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CONSTITUTING COMMUNITIES THROUGH WORDS THAT BIND: REFLECTIONS ON LOYALTY OATHS

*Sanford Levinson**

I. PREFACE: A PERSONAL INTRODUCTION

On December 5, 1942, Felix Frankfurter articulated what can only be described as a personal testament of faith as he joined his colleagues on the Supreme Court in considering a fascinating case involving the meaning of the oath one takes upon becoming a naturalized citizen.¹ After reminding the other Justices seated around the conference table that "[i]t is well known that a convert is more zealous than one born to the faith," Frankfurter went on to describe his own experience, unique among the Justices, of naturalization. "I was at college when my father became naturalized and I can assure you that for months preceding it was a matter of moment in our family life, and when the great day came it partook for me of great solemnity." Describing himself "[a]s one who has no ties with any formal religion,"² he immedi-

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These remarks were initially prepared for delivery at the Conference on Community Membership, Shalom Hartman Institute, Jerusalem, December 1985. The Institute is a remarkable place, its members incarnating an almost unique blend of passionate intellectual intensity and compassionate human decency. One of the participants in the Conference was the late Robert Cover, who was imbued by precisely the spirit that so impresses me about the Institute, and I dedicate this essay to his memory.

I have benefited from the remarks of members of the Conference and from a later reading of the paper by David Hartman, the Director of the Institute. As always, I have also been helped by the willingness of my colleagues at the University of Texas to read multiple drafts and respond to various formulations of tentative ideas. In particular, I wish to thank John Dzienkowski, Jim Fishkin, Betty Sue Flowers, Scot Powe, William Powers, and Mark Yudof, with special mention due, as is often the case, to Douglas Laycock. I am also grateful to Don Herzog, Robert Post, Michael Sandel, and Tom Shaffer for their responses.

1. *Schneiderman v. United States*, 320 U.S. 118 (1943). The case involved a Communist whose naturalization was challenged on the basis that no active adherent of Marxism-Leninism could have been "a person attached to the principles of the Constitution of the United States" as required by the naturalization statutes. See note 49 *infra* and accompanying text. The majority, in an opinion written by Justice Murphy, ruled against the United States. Frankfurter joined Chief Justice Stone's dissent, which argued that *Schneiderman* could be deprived of his citizenship. It may, of course, be relevant that the United States was allied with the Soviet Union at the time of the case.

2. Frankfurter had long since ceased affirming traditional Jewish beliefs. In 1917 he told a friend about attending Rosh Hashanah services and mentioned that "I'm rather happy that I can go through these symbolic religious events without a sense of discord or disrespect (by my mere presence) to the believers, tho the significance for me is not creedal." Felix Frankfurter to Katherine Ludington (Sept. 16, 1917), *quoted in* M. PARRISH, *FELIX FRANKFURTER AND HIS TIMES*:

ately went on to add that "perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship." The Justice then referred to his having known "literally hundreds of men and women of the finest spirit who had to shed old loyalties and take on the loyalty of American citizenship." He went on to read his colleagues a letter he had received from Professor Salvemini of Harvard:

When I took my oath [of citizenship] I felt that really I was performing a grand function. I was throwing away not my intellectual and moral but my juristic past. I threw it away without any regret. [Activities of the Mussolini regime] had really broken my connection with sovereigns, potentates, and all those ugly things which are enumerated in the formula of the oath. It is a wonderful formula. Your pledges are only juridical and political. You are asked to sever your connections with the government of your former country, not with the people and civilization of your former country. And you are asked to give allegiance to the Constitution of your adopted country, that is, to an ideal life.

Thus, I took my oath with a joyous heart, and I am sure I will keep it with the whole of my heart as long as I am alive.

Justice Frankfurter then concluded his homily by stating that "American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution."³

I suspect that at least some readers of this essay, especially those (like myself) who are fearful of the "new patriotism" that suffuses much modern political rhetoric, are uncomfortable with the intense patriotism expressed by the immigrants Salvemini and Frankfurter.⁴ But can one imagine a political community without love of country and commitment to what one would hope to be its highest ideals?

The title above describes what follows as "reflections." There *is* a topic, to be sure — loyalty oaths; however, my very interest in them — and the style of this essay — is derived in part from my decidedly

THE REFORM YEARS 129 (1982). And, responding to Walter Lippman's question, "What is a 'Jew' anyway?" Frankfurter could answer only that "[a] Jew is a person whom non-Jews regard as a Jew." Felix Frankfurter to Jerome Frank (May 3, 1946), *quoted in id.* Parrish goes on to write that for Frankfurter "the bonds of religion had become attenuated, leaving only the negative identification supplied by some gentiles." *Id.*

3. FROM THE DIARIES OF FELIX FRANKFURTER 211-12 (J. Lash ed. 1975) (statement at conference, Dec. 5, 1942).

4. Patriotism was a cardinal value for Frankfurter. Being told by Archibald MacLeish that he was writing a patriotic play, Frankfurter replied, "Good. You couldn't make it too patriotic for me." Kanin, *Trips to Felix*, in FELIX FRANKFURTER: A TRIBUTE 49 (W. Mendelson ed. 1964), *quoted in* Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430, 447 n.95 (1973).

mixed feelings about such oaths and a consequent difficulty in resolving my views about them. The difficulty is generated by the background issue against which the loyalty oath is only one foregrounded highlight, *i.e.*, personal and communal loyalty itself, the sense of fellowship so strongly evoked by Frankfurter.

Preparation of this essay has not served to resolve my own ambivalences about what, after all, Duncan Kennedy once named the "fundamental contradiction" of all social life, the tension between "individual freedom" and the coercive communal life with "[o]thers (family, friends, bureaucrats, cultural figures, the state)" that is "necessary if we are to become persons at all — they provide us the stuff of our selves and protect us in crucial ways against destruction."⁵ It should not be surprising if something so fundamental does not prove amenable to resolution. In any case, the reader should not expect to find a linear argument that moves toward a purportedly ineluctable conclusion, so much as an attempt to explore what underlies (and justifies) the mixture of responses. At best, I might hope these remarks achieve the status of meditations that aid the reader in analyzing what I am suggesting will (or ought to) be his or her own complex views.⁶

My remarks are best understood in the light of the context in which they were originally presented, a Conference on Community Membership held at the Shalom Hartman Institute in Jerusalem, Israel, in December 1985. A number of scholars, drawn from political theory, American law, and Jewish law, convened to discuss notions of community membership revealed in these various bodies of thought. As one of the principal organizers of the conference, I was motivated not only by the inherent interest of these topics, but also in substantial part by my own perplexities, over the years, about the twin notions of being Jewish and being American.

Although I feel a very strong sense of commitment to (and membership in) both communities, I have never been certain exactly what those commitments entail (and therefore what actually constitutes the meaning of my membership in them). In particular, I have wondered if the commitments can be reduced to words, containing propositional utterances, to which I would be willing to subscribe. If they cannot, then what is the nature of the commitments? Must we pass beyond

5. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-12 (1979). Kennedy "renounce[s]" and "recant[s]" the fundamental contradiction in Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15 (1984). See also the discussion of "Autonomy and Community" in Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 530-33 (1984).

6. A colleague has suggested, only half in jest, that I describe this essay as "an impressionist painting," with "splashes of thought" whose boundaries are not clearly delineated.

words, perhaps into the mysticism of the conclusion of Wittgenstein's *Tractatus*, "Whereof one cannot speak, thereof one must be silent"?⁷

I am one of that peculiar breed especially prevalent in the modern West — the "secular Jew."⁸ The one thing I am relatively clear about is that I am not able to subscribe to a set of affirmative theological propositions, including basic belief in the existence of God (let alone a God who revealed the Torah to Moses on Mount Sinai and entered into a covenantal understanding with the Jewish people). It may be, of course, that no such subscription is necessary; if so, that only highlights the question that remains: What does it mean to be a Jew (or to be recognized as a Jew by others)? And does that question have different answers for one born into (or in more existentialist language, "thrown into") a preexistent Jewish community, as opposed to one who self-consciously chooses Jewish identity, as, for example, by conversion? (Can one even imagine a convert to "secular Judaism"?)

Similar questions can be asked about one's (my) status as a member of the American polity. The United States, like all political entities, can be said to have a "civil religion" that its members are expected to profess.⁹ As Frances Wright, described as "an Americanized Englishwoman of the 1820s,"¹⁰ wrote, in words that could easily have been endorsed a century later by Frankfurter:

For what is it to be an American? Is it to have drawn the first breath in Maine, in Pennsylvania, in Florida, or in Missouri? Pshaw! . . . Hence with such paltry, pettifogging . . . calculations of nativities! *They* are American who, having complied with the constitutional regulations of the United States . . . wed the principles of America's Declaration to their hearts and render the duties of American citizens practically in their lives.¹¹

There is no guarantee, of course, that such "weddings" of principle to heart will endure through time. Early passion may turn into hollow form. I have elsewhere quoted Hegel's relevant comment: "How blind they are who may hope that institutions, constitutions, laws . . . from which the spirit has flown, can subsist any longer; or that forms in which intellect and feeling now take no interest are powerful

7. L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 7 (1921).

8. There is, I believe, no analogous identification of oneself as a "secular Protestant" or "secular Catholic," though one does sometimes hear references to "lapsed Catholics" or "apostates."

9. See Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123.

10. W. SOLLORS, *BEYOND ETHNICITY: CONSENT AND DESCENT IN AMERICAN CULTURE* 152 (1986).

11. Address by Frances Wright in Cincinnati, Ohio, printed in *The Beacon*, Mar. 17, 1838, quoted in W. SOLLORS, *supra* note 10, at 153.

enough to be any longer the bond of a nation!"¹² To try to discover what bonds us (or could bond us) into a coherent community, especially after the triumph of a distinctly modernist — and historicist — sense of the contingencies of our own culture, is at the core of my work. I am much more certain about my inchoate feelings of membership in the American community than I am about my ability to confess to any peculiarly "American" set of faith propositions, including the ascertainability or coherence of alleged constitutional norms. Again, my scholarly interest in these questions flows directly from intensely personal self-reflection.¹³

Much of the contemporary interest in community, as in the work, for example, of Michael Sandel,¹⁴ focuses on notions of "encumbered" selves whose task it is, at least in part, to come to recognize — to discover — the communities within which they are already embedded. One does not *choose* to be a member, for example, of one's family; one *is* a member, with whatever implications follow from that fact. Professor Werner Sollors has recently emphasized that "descent" plays a crucial role in providing one's identity. "Descent relations are those defined by anthropologists as relations of 'substance' (by blood or nature)."¹⁵ In turn, the language of descent "emphasizes our positions as heirs, our hereditary qualities, liabilities, and entitlements."¹⁶ One implication of a focus on descent, on the preestablished nature of one's identity, is that institutions that operate by descent principles, such as families, do *not* ask for overt loyalty oaths or vows of membership; that is presupposed.¹⁷

12. HEGEL'S POLITICAL WRITINGS 244 (T. Knox trans. 1964), *quoted in* Levinson, *Judicial Review and the Problem of the Comprehensible Constitution*, 59 TEXAS L. REV. 395, 418 (1981).

13. No doubt there is a similar linkage between the personal and the scholarly in my interest in wedding vows and the institution of marriage.

14. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

15. W. SOLLORS, *supra* note 10, at 6.

16. *Id.*

17. See, for example, the famous comment by Horace Kallen, a major early twentieth century theorist (and defender) of cultural pluralism: "Men may change their clothes, their politics, their wives, their religions, their philosophies, to a greater or lesser extent: they cannot change their grandfathers." H. KALLEN, *Democracy versus the Melting Pot*, in *CULTURE AND DEMOCRACY IN THE UNITED STATES: STUDIES IN THE GROUP PSYCHOLOGY OF THE AMERICAN PEOPLES* 122 (1924) (essay originally published in 1915), *quoted in* W. SOLLORS, *supra* note 10, at 151. Kallen later elaborated some of the implications of this distinction between what Sollors terms "blood" (grandfathers) and "law" (wives):

The citizen of America may become one of England, the Baptist a Methodist, the lawyer a banker, the Elk a Mason, the Republican a Socialist, the capitalist a proletarian. But the son, father, uncle, cousin cannot cease to be these; he cannot reject the relationships these words express, nor alter them. . . . Natural groups, like the Irish, the Jews, or any nationality, cannot be destroyed without destroying their members. Artificial groups, like states, churches, professions, castes, can. These are social organizations; natural groups are social organisms

But the recognition of "encumbrances" of the self, however important, should not gainsay the extent to which our most fundamental self-conceptions, and political theories, do indeed involve notions of "chosen identities" and "intentional communities." Professor Sollors, who views the tension "between *consent* and *descent* . . . as the central drama in American culture,"¹⁸ describes "consent relations" as including "those of 'law' or 'marriage,'" and he goes on to note that "consent language stresses our abilities as mature free agents and 'architects of our fates' to choose our spouses, our destinies, and our political systems."¹⁹ Choice in this case allows not only collaboration in common enterprises, but also the dissolution of bonds, whether by divorce, moving from one religion to another (or to no religion at all), or emigrating from one country to the voluntary embrace of another.²⁰ And Sollors well demonstrates the linkage in American writing between conceptualizations of "private" realms of love and marriage, on the one hand, and the public realm of citizenship on the other: The "arranged marriage," by which a spouse (almost invariably from one's own "ethnic group") is chosen by one's parents is systematically rejected in favor of the consensual marriage (often to an ethnic "outsider") sparked by romantic attachment. "American allegiance, the very concept of citizenship developed in the revolutionary period, was — like love — based on consent, not on descent, which further blended the rhetoric of America with the language of love and the concept of romantic love with American identity."²¹

The United States, as a nation of immigrants, has posed throughout its entire history the problem of chosen identity. A "double choos-

H. KALLEN, *THE STRUCTURE OF LASTING PEACE* 31 (1918), quoted in W. SOLLORS, *supra* note 10, at 151.

One sees these views reflected in the following description by an author of her ambivalences when observing the intense bond between her husband and their infant daughter: "I am sometimes sad at being displaced. Their tie is blood, and mine with Leon is based only on volition. Ours can be broken; theirs cannot." Kates, *Hers*, N.Y. Times, Oct. 9, 1986, at C2, col. 3.

One may, of course, doubt whether family relationships are quite so binding (or quite so "natural": consider adoption, for example) as Kallen portrays them, but surely anyone with such a view would find it unnecessary, perhaps even bizarre, to suggest applying the same kinds of procedures to the family as to "artificial" entities like the state. A true "nation-state," involving a perfect overlap between the social and the political, would present an interesting test case of Kallen's categories, but there are few such states, and the United States is most definitely not one of them.

18. W. SOLLORS, *supra* note 10, at 6 (emphasis in original).

19. *Id.* See the remarks of Horace Kallen quoted in note 17 *supra*.

20. One should note, of course, that not all political systems allow voluntary emigration, and most are less willing than the United States to embrace immigrants. No country, including the United States, leaves the decision to enter solely to the discretion of the would-be immigrant.

21. W. SOLLORS, *supra* note 10, at 112; see also *id.* at 151 ("To say it plainly, American identity is often imagined as volitional consent, as love and marriage, ethnicity as seemingly immutable ancestry and descent.").

ing" is involved: the choice of an immigrant to adopt an "American" identity is coupled with the necessity facing that immigrant to be chosen by the United States itself as suitable to be a member of the political community. Michael Walzer has written in *Spheres of Justice* both that "the primary good that we distribute to one another is membership in some human community,"²² and that the "distinctiveness of cultures and groups," a value that most of us support, "depends on closure."²³ This means, among other things, that a "sovereign state" must be permitted to "take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants."²⁴ And Peter Schuck and Rogers Smith have recently argued that "republican" thinkers, much admired in some circles these days,²⁵ endorse the right of a political community to "refuse consent to the membership of those who would disrupt their necessary homogeneity."²⁶ A "community" truly open to all comers is almost a contradiction in terms, although it is clearly possible to endorse such an open-arms policy in behalf of values other than community.²⁷

One important device used by intentional communities to define their membership is the taking of oaths focusing on the central values — or propositions — of the common enterprise. Although the discussion that follows touches as well on more general problems of loyalty, it is the loyalty *oath* and its special problems (and perhaps attractions) upon which I will focus. Loyalty oaths are inherently controversial; I suspect that many of the readers of this essay are antagonistic to them.

22. M. WALZER, *SPHERES OF JUSTICE* 31 (1983).

23. *Id.* at 39.

24. *Id.*

25. See, e.g., Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 30-31 (1986) ("[T]he purpose of this article is to help revive aspects of an attractive conception of governance — we may call it republican . . ."). For suggestions that this conception is less attractive than might first appear, see Hirsch, *The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community*, 14 POL. THEORY 423 (1986); Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473 (1986). These articles are part of a symposium on "Civil Republicanism and its Critics."

26. See P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 28 (1985). Harry Hirsch notes that "only a modern society that ruthlessly engages in the practice of exclusion can be homogeneous." Hirsch, *supra* note 25, at 435 (emphasis added).

27. Some writers, though, have expressed dissent from the notions expressed in this paragraph. Thus Joseph Carens argues, in an as yet unpublished paper, that liberal states committed to the priority of individual rights cannot limit immigration in order to protect homogeneity (or, for that matter, economic status). J. Carens, *Aliens and Citizens: The Limits of Liberal Theory* (unpublished manuscript); see also B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 89-95 (1980); Lichtenberg, *National Boundaries and Moral Boundaries: A Cosmopolitan View*, in *BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS* 79-100 (P. Brown & H. Shue eds. 1981); Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212 (1971).

In order to understand better the nature of the controversy (and antagonism), the essay begins by examining certain kinds of public pronouncements, what I call "words that bind." Of course many pronouncements can be characterized as "words that bind," including the signification of assent to the terms of any given contract, which itself can be viewed as simply a particular instance of binding by promise.²⁸ I want, however, to examine some of the implications of several peculiarly *public* oaths or vows that play a central role in defining or even *constituting* communities, whether political or otherwise. Indeed, the community becomes constituted only because the persons taking the oaths see their own self-identity to be derived from the community to which the oath is directed.²⁹ One may or may not regard the oath-takers as "individuals," but it is clear that the person subscribing to the oath would reject an identity as "merely" individual inasmuch as maintaining *that* atomized conception of identity would contradict what is most genuinely significant about the oath.

II. DEFINING COMMUNITIES THROUGH OATHS

Oaths are mixtures of pure form and substantive content. Their formal nature may remind one of the "contentless" seals once thought necessary to give legal validity to contracts.³⁰ In the case of vows, they signify a desire to be considered a member of a particular community and a willingness to remain within its boundaries. As Professor Robert Post has recently written, in an essay building on the tradition of social analysis going back at least as far as Emile Durkheim, "A community without boundaries is without shape or identity; if pursued with single-minded determination, tolerance is incompatible with the very possibility of a community."³¹ Preservation of "commu-

28. See C. FRIED, *CONTRACT AS PROMISE* (1981).

29. Donald Herzog has correctly pointed out that not all oaths manifest "constitutive" notions of self-identity. Thus the oaths attendant to an adult's joining, say, the Elks Club (I assume that the club in fact has rituals) are extraordinarily unlikely to signal any change in the core identity of the oath-taker. However, as one of Herzog's own examples, involving the Freemasons, suggests, understanding historical and social context is important to making such judgments about importance. Thus, joining the Freemasons in the late eighteenth century might well have signaled a fundamental fact about one's conception of oneself. Today, however, we (who are not Masons) do not tend to differentiate "Masons" from Elk, Moose, and other adult social clubs. Letter from Donald Herzog to Sanford Levinson (June 5, 1986).

30. See Arthur Leff's proposed definition of "seal" as a "way of saying 'this counts,' 'this is for keeps,' 'we're not kidding around any more' and similar things. Seals are not the only mechanism of that kind; the archaic language and ceremony of a marriage . . . has something of the same intent." *A Letter from Professor Leff to a Prospective Publisher*, 94 YALE L.J. 1852 (1985).

31. Post, *Reputation and the Constitution: The Social Foundations of Defamation Law*, 74 CALIF. L. REV. (forthcoming); see E. DURKHEIM, *DIVISION OF LABOR IN SOCIETY* 108-09 (G. Simpson trans. 1933); K. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 13 (1966).

nity" necessarily means that "tolerance must at some point or another come to an end. Exactly where that point is depends a great deal on the importance one attaches to the viability of community and to the exercise of freedom of expression as a reflection of individual autonomy."³² In any case, the limits of tolerance may be marked by oaths that both measure assent to the community's central propositions and put the oath-takers on notice of the boundaries beyond which they go only at peril of communal reproach.

I am particularly interested in three kinds of communities, marked by three kinds of oaths: (1) the *polity*, which can call on its members to take an oath of loyalty swearing their commitment to certain beliefs — usually involving the legitimacy of the state, its particular political structure, or its ideological aspirations; (2) the *marriage*, marked by wedding vows, by which (in our culture at least) two individuals join together in constituting a special kind of common enterprise; (3) the *religious denomination*, whose adherents often engage in creedal affirmations or similar public confession of their belief in its essential propositions.

Perhaps the most interesting and important aspect of all of these oaths is their role as signifiers of a transformed consciousness. The transformation signified is often a purportedly "new" (or, at least, substantially changed) identity on the part of those taking the vow. This signifying role is clearest in the wedding vow, but a transformation certainly can be present elsewhere as well, especially in political naturalization and religious conversion. For instance, the symbolism of religious conversion often includes "birth" or "rebirth"; after all, we have been told that only a person willing to lose his or her life "will save it, and live."³³ Also, it is surely no coincidence that one of the major events of the recently enacted national liturgy involving the restoration of the Statue of Liberty was a nationally televised oath-taking, which transformed recent immigrants into fellow citizens.³⁴

32. Post, *supra* note 31; see also Yudof, *supra* note 5 (education has function both of promoting autonomy and preserving community by transmitting communal values).

33. Luke 17:33 (New English Bible) ("Whoever seeks to save his life will lose it; and whoever loses it will save it, and live."); see also Matthew 10:39; Mark 8:35. Professor Sollors notes the frequency with which such "conversion" imagery appears in autobiographical narratives of immigrants detailing their becoming "Americans." He offers as an example the beginning of Mary Antin's *The Promised Land*: "I was born, I have lived, and I have been made over. Is it not time to write my life's story? I am just as much out of the way as if I were dead, for I am absolutely other than the person whose story I have to tell." W. SOLLORS, *supra* note 10, at 32 (quoting M. ANTIN, *THE PROMISED LAND* xi (1921)).

34. In the context of commercial transactions, any transformations manifested by an ordinary contract are usually of small import to the individual's self-conception. In any event, I am not claiming to be introducing hard-and-fast analytic distinctions so much as pointing to our common recognition that there remains an important difference between agreeing to be bound to

III. POLITICAL LOYALTY OATHS

Loyalty oaths have been part of American history from its (English) origins in the seventeenth century. The Puritan settlers of New England had agreed even before leaving old England to prohibit settlement of those "not conformable to their government," and by 1634 local governments measured conformity in part by a citizen's willingness to take an oath of loyalty pledging, "by the great and dreadful Name of the Everliving God," to be "true and faithfull" to the government of the commonwealth. This entailed, among other things, a commitment to "yield assistance and support thereunto," not to mention "submitting myself to the wholesome Laws and Orders made and established by the same." Perhaps most interesting (or ominous) is the promise that "I will not plot or practice any evil against it, or consent to any that shall do so; but will timely discover and reveal the same to lawfull authority now here established, for the speedy preventing thereof."³⁵ And the very first item printed, in 1639, by the first printing press in the English-speaking colonies was this loyalty oath.³⁶

The controversy about loyalty oaths is as old as their use. Roger Williams was only the most famous protestant against the Massachusetts Bay Colony oath; since his time, the conflict between the proponents and opponents of oath-taking has never ceased. Part of the reason for the intensity of the debate has to do with the history of the United States as both a revolutionary and an ideological community. Many persons regarded the American Revolution as a distinctively ideological struggle between the friends of "liberty" or "republican virtue" and the corrupt forces of the English court.³⁷ There was nothing "natural" about the social character equipped to maintain a republican political order; the community had to monitor actively the individuals who composed the social order and make sure that they did not succumb to decidedly unvirtuous temptations.

For obvious reasons, monitoring was especially important during the Revolution itself, when the fate of the fledgling country depended on the transformation of patriotic loyalties from England to the newly

the terms of a commercial contract and agreeing to be bound to another in, say, a marital relationship.

35. *Quoted in* H. HYMAN, *TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY* 14-15 (1959). Hyman's is the standard history of loyalty oaths.

36. *Id.*

37. *See* B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969). *See also*, however, F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985), for a magnificent portrayal of the mixture of views contending with one another in the post-Revolutionary United States.

declared United States of America. George Washington himself wrote in December 1775 "that it is high time a test act was prepared and every man called upon to declare himself; that we may distinguish friends from foes."³⁸ He also advised each of the new states to "fix upon some oath or affirmation of allegiance, to be tendered to all the inhabitants without exception, and to outlaw those that refuse it."³⁹ The Father of our Country thus helped to spawn its first loyalty oaths, as both the Continental Congress and the states followed his advice. And Harold Hyman, the ranking American historian of loyalty oaths, has pointed out that Washington was notably insistent on enforcing the congressionally mandated loyalty oath.⁴⁰

I do not necessarily mean this as criticism of Washington. Many writers have pointed out that an altogether plausible implication of "consent of the governed" is the manifestation of actual consent through a loyalty oath.⁴¹ It would have been paradoxical indeed had a revolution based in part on consent proved indifferent to how that central attribute of a legitimate government would be ascertained. And, to put it mildly, it has not proved easy for liberal theorists to derive more satisfactory theories of political obligation. Many candidates, including the Lockean chestnut of "tacit consent," are significantly less respectful of individual autonomy than the emphasis on overt oath-taking.

Loyalty oaths have recurrently returned to the forefront of American political consciousness whenever the United States has been (or has been perceived as being) at war. Thus the great clash of 1861-1865 provoked both the Union and the Confederacy to guarantee the loyalty of their citizens by requiring oaths. In the modern period, the "Cold War" has been the principal factor generating the demand for proofs of loyalty, and American politics of the late 1940s through the early 1960s featured regular struggles about the propriety of loyalty oaths. Those who regard themselves as "liberal" in their political views have criticized loyalty oaths and have argued that a liberal state has no business inquiring into the political views held by its members. Their (*i.e.*, our) obligation is not to affirm or otherwise hold certain

38. H. HYMAN, *supra* note 35, at 74.

39. *Id.* at 85. See, for a modern variant, the recommendation by Phillipine Justice Minister Neptali Gonzales that charges of rebellion, a capital offense under Phillipine law, be dropped in regard to those members of the military who would swear loyalty to the Aquino government. The news report indicated that "oath-taking ceremonies were held at camps throughout the country." *Marcos Running Mate, 40 Others are Charged in Revolt*, Boston Globe, July 29, 1986, at 4, col. 5.

40. H. HYMAN, *supra* note 35, at 82-84.

41. See P. SCHUCK & R. SMITH, *supra* note 26, at 27-28.

beliefs, but rather (and only) to behave in conformity with legal requirements.

In the modern period, struggles over loyalty oaths have often taken legal form and led to pronouncements of the Supreme Court concerning their constitutionality. One of the great testaments in behalf of what I defined above as the liberal notion of a behaviorally oriented state can be found in *West Virginia State Board of Education v. Barnette*,⁴² a case decided during World War II. A child who was a member of the Jehovah's Witnesses was punished for refusing to enact a peculiarly American form of the loyalty oath — the pledge of allegiance to the American flag at the beginning of the public school day, as required by state law. The Supreme Court reversed the child's suspension from the public school, with Justice Jackson writing one of the most-quoted sentences in all constitutional law: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁴³ Justice Frankfurter dissented, saying that the state could legitimately try to inculcate patriotism through a compulsory pledge of allegiance. *Barnette's* "fixed star" is almost invariably cited whenever the state tries to require its employees to take loyalty oaths indicating their commitment to certain beliefs, including, for example, the impropriety of overthrowing the American government by force or violence. Indeed, it is difficult to see how *any* oath could survive Justice Jackson's own statement of the American *credo*. And, after a somewhat checkered pattern of case law, the Court has proved quite hostile to most loyalty oaths, though it has refused to reject them entirely.⁴⁴

A taste of the current doctrine of American constitutional law is provided by *Cole v. Richardson*,⁴⁵ in which the Boston State Hospital dismissed a research sociologist because she refused to take an oath required of all public employees in Massachusetts. The oath was as follows:

I do solemnly swear (or affirm) that I will uphold and defend the Consti-

42. 319 U.S. 624 (1943).

43. 319 U.S. at 642.

44. See Umbach & Levinson, *Die Zulassung zum öffentlichen Dienst und die Schranken der politischen Betätigung der Beamten in den USA*, in *EXTREMISTEN UND ÖFFENTLICHER DIENST: RECHTLAGE UND PRAXIS DES ZUGANGS ZUM UND DER ENTLASSUNG AUS DEM ÖFFENTLICHEN DIENST IN WESTEUROPA, USA, JUGOSLAWIEN UND DER EG* 559, 569-75 (E. Bock-enforde, C. Tomuschat & D. Umbach eds. 1981) (on constitutional protection of political rights of U.S. civil servants).

45. 405 U.S. 676 (1972).

tution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.⁴⁶

The Court, through Chief Justice Burger, upheld the oath. Yet the majority went out of its way to affirm several earlier decisions, extremely controversial less than a decade before, striking down a variety of oaths. Thus the state cannot condition employment "on an oath that one has not engaged, or will not engage" in such speech as "criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office." Nor may employment be conditioned on oaths "denying past, or abjuring future, [constitutionally protected] associational activities" such as "membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose."⁴⁷

Cole represents what might be termed a "minimalist" position in regard to the demands that the state can make of its employees. Of course, our state and federal governments have not required a general loyalty oath from the citizenry as such; it is primarily those seeking government employment (including membership in the armed forces) or joining licensed occupations like the bar who are forced to swear even the minimal oath. Otherwise oaths are absent. Whatever the ideological emphasis on consent in the American polity, our allocation of citizenship has a heavily descent-oriented aspect derived from the fourteenth amendment, which makes birth within the territory of the United States a sufficient condition for citizenship and whatever benefits that status brings. It is not, for example, a prerequisite for voting that one swear even a *Cole* oath.⁴⁸

The United States *does*, however, look into propositional beliefs and require a loyalty oath of nonemployees in at least one important instance — when a person wishes to join our polity. As a predicate condition for becoming a naturalized citizen, applicants must show themselves "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."⁴⁹ As David Weissbrodt writes, "The purpose be-

46. 405 U.S. at 677-78.

47. 405 U.S. at 680.

48. It is also worth mentioning that one other common occasion for the swearing of a loyalty oath is in applying for a passport entitling one to leave and enter the United States. Why an oath should be required for a passport, but not for a ballot, is not self-evident.

49. Immigration and Nationality Act § 316(a), 8 U.S.C. § 1427(a) (1982). Requirements for naturalization are summarized in D. WEISSBRODT, IMMIGRATION LAW AND PROCEDURE IN A

hind this requirement is the admission to citizenship of only those persons who are in general accord with the basic principles of the community.”⁵⁰ Courts have identified these principles as including “belief in representative democracy, a commitment to the ideals embodied in the Bill of Rights, and a willingness to accept the basic social premise that change only be effected in an orderly manner.”⁵¹ Among other disqualifications for citizenship is voluntary adult membership in the Communist Party or any other totalitarian group, as well as the advocacy, irrespective of membership in any particular organization, of the overthrow of the United States government by unconstitutional means.⁵²

One aspect of satisfying these predicate conditions is the applicant’s taking an oath, as set out in the United States Immigration and Nationality Act. The Act prescribes a fivefold oath that must be taken, “in open court,” by the citizen-to-be:

(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law.⁵³

Whatever one might think of this particular set of commitments, it is worth noting that *only* naturalized citizens must make them in order to establish their status as citizens and to receive the benefits of that status. Given the modern view that the State can only minimally distinguish between citizens and resident aliens (or other “persons”) in allocating burdens or benefits,⁵⁴ the principal benefit conferred only on citizens is the right to vote and thus choose those who govern.⁵⁵

As a person born in the United States, however, I received *my* citizenship — and suffrage — “for free,” as it were, without any require-

NUTSHELL 161-90 (1984), *excerpted in* T.A. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 859-68 (1985).

50. D. WEISSBRODT, *supra* note 49, at 173.

51. *Id.*

52. See Immigration and Nationality Act § 313, 8 U.S.C. § 1424 (1982).

53. Immigration and Nationality Act § 337(a), 8 U.S.C. § 1448(a) (1982).

54. See the materials collected in T.A. ALEINIKOFF & D. MARTIN, *supra* note 49, at 834-49.

55. This distinction between citizens and noncitizens, it should be emphasized, is contingent rather than logically necessary. As Gerald Rosberg has pointed out, a number of states allowed resident aliens to vote throughout the nineteenth century. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1116-35 (1977).

ment of an affirmative manifestation of community membership on my part other than formal registration to vote. I have, of course, taken several loyalty oaths, one when I became a member of the California bar, others when I accepted employment at various universities, and yet another when I applied for a passport. Many other native-born citizens of the United States have also been forced to take such oaths, but what is more significant is the presence in our polity of literally millions of compatriots who have never had to swear fealty to the United States or its Constitution.

Thus the obvious question: Why does a naturalized citizen have to take an oath in order to vote while I do not? One formal answer to this question is simply to argue that it is misleading. Naturalized citizens do not take an oath "in order to vote," but rather in order to become a citizen, which renders one eligible to vote. And one might go on to point out that the fourteenth amendment assigns citizenship to every person "born . . . in the United States," so that an oath for native-borns is wholly superfluous.

The question, though, concerns the extent to which we ought to collapse the status of "citizen" into that of "voter." We certainly know that in fact citizenship does *not* entail a right to vote. The most important historical example in this country is certainly women, whose citizenship did not protect them from denial of the franchise until the passage of the nineteenth amendment. And today we deny such citizens as children, convicted felons, and some of the mentally retarded the right to vote. So even a textual explanation of why I become a *citizen* without having to subscribe to an oath cannot explain why I am entitled to participate in community decisionmaking by voting even absent any overt willingness to make a public commitment to minimally shared values.

One might argue, of course, that merely by being born and raised in the United States, I absorb the central values of American culture in a way that people born and raised elsewhere do not. This is an empirical rather than a theoretical proposition. One might devise techniques for measuring "Americanness" — and its partners "non-American-ness" or even "un-American-ness" — and see what the actual results are when placed against a sample population. In any event, there is certainly reason to doubt whether simply breathing the free air of the United States is enough to ward off the distempers that may threaten the maintenance of our noblest political ideals.

The United States has always been more notably pluralistic than any other major world community. Indeed, from its inception, it has

been obsessed with what makes one an "American."⁵⁶ And the United States is becoming ever more genuinely pluralistic as immigration patterns shift from traditional emphasis on Europe to Asia and Latin America.⁵⁷ "Americans" speak different languages and worship different gods. Hackneyed references to the "Judeo-Christian" tradition will not prove attractive, one suspects, to those who come from the Far East. Even among native-born citizens, examples of pluralism abound. Among other things, parents can send their children to private schools imbuing values significantly antagonistic to those of the public schools. Certainly one can debate the extent of a common political or cultural identity within the United States.

Might one rationally require that a loyalty oath identical to that asked of our new citizens be asked even of native-born persons, at least if they wish to participate in community decisionmaking through voting? Why should persons who refuse to adhere to central community tenets even conceive (or be allowed by others to conceive) of themselves as members of the community? If readers are offended by this suggestion, then they should ask themselves why it is legitimate to impose such a requirement on naturalized citizens. Why do we not open membership in the American polity to all persons simply on a first-come, first-accepted basis, save for any further exclusionary standards that would have to be rigorously "content-neutral" in regard to political beliefs?⁵⁸ This would allow the United States to exclude the sick or the indigent, but not the Communist or, for that matter, the Afrikaaner refugee whose greatest delight would be the establishment of apartheid in North America. No longer could newspaper stories be written about immigration officials interrogating applicants for citizenship on their knowledge of, or commitment to, principles of "Americanism."⁵⁹ Why do we assign the right to vote on the basis of mere

56. See W. SOLLORS, *supra* note 10, at 40-65.

57. See Reinhold, *Flow of 3d World Immigrants Alters Weave of U.S. Society*, N.Y. Times, June 30, 1986, at A1, col. 5, which notes that only five percent of the 570,000 legally admitted immigrants arriving in the United States in 1985 came from Europe; nearly half came from Asia, and migration from Latin America constituted another 40%. Moreover, in absolute numbers, more immigrants will arrive legally during the 1980s, approximately six million, than during any other decade in our history save for 1901-1910, when 8.8 million immigrants arrived. If illegal immigration, estimated at 300,000 to 500,000 per year, is added, then the numbers could surpass even that earlier highpoint. (Immigrants, however, constituted a significantly higher *percentage* of the population during these earlier periods. Indeed, today the United States' percentage of foreign-born residents (7%) is substantially less than Australia's (20%), Canada's (16%), or France's (11%).)

58. For the emphasis on "content-neutrality" as a major foundation of contemporary first amendment doctrine, see, for example, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Widmar v. Vincent*, 454 U.S. 263 (1981).

59. See Lowenstein, *Immigration Aides Base Big Decisions on 15-Minute Chats*, Wall St. J., June 5, 1986, at 1, col. 4.

descent? In order to test our response to such a suggestion, I want to discuss, and examine our response to, what may appear to be a sharply different example of words that bind — the wedding vow.

IV. THE INTENTIONAL COMMUNITY OF MARRIAGE

Even among intellectual circles thoroughly imbued with the skeptical ethos of late twentieth-century modernism, one finds people getting married. Indeed, a particularly interesting phenomenon is the decision to “get married” that is made by irreligious couples who have lived together for some years. This may mean only that they make an appearance in front of a justice of the peace; often, though, oaths are ceremonially taken in front of friends and family. What do such couples believe they are doing? One answer, whose obviousness should not mask its significance, is that they are announcing a transformation of status, from that of “singleness” (or atomism) into that of marriage.

At least within the major traditions of the West, the public taking of vows has long been a part of entering into marriage.⁶⁰ During the medieval and early-modern periods, the “betrothal” was more significant than the actual “wedding,” and an agreement was the key to a successful betrothal.⁶¹ Although the church through this period was (successfully) attempting to play an increasingly significant role in the ceremonies of marriage, “the church’s own courts recognized that, in the absence of church rites, the various forms of betrothal — spousals, handfasts, trothplights, contracts, represented a valid marriage.” The required proof for a valid marriage was “that vows had been made voluntarily, in the present tense, or when in the future tense were followed by intercourse.”⁶²

According to Gillis, “The seriousness of a commitment was measured by the degree of publicity that attended it. Promises made in private were regarded as having little worth as compared with those

60. See J. GILLIS, *FOR BETTER, FOR WORSE: BRITISH MARRIAGES 1600 TO THE PRESENT* 16 (1985). Gillis points out that more informal traditions exist, both in other societies and within our own. For Trobrianders the sharing of food apparently performed the same function as the articulation of words, and our own history has included “common law marriage” where there is no formal exchange of vows. See also L. MAIR, *MARRIAGE* 88-103 (1971) (chapter on “Marriage Procedures”).

61. The seventeenth-century political theorist Samuel Pufendorf referred to the “common Maxim of the Lawyers that *Consenting and not Bedding, makes a Marriage*.” S. PUFENDORF, *OF THE LAW OF NATURE AND NATIONS*, bk. 6, ch. 1, § 14, at 451 (2d ed. 1710) (1st ed. 1672) (emphasis in original), quoted in R. GOODIN, *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* 72 (1985).

62. J. GILLIS, *supra* note 60, at 20.

before witnesses.”⁶³ The vows spoken in the sixteenth century are recognizably similar to those probably taken by the married readers of *this* essay. Thus John Brotherton in the 1560s pledged to Alice Ince, “Here I take the, Alice Ince, to my wief, before all other women, so God me helpe”⁶⁴ By the seventeenth century, one reads of a blacksmith marrying his friends by commanding them to confirm their intention “to have and to hold for better for worse, till death us do part.”⁶⁵

How do we conceptualize marriage? One answer is provided by David Hartman:

Marriage is an invitation to enter a relationship that is close and intimate but that does not abolish the individuality of either partner. The commitment to respond to the feelings and needs of the other is so strong that the other becomes a part of one's own self-definition, yet the same commitment implies that the other is recognized as an individual with a will distinct from one's own.⁶⁶

Although each partner remains “autonomous, . . . it is an autonomy in which the relational framework is fundamental to one's self-understanding.” In comparing this to the covenantal relationship between persons and God, the central topic of his book *A Living Covenant*, Hartman points to “a similar fusion of relational self-understanding and autonomy. The love of the covenantal community for God is such that its members do not act with an isolated consciousness. Their self-definition includes their relationship to God”⁶⁷

Hartman captures with great beauty the difference between a genuine relationship — including a covenantal one — and a mere contractual agreement. The latter is presumably often the product merely of self-interested reasoning; each party collaborates only because of an individual decision that egoistic interests will be better served by agreeing than by rejecting an offer. There is no notion at all that “an isolated consciousness” is overcome merely because two parties agree to a joint endeavor. Hartman is working within a distinguished tradition; it was Hegel, after all, who defined as “shameful”⁶⁸ a marriage that is “degraded to the level of a contract for reciprocal use.”⁶⁹ The

63. *Id.* at 38.

64. *Id.* at 44.

65. *Id.* at 45.

66. D. HARTMAN, *A LIVING COVENANT: THE INNOVATIVE SPIRIT IN TRADITIONAL JUDAISM* 5 (1985).

67. *Id.*

68. G. HEGEL, *PHILOSOPHY OF RIGHT*, ¶ 75 (1821), *quoted in* R. GOODIN, *supra* note 61, at 91.

69. G. HEGEL, *supra* note 68, at ¶ 161 additions, *quoted in* R. GOODIN, *supra* note 61, at 91.

point, Hegel says, is to "transcend the standpoint of contract" as the marriage partners grasp their relationship in terms of "love, trust, and the common sharing of their entire existence."⁷⁰

The American view of contract is that there is precious little *obligation* to adhere to the agreement if one of the parties comes to a decision that a breach would be, in the language of the trade, "efficient."⁷¹ Someone who keeps a contract even where simply paying damages would have been cheaper is regarded with some perplexity, perhaps even ultimately labeled "irrational." The marriage relationship defined by Hartman and Hegel is obviously something different. If the other truly becomes part of one's own self-definition, then the language of egoistic individualism is no longer descriptively adequate.⁷² In harming the other (or not being concerned with achieving the good of the other), one is also in a significant sense harming oneself (or expressing insufficient concern about one's own well-being).

Obviously the vows that announce (or are a performative utterance establishing) one's "marriage" announce as well an *already* transformed consciousness, whereby one has accepted the potential of self-redefinition in terms of this new two-person community. It would indeed be odd if this act were performed in "private" because almost by definition one is eager to affirm to the world this transformation of self. If one is willing to be married *only* in private, that would seem to suggest strongly, in the absence of some special circumstances, that one should hesitate to get married at all.

An additional aspect of marriage vows is that they announce an unequivocal priority of commitment to the new spouse.⁷³ To "forsake all others" may or may not include sexual fidelity. However, it almost certainly must include the renunciation of overriding emotional loyal-

70. G. HEGEL, *supra* note 68, at ¶ 163, quoted in R. GOODIN, *supra* note 61, at 91.

71. A breaching party, to be sure, has a duty to pay damages, so that the victim of the breach gets the benefit of the bargain, but a presumption exists against requiring "specific performance." The most famous statement of this view is surely Holmes': "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — *and nothing else*." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (emphasis added); see *Redgrave v. Boston Symphony Orchestra*, 602 F. Supp. 1189, 1194 (D. Mass. 1985) (relying upon Holmes' bad man theory of contract law). However, my colleague Douglas Laycock has in conversation labeled a "myth" the classic notion articulated by Holmes. According to Laycock, "Courts frequently grant specific performance of contracts for the sale of ordinary goods if scarcity, time constraints, or the sheer size of the contract make it difficult or impossible to cover." D. LAYCOCK, *MODERN AMERICAN REMEDIES* 368 (1985). See generally *id.* at 364-97; D. Laycock, *The Scattered Remnants of the Irreparable Injury Rule* (manuscript in preparation).

72. See, however, G. BECKER, *A TREATISE ON THE FAMILY* (1981), for a modern effort by a Chicago economist to explain marriage in exchange theory and contractual terms.

73. The comments made about marriage do not depend on rejection of bigamy or other forms of polygamy. Presumably a bigamist has a different level of commitment to his wives than to others.

ties to any other person besides one's spouse, at least so long as competing loyalties are not legitimated by being entirely descent-based, as would be the case, for example, with loyalties to one's parents or children. What presumably cannot be tolerated is the prospect of multiple *consent*-based loyalties.

In the case of both politics and marriage, the oaths are in obvious tension with social realities: emigration and expatriation are real options for many, and divorce rates testify to the reality of similar options for the married. Some have even suggested that latter-day wedding vows take these new realities into account, though no one, I think, has suggested a plausible set of oaths. Does one pledge, for example, to love, honor, and protect "so long as nobody better comes along," "so long as you fulfill my needs," or whatever?⁷⁴

Nor does one see the argument, often asserted with regard to political loyalty oaths, that it is fruitless to ask for overt promises because of their manifest ineffectiveness — or worse. Thus, Donald Herzog has written, about political oaths, that they "generate not loyalty, but hypocrisy, resentment, and even secret illegal behavior . . . , even as pushing for religious conformity in early modern Europe multiplied religious opposition."⁷⁵ Presumably, anyone who intends to be loyal will be so without a specific promise, and those who are in fact disloyal will further demonstrate their perfidy by cheerfully lying about it and making promises that they have no intention of carrying out. Yet why do we not accept similar arguments in regard to wedding vows, which almost undoubtedly generate measures of "hypocrisy, resentment, and even" the particular "secret illegal behavior" of adultery? Instead, we accept these consequences because of the presumably greater goods generated by the availability of the wedding ceremony and the public exchange of vows.

Our ability to adopt ironic postures toward protestations of undying future love or commitment is a testament to our modernity. But our willingness to continue exchanging such vows — and to be moved at the wedding ceremonies we are privileged to attend — is a testament as well to our recognition of the possibility of a transformed (and socialized) consciousness. If that is the case with the dyadic community that we call marriage, then why not with more embracing communities that we call polities?

74. I am informed by Prof. Ellen Kandoian of wedding ceremonies in Maine during the 1970s that pledged durability of the marriage "as long as love shall last." Letter from Ellen Kandoian to Sanford Levinson (September 23, 1986).

75. Letter from Donald Herzog to Sanford Levinson (June 5, 1986).

V. AN "INTIMATE" POLITY?

In *A Living Covenant*, Hartman goes from the most personal of relationships, that with one's spouse, to the most cosmic of encounters, that with God. I am more interested in an intermediate relationship, that with one's fellow members of a polity. Can one imagine referring to one's fellow citizens in the same terms that Hartman evokes? Can we say, that is, that the invitation to enter a political community is (or ought to be) similar to beseeching a newcomer to forgo an "isolated consciousness" and replace it with "a relationship that is close and intimate"? Does one want to offer the polity as a candidate for a "relational framework . . . fundamental to one's self-understanding"? Surely one of the powerful visions running through much contemporary social thought is that of political community. Yet inevitable tensions exist between the notion of liberal freedom, with its historic emphasis on individuated, if not indeed isolated, consciousness, and the claims of community.⁷⁶

Even within liberalism itself, though, the question of loyalty oaths takes on a new dimension when one factors in the liberal emphasis on *consent* as the basis of political obligation. That notion, of course, has always proved theoretically recalcitrant. Active consent as an operative principle seems to doom the state to practical impotence; among other problems is that no one who had not given such consent would be obligated to obey the laws of the state. Those persons who manifest clear desire to join the political community accord it great legitimacy — after all, they made an affirmative decision to enter it, but the state is usually interested in imposing notions of obligation upon everyone, not only the active consenters. Thus is derived the Lockean solution of "tacit" consent, though this ultimately removes what is most attractive about active consent. Tacit consent maximizes the number of persons obligated, but loses the strength of a legitimacy based on the (active) consent of the governed.⁷⁷

One way of handling the problem of consent — and of remaining faithful to one of the best aspects of the liberal heritage — is through a loyalty oath. That presumably is at least one of the reasons behind the requirement that new citizens take such an oath. Native-born citizens, like myself, are presumably viewed as manifesting tacit consent, but no such assumptions are made about naturalized citizens, even if they have lived in the United States for many years as resident aliens.

76. See M. SANDEL, *supra* note 14, at 59-65.

77. There is a direct relationship between the numbers of persons obligated and the trivialization of what counts as "consent" of the governed. I am grateful to Jim Fishkin for emphasizing this point in conversations with me.

If we were willing to adopt a more explicitly Rousseauian vocabulary, we could talk of the process whereby "men" (or "women") become transformed into citizens. It is not at all coincidental that Rousseau is also associated with the notion of "civil religion," whereby the state inculcates its authority in part through adopting techniques borrowed from sectarian religion.

The transformation from personhood into citizenship is, of course, not at all inevitable.⁷⁸ Michael Walzer has suggested that most contemporary "citizens" of a country like the United States are more accurately described as psychological resident aliens than genuinely active participants (the *sine qua non* of most theories of citizenship) in the society.⁷⁹ One need not condemn this passivity, but social and political theory must take account of such realities. More particularly, one must ask if a country consisting primarily of resident aliens⁸⁰ can sustain itself as a community with ideals worth professing.

VI. CREEDAL ORTHODOXY AND RELIGIOUS COMMUNITIES

David Hartman's book is ostensibly about the relationship between God and human beings. However, this relationship is ultimately mediated through a Jewish *community* that in turn becomes part of the essential self-definition of the individual Jews. But the question of wedding vows is also implicated in Hartman's metaphor. As I understand Hartman's theology, God indeed enters into the covenant with Jews and Judaism, first with Abraham and then much more importantly at Sinai. Although Hartman rejects any claims of Jewish exclusiveness in being God's elect (God presumably can be a bigamist), there is nonetheless a promise of some special relationship and of at least some degree of care and protection.

Do Jews *qua* Jews make some kind of covenantal affirmation on their part in order to make the marriage "kosher," as it were? Is there a Judaic "Apostles' Creed" that defines what it means to be Jewish, so that refusal to affirm its tenets serves to indicate one's disaffiliation from the community? Historically, at least, that has not been a major aspect of Judaism, though the religious liturgy certainly contains aspects similar to propositional creeds.⁸¹ Many Jews do not in fact at-

78. See J. SHKLAR, *MEN AND CITIZENS: A STUDY OF ROUSSEAU'S SOCIAL THEORY* 57 (1969).

79. M. WALZER, *Political Alienation and Military Service*, in *OBLIGATIONS* 99-100, 112-13 (1970).

80. Whose status is a function of their being "alienated residents." See *id.* at 114.

81. Thus one modern prayerbook prefaces the "Sh'ma" — "Hear, O Israel: The Lord our God, the Lord is One" — with the comment, "We formally affirm God's sovereignty, freely pledging Him our loyalty." *SIDDUR SIM SHALOM* 284-85 (J. Harlow ed. 1985). And the song

tend services, in part because of an inability to affirm these creeds, yet they do not lose their identity as Jews. Membership in the community for most is biological, *i.e.*, being born of a Jewish mother, and no one is asked to indicate his or her adherence to a list of theological propositions. In this sense, Judaism is an example of a "descent-based" community.⁸² Conversion to Judaism raises a number of fascinating problems, though even there one finds relatively little emphasis on the propositional content of Judaism; far more important is the expressed willingness of the convert to take on the behavioral duties attached to Judaism.

The reference above to the Apostles' Creed points to the creedal (and intentional) nature of what is numerically the principal religion within the Western tradition. Membership in many branches of the Christian religious community requires public commitment to their particular creeds, the particular church's propositional "understanding of the meaning of Scripture."⁸³ As Professor Leith notes, "The creed has the negative role of shutting the heretic out and setting the boundaries within which authentic Christian theology and life can take place."⁸⁴

"Yigdal" that often concludes Sabbath religious services "is based upon thirteen principles of faith articulated by Maimonides." *Id.* at 327.

82. See W. SOLLORS, *supra* note 10.

83. CREEDS OF THE CHURCHES: A READER IN CHRISTIAN DOCTRINE FROM THE BIBLE TO THE PRESENT 8 (J. Leith 3d ed. 1982). The asking of such a commitment, and the intensity of feeling surrounding its affirmation, may vary, of course, not only among the particular denominations of Christianity, but also across the time embraced within the history of a given denomination. See, for example, a recent description by Professor Lief Carter of the local Episcopal church that he attends and in which he "actively participate[s]":

It has become crystal clear to me that *no* shared theological or ideological basis constitutes this community or permits smooth mediation of disputes. . . . My church community is constituted of and mediated by symbols, rituals, musical and rhetorical performances, displays of good character and, above all, affection expressed through conversation. Theology is rarely mentioned outside the service. When it comes up, it is as likely to start a fight as it is to mediate one.

Carter, *Jumping: Mashaw on Due Process in the Administrative State* (Book Review), 1986 AM. B. FOUND. RESEARCH J. 141, 148-49. What, then, does it mean to call oneself an "Episcopalian"? Is a "conversational community" the same as a "faith community"? See also note 109 *infra*.

84. CREEDS OF THE CHURCHES, *supra* note 83, at 9; see, e.g., Berger, *Vatican Tells Priest to Retract Views*, N.Y. Times, Mar. 12, 1986, at A17, col. 1, detailing a letter sent to Catholic University Professor Charles Curran from Joseph Cardinal Ratzinger, prefect of the Sacred Congregation for the Doctrine of the Faith. The Vatican took exception to Father Curran's views on the legitimacy of birth control and other sexually related activities, and he was requested to "reconsider and retract these positions which violate the conditions necessary for a professor to be called a Catholic theologian." *Id.* at col. 4. Cardinal Ratzinger, in an action approved by Pope John Paul II, subsequently revoked Father Curran's right to teach theology at Catholic University "in light of your repeated refusal to accept what the church teaches." Goldman, *Vatican Curbs U.S. Theologian Over Liberal Views on Sex Issues*, N.Y. Times, Aug. 19, 1986, at 1, col. 2. The Chancellor of the University, Archbishop James Hickey, stated that he fully support[ed] this judgment of the Holy See The Holy Father and the bishops have the right and the duty to insure that what is taught in the name of the church be completely

There are obvious political analogies to creedal affirmations. Thus naturalized Americans, at least, cannot be radical "protestants" in defining what "Americanism" means to them, as can presumably those of us who are native-born "Americans." *We* are free to regard the Constitution as an abomination and even support its violent replacement by a more agreeable substitute; naturalized citizens, however, are formally bound to swear that their new self-definition of being "American" will include *at least* the propositions laid out in their oath — and these propositions refer not simply to something that might be called generalized "national" loyalty, but also to the specific creedal affirmations laid out in the Constitution.⁸⁵

VII. THE SPECTRE OF MULTIPLE COMMUNITY MEMBERSHIPS

Thus far this essay has examined three notions of self-definition, and of actual and potential oaths announcing those definitions. I want to conclude by focusing upon perhaps the most important problem generated by the idea of loyalty oaths — the requirement of exclusivity of attachment, whether to one country, one spouse, or one God.⁸⁶ All of these oaths are attempts to fend off the feared development of dual loyalty, which, like *imperium in imperio* in eighteenth-century thought, is seen as close to a logical absurdity.

Dual loyalty as an issue obviously cuts straight to the heart of both theory and practice. Consider Michael Walzer's comment that "a pluralist, at bottom, is a man with more than one commitment, who may at any moment have to choose among his different obligations."⁸⁷ However much we may choose pluralism as the preferred path for ourselves, there is inevitably something disquieting about recognizing the same pluralistic openness in our fellows, for it may be their presumed obligations to ourselves that they may choose to reject. Thus one can perceive loyalty oaths as a hedge against Walzerian contingency. Institutions and individuals, whether the state, one's spouse, or God, are, in sociologist Lewis Coser's term, "greedy,"⁸⁸ always seeking ways of making themselves the true centers of attention. Ideally,

faithful to its full and authentic teaching. The faithful have a right to sound teaching and the church's officially commissioned teachers have a particular responsibility to honor that right.

Id. at 14, col. 2.

85. Once within the polity, though, naturalized citizens presumably acquire the same freedom of belief that we have and may repudiate the propositional oaths earlier taken.

86. See generally M. GRODZINS, *THE LOYAL AND THE DISLOYAL: SOCIAL BOUNDARIES OF PATRIOTISM AND TREASON* 5-8 (1956).

87. M. WALZER, *The Problem of Citizenship*, in *OBLIGATIONS* 205 (1970).

88. L. COSER, *GREEDY INSTITUTIONS: PATTERNS OF UNDIVIDED COMMITMENT* (1974).

from their perspectives, the kind of pluralism described — indeed celebrated — by Walzer becomes impossible. Few devotees of pluralism in the abstract are genuinely willing to embrace the divided loyalty of a spouse, for example, and those who take the nation-state with the utmost seriousness often prove just as uncomprehending of the legitimacy of multiple attachments.

Recall that in the basic American oath the new citizen is asked to “renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen.” We demand that naturalized citizens give priority to the new polity, although the notion of hyphenated citizenship recognizes the continuation of at least sentimental ties to the old culture as well. Such “abjuration” oaths are not universal, however. James Kettner, in his magisterial study of theories of American citizenship, writes of state naturalization policy following the Revolution that, although “[a]pplicants for citizenship were expected to swear or affirm publicly their allegiance to the new states,” only “[o]ccasionally [were] they required to disavow explicitly all foreign attachments.”⁸⁹ The Constitution, of course, made naturalization a matter of national, rather than state, concern.⁹⁰

The Naturalization Act of 1790, the first passed by Congress, required an affirmative oath of allegiance but did not require renunciation of previous commitments.⁹¹ That arrived only in 1795, with the passage of a more comprehensive naturalization act. Some of the pressures for revision were a result of the dislocations in Europe touched off by the French Revolution and the consequent warfare on the continent. The United States, committed to splendid neutrality three thousand miles away, proved attractive to “discontented Englishmen, aristocratic Frenchmen, German pietists fleeing forced military service, French planters escaping from West Indian uprisings led by Toussaint l’Ouverture, and Irishmen in flight from British repression.”⁹² This in-migration of a “large number of refugees with passionate political beliefs”⁹³ led to heightened concern about the prerequisites for becoming a member of the American community. The amended act required not only explicit abjuration, but also renun-

89. J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 218 (1978).

90. See U.S. CONST. art. I, § 8: “The Congress shall have Power . . . to establish a uniform Rule of Naturalization . . . throughout the United States.”

91. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

92. J.M. SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 23 (1956).

93. J. KETTNER, *supra* note 89, at 240.

ciation of any title of nobility borne by the newcomer.⁹⁴ Both the abjuration and the renunciation have been a part of American law ever since.⁹⁵

Yet to this day not all countries require abjuration of their new citizens. The most important example in the contemporary world is almost certainly Israel. The ability to become an Israeli citizen without renouncing prior loyalties is precisely what allows retention of United States citizenship (and passports), as loss of that citizenship requires explicit renunciation rather than the mere act of becoming a citizen of another country. To this extent, then, American law tolerates political bigamy so long as the second political marriage follows, rather than precedes, the acquiring of United States citizenship.

One does not have to be religious in order to be skeptical of the workability of bigamy, at least among equals. Similar doubts can arise concerning the implications of dual nationality. If conflicts arise, it is hard to believe that the United States does not expect a resolution in favor of itself where basic issues of loyalty are concerned. Consider, for example, the fate of Tomoya Kawakita, a dual national of both Japan and the United States who had lived in Japan during World War II and engaged in serious mistreatment of American prisoners of war. He was prosecuted and convicted of treason, a crime that can be committed *only* by a citizen; indeed, he received a death sentence. The Supreme Court, through Justice Douglas, upheld the conviction.⁹⁶

Kawakita had been born in the United States in 1921; he therefore had birthright citizenship. He went to Japan in 1939, traveling on a U.S. passport: "to obtain it he took the customary oath of allegiance."⁹⁷ Staying in Japan, Kawakita, after registering with the American consulate as an American citizen, entered Meiji University. "In April, 1941, he renewed his United States passport, once more taking the oath of allegiance to the United States."⁹⁸ Remaining in Japan throughout World War II, he accepted employment as an interpreter with a Japanese corporation that used American prisoners of war as factory workers. It was his conduct toward these workers that constituted the treasonable acts for which he was convicted.

Kawakita returned to the United States, on an American passport, in 1946. "He stated under oath that he was a United States citizen

94. Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

95. See Immigration and Nationality Act § 337(b), 8 U.S.C. § 1448(b) (1982) (renunciation).

96. *Kawakita v. United States*, 343 U.S. 717 (1952).

97. 343 U.S. at 720.

98. 343 U.S. at 720.

and had not done various acts amounting to expatriation.”⁹⁹ Only after his return, when he was recognized by a former prisoner of war, was he arrested, tried, and ultimately convicted. His lawyers argued at trial that he had renounced his American citizenship and thus had no duty of allegiance to the United States.

The courts found no evidence that Kawakita had actively renounced his citizenship. The Supreme Court did refer to “an administrative ruling of the State Department that a person with a dual citizenship who lives abroad in the other country claiming him as a national owes an allegiance to it which is paramount to the allegiance he owes the United States.”¹⁰⁰ This recognition of “paramount” status did not, however, prevent the Court from upholding the conviction — and the death sentence. It pointed out that Kawakita could have taken himself out of the reach of the treason laws by renouncing his citizenship in the United States. But having retained his citizenship, he also retained at least “a minimum of allegiance which he owes to the United States while he resides in the enemy country. . . . An American citizen owes allegiance to the United States wherever he may reside.”¹⁰¹

I presume that Israeli citizens, however much they may hold on to United States, Canadian, or other passports, are in fact expected unequivocally to prefer the interests of Israel over those of the other country. A truly complete dual citizenship, which would have to mean equally genuine dual loyalty (or else what do we mean by “citizenship?”),¹⁰² is no more an operative part of American ideology than is social (or legal) tolerance of bigamy. Yet current constitutional doctrine requires legal tolerance of dual citizenship,¹⁰³ even if not, at least not yet, of bigamous marriage.¹⁰⁴

But an equal promise of priority is included in the wedding vow. Not surprisingly, this conflict between the public and the private, the

99. 343 U.S. at 721.

100. 343 U.S. at 734-35.

101. 343 U.S. at 735-36.

102. Douglas Laycock, for example, notes that citizenship “is the definitive indication of the polity with which one is affiliated.” Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEXAS L. REV. 343, 388 (1981) (emphasis added). He seems to assume that the proper article is “the” rather than “a,” though dual citizenship requires the use of the latter.

103. See *Perkins v. Elg*, 307 U.S. 325, 329 (1939); T.A. ALEINIKOFF & D. MARTIN, *supra* note 49, at 917-33.

104. For what it is worth, I doubt that there is a plausible nonreligious rationale for the state’s prohibition of bigamy and most other atypical forms of marriage. In the absence of legitimate secular reasons, I would have little trouble interpreting the Constitution to protect such marriages against state regulation. I would, however, scarcely predict this as a likely development in the near future, especially given the Supreme Court’s egregious decision in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

family and the state, itself generates exquisite problems in the law. For example, most states grant testimonial privileges against the forced (or perhaps even voluntary) testimony by one spouse against another, and all states protect confidential statements from even voluntary disclosure before a court.¹⁰⁵

A classic tension in republican political theory, in fact, is that between the claims of chaste public life and the more sensual private realm. This is revealed by a telling piece of Americana, the debate at the time of the Revolutionary War over the official seal for the new country. John Adams suggested that the seal show Hercules, staring resolutely ahead at a mountain labeled "virtue," being enticed by a half-clothed woman labeled "sloth."¹⁰⁶ Political revolutionaries have always been suspicious of the sensual (and oft-times even of the family), precisely insofar as accepting its legitimacy allows the direction of energies (and loyalties) *away* from the life of the polity.

But religion itself also makes obvious claims of sovereignty as against other social institutions.¹⁰⁷ A staple of political theory following the development of the notion of political sovereignty by Bodin is that there cannot be two sovereigns within a polity. By definition sovereignty is an exclusive status. Yet anyone who takes (at least Western) religion seriously poses an alternative sovereign against the claims of the State, however much the claims are dissipated by doctrines like the Talmudic injunction to follow the local law or by Christian doctrines about God and Caesar.

The United States has its Jehovah's Witnesses and Amish — both radical Protestant sectarians — who render unto Caesar the most minimal of recognition. Israel, of course, includes a contingent of Jews

105. See Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631.

106. What was selected, of course, was the mystic pyramid and eye, with the slogan, "A New Order for a New World." See, e.g., United States, One Dollar Federal Reserve Note, serial no. F92945666C (1985), reverse side (on file in author's wallet).

107. See, e.g., Seib, *Religious Discord Rises Among Israeli Jews, Spurs Intense Debate*, Wall St. J., June 18, 1986, at 1, col. 1, which details the increasing conflict between "religious" and secular Jews in Israel, including a number of attacks by the so-called ultra-Orthodox on bus stops containing offensive advertisements. Seib writes that the

ultra-Orthodox seem to consider arrest and sentencing for such activities more a cause for celebration than consternation. On one recent morning, when religious Jews were being sentenced for bus-stop attacks, two handcuffed young ultra-Orthodox men burst into a happy song as they were led into a municipal court [in Jerusalem]. "God is our king, and only to him [sic] are we slaves," they sang as friends joined in.

Id. at 12, col. 1. See also the comment by Professor Paul Simmons of the Southern Baptist Theological Seminary: "[I]dentifying the Judeo-Christian posture with American nationalism is to lose the transcendent and absolute nature of the Christian faith. For Christians and Jews, loyalty to God must transcend any earthly loyalties." Quoted in Lasch, *What's Wrong with the Right*, TIKKUN, Number 1, 1986, at 23, 28.

who reject the legitimacy of the state because they interpret the traditional Jewish sources to foreclose the legitimacy of a "Jewish state" that is not Messianically founded. And, from the other end of the spectrum, a significant threat to Israel's integrity is posed by militant religious Zionists who interpret Jewish law to prohibit any voluntary renunciation of *Eretz Israel*, are seemingly threatening disobedience (and potential civil war) should an Israeli government agree to any such renunciation, as by an agreement with Jordan.

All political states, then, face the problem of multiple loyalties of their citizenry; this is the price of a pluralist culture. Some of the time the competing loyalty is to other political entities; on other occasions, though, the competitors are other institutions within the society, whether family or religious community. Generally speaking, we do not treat these competitors equally. Thus we find understandable — and endorse — the demand made by the United States that its new citizens repudiate their previous primary loyalties to other countries. Yet I am quite sure that most of us would condemn as totalitarian an explicit requirement by the United States (or any other country) that one affirm primary loyalty to *it* over the competing loyalties to family and religion. I believe that there is a greater problem here than the traditional learning allows.

VIII. CONCLUSION

Over 2500 years ago the prophet Amos asked, "Will two walk together, Except they have agreed?"¹⁰⁸ The particular context of his writing suggests that the "two" being discussed are God and the people of Israel. But the question haunts even a secular consciousness concerned with constructing social orders among human beings. To what extent can strangers walk together in everyday life unless they can count on one another to have agreed on a minimal common way of life or common morality, to have entered into what might portentously be called a common covenant based on those understandings? It is, after all, such understandings, whether or not predicated on myths of social contract or covenant, that help to define that elusive thing called "community."¹⁰⁹

108. *Amos* 3:3 (THE TWELVE PROPHETS 93-94 (A. Cohen trans. 1948)).

109. Cf. L. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS 15 (1985) (emphasis in original):

Communities are those networks of people who believe their past communications had meaning and who have faith that future communications will also have meaning. Community members do *not* necessarily share substantive beliefs. Good friends who disagree strongly about ideologies, scientific propositions, and questions of taste remain good friends as long as they continue to use the same communicative framework.

Concerns about loyalty can arise only in a pluralistic world of multiple communities. The handling of conflicts engendered by pluralism of communal attachment, especially when those communities are "intentional" in form, raises profound problems in both theory and practice, especially for those societies, like the United States, that classify themselves as "liberal." An essential question of our internal politics is what, if anything, constitutes the "common ground" of our social and political life. Is it sufficiently solid to allow us to walk together, or is it so divided by rifts and threatened by sinkholes as to make any journey precarious?

Robert Booth Fowler, reviewing Anthony Lukas' prize-winning study of three Boston families, *Common Ground*,¹¹⁰ notes the profound paradox contained within the title. The ultimate commonality seems to be only uneasily (indeed, angrily and sometimes violently) shared territorial space; otherwise, according to Fowler, Lukas "reflects modern liberalism's fundamental skepticism about basic answers in life." The lack of a common ground of "basic philosophical or religious answers," however, is viewed as "a positive thing, a basis for the virtue of social pluralism and intellectual diversity."¹¹¹ What, Fowler then asks, "is the 'common ground' this book is [ostensibly] about?" Beyond Lukas' own profoundly liberal ability to delineate with respect the radically discordant worlds of his subjects, "*Common Ground* finds and can offer us no common ground. It reflects modern liberalism at bay."¹¹²

No one can seriously doubt that genuinely stable common grounds are constructed out of years of everyday practices, just as a "marriage" is ultimately achieved in the relationship between the spouses. Yet, just as the achievement of marriage usually includes a constitutive oath, so do political entities recurrently turn to the loyalty oath as a means of achieving community by creating ties and bonds capable of withstanding the temptations posed by competitors.

I have tried to suggest, at the very least, that it may be much harder than we have recognized to develop a genuinely coherent approach to loyalty oaths once we move beyond "local" controversies posed by particular oaths in particular times. It may be, of course,

However, Carter also writes that "[e]ven in normal times the conversations that build communities need authoritative and hence undisputed starting points." *Id.* at 51-52.

110. J.A. LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1985).

111. Fowler, Book Review, 73 J. AM. HIST. 252, 252 (1986).

112. *Id.* at 252-53; see A. MACINTYRE, *AFTER VIRTUE* (1981), for an extended discussion around the theme that "[t]he notion of the political community as a common project is alien to the modern individualist world." *Id.* at 146.

that only such particularities are worth discussing, but that conclusion in itself would have significant implications for the way that we approach moral and political issues, including those generated by the notion of community. In the meantime, we are still left with the task of resolving our own views about the oaths we take — and require of others — when we adopt new citizenship, get a passport, get married, or join in religious fellowship.