 1790 and 1795 debates concerning naturalization. A 1789 act that imposed duties on imports granted a ten percent tariff reduction for goods imported in American built and owned vessels.⁸⁰ Under the act concerning duties on tonnage rates were five to eight times higher for foreign vessels than for American built and owned ships.⁸¹

In the House of Representatives, Thomas Hartley, of Pennsylvania, addressed participation in the governance of the country. “[A]n actual residence of such a length of time as would give a man an opportunity of esteeming the Government from knowing its intrinsic value” was necessary beyond “the bare oath” to assure that a man would become a good citizen.⁸² What lapse of time could achieve this goal of acculturation by osmosis continued to be a subject of debate over many decades. But the method remained primarily osmosis. Since a knowledge of English was not required until 1906, many new citizens continued to live in the monolingual environments that had been Jefferson’s nightmare.⁸³

James Madison had no doubt that a period of residence should be made a prerequisite of citizenship, but the reasons he gave were primarily of a commercial nature and were expressed in opposition to a proposal that would have eliminated any residency term for citizenship. “[T]hey shall take nothing more than an oath of fidelity, and declare their intention to reside in the United States. Under such terms . . . aliens might acquire the right of citizenship, and return to the country from which they came, and evade the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America, enjoying at the same time all the advantages of citizens and aliens.”⁸⁴

The abjuration oath of 1795 was, in part, meant to deal with this issue of continuing concern to Madison. No committee records are preserved in the National Archives, however, indirect evidence suggests that the New York style abjuration oath was already in the bill when it was submitted in December by a committee consisting of Madison, Samuel Dexter, of Massachusetts, and Thomas Carnes, of Georgia.⁸⁵

As for the legislative motives for the 1795 abjuration oath, one can distinguish among ideological, commercial, and legal ones. The ideological motive for the oath may be seen in the insistence on more complete Americanization that it represented. Ideology was equally involved in the question what length “apprenticeship” might qualify foreigners “to assume the character and discharge the duties of American

⁸⁰ 1 Stat. 24; on constitutional issues, see Currie, 57.

⁸¹ 1 Stat. 27; see Currie, 58.

⁸² Annals 1: 1147–48.

⁸³ On the Pennsylvania Germans, see Elkins and McKittrick, 695.

⁸⁴ Annals 1: 1150. See also Annals 1: 1147 (White); Annals 1: 1151–52 (Hartley).

⁸⁵ Annals 4: 968. On the oath in the original bill, see Annals 4: 1029 (Murray).

citizens.”⁸⁶ There was a consensus that a longer time period was necessary than that required by the 1790 act.⁸⁷

Indeed, Dexter, wanted to go beyond the mere lapse of time as an indicator of acculturation and moved that no alien should be admitted to citizenship but on the oath of two credible witnesses that, in their opinion, he was of good moral character and attached to the welfare of this country.⁸⁸ The motion was seconded by Theodore Sedgwick, also of Massachusetts, one of the more rhetorical members of the House who argued that the European war (“the most cruel and dreadful which had been known for centuries”) had unleashed fierce and unrelenting passions that would bring the conflicts of Europe to America:

Could (he asked) any reasonable man believe that men who, actuated by such passions, had fought on grounds so opposite, almost equally distant from the happy mean we had chosen, would here mingle in social affections with each other, or with us? That their passions and prejudices would subside as soon as they should set foot in America? Or, that possessing those passions and prejudices, they were qualified to make or to be made the governors of Americans?⁸⁹

Further proposals that the witnesses additionally swear to the applicant’s attachment to a “republican form of government,” attachment to “the constitution of the United States,” or attachment to “the principles of the government of the United States,” as well as the original motion, were, however, defeated in favor of what was eventually enacted: that it appear to the satisfaction of the court admitting the applicant for citizenship that “he has behaved as a man of good moral character, attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same.”⁹⁰

Ideologically, by 1795, many members of Congress were committed to a concept of American citizenship that stressed the unique nature of American government and therefore assumed a need for immigrants to make a choice, to start anew politically and sever all previous allegiances, even identities, in addition to getting acculturated. If the United States stood for a *novus ordo seclorum*, a new order for the ages, then new Americans in particular needed to break with the old order.⁹¹

The Virginian William Giles, generally a man of passionate views,⁹² successfully proposed an amendment to the 1795 naturalization bill that aliens who bore titles of nobility should renounce such titles “before they can enjoy any right of citizenship.”⁹³ Madison supported Giles since nothing, he thought, could be more reasonable than forcing “titled characters to renounce everything contrary to the spirit of the Constitution,” while Sedgwick argued, in opposition, that the oath of citizenship was *itself* the radical break: “By taking an oath of citizenship, the individual not only renounces, but solemnly abjures nobility. The title is destroyed when the allegiance is broken

⁸⁶ Annals 4: 1009 (Sedgwick).

⁸⁷ See Frank George Franklin, 49.

⁸⁸ Annals 4: 1004.

⁸⁹ Annals 4: 1008.

⁹⁰ 2 Stat. 414.

⁹¹ Cf. Zolberg, 79.

⁹² Cf. Elkins and McKittrick, 295.

⁹³ Annals 4: 1030.

by his oath taken to this Government. This abjuration has destroyed all connexion with the old Government. Why then provide for it for a second time?"⁹⁴

After some lengthy diversion concerning the analogies between the European world of lords and vassals and the relationship of master and slave in the South, Giles' motion carried 59 to 32.⁹⁵ The requirement to renounce titles of nobility is still part of the law of naturalization.⁹⁶

As prominent as these ideological concerns were, abjuration also and importantly had commercial motives. Dexter who, as mentioned, had been a member of the select committee of three that had been charged with drafting the changes to the 1790 Naturalization Act, referred to the ease with which foreign agents could take the old oath in order to save tonnage charges.⁹⁷ Dexter proposed a remedy for this "evil" and "a proviso that those who renounced all foreign allegiance forever, and declared on oath their intention of becoming citizens should pay no more tonnage dues than they would if fully naturalized."⁹⁸ While in the end this particular motion was withdrawn at Madison's insistence, it makes clear that the abjuration oath was viewed as a more formidable, more demanding barrier to evasion than the mere oath to support the constitution.

Madison, who had been on an anti-British rampage all year and who had worked himself into a frenzy concerning alleged British infiltration of American commerce, stressed the protectionist aspect of barriers to naturalization.

[T]here was no class of emigrants from whom so much was to be apprehended as those who should obtain property in shipping. ... If he were disposed to make any distinction of one class of emigrants more than another as to the length of time before they should be admitted citizens, it would be as to the mercantile people – as these people may, by possessing themselves of American shipping and seamen, be enabled clandestinely to favor such particular nations in the way of trade as they may think proper.⁹⁹

These remarks were a more abstract version of specific, almost paranoid allegations he had made a year earlier.

The body of merchants who carry on the American commerce is well known to be composed of so great a proportion of individuals who are either British subjects, or trading on British capital, or enjoying the profits of British consignments, that the mercantile opinion here, might not be an American opinion; nay, it might be the opinion of the very country of which, in the present instance at least, we ought not to take counsel.¹⁰⁰

Finally, in addition to ideological and commercial considerations in favor of the abjuration requirement, there were legal ones. A motion by James Hillhouse, a law-

⁹⁴ Annals 4: 1035. To which Giles responded: "[B]y admitting a thing to have been once done, it was admitted that it might be done again. If it had been right to do it once, there could be no harm in repeating it." *Ibid.*

⁹⁵ See Frank George Franklin, 54.

⁹⁶ See also the Constitution, Art. I, Sec. 9 and 10.

⁹⁷ Frank George Franklin, 50.

⁹⁸ *Ibid.*

⁹⁹ Annals 4: 1033.

¹⁰⁰ Annals 4: 390. See Elkins and McKittrick, 387. For relevant statistics on tonnage and shipping, see *id.*, 382. "Fraudulent usurpation of our flag" is mentioned as something to guard against in Jefferson's First Annual Message; Jefferson, 508.

yer and the Treasurer of Yale College, that an American citizen who became the citizen of another country should not afterwards be readmitted as an American citizen, led to a lengthy analysis of expatriation by William Murray, a lawyer from Maryland who had received his legal education at the Inns of Court in London. Murray touched on a number of issues, including the role of the abjuration oath in confirming the right of subjects and citizens to expatriate, or, put differently, the position that there was no such thing as perpetual allegiance.

If [the Government] accepts the allegiance of an alien, it presupposes that the alien has the right to tender his allegiance; and one clause of the bill expressly requires of the alien an abjuration of his former allegiance, which is certainly proper. *In doing this, the bill admits, unequivocally, the right of subjects and citizens to expatriate.* [my emphasis] The British Government, by want of conformity between their first principle, as laid down in their law books, and the practice of Parliament, have shown us a singular mixture of old principles which the nation have outgrown. It is a maxim with them, that allegiance cannot be dissolved by any change of time or place, nor by the oath of a subject to a foreign Power; yet they naturalize by act of Parliament. They accept what they declare by their theory of civil law cannot be rightfull offered; nay, for one century the throne of England has presented Monarchs who were foreigners.¹⁰¹

Murray's argument had a double thrust. First, he emphatically took the position that there was a unilateral right to abjure one's allegiance. This was of importance also to the ongoing impressment controversy between the United States and Great Britain in which Britain, on the basis of the doctrine of perpetual allegiance, claimed the right to impress those American seamen who had been British subjects before their naturalization. The controversy became a major contributor to the War of 1812.¹⁰²

Second, Murray agreed with Hillhouse that, as an alien, an expatriated American citizen had no right of readmission to the United States. However, for Murray, all that meant was that the country could choose whether he should enjoy the privileges of citizenship again.¹⁰³

With respect to those citizens who were naturalized Americans, John Locke's view loomed in the background. In *The Second Treatise*, Locke had, without further explanation, postulated that he who by actual agreement and express declaration has given his consent "to be of any commonwealth" is "perpetually and indispensably obliged to be and remain unalterably a subject to it."¹⁰⁴ I assume that underlying this "once and for all" proposition was Locke's view that express consent meant an explicit promise to obey a government.¹⁰⁵ Once one had made such a promise, Locke did not allow further room for unilateral action.

The House of Representatives saw it differently. It not only defeated the Hillhouse motion, but struck from the bill the requirement that aliens should foreswear their allegiance to other states *forever*.¹⁰⁶ It was Elias Boudinot, of New Jersey, who moved

¹⁰¹ Annals 4: 1029.

¹⁰² See Kettner, 269–70.

¹⁰³ Annals 4: 1028.

¹⁰⁴ Locke, sec. 121.

¹⁰⁵ Cf. Wolin, 311.

¹⁰⁶ Annals 4: 1061. While "forever" does not appear in the abjuration oath, for unknown reasons it

that the word be deleted, telling the story of “a very respectable emigrant” whose large fortune would very likely be of much use to the country but who had assured Boudinot “that, rather than swallow such an oath, he would return to his own country.”¹⁰⁷ Boudinot, of Huguenot stock, used the occasion to throw cold water on the very idea of an oath of allegiance.

[H]e had always considered oaths of allegiance as an imposition. They might keep away men who had scruples, because they had *principles*; others would swear, and break off, when it suited them. The word *forever* implied that these people were not at liberty to return home, and reassume the allegiance to their own country. What if the United States were to become a tyrannical Government? Were people not to have the liberty of leaving it?¹⁰⁸

The most stringent attack on oaths of abjuration had come, about eight years earlier, from the pen of the person who, in many ways, was the very incarnation of Americanism, Noah Webster. In his famous essay *On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusion from Office*,¹⁰⁹ he impatiently declared them to be a relic of the era where despots found the solemnity of oaths to have an excellent effect on “poor superstitious soldiers” and other subjects securing the obedience of men to tyrants. In Humean fashion, Webster argued that when a man steps his foot into a state, he becomes subject to its general laws and is under allegiance to that government. “Ten thousand oaths” do not increase the obligation upon him.

Abjuration! a badge of folly, borrowed from the dark ages of bigotry. 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. . . .

I pray God to enlighten the minds of the Americans. I wish they would shake off every badge of tyranny. Americans! – The best way to make men honest, is to let them enjoy equal rights and privileges; never suspect a set of men will be rogues, and make laws proclaiming that suspicion. Leave force to govern the wretched vassals of European nabobs and reconcile subjects to your own constitutions by their excellent nature and beneficial effects. No man will commence enemy to a government which givs him as many privileges as his neighbors enjoy.¹¹⁰

Noah Webster, Boudinot, and others stated their vision of a country that would generate loyalty through what it had to offer, that is, apart from land, free and equal republican institutions. They were, as it were, followers of Frederick Jackson Turner before his time.¹¹¹ On the other hand, Madison, and also many Federalists, were driven more by a nationalist perspective that considered it important to draw a distinct and sharp line between the United States and other countries. The language employed by the 1795 abjuration oath can hardly be viewed as tolerating fuzziness on the subject of citizenship.

was retained in the oath to be sworn at the time an applicant declared his intention to become a citizen. See *supra* at note 2.

¹⁰⁷ Anecdotal evidence suggests that this attitude can still be found today. However, instead of returning to “their own country,” people forego citizenship while staying on as “resident aliens.”

¹⁰⁸ *Ibid.*

¹⁰⁹ Webster, 151.

¹¹⁰ Webster, 153.

¹¹¹ Turner, 26.

While the 1795 act had, in the form of a duty, unambiguously embraced an alien's right to forswear allegiance to a foreign government, judges of the Supreme Court, that very year, expressed strong reservations about an unfettered right on the part of American citizens to expatriate. This occurred in the 1795 admiralty case of *Talbot v. Jensen*.¹¹² The decision involved an American privateer who supposedly had renounced his allegiance and become a French citizen for the purpose of capturing prizes under a French commission. After having indulged various dicta that indicated doubts concerning a right of expatriation, the court, however, found it unnecessary to pass on the matter.¹¹³

A few years later, likewise in a privateering case, Chief Justice Oliver Ellsworth, a staunch Federalist¹¹⁴ sitting in the Circuit Court for the Connecticut District, confronted the issue in a criminal case. He postulated that the United States had adopted the common law¹¹⁵ and that the common law had remained the same as it was before the revolution. For him, this included the concept of perpetual allegiance, but with a non-monarchical twist. Ellsworth declared it to be a "great principle" that all members of the civic community are bound to each other by a compact that one of the parties cannot dissolve by his own act. Rather casually, Ellsworth distinguished American naturalization of foreigners by suggesting that we do not inquire what a foreigner's relation to his own country is: "[I]f he embarrasses himself by contracting contradictory obligations, the fault and folly are his own."¹¹⁶

In light of the 1795 Naturalization Act, this was cavalier, to say the least. Ellsworth's opinion caused an uproar in the press and among Republicans who accused him of reviving "the antiquated, opprobrious system of feudal vassalage."¹¹⁷

As it turns out, ambiguities concerning the right to expatriation were not finally resolved until the Fourteenth Amendment put citizenship clearly on a national basis and Congress, in 1868, legislated its views on expatriation.¹¹⁸ Though the 1868 statute dealt with the rights of naturalized American citizens abroad, it was seen as having a wider application.¹¹⁹ The preamble to the "Act concerning the Rights of American Citizens in foreign States"¹²⁰ used the most sweeping language. It found the right of expatriation to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Equally sweepingly, the statute declared as "inconsistent with the fundamental principles of this government" "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, or *questions* the right of expatriation." (my emphasis).

¹¹² 3 U.S. 133.

¹¹³ The case also raised the unresolved matter of the relationship between state and federal citizenship. See Kettner, 279–81.

¹¹⁴ See Warren, 140.

¹¹⁵ On Ellsworth and federal common law, see Presser, 97.

¹¹⁶ *The Case of Isaac Williams*, Kurland and Lerner, 580. Cf. Goebel, 631.

¹¹⁷ Warren, 160–61.

¹¹⁸ See Kettner, 343.

¹¹⁹ In the 1860s, the United States also negotiated a series of treaties (the so-called Bancroft treaties) that recognized naturalization as extinguishing original nationality, except in the case of return to the home country; Spiro 2008, 64.

¹²⁰ 15 Stat. 223 (1868).

Little wonder that, in 1873, Attorney General George H. Williams issued an opinion that found the statute applicable to acts of expatriation by American citizens and then explicated:

Congress has made no provision for the formal renunciation of citizenship by a citizen of the United States while he remains in this country; but if such citizen emigrates to a foreign country, and there, in a mode provided by its laws, or in any other solemn and public manner, renounces his United States citizenship, and makes a voluntary submission to its authorities with a *bona fide* intent of becoming a citizen or subject there, I think that the Government of the United States should not regard this procedure otherwise than an act of expatriation.¹²¹

It is subsequent developments in the law of expatriation as it pertains to *American* citizens that raise fundamental questions about allegiance more generally. Permit me to fast-forward.

Following a wide variety of legal provisions and changes in naturalization and expatriation laws, that began in earnest in 1906,¹²² Congress, in 1940, further amended and codified then existing law.¹²³ One of its goals at the time was to reduce the incidence of dual citizenship. The ideal, shared by many other countries, was that every person should have one nationality only.¹²⁴ The entry on dual citizenship in the 1931 *Encyclopedia of the Social Sciences* included the assertion that dual nationality is essentially an incongruity.¹²⁵ Or, as Peter Spiro puts it: “Dual citizenship was once thought an offense against nature, . . . an immoral status akin to bigamy. One might be a dual citizen by virtue of the interplay of different citizenship regimes, but one could not openly maintain allegiance to more than one nation.”¹²⁶

The 1940 Nationality Act 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 state of birth or for five years in any other foreign state.¹²⁷

After initially, in the 1958 case of *Perez v. Brownell*, upholding Congress’ power to expatriate as an exercise of its power to regulate relations with foreign countries under the “necessary and proper clause,”¹²⁸ the Court, less than ten years later, overruled *Perez* and held, 5–4, in *Afroyim v. Rusk*¹²⁹ that under the Constitution Congress had no power to divest a citizen of his citizenship absent *voluntary* renunciation. Providing the citizenship clause of the Fourteenth Amendment with particular significance, Justice Black wrote:

¹²¹ 14 Op.Att.Gen. 296 (1873). In 1907, Congress regulated the matter by statute; 34 Stat. 1228.

¹²² 34 Stat. 596 (1906).

¹²³ A good short summary of legal developments can be found in Justice Frankfurter’s majority opinion in *Perez v. Brownell*, 356 U.S. 44, 49–56 (1958).

¹²⁴ Aleinikoff, 137.

¹²⁵ Flournoy, 258.

¹²⁶ Spiro 2008, 59.

¹²⁷ 54 Stat. 1137, 1168–1170. Present law is codified in the Immigration and Nationality Act of 1952; 66 Stat. 163.

¹²⁸ *Perez*, supra note 121.

¹²⁹ 387 U.S. 253 (1967).

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world – as a man without a country. 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. 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.¹³⁰

Afroyim v. Rusk was one of the Warren Court's more consequential, if poorly reasoned, landmarks. First of all, it made subjective intent to relinquish citizenship the core issue. As Spiro puts it: "Today there is no activity (including office holding and military service) that will by itself result in expatriation."¹³¹ Secondly, the decision, in conjunction with an ever spreading acceptance of dual citizenship on the part of other countries, had the effect of providing individuals with choices that they had not previously enjoyed to such a full extent.¹³²

Perez and Afroyim had voted in foreign elections. In a 1970s draft avoidance case, *Terrazas*, a dual citizen of the United States and Mexico by interplay of *ius soli* and *ius sanguinis*, had taken out a Mexican certificate of nationality, swearing allegiance to Mexico and forswearing allegiance to the United States, "expressly renouncing United States citizenship, as well as any obedience and loyalty to any foreign government, especially to that of the United States of America."¹³³ The case that reached the Supreme Court was mostly about standards of proof, but the Court left no doubt that, to be consistent with *Afroyim*, the trier of fact must conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.¹³⁴

In short, if the doctrine of perpetual allegiance once stood for the proposition that an individual cannot unilaterally break the ties to a given society, the Supreme Court made perpetual allegiance to mean that the United States cannot, unilaterally, terminate citizenship. An "expatriating act" without the intent to relinquish citizenship does not expatriate.

In administrative law¹³⁵, as expressed in an advisory about possible loss of citizenship on the State Department's web site, this reads as follows:

The Department has a uniform administrative standard of evidence based on the premise that U.S. citizens intend to retain United States citizenship when they obtain naturalization in a foreign state, subscribe to a declaration of allegiance to a foreign state, serve in the armed

¹³⁰ Id. at 267.

¹³¹ Spiro 2008, 69.

¹³² Cf. Fahrmeir, 177.

¹³³ *Vance v. Terrazas*, 444 U.S. 252, 255 (1980).

¹³⁴ Id. at 261. Under a preponderance of the evidence standard, *Terrazas*, on remand, lost his claim that he had not intended to relinquish U.S. citizenship; *Terrazas v. Haig*, 653 F.2d 285 (1981).

¹³⁵ See 22 CFR § 50.40.

forces of a foreign state not engaged in hostilities with the United States, or accept non-policy level employment with a foreign government. ...

In light of [this] administrative premise, a person who:

1. is naturalized in a foreign country;
2. takes a routine oath of allegiance to a foreign state;
3. serves in the armed forces of a foreign state not engaged in hostilities with the United States; or
4. accepts non-policy level employment with a foreign government, and in so doing wishes to retain U.S. citizenship need not submit prior to the commission of a potentially expatriating act a statement or evidence of his or her intent to retain U.S. citizenship since such an intent will be presumed.

When, as the result of an individual's inquiry or an individual's application for registration or a passport it comes to the attention of a U.S. consular officer that a U.S. citizen has performed an act made potentially expatriating. ..., the consular officer will simply ask the applicant if there was intent to relinquish U.S. citizenship when performing the act. If the answer is no, the consular officer will certify that it was *not* the person's intent to relinquish U.S. citizenship and, consequently, find that the person has retained U.S. citizenship.¹³⁶ (emphasis in the original)

The concept of "volitional allegiance" has acquired a meaning that until quite recently would have been unimaginable. The way the State Department web site deals with dual citizenship is simply to say: "U.S. law does not mention dual nationality or require a person to choose one citizenship or another."¹³⁷ The State Department lawyers wisely do not pause to explain the meaning of "to renounce" in the abjuration oath.

Anecdotal evidence would show, citizens need not restrict themselves to "dual" citizenship. As people go about diversifying their citizenship portfolios,¹³⁸ they easily may end up with multiple citizenships. The notion of a "cosmopolitan citizen" has acquired a self-interested reality.¹³⁹

The development is a worldwide one. Many countries have come to accept dual citizenship,¹⁴⁰ in some instances, such as Ireland and Mexico, they have actively embraced it for political reasons.¹⁴¹ In a mostly conscription-free age, individuals are not so much concerned with what Chief Justice Ellsworth called "the folly" of contracting contradictory obligations, but with maximizing rights, including economic ones. It is not so much allegiance that is on their minds, but the benefits conferred by a foreign passport. For instance, an American who is a dual citizen of any one of the 27 member states of the European Union, will benefit from the freedoms and the non-discrimination rules of the EU in its entire territory. These privileges, in turn, have created an EU "citizenship" that is of increasing importance to the EU's population of almost 500 million.¹⁴²

¹³⁶ U.S. Department of State: Advice about Possible Loss of U.S. Citizenship and Dual Nationality.

¹³⁷ U.S. Department of State: Dual Nationality.

¹³⁸ The formulation is that of my Stanford colleague James Sheehan.

¹³⁹ Lawrence Summers recently even referred to the development of "stateless elites" whose allegiance is to global economic success and their own prosperity.

¹⁴⁰ Cf. Spiro 2008, 59.

¹⁴¹ Aleinikoff, 140–47.

¹⁴² On these and related matters in British law, see Lord Goldsmith, 27–31.

More generally, human rights law worldwide has come to occupy a status that makes citizenship less important in asserting rights that are viewed as *human* and that can be invoked against governments by citizens and noncitizens alike (as is most prominently the case with the European Convention on Human Rights that extends to more than 50 countries). While national boundaries are still far from being viewed as morally arbitrary,¹⁴³ globalization is undercutting their significance.¹⁴⁴

In a report for the British government, Lord Goldsmith has recently referred to the “blurring of citizenship,” emphasizing in particular that social and economic rights are not closely tied to citizenship status.¹⁴⁵ Developments in American constitutional and statutory law have made many, though by no means, all entitlements independent of citizenship. An almost unanimous Supreme Court, in the 1971 Pennsylvania welfare law case of *Graham v. Richardson*,¹⁴⁶ declared alienage to be an inherently suspect classification, though, since then, the degree of suspicion the Supreme Court musters in alien cases has more waned than waxed.

Also, when the government acts against aliens under general laws hallowed principles of American law, such as due process, can easily seem hollow as, for instance, when the federal government, after September 11, rounded up hundreds of aliens on immigration charges and as “material witnesses,” to hold them incommunicado, and proceed against them in closed, essentially secret hearings.¹⁴⁷ Not infrequently, treatment of immigrants whose status is disputed, shocks the conscience.¹⁴⁸ On the whole, however, the status of aliens in American law, especially resident aliens, has clearly improved since the World War II detention of more than one hundred thousand Japanese nationals and Japanese-Americans.

Incidentally, in the Japanese detention camps, both aliens and *citizens* were given a questionnaire that asked whether they would “swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization.”¹⁴⁹ This presented *American citizens* of Japanese descent with the dilemma of forswearing an allegiance they had never had, and *Japanese citizens*, if they answered “yes,” with the dilemma of performing an act (forswearing allegiance to the Japanese emperor) that would leave them stateless without the possibility of becoming Americans, as American law at the time did not allow the naturalization of Japanese.¹⁵⁰

I return to the present. The naturalization oath that is required by Sec. 337 of the Immigration and Nationality Act now reads as follows:

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

¹⁴³ The position advocated by Nussbaum, 14.

¹⁴⁴ Spiro 2008, 6. Generally, see also Wriston, *passim*.

¹⁴⁵ Lord Goldsmith, *supra* note 139, 13.

¹⁴⁶ 403 U.S. 365. On *Graham*, see Schuck and Smith, 107.

¹⁴⁷ A Review of the Treatment of Aliens, Inspector General of the United States Department of Justice.

¹⁴⁸ See Casper, 158–60.

¹⁴⁹ As quoted in Hatamiya, 20.

¹⁵⁰ *Id.* at 20–21.

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; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.¹⁵¹

Is this, to quote the peculiar State Department term, a “routine” oath of allegiance?¹⁵² Or, should we think of a person who, the day after having taken the abjuration oath, goes to the consulate of his or her country of origin to obtain a new passport, as a documented, but somewhat illegal citizen, perhaps a perjurer?

To this day, the state of California continues to demand of all state employees a loyalty oath that dates back to the McCarthy era. A person who, while taking the oath, states any material matter as true which he knows to be false, is guilty of perjury.¹⁵³ The abjuration oath does not have a perjury penalty attached to it and in practice the government does not enforce it, instead it is winking and so are many of the jurors.

On the one hand, there is a duty “absolutely and entirely” to renounce all prior allegiances. On the other hand, there is a constitutionally derived, if grudgingly granted, conflicting liberty to hold several citizenships simultaneously.¹⁵⁴

If one takes, with Oliver Wendell Holmes, “the view of our friend the bad man,”¹⁵⁵ there is no antinomy since the courts and, indeed, the legal system as a whole will do nothing about violations of the abjuration oath. A problem exists only for those potential citizens who conscientiously will rather forego naturalization than forswear allegiance. Given this unattractive situation, should the unenforced abjuration oath simply be abolished?¹⁵⁶

To the extent to which the underlying issue is one of potentially conflicting loyalties and commitments, another version of the bad man might argue that it makes little difference in the real world whether American citizens retain the citizenship of their country of origin, since, in some instances, the naturalized Americans (and their descendants) might be inclined to favor that country through political activities regardless of whether they are formally its citizen. Arguably, this has been the case throughout American history. In any event, what really matters is the obligation to obey the law and for it citizenship is mostly irrelevant. As Noah Webster had put it: “When a man steps his foot into a State, he becomes subject to its general laws.”¹⁵⁷

Nevertheless, whenever possible, government should not send confusing signals,¹⁵⁸ conflicting messages. It should speak clearly and forthrightly. Government should also never be found in the proximity of what might be misunderstood as subornation

¹⁵¹ 8 U.S.C. 1448.

¹⁵² *Supra* at note 126.

¹⁵³ Sec. 3108 California Government Code.

¹⁵⁴ Somewhat of a Hohfeldian antinomy; see Hohfeld, 30

¹⁵⁵ Holmes, 173.

¹⁵⁶ This is advocated by Aleinikoff and Klusmeyer, 38; also Spiro 1997, 1453.

¹⁵⁷ Webster, 152.

¹⁵⁸ Aleinikoff and Klusmeyer, 38.

of perjury or, for that matter, of its own allegiance. All of this suggests to me that we would be well advised to eliminate the abjuration element from the oath of allegiance as reflecting old principles which the nation has outgrown.

Yet, given our incapacity to develop sensible, honest and efficient immigration policies in general, it may be impossible to add the symbol-laden question of dual citizenship to the agenda, especially, since, except for a few scholars and polemicists, there has been almost no public discussion of the topic. The fact that the topic especially involves our immediate neighbors, Mexico and Canada, both of which now allow dual citizenship, does not make debate any easier.

Assuming that nothing will be done, let me employ a heuristic device of my invention that takes a common-sensical view of the abjuration requirement against the background of present American policies. Since neither law nor the meaning of legal terms are immutable, we would be well served to remember Justice Holmes' elegant formulation: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."¹⁵⁹

Suppose I were a federal judge officiating at a naturalization ceremony. In addition to whatever else serious and uplifting there is to be said at such occasions, I might go on to state the following:

You are about to take an oath of allegiance that makes you renounce allegiance to other countries of which you are a citizen. This requirement is almost as old as the Constitution of the United States. At the time of its adoption, the world was mostly made up of princely regimes. Republican governments were few, democracies hardly existed. The potential for, indeed, the reality of, conflict over which person "belonged" to which country was widespread. The framers of the abjuration oath wanted to minimize that conflict. However, they also wanted to make sure that those who, like you, entered into an agreement with the people of the United States, would sincerely attach themselves to the principles of the constitution of the United States, and would be well disposed to its good order and happiness, as the law then said. The desire and the need of the United States for this commitment, this allegiance, has not changed since the 18th century.

What has changed is that our country, in recent decades, has recognized a right on the part of individual citizens to maintain more than one citizenship. Some would prefer it, if you had only the citizenship of the United States. However, if for sentimental or other reasons, you decide to carry another passport, you are doing nothing illegal.

The forswearance of allegiances that the oath still demands, nowadays means to indicate to you that the obligations you take on are a very serious matter, as is your commitment to participate in the governance of our country, to become one of "the people." For purposes of governance, you cannot and you should not serve two masters.

What I have been trying to accomplish with this little discourse, is to adapt the venerable oath to the present constitutional context by preserving as much of the commitments of its framers as possible. The abjuration requirement may be viewed as emphasizing that admission to citizenship, in particular the right to participate in legislative deliberations, the right to vote, the right to become a legislator in the broadest sense of the word, involves a choice. Looked at this way, what matters in

¹⁵⁹ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

forswearance is not the denotative meaning of the act, but the connotations it signifies about the importance of what John Locke called “the legislative.” I quote:

Civil society being a state of peace amongst those who are of it, from whom the state of war is excluded by the umpirage which they have provided in their legislative for the ending of all differences that may arise amongst any of them, it is in their legislative that the members of the commonwealth are united and combined together into one coherent living body. This is the soul that gives form, life and unity to the commonwealth; from hence the several members have their mutual influence, sympathy, and connection; ...¹⁶⁰

Of course, none of these sentiments have been or will be subject to enforcement. We are dealing here with virtue, with voluntary observance of standards of right conduct. What can be and will be enforced are the laws promulgated by the “legislative.” That enforcement will in any event take place regardless of abjuration. Furthermore, if the government of the United States, to adapt Noah Webster, is no better than that of his or her home country, the naturalized citizen will be influenced by partialities in spite of any solemn renunciation of a foreign power.¹⁶¹

To my mind, John Page, a member of the First Congress and later governor of Virginia, had it right when he expressed the view that good citizenship was a function of having good laws. Page shall have the last word: “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.”¹⁶²

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¹⁶⁰ Locke, 212.

¹⁶¹ See supra at note 102.

¹⁶² Annals 1: 1149.

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