

Whose Membership Is It, Anyway? Comments on Gerald Neuman

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As anyone familiar with Professor Neuman's work would anticipate, he has taken on a neglected but important subject—the normative foundations of the American law of naturalization—and illuminated it in the lambent light cast by his powerful analytical intellect. By testing the principal structural and doctrinal elements that define our naturalization law against normative models of justification, Professor Neuman raises significant questions about this law—about its philosophical coherence, empirical grounding, policy choices, and responsiveness to social change.

Because I agree with most of Professor Neuman's observations on these issues and because a commentator should seek to improve the author's final product, I shall limit most of my comments to the relatively few points with which I disagree or that I feel should be clarified. These points, however, should not obscure my overall admiration for the paper's considerable achievement. After making these critical points, I shall conclude my comments by briefly exploring how his models might be applied to an important dimension of naturalization policy to which his paper only alludes: the polity's stance toward the individual's decision about whether or not to apply for membership.

I. THE NORMATIVE MODELS AND THEIR APPLICATION

We should begin, as Professor Neuman does, with the four normative models. As he makes clear, these are intended to be simple, stylized models of justification; they constitute only "a

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heuristic device and not as a precise representation of available theoretical alternatives or intellectual history.”¹

Nevertheless, one is struck by how thin and unattractive both of his liberal models are; they posit little more than naked individual self-interest. In fact, they are grotesque caricatures of most contemporary liberal theory. Although the liberty to pursue one’s own projects is of course a central value in all liberal systems, there are many other plausible accounts of liberalism that recognize constraints on self-interest such as social duties, discursive requirements, rationality, respect for the dignity of others, legal values, and so forth. This is not simply a debating point; a more robust, other-regarding model of liberalism might well yield different justificatory arguments for (or against) certain features of naturalization law.²

In introducing his discussion of constraints on naturalization discretion, Professor Neuman imposes what would seem to be a crucial limitation on the “unilateralness” of his unilateral liberalism model, without explaining or justifying the limitation: “naturalization,” he says, “is a right that can only be denied when it would threaten important societal interests.”³ My point is not that the last phrase is ambiguous (although it is) but that it refers to governmental interests that have no obvious place in a unilateral liberal system. In such a system, why should the polity’s interests qualify an individual’s power to gratify her wish to naturalize? Indeed, why should a unilaterally liberal polity have *any* independent interests at all on this point? In the real worlds of politics and of naturalization law, of course, polities do have such interests. I had assumed, however, that the purpose of the models was not to represent the reality of positive law but rather to isolate relatively pure justificatory discourses in order to map them against that reality.

1. Gerald Neuman, *Justifying U.S. Naturalization Policies*, 35 Va. J. Int’l L. 237, 238 (1994).

2. Where Professor Neuman’s republican and communitarian models are concerned, this particular objection may not weigh as heavily. They too, of course, are susceptible to multiple meanings; after all, neither republican “participation” nor community “identity” is a self-evident concept. But those core ideas are perhaps somewhat less tautological than the notion of self-interest.

3. Neuman, *supra* note 1, at 242.

His “bilateral” liberal model, which he associates with me and Rogers Smith,⁴ is even more flawed in its treatment of the role of governmental interests. Although our version of bilateral liberalism does require the polity to consent to the membership of its citizens, it does not follow, and Smith and I expressly disclaim such a view,⁵ that a liberal polity can simply condition its consent on whatever criteria it likes—or, as Professor Neuman puts it, on “a wide-ranging instrumental calculation of the net benefits it would gain from acquiring the applicant as a member, or more generally on the expected benefits from adopting a particular set of naturalization criteria.”⁶ In any sensible version of bilateral liberalism, a liberal polity’s conditions for membership must themselves be, in some meaningful sense, liberal. That is, the polity’s conditions must be broadly consistent with the protection of individual liberty and human rights—and not just for those who are accepted for membership but also for those who are ultimately denied it. The liberal polity, for example, could not deny naturalization on the basis of the applicant’s speech unless that speech transcended liberal limits, such as constituting an actual incitement to riot or obscenity.

Professor Neuman suggests both that U.S. citizenship law as a whole is normatively incoherent in this respect, and that this incoherence is understandable in view of the multiple sources of law.⁷ Is that the only reason for this normative incoherence? Perhaps our citizenship law is a normative hybrid (muddle?) because it reflects a society that simultaneously and pragmatically embraces a *variety* of value systems which, when viewed abstractly, seem inconsistent with one another. One wants to know whether Professor Neuman thinks that this is so, and if it is, whether he believes that this is problematic for American society or is instead (as I believe) a source of national strength.

Professor Neuman acknowledges⁸ that there may be other normative models that should be included in the analysis and notes that “the rhetorical trope” of “worthy of grace” does not qualify as an additional model. He fails to mention one rather common

4. Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985). Professor Neuman (among others) has criticized our argument. Gerald Neuman, *Back to Dred Scott?*, 24 *San Diego L. Rev.* 485 (1987).

5. See, e.g., Schuck & Smith, *supra* note 4, at 98-100.

6. Neuman, *supra* note 1, at 239.

7. *Id.* at 247-48.

8. *Id.* at 242 & n.12.

mode of naturalization, however, that might provide sufficient content for this trope to meet his justificatory standard. I have in mind the statutory naturalization of groups of individuals who have rendered significant, unusual service to the nation in a time of crisis. Many foreign soldiers who served with American forces have been naturalized in this way. An inquiry into the various circumstances that have led Congress to confer such naturalizations in the past might yield recognizable patterns and discourses of merit against which naturalization law's doctrines could be tested.

Professor Neuman writes that the breadth of the *jus soli* system reflects liberal principles.⁹ And in the penultimate sentence of his paper, he writes of "the liberal vision of citizenship that dominates birthright citizenship law and expatriation law."¹⁰ Without wishing to rehearse the elaborate argument that Rogers Smith and I develop in our 1985 book, we show that Professor Neuman's claim that *jus soli* reflects liberal principles is quite wrong both historically and conceptually. At its core, *jus soli* is an ascriptive rule, not a consensual one. It originated in an English common law precedent, *Calvin's Case*, in which Lord Coke grounded *jus soli* in natural law, not liberal ideals, in order to establish a rule of perpetual allegiance deriving from the fortuity of birth on territory controlled by the English sovereign (in this case, Scotland). *Jus soli* can be rendered consistent with a liberal conception of citizenship—understood as bilateral consent to membership—only if all birthright citizens possess a meaningful, practicable right of self-expatriation (which, as I explain just below, is not now the case). It follows that *jus soli* in a liberal polity must not extend birthright citizenship to individuals whose presence and birth on the state's territory is illegal unless the polity *affirmatively* decides to extend it to them.

In the same sentence, Professor Neuman makes a second claim about *jus soli*—that it "would be harder to explain on republican or communitarian grounds."¹¹ But this also seems wrong, especially as to republican principles. Any expansive citizenship regime, of course, serves liberal values in the sense that it assists the putative citizen to protect her interests from public and private invasions. But for the very same reason, a republican polity committed to civic participation might adopt a *jus soli* rule on the the-

9. Id. at 248.

10. Id. at 278.

11. Id. at 248.

ory that citizenship facilitates, indeed is essential to, meaningful participation in its affairs, and that the more participation the better. As for communitarianism, certain medieval conceptions rooting a polity in divine or royal authority over a particular territory might also find *jus soli* compatible with its premises.

Professor Neuman notes that citizens who wish to exercise their right of self-expatriation are "largely free to renounce citizenship without the society's consent."¹² Current law, however, is otherwise. A decade ago, Smith and I described the existing regime as follows, while calling for a more readily available renunciation process:

despite recurring calls for legislation fully prescribing formal expatriation procedures, no regularly available domestic process has ever been established. Currently, the attorney general is authorized to prescribe a means to renounce citizenship formally in time of war whenever he deems such renunciation not to be contrary to the interests of national defense. . . . But . . . there is no legislated procedure for expatriating oneself within the United States under more normal circumstances. As a result, few know that an expatriation right exists, and it is procedurally difficult to exercise. In that sense, citizenship is experienced more as ascribed than as consensual.¹³

The law has not subsequently changed in these respects.

In Part II of his paper, Professor Neuman argues that the ideological qualifications for naturalization are problematic from both liberal perspectives,¹⁴ and indeed they are. Nevertheless, a liberal argument can be made for at least some of these qualifications (especially those aimed at communist and anarchist views), and although I find this argument wholly unconvincing, it probably animated the Congresses that enacted these qualifications. The argument would begin with the idea that a liberal state must be founded on a respect for, and guarantee of, private property, which is viewed as both the individual's ultimate safe haven from public and private coercion and an important environment for individual development and self-realization. On this view, communist and anarchist beliefs are potentially destructive of this fundamental value and should be discouraged from taking root in the polity, if

12. Id. at 250 n.29 (citing T. Alexander Aleinikoff).

13. Schuck & Smith, *supra* note 4, at 122-23 (footnotes omitted).

14. Neuman, *supra* note 1, at 253.

not extirpated altogether. To the objection that such a liberal naturalization law cannot bar aliens from embracing ideas that citizens may freely hold and espouse, one might respond that the state may rightly view the two situations differently. The argument would be that the alien, unlike the citizen, is not yet a member of the polity and can therefore be barred by a criterion (so long as the criterion is itself justified on liberal grounds) that could not be applied to expel those who are already members. On this view, a citizen's *loss* of membership would constitute a greater deprivation than an alien's failure to acquire it in the first place—an intuition supported both by common sense and much experimental psychological data.

Let me add three very small points. First, Professor Neuman states that the U.S. has a “rather high” naturalization rate. This may be true in comparison to Germany's rate, which as he observes is “extremely low.”¹⁵ Compared to other western democracies, however, the U.S. rate appears to be rather middling—although it has increased in recent years. In Rogers Brubaker's comparative study of naturalization rates in the mid-1980s, he found that the U.S. rate was lower than Canada's and Sweden's while it was higher than France's and Germany's.¹⁶

Second, an oath of renunciation in connection with American naturalization suffices under current law regardless of its legal effect in the other country, as Professor Neuman states,¹⁷ but also regardless of whether the renouncer continues to have strong feelings of solidarity with the other country so long as these feelings do not rise to a level or assume a character that violates the oath. The fact that such feelings might occasion some of the same conflicts that the renunciation requirement is presumably meant to eliminate simply reinforces Professor Neuman's point that the renunciation requirement is underinclusive as well as overinclusive.

Third, Professor Neuman contends that American pluralism and the United States' toleration of dual citizenship imply that communitarian concerns about national identity do not justify the requirement to renounce prior allegiance. But his conclusion seems to turn on what prior allegiance and national identity mean. If the national identity consists of a commitment to liberal democratic

15. *Id.* at 274.

16. *Immigration and the Politics of Citizenship in Europe and North America* 117-20 (William Rogers Brubaker ed., 1989).

17. Neuman, *supra* note 1, at 275 n.122.

values, a communitarian would indeed want to insist that, say, an adherent of the late Ayatollah Khomeini's regime must at the very least renounce his allegiance to that regime, understood as commitment to anti-democratic values.

II. EXTENDING THE MODELS

Professor Neuman's paper is principally concerned with the substantive criteria of eligibility for naturalization and, to a lesser degree, with the relationship between naturalization law and other rules that govern the acquisition and loss of citizenship. Here, I wish to raise another set of questions that are logically prior to, and in that sense more fundamental than, the substantive doctrines that his paper so richly illuminates.

This inquiry asks the following sorts of positive and normative questions: As a descriptive matter, what is the government's stance toward an alien's decision about whether to apply for naturalization in the first place? As a normative matter, taking the perspective of Professor Neuman's various models, what *should* that stance be? Should the polity view the decision to naturalize *vel non* as a choice which, like most consumption choices, is essentially the individual's affair? Should it instead regard the alien's decision as one in which it too has an important stake that is quite independent of the alien's and that the government can properly seek to influence? If the latter, what doctrinal and other policy tools are available to the government for shaping such decisions? What normative tensions might be created by aggressive governmental policies that seek either to encourage or discourage aliens' decisions to apply for naturalization? Finally, what might we learn by approaching these questions from the kind of cross-national perspective to which Professor Neuman has contributed so much in his recent research?¹⁸

The positive question—what is the polity's stance—is easily answered insofar as the United States is concerned. Until very recently, the federal government appeared to regard a resident alien's decision about whether to naturalize or not as a matter of supreme indifference. Viewed most charitably, the government

18. E.g., Gerald L. Neuman, Immigration and Judicial Review in the Federal Republic of Germany, 23 N.Y.U. J. Int'l L. & P. 35 (1990); Gerald L. Neuman, "We are the People": Alien Suffrage in German and American Perspective, 13 Mich. J. Int'l L. 259 (1992); Gerald L. Neuman, Nationality Law in the United States and the Federal Republic of Germany: Structure and Current Problems (January 1995) (unpublished manuscript).

sought to maintain a more or less neutral stance. To be sure, it distributed educational materials and application forms that purported to encourage naturalization, and some judges took pains to make the naturalization ceremony an evocative, unforgettable experience for the new citizens. Beyond this, however, the government left the decision to whatever private motives might animate the alien in whatever direction he or she chose. In this sense, the government's stance toward naturalization was much like its official stance toward voting: Government organs may remove obstacles to registration and gently exhort the public to perform its civic duty and vote, but the mobilization of voters is essentially a private task thought to be best left to the political parties and other private organizations. Even the Immigration Act of 1990, which sought to encourage naturalization, did little more than authorize administrative naturalization ceremonies as a remedy for the long backlogs that the government's indifference to naturalization had allowed to accumulate.

The United States' posture of passivity and neutrality has sometimes been contrasted to the more active and affirmative naturalization policies of other liberal democracies, especially Canada. In a variety of ways, Canada energetically promotes naturalization rather than leaving it wholly to private initiative. Perhaps as a result, Canada's aliens have the highest naturalization rate among western democracies. In the United States, the current INS commissioner has placed a high priority on increasing naturalization rates, as have some private organizations committed to the advancement of minority group interests. Moreover, congressional moves to withhold welfare benefits from legal aliens appear to be motivating some naturalization activity.¹⁹ But it is too early to tell whether these efforts will bear fruit.

The normative question—what *should* the polity's stance be—depends, of course, on the particular conception of membership being posited. In a very tentative and exploratory fashion, I shall apply each of the models to this question.

19. Laura Keeton, *More Legal Aliens Seeking Citizenship to Keep Benefits*, Wall St. J., Mar. 6, 1995, at B1, col. 5. Other factors contributing to the recent spate of naturalizations include a new fee for renewal of green cards and the new eligibility for naturalization of aliens legalized under the 1986 Act's amnesty.

A. *Libera.*

In a unilateral liberal view of naturalization, the choice about whether or not to seek naturalization is a matter for the individual alien to decide. As Professor Neuman points out,²⁰ this choice would be based on whatever public or private interests happen to motivate her. If individuals prefer to remain aliens, with whatever advantages or disadvantages this may entail, that is their choice. Much the same would be true from a bilateral liberal perspective: the criteria that the polity has established for its consent would come into play only if and when the alien decides to apply for naturalization.

Even a liberal regime, however, might perceive a liberal interest in encouraging its aliens to apply for naturalization. The defining purpose of a liberal polity is to maintain the conditions necessary for the flourishing of individual liberty, and that should include tolerance, due process, and substantial equality for legal aliens within its borders. But one can imagine situations in which that polity might plausibly conclude that the liberal project could not succeed without an increase in naturalizations. At some point, for example, the ratio of aliens to citizens might become so high that aliens' lack of direct or indirect political participation and representation would present a serious problem for democratic governance, one to which the polity might properly respond by encouraging, although not coercing, naturalization. Such a scenario is by no means far-fetched. According to one recent demographic estimate, if Germany continues to naturalize foreign long-term residents at the current low rate, almost one-third of its population will consist of foreign nationals in 2030; the percentage in large cities could reach 45%.²¹ At the very least, all liberal polities have an interest in informing aliens about the naturalization option and making it attractive and accessible to them. Depending on the weight of this interest, the polity might go beyond informing aliens to a strategy of subsidizing those who naturalize—or perhaps denying benefits to those who do not.²² Such a strategy, of course, would abandon any pretense of state neutrality toward the decision about whether to apply.

20. See Neuman, *supra* note 1, at 238.

21. Rainer Münz & Ralf Ulrich, *Changing Patterns of Migration: The Case of Germany, 1945-1994*, German-American Migration and Refugee Policy Study (on file with author).

22. See Keeton, *supra* note 19.

B. *Republican*

A regime founded on republican principles would appear to have the greatest stake in encouraging aliens to seek naturalization rather than in adopting the presumptively liberal stance of benign neutrality. Higher rates of naturalization—albeit for the “right” reasons—should help to enlarge and enrich the projects of civic participation and deliberation, the very *raison d’être* of a republican polity.

A complication might arise in a republican polity, however, if the aliens’ linguistic limitations or ideological commitments turned out to impede rather than promote public discourse and involvement and if these impediments proved to be intractable to the processes of republican civic education and persuasion. In those circumstances, a republican polity might wish to discourage naturalization by these aliens in the name of preserving republican deliberation. It is doubtful, however, whether the polity could successfully discourage these aliens from applying while at the same time encouraging applications by other aliens who are not thought to pose such problems, without discriminating against the former in ways that violate other norms of equal treatment and equal participation.

C. *Communitarian*

From the communitarian perspective, the threshold question is whether the alien shares the national identity that the polity purports to reify. In polities such as the United States, the national identity (at least for purposes of qualifying for naturalization) is defined according to criteria that almost anyone who has the will and time to do so can readily satisfy. In a real sense, the alien demonstrates her commitment to and participation in this minimally-defined “pluralistic” national identity by the very acts of applying for naturalization and passing the necessary tests. Some of the proposals to deny welfare benefits to legal residents who fail to naturalize seem to reflect this view.²³

But in polities that posit a national identity that is harder to achieve by mere acts of will, as with an ethnically defined identity, the alien’s wish to apply for naturalization may be viewed as *necessary* but by no means *sufficient* evidence that she possesses that identity. Such a polity need not devote much effort to encouraging aliens to seek naturalization; the aliens’ initiative in undertaking to

23. *Id.*

do so will itself be an important datum bearing on their felt solidarity with the communal identity. If aliens fail to seek naturalization, a communitarian polity will probably take this inaction as strong evidence that they do not in fact share that identity and are in that sense unassimilable to it.

This appears to be the view, for example, taken by many Germans of the unwillingness of many long-resident Turks and other ethnic minorities to naturalize despite recent efforts by Germany to ease the preconditions for their doing so. It may be that Americans, who as Professor Neuman shows draw on a mix of liberal, republican, and communitarian norms of citizenship, will come to view the continuing low naturalization rates of resident aliens from Mexico (only one in six after 15 years of U.S. residence) in the same way. This would be unfortunate, as the notion of aliens' inability to share in the national identity would tend to become a self-fulfilling prophecy, perpetuating and deepening the feelings of estrangement between citizens and aliens that is a most lamentable feature of the present debate over immigration and membership.

