

**CITIZENSHIP IN A POST-9/11 WORLD:
AN EXCHANGE BETWEEN PETER H. SCHUCK
AND DAVID D. COLE**

**THE MEANING OF AMERICAN CITIZENSHIP IN A
POST-9/11 WORLD**

*Peter H. Schuck**

Let me begin by saying what I am *not* going to discuss. I am not going to discuss the law of war, unless I am drawn into it, because I am not an expert on the law of war, unlike David Cole. Therefore, if some of you came here hoping for a debate between David and me on issues of surveillance and detention of enemy combatants, you are not going to get it, at least if I can avoid it. I agree with a lot of what David says, and I certainly admire his work as an advocate in pressing legal challenges to provisions and practices whose legality has not been tested in this very unusual environment. Whether I would agree with his legal positions or on the policy questions is for me the most important thing. I suspect that this would require a much longer conversation in which I surely would learn a lot from him. So, to repeat, such a debate is not in the cards here, and I hope that you do not view it as an evasion if I attempt to keep my comments focused on the issue that I was asked to address, which is the role of citizenship after 9/11.

September 11 and the ensuing crisis, without any question, have raised acutely the significance of citizenship in conducting and regulating the global war on terror—GWOT, as we know it. First, I want to say that I use the phrase “global war on terror” without any embarrassment or irony, unlike many in this room who put scare quotes around that phrase—or think about the subject in scare quote terms. We are at war, the threat is global, and terror, while not itself our enemy, is a major instrument of our enemies. I think that any conversation that proceeds without a full appreciation of that fact is deeply misguided and radically incomplete.

This is a new kind of war in many important respects, creating unique challenges to our ability to conduct it effectively while keeping faith with our traditions of openness to immigrants and devotion to the rule of law.

* Simeon E. Baldwin Professor of Law, Yale Law School, and Bacon-Kilkenny Distinguished Visiting Professor, Fordham Law School (Spring 2007). These remarks were made on September 30, 2006, at the New Dimensions of Citizenship Symposium held at Fordham University School of Law. This is an edited version of Professor Schuck's remarks.

I want to pause for a moment over this notion of the rule of law to say that I emphatically disagree with those who act as if it sufficed merely to invoke the “rule of law” in order to win any argument on these subjects. Such people deride any suggestion that the domain of law is, and ought to be, circumscribed, or at least redefined, in certain circumstances, including in the conduct of war. They often argue as if the law’s sovereignty is, and should be, the same in all circumstances and at all times. Such thinking is gravely—I use “gravely” advisedly—misguided. The rule of law should not be waved as a talisman or shibboleth of rectitude or used as a shibboleth in order to end the conversation. Neither should one use the existence of a war on terror as a trump card or conversation stopper. I think, instead, that we need to analyze specific cases and determine what the appropriate domains of law and politics and discretion ought to be with respect to particular practices. In short, invoking the rule of law should begin this discussion, not end it.

We are in a new kind of war, raising new challenges to traditional legal principles and also to our traditional openness to immigration. What is the nature of this new kind of war? It is capable of inflicting incalculable damage in an instant on our people and on our allies, and indeed on our adversaries, who sometimes are even prepared to suffer this damage themselves.

This new war is not waged on a traditional battlefield. It is one in which combatants do not wear uniforms, they do not represent state actors, and they are not under bureaucratic controls. They do not accept the traditional principles elaborated in the law of war, such as the prohibition against targeting civilians. Driven by religious zeal and hatred of the West, and of the United States in particular, they do not seem to respond to the usual incentives that powerful nations like ours can employ. Our adversaries in this war are increasingly fragmented and localized. This means, among other things, that there is literally no one with whom we could effectively negotiate an end to the warfare, even if some of our adversaries wished to do so.

There is no obvious beginning or end to this war. I mention this fact not only because it raises many special problems, including the duration of detention, for example, but also because this war on terror is going to be waged long after George W. Bush is gone from office and is back in Crawford. It is very important, then, to remember that even liberal Democratic Presidents—if ever there are any again—are going to have to wage this war; it will not end on January 20, 2009. So in framing the rules of that long-term engagement, it is extremely important to recognize that constraining George W. Bush and his Administration is *not* the name of the game. In binding him, we are binding all future Presidents. This may be a good or a bad thing, depending on how one feels about the specific binds in question, but it would be delusional to think that they will only bind Presidents with whom one disagrees or whom one distrusts.

The major weapon of this war is stealth. Information about our adversaries depends upon extremely difficult, costly, protracted, and often erroneous intelligence gathering. Additionally, it requires the screening of unknown individuals and networks, in ways that previously had not been at the center of our war-fighting experience.

This war is not at all like prosecuting criminals, and the model of the criminal defendant, entitled to all the due process safeguards prescribed by the Fifth and Sixth Amendments to the Constitution, is really quite inapplicable. This emphatically does not mean that due process is inapplicable, or that many of the concerns about treating individuals fairly and adjudicating their cases accurately and justly are inapplicable. But to rely upon the criminal justice model to resolve these very difficult questions constitutes a serious category mistake.

The question is not, as it is often put, whether detainees have due process rights. Of course they do. But the content of many of those rights must depend, as the U.S. Supreme Court in *Mathews v. Eldridge*¹ held, on the context and the competing interests and stakes. In a war, it is inevitably the case that people's interests—indeed, their lives—are often sacrificed without any process at all. We drop bombs on enemies, thereby assuring that we will destroy the lives and property of a vast number of innocent people. We do not go to a court in order to authorize a bombing mission. We send out soldiers to secure certain objectives, and it is inevitable that they will take innocent lives, as well as the lives of those who are indeed enemies but who have not been certified as enemies by courts.

So what this means is that it is an exceedingly difficult problem for the law to solve. We do not solve it, I think, by simply invoking the notion of human rights and conventional notions of the rule of law. (When I say "conventional," I mean the rule of law as applied in the more typical context of domestic politics and governmental activity.) This does not mean—I emphasize this again—that any particular practice being disputed is necessarily justified by reason of the fact that we are at war. Far from it. But it does mean that we must analyze these practices as if we were balancing interests and stakes in a way that involves different weightings than when we balance interests and stakes in peacetime.

In every case, two questions that I want to ask and answer first are, How effective are these practices in securing the information that we need in order to defend ourselves? And are there alternatives that would be as effective as these methods yet would involve less sacrifice of individual liberty? Those are hard questions. They have not been discussed at all here. Since this is a conference on citizenship rather than on the law of war, perhaps they should be off the table. But when our discussion implicates these hard questions, we should take them very seriously and demand good answers, not slogans.

1. 424 U.S. 319 (1976).

Here is another relevant question. I want to know whether the way in which we treat our detainees affects the way in which our enemies treat American soldiers who are in their custody. The answer to that question is not at all obvious. Yet, it is highly relevant to the arguments that were made by Senators John McCain, John Warner, and Lindsay Graham in their debate with the White House over the Military Commissions Law.²

These are just three examples of the kinds of questions that I think we need to ask. But simply waving the bloody shirt of the Constitution and the rule of law does not answer such questions. Flourishing those ideals certainly identifies precious and cherished values that governmental policies may possibly compromise. But it does not answer the policy questions as to how we ought to strike that balance in defining what due process and sound policy require.

I said that I was not going to debate the law of war. This is all I want to say on the subject here.

The question I now want to address is this: What does all this have to do with citizenship in the post-9/11 era? In order to address that question, I must first sketch the nature of the contemporary debate over citizenship.

Citizenship, conventionally understood, marks full and permanent membership in a political community.³ It defines the circle of our greatest trust and of our most extensive common endeavors. I say “greatest” and “most” in order to emphasize the fact that this conception of citizenship does not mean that people who are outside that circle do not enjoy our trust. It is a matter of degree. Many years ago, in the *Pittsburgh Law Review*, Alexander Aleinikoff and David Martin used this metaphor of circles of community, with citizenship marking the most important of those.⁴

To almost all Americans, the idea of an exclusive national citizenship, one that draws a sharp line between members and nonmembers, and then treats the nonmembers unequally in certain respects—I say certain respects, not all respects—is unexceptionable.⁵ This is the dominant, indeed the almost universal, view of citizenship among Americans, and I daresay among the members of other political communities in developed countries as well. I say “developed countries” only because those are the ones whose systems I know best. The important point here, I think, is that Americans would continue to support this view of citizenship only so long as

2. See, e.g., Rick Klein, *Possible Pact on Terror Legislation Arises: GOP Looks to End Internal Feud over Geneva Conventions*, Boston Globe, Sept. 20, 2006, at A2, available at http://www.boston.com/news/nation/washington/articles/2006/09/20/possible_pact_on_terror_legislation_arises/?page=1.

3. See, e.g., Peter H. Schuck, *Citizenship in Federal Systems*, 48 Am. J. Comp. L. 195, 207 (2000).

4. See generally T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties”*: A Response to Martin, 44 U. Pitt. L. Rev. 237, 240-45 (1983); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 201-04 (1983).

5. For a different view, see Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (2006).

citizenship is easy to acquire and available on a nondiscriminatory basis to those who have entered legally under a normatively attractive, legitimate immigrant admissions policy.

Now, most scholars who write about citizenship take a very different view.⁶ They oppose pretty much any differential treatment between citizens and noncitizens, certainly as to welfare rights, but also as to the broader panoply of public benefits. The big exception, of course, is the right to vote. But even here I hazard the speculation, judging from the tendency in law review articles, that almost all immigration scholars favor extending voting rights to noncitizens, as is the case in local elections in some European municipalities and in a small number of American municipalities.⁷

The intellectual critique of traditional differentiating notions of citizenship—the view embodied most clearly in the law and, I think, in the minds of the vast majority of American people—has three aspects. I refer to them as the egalitarian, the functional, and the transnational critiques.

The egalitarian critique⁸ holds that all status differentials are presumptively illegitimate, especially when government mandates or authorizes them. Even more objectionable are rules that, however neutral they may appear on their face, have differential impacts on ethno-racial minorities. This is arguably true of the distinction between citizens and noncitizens, for the obvious reason that noncitizens—putting temporary visitors (nonimmigrants) aside—tend to be disproportionately people of color. These inequalities, according to the dominant academic, egalitarian view, should be treated by the law the same way that suspect classifications are treated in equal protection jurisprudence: They must be narrowly tailored and justified by compelling government reasons.

This egalitarian critique of the traditional notion of citizenship also takes a highly inclusive notion of citizenship. Another tenet of this critique is that advanced by T. H. Marshall in his famous argument that the legal-political conception of citizenship is radically incomplete, in that full citizenship also requires the economic, social, and cultural equality necessary for full and equal participation in community life.⁹

Now, I believe that most of this debate is one not really about citizenship, but about equality. It is a debate about the appropriate scope and content and normative justifications for the welfare state. I do not think that one can talk intelligently or even intelligibly about equality without engaging in

6. See, e.g., Motomura, *supra* note 5, 202-03; Linda Bosniak, *Varieties of Citizenship*, 75 *Fordham L. Rev.* 2449 (2007).

7. See, e.g., Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 5 (2006); Motomura, *supra* note 5, at 191-92; Sewell Chan, *Alliance Backs Voting Rights For Noncitizens*, N.Y. Times, Feb. 20, 2007, at B4.

8. See Peter H. Schuck, *Meditations of a Militant Moderate: Cool Views on Hot Topics* 174-75 (2006).

9. See generally T. H. Marshall, *Citizenship and Social Class*, in *Sociology at the Crossroads* 67 (1963).

that very detailed, difficult, complex debate about the nature, forms, and scope of the welfare state. Such a debate, if properly conducted, would raise numerous empirical, historical, cross-cultural, conceptual, and normative issues. Our conversation in this Symposium—and similar conversations elsewhere—do not even acknowledge the relevance, much less the difficulty, of these issues.

The second intellectual critique of traditional notions of citizenship is a functional one.¹⁰ Functionalist critics emphasize that noncitizens are hardworking, pay taxes, and obey the laws, just as citizens do. Indeed, many academics also extend this functionalist critique to debates about undocumented immigrants. They, too, work hard, pay sales, payroll, and other indirect taxes, and generally obey laws other than the ones that render them undocumented. They take great risks to cross the border, and they are often family-oriented and religious. All this is true. For functionalist critics of traditional citizenship, it follows from this functional equality that noncitizens should enjoy the same rights as citizens, all the way down.

The third critique of traditional notions of citizenship is a trans- (or post-) national one.¹¹ This critique views the nation-state as increasingly anachronistic, from which it is thought to follow that the notion of citizenship associated with the nation-state is anachronistic as well. In this view, the transnational regime is constituted by international treaty and customary law, universal human rights discourse, supranational institutions, NGOs, and so forth. This regime, and the ideal of post-national citizenship that goes with it, is seen as being more enlightened, humane, and just than the traditional regime of sovereign nation-states.

The idea is that people today are educated, work, invest, and consume in a global marketplace that no single nation, not even the United States, can control. From this, it somehow follows—although others may see this as a non sequitur—that traditional notions of citizenship are no longer justifiable.

Now, in a globalizing world, and to cosmopolitan minds, the sovereign nation-state, with its apparatus of national citizenship, may seem anachronistic, arbitrary, and unjust. But for the vast majority of people in liberal democracies—including many who think of themselves as cosmopolitan—these global trends make the traditional view of citizenship even more salient and more precious than ever. They are surprised, for example, by the degree of violence in liberal democratic Europe over questions of immigrant and minority group inclusion. For them, these conditions heighten their sense that the United States, for all its faults, is in this respect a successful, unique, and remarkably inclusive society.

This perception was totally absent from the discussion earlier in this Symposium, in which the United States, past and present, was depicted as

10. Schuck, *supra* note 8, at 175.

11. *See id.* at 175-76. *But see* Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* 202-05 (1998).

one endless litany of atrocities, repressions, sexism, racism, and every other bad “ism.” It is important to affirm my belief that much of that shameful history is true. But it *is* history, and in my view, supported in my recent work,¹² the United States has radically transformed itself in these respects during the last forty years. While the pre-1960s history is extremely important—and I admire the important work of Mae Ngai and others that painstakingly reminds us of the terrible failures in our history¹³—there was absolutely no recognition earlier in this Symposium that anything has changed since the “bad old days.” I think that such selective amnesia by people dedicated to uncovering complexity is most regrettable.

Thus, there is this view abroad—again, a view not articulated during this Symposium—that the United States can lay claim to being a singularly successful, unique, and inclusive society, given the challenges that our extraordinary diversity has posed.¹⁴ The embrace of what is today a remarkably inclusive conception of citizenship, though not as expansive as many would like, is neither xenophobic nor nativist, except at the tiny lunatic fringe (which includes, most prominently, Patrick Buchanan). According to a recent Pew poll, sixty percent of Americans think that immigration from Asia, Mexico, and Latin America is a good thing.¹⁵ In contrast, only one-third of Germans think this of immigration to Germany from the Mideast and North Africa.¹⁶

It is a great mistake, and a politically dangerous one, for pro-immigration forces to conflate opposition to illegal migration with nativism.¹⁷ My prediction, for what it is worth, is that at the end of the day, Congress will expand legal immigration, enact a relatively generous amnesty for undocumented workers, and provide most of them with a timely and properly conditioned path to citizenship. I hope so.

The United States is an outlier in many other respects that are relevant to national citizenship when we are compared with Europe and other developed liberal democracies. First, Americans tend to be very proud of their country, very patriotic. You might think that that is equally true of every country, but you would be wrong. A Pew survey conducted just this year indicates that 71% of Americans say that they are very proud to be in

12. See, e.g., Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* (2003); Schuck, *supra* note 8, at 22-32; see also Orlando Patterson, *Rituals of Blood: Consequences of Slavery in Two American Centuries*, ch. 1 (1998).

13. See Mae M. Ngai, *Birtright Citizenship and the Alien Citizen*, 75 *Fordham L. Rev.* 2521 (2007).

14. See, e.g., *Understanding America* (Peter H. Schuck & James Q. Wilson eds., forthcoming 2008).

15. See Pew Research Ctr. for the People & the Press and Pew Hispanic Ctr., *America's Immigration Quandary* 3 (Mar. 30, 2006), available at <http://people-press.org/reports/pdf/274.pdf> (stating that only forty percent of Americans believe that legal immigration should be decreased).

16. See Pew Global Attitudes Project, *American Character Gets Mixed Reviews: U.S. Image Up Slightly, But Still Negative* 35 (June 23, 2005), available at <http://pewglobal.org/reports/pdf/247.pdf>.

17. Schuck, *supra* note 11, at 5-11.

America; 38% of the French take that view with respect to France; 21% of Germans and 21% of Japanese say that they are proud to be Germans and Japanese.¹⁸

The United States is also vastly more religious than other liberal democracies.¹⁹ This, I think, is one reason why there is widespread support for immigration in the United States. Immigrants, especially those who become citizens, play a crucial role in strengthening churches and, partly for that reason, strengthening the communities in which they live.²⁰

Arabs and Muslims in the United States have assimilated remarkably well. There are relatively few hate crimes committed against them, or at least few complaints by Muslims and Arab Americans against government agencies.²¹ They are patriotic and share Americans' pride in the American system, although of course they are very critical of our foreign policy, as many of the rest of us are.²²

If there were a political backlash against the universalizing notions of American citizenship, then one would expect it to be directed at three aspects of citizenship: dual citizenship, birthright citizenship, and easy naturalization requirements. I find the lack of any serious political support in Congress for any change in any of these elements to be the single most striking, puzzling, and significant aspect of the post-9/11 debate over citizenship law. It is worth reflecting on why this is the case. I do not deny, of course, that bills are periodically introduced in Congress, especially with respect to birthright citizenship, but those bills have been around for at least twenty years and have gone nowhere.²³ They have no political legs, and the politicians who sponsor them are presumably well aware of this.

Before moving to my conclusion, I want to put the question of discrimination against noncitizens, a subject to which Professor Cole has devoted much attention, in historical context. As a political matter, it is obviously easier for American society to impose disabilities on noncitizens than on citizens. Society should think very, very carefully before it does

18. See Andrew Kohut & Bruce Stokes, *America Against the World: How We Are Different and Why We Are Disliked* 45 (2006) (citing the World Values Survey 2000); see also James Q. Wilson, *American Exceptionalism*, AEI Online, On the Issues, Aug. 29, 2006, http://www.aei.org/publications/pubID.24842/pub_detail.asp.

19. See Pew Research Ctr. for the People & the Press, *Pew Global Attitudes Project, Among Wealthy Nations . . . U.S. Stands Alone in its Embrace of Religion 2* (Dec. 19, 2002), available at <http://pewglobal.org/reports/pdf/167.pdf>.

20. Schuck, *supra* note 12, ch. 7.

21. See, e.g., Spencer Ackerman, *Religious Protection: Why American Muslims Haven't Turned to Terrorism*, *New Republic*, Dec. 12, 2005, at 18; James Fallows, *Declaring Victory*, *Atlantic Monthly*, Sept. 2006, at 60 (stating that the disaffection toward Muslims in Europe is "ten to fifty times worse than here"); Eric Lichtblau, *Justice Report Finds No Complaint*, *N.Y. Times*, Aug. 16, 2005, at A11.

22. Ackerman, *supra* note 21; Fallows, *supra* note 21.

23. See, e.g., Associated Press, *"Birthright Citizenship" Debate Set to Begin*, *MSNBC.com*, Dec. 26, 2005, <http://www.msnbc.msn.com/id/10609068/>.

this. It should ensure that some strong governmental interest in creating such disabilities exists.

Professor Geoffrey Stone's recent, monumental review of the history of civil liberties in the United States during wartime shows that—contrary to many Symposium commentators' claims about repeating the same errors and abuses—we have in fact progressively learned from our mistakes over time.²⁴ Although the first targets were indeed noncitizens, and the restrictions were then extended to U.S. citizens, this has not been as true in more recent times.

I wish to make two other historical points, very briefly. I am not endorsing John Yoo's view of presidential power in wartime;²⁵ this is not my field. A prize-winning paper by a Yale Law School student reviews how the framers understood the Commander-in-Chief power at the time the Constitution was adopted and during the 1790s.²⁶ It turns out that some of the very same questions that we are debating today in connection with interrogations, abuse of prisoners, and so forth, were very much in the minds of the framers, and were the subject of specific disputes over the way in which the military had conducted themselves in these very areas.²⁷ According to this paper, they took a very expansive view of the Commander-in-Chief's powers in these areas, partly because of their trust in General and President George Washington. I cannot endorse the paper's analysis because I have not read the sources, but it does remind us that the framers were very, very concerned about national security in ways that caused them to strike a balance that might be different than the one drawn in the more secure conditions of peacetime.

A final historical point. Military historians tell us that in fact the history of war, American wars and other wars, is filled with atrocities, torture, and abuses against prisoners. This is not new. In fact, it was probably worse in World War II²⁸ and in Vietnam, according to military historians' accounts.²⁹ So this, alas, appears to be a structural problem of war. It is not peculiar to this particular war or Administration, an Administration that I oppose for many reasons. These historical accounts suggest something about our national character. Our character in wartime is rather different

24. See Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (2004).

25. See, e.g., Memorandum from John Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice & Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Defense (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

26. Brian Logan Beirne, *Battle Royale: George v. George: Implication for Executive Commander-in-Chief Powers* (2006) (unpublished manuscript at 14-17, on file with the Fordham Law Review) (cowinner of the Cullen Prize, Yale Law School).

27. *Id.* at 36-67.

28. See, e.g., Victor Davis Hanson, *On Torture, U.S. Must Take the High Road: We Mustn't Stoop to Our Enemies' Level*, Chi. Trib., Dec. 2, 2005, § 1, at 19.

29. See, e.g., Joanna Bourke, *An Intimate History of Killing: Face-to-Face Killing in Twentieth Century Warfare*, ch. 6 (1999).

than our character in peacetime—or at least we balance our values in different ways in these very different contexts. Whether this should be a cause for regret or for relief is an intriguing question.

In conclusion, let me return to my starting point. We face a new and exceedingly dangerous kind of challenge. It will require new legal forms that strike a different balance than that struck by criminal justice proceedings and by the traditional rules of war. To say that the balance is different does not necessarily imply that the rule of law and our constitutional values are being abandoned—although there is certainly a risk of this. We ought to debate this risk with painstaking care. But we ought not to conflate our dissatisfaction with one or another rebalancing with an abject abandonment of the rule of law. The rule of law, after all, is defined and subject to particular legal forms, interpretations, and institutions. In the end, of course, the courts must tell us whether these changes have defied the rule of law or have instead merely redefined it, as so often in the past, to take account of evolving conditions. And we academics in turn must hold the courts to the highest standards of professorial review.