
BOOK REVIEW

BEYOND SOVEREIGNTY AND UNIFORMITY: THE CHALLENGES FOR EQUAL CITIZENSHIP IN THE TWENTY-FIRST CENTURY

AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES. By Hiroshi Motomura. New York: Oxford Univ. Press 2006. Pp. 254. \$24.99.

BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION. By Peter J. Spiro. New York: Oxford Univ. Press 2008. Pp. 194. \$29.95.

THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP. By Linda Bosniak. Princeton: Princeton Univ. Press 2008. Pp. xii, 222. \$22.95.

*Reviewed by Rogers M. Smith**

Virtually everyone who will read these words was born in the latter two-thirds of the twentieth century. Our formative experiences during those years have led most of us to think about American citizenship in two ways that are not wrong, but are partly misleading, and are now changing.

We tend to think of American citizenship as membership in a sovereign state of the sort that we take to comprise the most important unit of world politics. And we think of American citizenship as something that should be and now largely is an essentially uniform status, conferring the same legal rights and duties on all those who possess it. Neither of these things has ever been wholly empirically true or normatively uncontested. The world has never been politically organized exclusively in terms of sovereign states, and many have never wanted it to be. Citizenship has never been essentially a uniform status, in American law or anywhere else, and many have never wanted it to be. But both things seemed true to a greater degree in the last third of the twentieth century than ever before — and, it now appears, than ever since. Today both citizenship as membership in a sovereign state and citizenship as a uniform status face empirical transformations and

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normative challenges that loom increasingly large. Just how much these conditions are really changing, and how we can and should respond, are the central issues facing the architects and bearers of American citizenship, as well as other forms of citizenship, in the twenty-first century.

This Review considers three books written for general audiences by leading scholars of immigration law and citizenship in order to assess how far they help readers to understand these challenges and possible responses: Hiroshi Motomura's *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States*; Linda Bosniak's *The Citizen and the Alien: Dilemmas of Contemporary Membership*; and Peter J. Spiro's *Beyond Citizenship: American Identity After Globalization*. As their titles suggest, these books have related but distinct foci, and this Review's concerns are not exactly those of any of the authors. Part I of this Review details the historic transformations in citizenship that merit consideration today. Part II examines the aims of these three works and evaluates the extent to which the authors realize them, while also exploring how the authors' arguments reflect and illuminate the transformations now occurring. Finally, in Part III, this Review contends that while these works make important contributions on their own terms, and also help readers grasp the emerging horizon of citizenship issues, they do more to clear the path toward that horizon than to take us far into the uncharted territories ahead. In order to undertake all the intellectual, legal, and political work now required in regard to citizenship, it is necessary to confront the political challenges of building enduring, effective forms of community that can thrive in a world of less than fully sovereign states and of many profoundly differentiated forms of political membership residing both within and beyond state boundaries.

I. TWO PARTIAL MYTHS OF CITIZENSHIP

To grasp the historical and political landscape upon which current transformations are occurring, this Part begins with some clarifications of the two assumptions about citizenship just identified: that in law, citizenship fundamentally means membership in sovereign states, and that the legal dimensions of citizenship, at least, are and should be largely uniform. Both assumptions have always been at best partial truths, so they are also partly myths, though for good reasons they came to be more widely embraced in the latter half of the twentieth century.

In the theories of international relations that emerged in that period, as well as in other academic endeavors and much legal and popular discourse, it became common to argue that, politically, the world was essentially divided into states that governed particular territories and populations, and that recognized the sovereignty of other states

over other populaces and regions, in return for reciprocal state recognition of their own sovereignty. Many traced this putative system of mutually respectful sovereign states to the Peace of Westphalia, which ended Europe's Thirty Years' War in 1648.¹ But as Stephen Krasner and others have argued, the two treaties comprising the Peace did not really originate the modern legal and political conceptions with which the Peace is now identified. Rather, those agreements between the French and Swedish monarchs and the Holy Roman Emperor authorized some violations, in regard to religion and other matters, of what would now be seen as state sovereignty.² Krasner credits Emmerich de Vattel and Christian Wolff with primary authorship of the idea that states "should not intervene in or judge domestic affairs in other states";³ he notes that the United States, with its long history of intervening in Latin America under the Monroe Doctrine, did not formally accept this principle until the seventh International Conference of American States in 1933.⁴ Because of America's dual legacy as both a nation born in revolution against a centralized imperial government and a nation that has always had an empire of its own, its officials have often resisted notions of centralized sovereignty at home while refusing to recognize full national sovereignty for other states abroad.

Prodded by mounting concerns over immigration and national security, as the United States rose to greater international prominence in the late nineteenth and early twentieth centuries, it increasingly gave its official endorsement to Vattelien conceptions of state sovereignty. Those affirmations came as part of a long global history in which many forms of feudal, tribal, theocratic, imperial, and federated systems that did not assign exclusive sovereign authority to identifiable states gradually lost sway to political regimes modeled in part on the European monarchical states that asserted novel claims to absolute authority in the seventeenth and eighteenth centuries. By the mid-twentieth century, after the spread of those models, two world wars, and the breakup of traditional empires, it made sense to say that states claiming international legal recognition to sovereign status, now often republics and often claiming to be "nation-states," represented the dominant, though by no means exclusive, form of political community

¹ Modern international relations scholarship has been particularly shaped in this regard by Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 41 (1948). See also PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 130 (2008).

² See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) [hereinafter KRASNER, SOVEREIGNTY]; Stephen D. Krasner, *Rethinking the Sovereign State Model*, 27 INT'L STUD. 17, 17-19, 34-38 (2001) [hereinafter Krasner, *Rethinking*].

³ Krasner, *Rethinking*, *supra* note 2, at 20.

⁴ KRASNER, SOVEREIGNTY, *supra* note 2, at 21-22; Krasner, *Rethinking*, *supra* note 2, at 20-21.

in the world. But even then, many states were parties to constraining bilateral or multilateral conventions and contracts, subject to coercion by more powerful states, and limited in their actual governing capacities in ways that circumscribed their sovereignty both in law and in fact.⁵ Large portions of the world's population still resided in political communities that were not full-fledged Vattelien sovereign states.

The experiences of the Second World War, in particular, made it seem more essential than ever before for all persons to be able to claim membership in a sovereign state that would accept responsibility for them. As both Bosniak and Spiro note, the émigré political philosopher Hannah Arendt famously argued in this era that citizenship in a political community was the prerequisite for having rights at all, the source of “the right to have rights”⁶ — a view that Chief Justice Earl Warren later wrote into American constitutional law.⁷ In a world recently scarred by totalitarian regimes engaged in mass expulsions, wars, and genocide, if a person did not “belong” to a state (and a state both concerned with protecting rights and powerful enough to do so), no rights appeared secure enough to be genuinely possessed, much less enjoyed.

But even as circumstances made citizenship in sovereign states seem imperative, the world remained in fact structured by a wide variety of political forms, and both continuing and new developments were further undermining Westphalian portraits of the global political environment in ways that have accelerated over time. The end of the Second World War saw the creation of the United Nations (UN) and its International Court of Justice, the Council of Europe, and also the North Atlantic Treaty Organization (NATO), which were all efforts to forge transnational institutions that could promote peaceful dispute resolution, international law and international security, and pursue other common objectives. Both the formal and practical powers of these institutions depended, however, on the willingness of their member states to take action, and NATO did not actually engage in active military operations until the end of the Cold War. But these new organizations and the heightened attention both to international law and to the multilateral security systems that they fostered made the reali-

⁵ DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* 31–38 (1995); KRASNER, *SOVEREIGNTY*, *supra* note 2, at 9–42, 152–219.

⁶ SPIRO, *supra* note 1, at 70 (citing HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 292 (2d ed. 1966)); *accord* LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 24, 117 & n.55 (2006).

⁷ *See Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967); *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting); SPIRO, *supra* note 1, at 83, 132.

ties of world politics more complicated than simply interactions among individual sovereign states.

The UN has contributed to further efforts to create international law treaties and institutions, including most recently the establishment of the International Criminal Court in 2002. From its ratification in 1953 on, the European Convention on Human Rights, eventually enforced by the European Commission on Human Rights and the European Court of Human Rights, also helped generate supranational regional institutions that have contributed to the establishment of the European Union. The European Court has formal legal authority to make decisions binding on its members' national courts, so many believe that it is more than simply a vehicle for the policies of sovereign states. The end of the Second World War also saw the creation of new economic agreements and institutions — including the World Bank, the International Monetary Fund, the General Agreement on Tariffs and Trade (GATT) (forerunner of the modern World Trade Organization (WTO)), and regional development banks — which have wielded economic power in ways that have restricted and sometimes restructured the domestic economic institutions and policies of many states. These have in ensuing decades been accompanied and sometimes rivaled by regional economic compacts, such as the North American Free Trade Agreement (NAFTA), which have withstood challenges to claims that their dispute resolution provisions and institutions infringe upon state sovereignty.⁸

In addition to these developments, a great multiplicity of other, less clearly enforceable international laws and treaties has proliferated, along with the spread of multinational corporations and transnational institutions, organizations and associations, and many forms of globalization that include expanded and intensified international economic, communications, and migration networks. At the same time, the sovereignty of many nation-states has been modified in the opposite direction by their acceptance of significant devolution of governmental power to regions and localities, such as Scotland and Wales in the United Kingdom and Catalonia in Spain.⁹

Bosniak and particularly Spiro argue that these varied innovations represent significant erosions in the sovereignty of states and that such transformations are likely to increase. Both they and Motomura

⁸ See Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385 (2000); Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 J. COMMON MKT. STUD. 743, 747–49, 753–54 (2002); Krasner, *Rethinking*, *supra* note 2, at 24–31. See generally *MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS* (Peter B. Kenen, ed., 1994).

⁹ Andrés Rodríguez-Pose & Nicolas Gill, *The Global Trend Towards Devolution and Its Implications*, 21 ENV'T & PLANNING C: GOV'T & POL'Y 333 (2003).

would agree that due to such changes, particularly the consequences of heightened immigration flows, it is increasingly insufficient to think of citizenship exclusively in terms of membership in one sovereign national state. Scholars and policymakers must recognize the proliferation of differing kinds of citizens or quasi-citizens, such as dual nationals, members of subnational, national, and supranational forms of political communities, resident aliens with local voting privileges, multinational corporate citizens, and much more. These authors display less agreement, however, on what empirical and normative weight should be given to the past and present limits on, departures from, and alternatives to sovereign nation-state citizenship.

To address those questions, it is necessary to recognize the limitations of the second partial myth of citizenship this Review has noted: the legal uniformity of citizenship. Here too, something which was not characteristic of the past became empirical and normative common sense in the late twentieth century, but now is once again being challenged. It is not controversial to assert that at the time of their nation's founding and throughout the nineteenth century, most Americans did not believe that their laws should define an identical bundle of legal rights and duties for all persons whom the law deemed "citizens." They accepted that different sorts of persons should have different sorts of citizenship (and that some people should not be citizens at all).

The list of legally recognized "differentiated citizenships" was in fact always more extensive than we often now acknowledge. National and state laws denied to women, minors, and varieties of nonwhite citizens certain political, civil, and economic rights enjoyed by white men, while naturalized citizens faced some temporary and some permanent differences in their citizenship rights compared to those possessed by native-born citizens. White men in territories also had different rights than those in states. States structured the rights of their citizens in ways that differed from each other and from national citizenship, sometimes disfranchising poorer white men. Corporations came to possess a form of jurisdictional citizenship. Overseas merchants could sometimes gain a form of "commercial" citizenship. Some religious groups felt, credibly enough, that the laws denied to persons with their beliefs civic privileges and accommodations that were accorded to more politically dominant denominations. Doctrines claiming that men and women should inhabit "separate spheres," that whites and nonwhites were best suited to, at most, "separate but equal" public statuses, that the native-born were inherently more trustworthy, that territorial inhabitants needed tutelage for full self-governing citizenship, that states' rights justified variations in citizenship, that the necessities of promoting the growth of American economic enterprises at home and abroad justified some economic forms of citizenship, that certain types of religion were more appropriate to

American citizenship, and more, all served to legitimate the elaborate differentiated legal structure of U.S. citizenship — when justifications were perceived as necessary at all.¹⁰

During the first two-thirds of the twentieth century, a combination of domestic and international political pressures, along with a range of other intellectual and social developments, generated pressures to unify these previously differentiated conceptions of American citizenship. Movement activists, American governing elites, and eventually most citizens came to regard many traditional doctrines justifying differentiated civic statuses, including “separate spheres” for the sexes and “separate but equal” arrangements for the races, as politically undesirable and morally inconsistent with equal citizenship. Americans then adopted constitutional amendments, antidiscrimination statutes, and judicial rulings that made legal differentiations in citizens’ rights and duties more presumptively illegitimate. The landmarks include the Nineteenth Amendment enfranchising women,¹¹ *Brown v. Board of Education*,¹² the 1964 Civil Rights Act,¹³ the Twenty-fourth Amendment banning the poll tax,¹⁴ the 1965 Voting Rights Act,¹⁵ the Indian Civil Rights Act of 1968,¹⁶ the Twenty-sixth Amendment enfranchising eighteen-year-olds,¹⁷ the 1990 Americans with Disabilities Act,¹⁸ and many other measures — some now revered, some still controversial. The dominant implication of all these amendments, statutes, and judicial rulings was that uniform, formally identical treatment of citizens should be the law’s default position, with departures from such treatment requiring special justification.

The reality, however, is that most American governing officials and most American citizens still believe that people (and corporations) have many different characteristics that the law, including laws defining access to citizenship and the rights and duties of citizenship, must somehow recognize — even if Americans disagree about the forms such legal recognition should take. As a result, American law still does not actually define citizenship statuses in a wholly uniform and formally identical fashion, nor is it ever likely to do so. The law contin-

¹⁰ For an overview, see ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

¹¹ U.S. CONST. amend. XIX.

¹² 347 U.S. 483 (1954).

¹³ Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 and 42 U.S.C.).

¹⁴ U.S. CONST. amend. XXIV.

¹⁵ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 42 U.S.C.).

¹⁶ Pub. L. No. 90-284, tits. II–VII, 82 Stat. 73, 77–81 (1968) (codified as amended in scattered sections of 18 and 25 U.S.C.).

¹⁷ U.S. CONST. amend. XXVI.

¹⁸ 42 U.S.C. §§ 12101–12213 (2000).

ues to structure, and indeed to add or elaborate, many forms of differentiated citizenship — state, national, and quasi-colonial, native and naturalized, human and corporate, juvenile and adult, homosexual and heterosexual, white and nonwhite, male and female, and more. Again, these civic differentiations are only being compounded by the developments that are eroding the always-partial primacy of exclusive citizenship in sovereign states.

The analyses of Motomura, Bosniak, and Spiro are all motivated in part by the fact that recent trends are adding growing numbers of overseas American citizens, persons and corporations possessing legal citizenship in two or more nation-states, and immigrants who lack legal citizenship but may be viewed as various classes of “Americans in waiting”¹⁹ or aliens with “some aspects of citizenship.”²⁰ All three analysts are also vividly aware that newer forms of differentiated membership intersect in turn with a variety of the older and some other new categories that collectively work to fragment the uniformity of citizenship statuses. These categories include racial and ethnic classifications, now expanded to include a greater variety of Latino and Asian Americans as well as multiracial identities; gender classifications, which lawmakers have been increasingly pressured to expand to a diversity of sexual orientations and conceptions of gender roles; and religious memberships, with the range of faiths increased and, in the eyes of many Americans, made more exotic by heightened immigration.²¹

Analyses of these new forms of citizenship and claims to citizenship, along with other continuing forms of differentiated citizenship, are needed because they raise questions Americans are finding hard to answer. The best known forms of traditionally differentiated citizenship in United States history — racial and gender discriminations — are now rightly infamous, with older doctrines of difference often seen as thin veils for systems of unjust subordination, exploitation, and exclusion. But many still believe that certain kinds of special rights and aid should be provided to women, nonwhites, the disabled, members of the native tribes, businesses, and more, in ways that preserve or extend civic differentiation. Yet it is enormously difficult to decide whether differently situated persons with different bundles of rights and duties are nonetheless meaningfully equal in their civic standing.

¹⁹ HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 8 (2006).

²⁰ BOSNIAK, *supra* note 6, at 81; *see also id.* at 82.

²¹ Recent works exploring these issues include *QUEER MIGRATIONS: SEXUALITY, U.S. CITIZENSHIP, AND BORDER CROSSINGS* (Eithne Luibhéid & Lionel Cantú Jr. eds., 2005); *AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001); and *SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM* (2007). For overviews of these trends, see *PETER KIVISTO & THOMAS FAIST, CITIZENSHIP: DISCOURSE, THEORY, AND TRANSNATIONAL PROSPECTS* (2007).

American legislators, jurists, and citizens are rightly anxious and uncertain about whether any or all of these forms of differentiated citizenship are legitimate, indeed desirable, variations in fundamentally equal civic statuses, or are instead new forms of unjust hierarchy.

So far, the nation's lawmakers and citizens have been unable to generate any coherent account of what forms of civic differentiation should be embraced and what forms should be banned. Instead, variations in legal civic status rest on ad hoc, contextual judgments of their current acceptability to influential groups and the public at large. American citizenship laws have evolved into an uneasy mix of presumptions in favor of uniform legal status with specific provisions creating multiple forms of differentiated citizenship. These combinations gain whatever stability they possess not from logic but from their political viability.

Perhaps that is the best we can hope to achieve, but this pattern obviously is a formula for ongoing contestation over what types of civic differentiation should be permitted. If America's great "citizenship" problem entering the twentieth century was "the problem of the color line,"²² its greatest "citizenship" problem entering the twenty-first is "the problem of the difference lines" — the problem of deciding when extending particular legal rights and obligations not assigned to all others represents a way of promoting rough civic equality in the face of actually differing resources, opportunities, and aspirations, and when doing so instead imposes on some persons inappropriately subordinated or marginalized civic statuses. These are problems or sets of problems that fall partly within, partly beyond, and that indeed are partly comprised by existing citizenship laws, policies, and boundaries.

Despite their differing aims, these three books collectively and successfully display many of these changes and the array of possible legal and political responses Americans might pursue. Understandably, the authors do not develop those responses in detail or make definitive cases for particular alternatives. But by understanding what they do accomplish, the directions in which they point, and the questions they leave unanswered, readers can gain insight into the problems that must be addressed and the options for doing so.

²² W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 8 (Henry Louis Gates, Jr. ed., 2007) (1903).

II. THREE VIEWS OF IMMIGRATION AND CONTEMPORARY AMERICAN CITIZENSHIP

A. *Americans in Waiting*

Hiroshi Motomura's book is in some ways both the most conventional and the boldest of the three works here examined. It argues for immigration policies that would be strikingly more receptive to new legal immigrants than those that now prevail, but it does so chiefly in terms of the interests of current American citizens. Co-author of the most important casebook on immigration and citizenship,²³ Motomura draws on his extensive knowledge of immigration statutes and cases and pertinent secondary literatures to argue that three conceptions of the relationship of immigration to citizenship are visible in America's past and present laws and policies. These are:

1) Immigration as a contract leading to citizenship, in which immigrants are understood to be asked to agree to certain terms of admission, even highly unequal ones, and to be bound by them thereafter — though they can also claim a right to have America live up to the accompanying promises it made to them (pp. 9–11, 15–62).

2) Immigration as affiliation with the American citizenry, in which immigrants begin with rights of personhood and, as they develop greater ties with America, eventually merit equal citizenship status. This process of affiliation can involve changing America as well as changing immigrants, but often affiliation has been understood in the United States to mean assimilation to dominant American cultural values and practices (pp. 10–11, 63–114).

3) Immigration as transition to citizenship, in which immigrants are presumed from the day of their arrival to be future citizens, "Americans in waiting," and so federal and state agencies treat them as virtually identical to citizens unless they show that they are not going to accept the opportunities for equal legal citizenship afforded them. Motomura sees this conception as prevalent to varying degrees from 1795 to 1952, for in those years federal laws required aliens to file a formal declaration of intent to apply for citizenship — to become "declarant aliens" — two or more years before they were naturalized. This period is what Motomura calls the "lost story" of "Americans in waiting," and if it has not been entirely lost, neither has any other writer attached the significance to it that he does. He details how many states bestowed voting rights on these "near-citizens" (though often with racial restrictions), while courts and public policies often

²³ THOMAS ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* (6th ed. 2008).

avored them in other ways over nondeclarant aliens. But the McCarran-Walter Act of 1952²⁴ made declaration of intent to apply for citizenship optional for those seeking naturalization, and this civic status declined in prevalence and significance. Conceptions of immigration as contract and as affiliation came to occupy center stage in American law and policies (pp. 8–9, 115–88).

Motomura's main goal is not to convince us via systematic evidence that these three conceptions best capture the historical themes of American immigration policies and citizenship laws, though his knowledgeable judgments deserve respect. He seeks instead to persuade us that "immigration as a transition to citizenship" (p. 8) is the most desirable model for American laws and policies, particularly today. He would not restore the requirement of filing a declaration of intent to naturalize, but rather would have American lawmakers treat all permanent resident aliens as if they had done so. This means making them eligible for all forms of public employment, for federal Supplemental Security income, a benefit denied them in 1996, and for food stamps immediately, without the current five-year requisite waiting period. It also means allowing them to vote in at least local elections during their first five years of residency, before they are eligible to naturalize, and restricting the grounds and procedures for deportation. If after five years these putatively declarant aliens chose not to naturalize, they would lose the vote and perhaps other benefits, though Motomura stresses that claims of personhood as well as prudence might support continued assistance (pp. 189–200).

These proposals are the bold part of Motomura's argument. His reasons for the proposals express the more conventional side of his views. He seeks a balance in which immigrants are made to feel welcome — by limiting their economic hardships and political disadvantages and permitting them to continue many of their distinctive cultural traditions — but are also encouraged to embrace citizenship in one relatively unified, harmonious American nation. Motomura is very conscious of America's long history of racial exclusions and discriminations and the harsh pressures to assimilate culturally often present in its immigration and citizenship policies, and he wants immigrants to feel entitled to "change America as much as America changes them" (p. 164). He believes that if immigrants are not made to feel that their new country is receptive to people of their race, national origin, and culture, they will be reluctant to integrate into their new nation, and this reluctance will in turn be used to justify further discriminatory and exclusionary measures (pp. 164, 188). For Motomura,

²⁴ Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

the “idea of Americans in waiting is the key to breaking this cycle for all immigrants” (p. 188). Here he is on solid ground: recent studies by political sociologist Irene Bloemraad and others, along with the lessons of historical experience that Motomura details, provide strong evidence that societies, like Canada, with more welcoming, multiculturalist policies of aid for immigrants, achieve higher levels of political integration and participation than societies, like the United States, with more demanding, “immigration as contract” or as “affiliation and assimilation” policies.²⁵

Nonetheless, Motomura’s arguments display a common but questionable normative onesidedness that parallels the one substantial weakness in his reading of the history of immigration rulings. His historical account misses the crucial role of immigration decisions in planting dubious claims of absolute sovereignty into American constitutional law, and his normative arguments lean too heavily on the undefended presumption that it is the interests of existing American citizens that matter most when deciding issues of immigration and citizenship.

Though in external affairs the United States from the outset claimed recognition for itself as a sovereign state of equal standing with the monarchical states of Europe, the ambivalences of Americans both about centralized power and about their obligations to neighboring states have meant that the notion of sovereignty never fit easily into the American constitutional system.²⁶ Domestically, the new nation had at best dual sovereignty, divided between the federal and state levels. The defenders of the United States Constitution were quick to assure proponents of state sovereignty that it enacted no “consolidation of the States into one complete national sovereignty,” with the states retaining “all the rights of sovereignty which they before had, and which were not . . . exclusively delegated to the United States.”²⁷ Prior to the Civil War, the English legal philosopher John Austin, whose theory of law insisted that it must always be possible to identify an ultimate law-positing sovereign, struggled with the American case, concluding that sovereignty in both the American states and the federal union rested with “the states’ governments as forming one aggregate body: meaning by a state’s government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legisla-

²⁵ See especially IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* (2006).

²⁶ See Keohane, *supra* note 8, at 749–52.

²⁷ *THE FEDERALIST* NO. 32, at 194 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

ture.”²⁸ As a matter of law, he was right; but this is a body that never meets to act directly on any matter.²⁹ Though formally it makes sense to say that those eligible to elect state legislatures collectively comprise the American sovereign, this sovereign is almost always more an abstract possibility than a live political actor.

In light of the politically and intellectually complex status of sovereignty in American constitutionalism, it is not surprising that for much of the nineteenth century courts treated immigration regulations as exercises of first state police powers, then the federal commerce power, and not as acts of national sovereignty (pp. 22–23).³⁰ It was thus significantly novel, and momentous, when in the first Chinese Exclusion Case, *Chae Chan Ping v. United States*,³¹ the Supreme Court held that Congress could override its treaty commitments to China and its issuance of a certificate of return to a Chinese immigrant because the “power of exclusion of foreigners” was “an incident of sovereignty.”³² Justice Stephen Field, otherwise a champion of freedom of contract, stressed that this sovereign power could never be “the subject of barter or contract,” so that if the U.S. government chose to break its own promises to permit an immigrant to re-enter, it could do so “at any time, at its pleasure.”³³ This was the origin of the doctrine of the federal government’s “plenary power” over immigrants, at least in regard to their entry and removal, a doctrine that Motomura correctly identifies as a vehicle for many ensuing oppressive actions and policies (pp. 26–37, 42–43).

Despite the directly contrary language in Justice Field’s opinion, Motomura’s reading of *Chae Chan Ping* and other plenary power decisions emphasizes the relationship of these cases to the notion of “immigration as contract” (p. 31) rather than their embodiment of what might be termed instead “immigration as sovereign discretion.” This reading goes against the judgment of much other scholarship and against much of what he defines contracts as involving.³⁴ Motomura

²⁸ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 222 (2d ed. London, John Murray 1861). Thus, sovereignty would not rest in “the common government,” which was “merely a subject minister of the united states’ governments.” *Id.*

²⁹ The closest approximations are when citizens choose their representatives to the Electoral College or the state legislators or state convention members who will decide whether to ratify constitutional amendments. Because those in one congressional district or state cannot vote for candidates in another district or state, citizens do not act as one aggregate body when they elect the Congress, only as district and state bodies acting simultaneously.

³⁰ See especially *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283 (1849), which analyzed fees for vessels entering the port of New York under the Commerce Clause doctrine.

³¹ 130 U.S. 581 (1889).

³² *Id.* at 609.

³³ *Id.*

³⁴ For other interpretations stressing the novel assertions of unbridled sovereignty in *Chae Chan Ping*, see, for example, BOSNIAK, *supra* note 6, at 51; STEPHEN H. LEGOMSKY, *IMMI-*

says that “contract is the idea of an agreement rooted in notions of promises, notice, and expectations” (p. 30). But in excluding Chae Chan Ping, who could claim a congressionally authorized certificate of return and the protection of a treaty, Congress broke its promises with relatively little notice and thwarted reasonable expectations it had authorized, and the Court upheld these actions by saying explicitly that notions of contract (even nineteenth-century notions of contract) did not apply.³⁵

Motomura’s motive for these rather strained readings appears to be to provide a lineage for recent discussions of immigration as contract, where these ideas have indeed been invoked both for and against claims of immigrants, and to show that immigration as contract can sanction unjust treatment (pp. 51–62). These are laudable objectives, but they lead him to minimize the significance of immigration cases as landmarks in America’s official embrace of doctrines of relatively unbridled national sovereignty, at least in external affairs, in the nineteenth century. Still more importantly, they prompt him to neglect the arguments for and against understanding immigration and access to citizenship today as matters of national sovereign discretion in which it is perfectly permissible to give overwhelming weight to the interests and preferences of the existing citizenry. As Bosniak and Spiro stress, that is a topic that needs to be addressed if we are to assess the changes now occurring in national sovereignty over citizenship.

And though Motomura is unquestionably committed to the human rights of immigrants and to more receptive treatment of them in the United States, he still displays a streak of perhaps unintended national chauvinism when he says, in regard to the use of ethnic, religious, and national origin “profiles” to detain immigrants, “The real test of profiling is how it affects citizens, and the worst aspect of plenary power is that it disregards the interests of citizens in choosing new citizens, and thus in shaping their national future” (p. 183). It is, at a minimum, not self-evident why it is worse to disregard the interests of citizens than noncitizens, and Motomura’s undefended assumption in favor of national citizens does not help us to think about the issues involved.

To his credit, however, he does make one observation that merits emphasis in reflections on sovereignty and citizenship. He warns that

GRATION AND THE JUDICIARY 177–222 (1987); SMITH, *supra* note 10, at 367–68; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862–63 (1987).

³⁵ See *Chae Chan Ping*, 130 U.S. at 609. Similarly, when Motomura discusses how in a different era the Supreme Court struck down certain grounds for deportation as “unconstitutionally vague,” *Jordan v. De George*, 341 U.S. 223, 231 (1951), he correctly observes that this standard is generally applied to criminal statutes. Yet he still suggests a bit tendentiously that federal decisions employing such reasoning should be read as resting on “a contract-based emphasis on notice.” MOTOMURA, *supra* note 19, at 43–44.

if U.S. citizenship becomes less “meaningful,” the “less it means to be a citizen, the more other forms of belonging will emerge, many of them more parochial and less cosmopolitan or democratic, and more closely tied to the exclusionary workings of race, ethnicity, or class” (p. 166). In this he exhibits the perspective of a child of the modern civil rights era, in which the cause of equal national citizenship served to combat with real success a variety of deeply entrenched systems of discrimination. The lessons of that experience are indeed of great importance to an analysis of the trends and arguments that point toward lessening the significance of American national citizenship today. But to find explicit reflections on those trends and arguments, it is necessary to turn to the other two authors under consideration here.

B. *The Citizen and the Alien*

Linda Bosniak’s book extends arguments advanced in a number of her influential earlier writings, and her mapping in the first two chapters of different conceptions of citizenship and their attendant literatures is already becoming a staple of courses on citizenship in many disciplines (pp. 1–36). Her central aim, however, is to argue that we cannot hope to keep distinct two bodies of law that she sees as driven by citizenship concerns: immigration law, the rules defining which aliens have legal access to U.S. territory and sometimes thereafter to its citizenship; and laws defining the prerogatives of citizens, including the rules defining what legal rights aliens in U.S. territory have in comparison to U.S. citizens. Bosniak argues that efforts to keep these two legal realms distinct are driven fundamentally by desires to be “hard” and exclusionary toward outsiders who might in some way harm the existing citizenry, while being relatively “soft” toward citizens and welcoming even toward resident aliens, in order to foster a just and harmonious internal civic equality (pp. 4–5). She views Michael Walzer’s arguments distinguishing these spheres of policymaking as the most impressive theoretical defense of such positions (pp. 4–9, 39–53, 124–26).

Walzer has insisted influentially that distributions of social goods should be determined by the “meaning” of the goods in question — in other words, by the social understandings of those for whom, by whom, and to whom they are distributed.³⁶ Goods with distinct meanings should be distributed in “autonomous” fashion, via means and in patterns that their meanings make appropriate.³⁷ Among the great dangers that just, democratic societies must guard against is the danger that some systems appropriate for distributing certain social goods

³⁶ See MICHAEL WALZER, SPHERES OF JUSTICE 8–9 (1983).

³⁷ *Id.* at 10.

(such as markets or elections) will come to dominate the distribution of goods for which they are inappropriate (as when political offices are effectively purchased, or when public resources are doled out as political patronage).³⁸ Walzer has also contended that membership in a particular political community is itself a social good, one that is a basis for many if not “all the other social goods,”³⁹ and one that should be distributed in accordance with the meanings it has for members of that community.⁴⁰ The distribution of membership should not come to dominate all other concerns of justice and human welfare: it should not override all obligations a community’s members may owe to outsiders.⁴¹ But Walzer’s theory does hold that a political community can treat the “sphere of justice” for distributing the social goods of membership as a “sphere” that is distinct from the “spheres of justice” that involve distribution of goods to nonmembers.⁴² Even though a society cannot simply be “hard” toward outsiders and “soft” toward insiders, it nonetheless can treat them very differently.

In the central chapters of her book, Bosniak shows that these Walzerian distinctions cannot be rigorously maintained. She particularly stresses how the egalitarian, anti-caste concerns that Americans often stress in their “internal” laws, including laws affecting resident aliens, can be in tension with measures expressing goals of exclusion and restriction visible in their “external” immigration laws, as well as some domestic legislation (pp. 38–40). She highlights how the disregard for alien interests and the anxieties about various groups of aliens visible in exclusionary immigration policies have often worked politically to justify invidious internal discriminations at the local, state, and national levels (pp. 34–35, 38–39, 99–100).

The interweaving can work the opposite ways also, with internal inequities motivating immigration exclusions, while foreign policy concerns limit domestic discrimination. As Motomura notes, the quota system in the 1924 National Origins Act, which permitted immigrants from some nations to come to the United States in proportion to the share of the U.S. population that their fellow nationals had formed in 1890, did not count “the descendants of slave immigrants”⁴³ among the groups counted for purposes of constructing immigration quotas.⁴⁴ The Act’s legislative history makes it clear that it did not include the

³⁸ See *id.* at 10–13, 97–103.

³⁹ *Id.* at 63.

⁴⁰ *Id.* at 29. See generally *id.* at 31–63.

⁴¹ See *id.* at 42–63.

⁴² See *id.* at 42–95.

⁴³ MOTOMURA, *supra* note 19, at 128.

⁴⁴ *Id.* at 128, 132 (discussing the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (commonly known as the National Origins Act)).

descendants of slaves because many of its proponents wished to prevent the immigration of blacks, who might oppose segregation and otherwise contest American doctrines and practices of white supremacy.⁴⁵ Conversely, Cold War pressures later pushed the United States to lift racial bars on naturalization and to disavow formal domestic racial segregation. In both cases “external” immigration laws and “internal” laws governing alienage and citizenship proved to be deeply interconnected, not separate. What is more, officials at each level of government have also sought to uphold their turfs against the others, sometimes in ways that have assisted aliens, sometimes in ways that have harmed them, often in ways that have further confounded efforts to keep foreign and domestic regulatory arenas distinct.⁴⁶

In response to all these pressures, Bosniak’s analysis suggests that policymakers have several options. They can still strive heroically to keep discussions of immigration policies and domestic measures affecting resident aliens entirely separate — though her whole analysis suggests these efforts will ultimately prove futile. Alternatively, they can accept convergence in either of two directions: toward more generous treatment of aliens seeking to enter, or toward harsher treatment of aliens who are already within the nation’s boundaries. They can also seek to achieve a certain measure of coherence by advantaging and disadvantaging the same groups both in immigration rules and domestically — as when American immigration policies banned Asians and Communists from entering, even as Asian and Communist Americans were subjected to discrimination within the United States.⁴⁷ But though such consistency has often been politically popular, it generally has meant sacrificing normative aspirations to full and equal citizenship for all who are inside the political community — an aspiration that Bosniak rightly discerns to have become increasingly potent since World War II (pp. 31, 141 n.1). None of these options seems intellectually, politically, and normatively satisfying. Still, *The Citizen and the Alien* provides abundant evidence that various legislators, courts, and

⁴⁵ *Id.* at 128; see also 65 CONG. REC. 5960, 5961 (1924) (statement of Sen. Smith) (“Thank God we have in America perhaps the largest percentage of any country in the world of the pure, unadulterated Anglo-Saxon stock; certainly the greatest of any nation in the Nordic breed. It is for the preservation of that splendid stock that has characterized us that I would make this not an asylum for the oppressed of all countries, but a country to assimilate and perfect that splendid type of manhood that has made the American the foremost Nation.”). I am grateful to Robert Allen for calling this quote to my attention.

⁴⁶ See, e.g., DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 52–53, 58–59, 67–70, 113 (2002); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 20–23, 99–120, 185–98, 386–89, 402–10, 438–39 (2006).

⁴⁷ See MOTOMURA, *supra* note 19, at 38–42, 63–76 (discussing relation between citizenship and domestic policies of racism and anticommunism); TICHENOR, *supra* note 46, at 94–113, 138–49, 188–96; ZOLBERG, *supra* note 46, at 191–93, 316–17.

academics have at different times embraced all of these alternatives. The result has been a range of state and national statutes, executive actions, and judicial decisions in which this reader can discern no coherent pattern except that, as Bosniak argues, efforts to keep these realms truly apart cannot hope to succeed (pp. 53–101, 122–26).

This multiplicity of multidirectional measures, enacted today amidst rising numbers of permanent resident aliens, birthright citizen children of alien parents, dual citizens, and numerous sorts of temporarily resident aliens — all treated differently for some purposes on the basis of economic skills, gender, national origin, and more — together contribute to the persistence and indeed proliferation of differentiated statuses in relation to citizen rights that I noted at the outset. Bosniak has long argued, and she further details here, how some classes of aliens are in fact sufficiently possessed of some of the attributes of citizenship that it may make sense descriptively to speak of “alien citizenship” (pp. 2–4, 35, 81, 85, 93–95). Normatively, what does Bosniak think Americans should do about this interwoven yet differentiated body of immigration, alien, and citizen laws and statuses? Among the problematic alternatives she discerns for American policymakers, which ways should they go? Answering that question is not her goal in this book, but she is forthright about many of her own judgments.⁴⁸

Unlike Spiro, Bosniak believes that “postnational” and “transnational” forms of citizenship, though of growing significance, at present are so “limited” a part of the “citizenship landscape” that it remains appropriate to focus on “citizenship within the national society” (p. 6). Like Motomura, she remains strongly committed to the modern egalitarian civil rights ethos, and she is attracted to arguments like his that urge treating resident aliens, at least, as closely as possible to citizens (while treating everyone well). But though Bosniak is interested in the concept of “alien citizenship,” fundamentally she is “a supporter of personhood-based conceptions of rights” who does not give the priority to the interests of citizens that Motomura and most other Americans do (p. 95). She also recognizes that claims for better treatment of aliens based on citizenship values probably can never credibly extend to fully equal rights, precisely because aliens are at best “partial” citizens (pp. 99–100, 124, 131–32). As long as any distinction between aliens and

⁴⁸ Not all: Bosniak has an intriguing and insightful discussion of how more affluent American women today are often able to exercise greater economic and political autonomy, and so be fuller citizens, because domestic work they would formerly have been compelled to perform is now done by immigrant women. Bosniak persuasively rejects as too simple the argument that this means wealthy American women are securing full citizenship at the expense of poorer non-American women’s citizenship. BOSNIAK, *supra* note 6, at 115. But she gives us no sense of how she would have us deal with the very real problems of gender, class, and national inequalities she depicts. *See id.* at 102–21.

citizens is maintained, there are likely to be differentiations that many experience as disadvantages.

For Bosniak, then, the persistence of national citizenship, or indeed any form of “bounded solidarity” in which “compatriot insiders ‘take priority’ over non-national others and in which the territorial border encircling compatriots is policed against penetration by those others” (p. 125), is deeply problematic. She urges us to rethink the “taken-for-grantedness” of “normative nationalism,” of preferences for national citizenship over other forms of human membership, identity, and status (p. 135). She stresses how the privileging of conationals and residents on bounded national territories sustains global inequalities in ways open to charges of moral arbitrariness, indeed injustice (p. 134–39). And in a revealing footnote, she lists the motivations for “bounded solidarity” that she discerns. They include “hatred or xenophobia or hostility toward the other” or, alternatively, “selfishness, self-interestedness, or indifference” (p. 206 n.11).⁴⁹ Whether by oversight or choice, no notion that there could be anything morally commendable about attachment to particular communities, including national communities, appears. The implication of all the normative comments she interjects in a largely descriptive and analytical work is that we must somehow find a way to transcend the indefensibly unequal statuses that she sees national citizenship as necessarily entailing.

Because Bosniak does not believe that any alternatives to national citizenship are yet credible, her work, as the title suggests, is focused on delineating analytically perhaps irresolvable “dilemmas of contemporary membership,” not on arguing for any routes to progress. Her book thus helps us perceive the sources and character of many of the issues raised by differential citizenship statuses today, particularly those tied to the conditions of different classes of aliens. She leaves it largely up to us to decide what to do about them.

C. *Beyond Citizenship*

Peter Spiro, in contrast to the array of choices presented by Bosniak, advises that we really only have various “postnational” choices. He writes to convince us that we are already pursuing routes that are irreversibly leading to major transformations, indeed to the “fading of America” (p. 40) and of American citizenship — which may or may not prove to be progress (pp. 161–63). His book’s central thesis is that, as an empirical matter, “the ‘group’ defined by American nationality is breaking down, as reflected in its membership regime” (p. 131). And as part of this breakdown, “sovereignty . . . has been diluted” by inter-

⁴⁹ See also *id.* at 125 (“I am sympathetic to those ethical cosmopolitan theorists who have raised fundamental questions about [the] legitimacy [of citizenship as bounded solidarity].”).

national law, human rights norms, and a range of other developments that have made American citizenship much less a status with distinctive privileges, obligations, values, and attachments than it was in the past (p. 131). Those developments include the spread around the globe of political institutions and ideologies, economic systems, and cultural practices that make many of the states and peoples of the world almost as American as those who are formally Americans (pp. 50–52). American citizenship and legally distinct national citizenships more generally are not about to disappear, in Spiro’s view, but they simply matter less to people than in the past, for good or ill. Spiro does not think for a second that this means we are moving toward “a global state” of any sort (pp. 131–35). He expects “community differentiation” to persist, but in “different and more complex” forms (p. 131). He writes to encourage us to “confront the terms of the reordering” (p. 8), to “situate the national community among other communities” as it declines (p. 135), and to seek to work against new “structures of injustice” that may emerge and indeed are emerging in a world in which national citizenships matter much less (p. 8).⁵⁰

Though Spiro’s provocative claims push us to think about the right questions for today and the future, he can be criticized for sometimes overstating the evidence on the “fading” of American citizenship and national citizenships more generally. He builds here in part on his important previous work highlighting the growth of dual and indeed plural national citizenships — a growth occasioned by heightened population mobility, the spread of *jus soli* rules automatically attaching citizenship by place of birth regardless of parentage, and the increased willingness of countries to accept dual citizenship for the children of their citizens born in other countries and even for those adults who choose to reside and gain citizenship elsewhere. Many states today are not only recognizing but assisting multiple citizenships, for reasons that often involve national self-interest (immigrants provide remittances that can provide major boosts to national economies), as well as the spread of human rights norms favoring mobility, choice, and rights for all (pp. 19–32, 67–79).

Spiro is highlighting real phenomena, but to judge how far they are diluting the significance of citizenship in the United States or other modern states, it is necessary to obtain a clearer sense of their magnitude. Bosniak notes, for example, that more than three percent of the world’s population today have “migrated across national borders during their lifetimes” — nearly 180 million people.⁵¹ Even so, this means that ninety-seven percent of the people in the world have never mi-

⁵⁰ See also SPIRO, *supra* note 1, at 4–7, 132–35.

⁵¹ BOSNIAK, *supra* note 6, at 8.

grated. Though some of those persons may nonetheless have acquired dual citizenship in one way or another, Spiro provides us with no numbers on how many plural citizens the United States and other countries now have — only the plausible but not decisive assurances that the numbers display “dramatic growth” (p. 68) and “will surely grow” (p. 22) in the future. He also acknowledges that “plural citizenship,” which remains after all a form of membership in states, “may evidence the continuing relevance of states in the world order,” not their obsolescence (p. 74). He still thinks, though, that this trend will in the long run “further erode” national community in America and elsewhere as attachments become less exclusive (pp. 74–75). At a minimum, Spiro’s claim that plural citizenships are fostering greater complexity in state memberships is more persuasive than his suggestion that state citizenships are, as a result, ceasing to matter greatly.

Spiro is also not entirely convincing when he seeks to show the declining significance of sovereignty by asserting that states today seem “less competitive,” and that “defense” is “a mostly obsolete function, at least against other states” (pp. 78–79). Spiro believes that the major security issues now and in the future center on terrorism and violent crime, which are generally not perpetrated by states against states. They are undertaken by various, often transnational, groups, which must be combated by multilateral and subnational enforcement efforts as much as by national states (pp. 133–34, 138–40). Such groups are also often fought by private security forces that are sometimes employed by corporations, not states (p. 140). To Spiro, these patterns mean that the importance of the state as “a provider of security” has already “diminished” and will continue to decline (p. 138).

Again, there is evidence for the trends Spiro identifies, but it is difficult to be sure that they have gone as far and are as certain to persist as he believes. If national states today do not entirely have the monopoly of legitimate force that Max Weber saw as the defining characteristic of the modern state,⁵² it is still true that decisions to exert force even through multilateral organizations generally rest with national governments, and that such governments still assert authority over subnational provincial, state, and municipal ones. And the terrorist attacks of 9/11 did, after all, prompt the United States to launch wars against two states, the Taliban’s Afghanistan and Hussein’s Iraq, even if America also has sought to promote multilateral efforts to fight terrorism. Moreover, America’s old Cold War rival, Russia, has recently shown in Georgia that it is more than willing to engage in certain forms of interstate warfare to reassert the regional hegemony it en-

⁵² MAX WEBER, *The Profession and Vocation of Politics*, in *POLITICAL WRITINGS* 309, 316 (Peter Lassman & Ronald Speirs eds., 1994).

joyed in the days of the Soviet Union. Though Spiro, like many others, takes heart from the fact that in the broader historical perspective democracy is on the rise around the world, and democratic states appear not to fight each other, there is also evidence that non-democratic states are again resurgent in many places (p. 52).⁵³ It seems at best premature to assert that the central role of national states in matters of military security and policing is fast becoming a thing of the past. And as long as states are primarily exercising those kinds of coercive powers, citizenship in states is likely to remain highly significant to most people.

Spiro seeks to minimize that significance by contending that the spread of human rights norms limits not only how harshly states exercise force, but also how much they feel free to treat noncitizens worse than citizens. He suggests that in the Palmer Raids of World War I and the Japanese internment of World War II, the U.S. government took far harsher actions against resident aliens than it has taken in the wake of the 9/11 attacks (pp. 96–97). He is not wrong, but his argument again seems overstated in two ways. First, he neglects the fact that these earlier repressive actions in fact affected American citizens accused of subversion or simply of having Japanese ancestry, not just aliens.⁵⁴ This history underlines that, even in the years during which Spiro sees nation-state membership as genuinely primary, citizenship was often not the decisive indicator of which groups were privileged and which were targeted for repression. Instead, public policies and private conduct often differentiated among types of citizens and aliens in severely consequential ways.

Second, and still more pertinently, Spiro also understates the hardships Arab and Islamic immigrants have faced since 9/11. He writes that under the USA PATRIOT Act, suspected terrorist aliens can be detained only for seven days and must be released if immigration or criminal charges are not pressed within that time (p. 96). But Section 412 of the Act in fact authorizes the repeated renewal of such detentions without charges if the executive branch shows simply that it has “reasonable grounds to believe” that the detained aliens are engaged in terrorism.⁵⁵ The Justice Department has chosen not to exercise its Section 412 powers, but the powers’ existence has been an understandable

⁵³ Larry Diamond, *The Democratic Rollback: The Resurgence of the Predatory State*, FOREIGN AFF., Mar.–Apr. 2008, at 36.

⁵⁴ See MOTOMURA, *supra* note 19, at 187. See generally PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983).

⁵⁵ Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (codified at 8 U.S.C. § 1226(a) (2006)).

source of alarm for many immigrants as well as civil liberties groups.⁵⁶ Spiro also gives little attention to actions like the post-9/11 anti-terrorist National Security Entry and Exit Registration System (NSEERS), commonly called the “Special Registration Initiative,” which was targeted at keeping track of immigrants with Arabic and Muslim origins.⁵⁷ That program led to the questioning of roughly 130,000 male immigrants and alien visitors, the detection of some 9,000 illegal aliens, the arrest of over 800 criminal suspects, and the detention of 11 suspected terrorists, but it did not lead to the conviction of any terrorists.⁵⁸ Motomura is probably right that because of government enforcement efforts like these, plus a sharp increase in hate crimes against Muslims and persons of Middle Eastern ethnicity, “a climate of fear pervaded” America’s Arab and Muslim communities for at least several years following 2001.⁵⁹ Though Spiro is correct that public and private xenophobic injustices were worse at various points in America’s past than at present, it is not likely that many immigrants with these origins share his sense that American nationalism is well on its way to becoming a spent force. They are more likely to agree that even legal citizenship is not much protection against being perceived as too foreign to be trusted.

Similarly, Spiro sometimes sounds either unduly sanguine or insensitive when he suggests that, in regard to state social assistance programs, aliens in America already have virtually the near-equal status that both Motomura and Bosniak wish for them to have. Like those authors, he calls attention to how the 1996 Personal Responsibility and Work Opportunity Reconciliation Act,⁶⁰ which ended the federal Aid to Families with Dependent Children program, also made immigrants arriving after its enactment ineligible for all federally funded means-tested benefit programs like Temporary Assistance for Needy Families (TANF) and Medicaid for five years, with a state option to restore

⁵⁶ The Justice Department has responded to what it terms the “myth” of excessive authority under Section 412. See U.S. DEP’T OF JUSTICE, THE USA PATRIOT ACT: MYTH VS. REALITY, http://www.lifeandliberty.gov/subs/add_myths.htm (last visited Nov. 20, 2008).

⁵⁷ For the orders comprising the NSEERS, see Registration and Monitoring of Certain Immigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,641 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,525 (Nov. 22, 2002).

⁵⁸ Rachel L. Swarns & Christopher Drew, *Fearful, Angry or Confused, Muslim Immigrants Register*, N.Y. TIMES, Apr. 25, 2003, at A1. This meager record of results eventually led the Bush Administration to curb the initiative.

⁵⁹ MOTOMURA, *supra* note 19, at 186; see also Letter from Alliance of Iranian Americans et al. to President George W. Bush (Jan. 13, 2003) (available at <http://www.aiala.org/content/default.aspx?bc=6714%7C6866%7C10107%7C8123>) (requesting an end to the Special Registration Program).

⁶⁰ Pub. L. No. 104-193, 110 Stat. 2105 (1996).

them thereafter. It denied them Supplemental Security Income (SSI) and food stamps altogether. Spiro stresses correctly that states have since chosen to provide many benefits to their alien populations themselves, and that later federal laws have allowed permanent resident aliens to regain eligibility for federal assistance, except for SSI disability, five years after their admission (pp. 81, 89, 94–95). This is a classic glass half-full, half-empty situation. Spiro is surely right to regard the inability of legally admitted aliens to obtain food stamps for five years after arrival as a minor disadvantage in many cases; yet like SSI eligibility, it is also surely not trivial for many poorer and less-skilled immigrants. We are still in the process of learning how substantial these continuing official disadvantages are in times of more general economic difficulties. At a minimum, it is likely that they leave many resident aliens longing for the citizenship status that Spiro sees as no longer so important.

One final reason that Spiro is not wholly convincing when he tells us that we are moving “beyond citizenship” is that he pays little attention to the social-psychological dimensions of citizenship — how much people feel that their national citizenship is crucial to their identity. In part this neglect bespeaks hard-headed realism: we may learn more about what people really care about by looking at what they do, not what they say. For Spiro, if people are not acting as if national citizenship is important — if aliens are not naturalizing, if citizens are not voting, if globally mobile persons are blithely accepting two or more nationalities while primarily devoting themselves to transnational economic and civil society pursuits — then any self-reported strong senses of nationalism may be more psychologically interesting than politically or legally salient.

Still, Spiro himself contends that the “need for community” is among “the fundamental attributes of human character,” though he rightly argues that it can be and is met by many forms of community, not necessarily national ones (p. 131). He also believes that neither effective governance nor beneficent redistributive programs can flourish without senses of solidarity, though again he believes that while these are fading at the national level, they can be found elsewhere, particularly in the organizations comprising “civil society” (pp. 131, 134, 161). That many people are attached to forms of community other than nation-states cannot be denied, but there is also far more evidence than Spiro acknowledges that many Americans, in particular, still possess strong senses of national identity that are politically consequential. Their nationalism shapes their policy positions, their responses to candidates, and many dimensions of how they live. We need a fuller assessment of those patterns of belief and behavior before we can agree

today that “American citizenship no longer reflects or defines a distinctive identity” of great importance, as Spiro claims (p. 161).⁶¹

Spiro is broadly right about current trends, though he exaggerates how far advanced they already are and underestimates the political and policy obstacles against further development in postnational directions. For all the reasons Spiro gives, it does appear that we are evolving into a world in which claims to exclusive, unbridled national sovereignty are becoming less defensible in principle and less common in fact, and in which more and more persons belong to a number of political communities, none of which commands their exclusive loyalty. As all three of these books show, it is also a world in which issues of the differential treatment of varied classes of aliens and citizens are becoming more acute, whether seen from the standpoint of Motomura’s humanitarian nationalism, Bosniak’s universalism without illusions, or Spiro’s qualified optimism about the viability of these transformations. In the United States and in many other parts of the world, there are now simply more aliens and plural citizens, resident in more places, with much more division and confusion about the rights and statuses they have or should have, than in some other historical eras. These developments are indeed what we need to understand if we are to construct desirable forms of political community now and in the future. Part III offers some observations about what these three works help us to grasp and what they may miss in regard to this endeavor.

III. PROBLEMS AND PROSPECTS FOR TWENTY-FIRST-CENTURY CITIZENSHIPS

The contributions of these three authors are substantial. Whatever the limitations of his “normative nationalism,” Hiroshi Motomura helps us to see that if, by being less welcoming to immigrants, we resist the forces eroding national citizenship that Spiro details, we are likely only to add to their “alienation” from the American citizenry, thereby promoting destructive cycles of mutual distrust.⁶² Linda Bosniak makes it impossible for us to believe either that we can “compartmentalize” immigration, alienage, and citizenship laws, creating secure havens of civic equality for some while excluding others, or that we can unthinkingly treat the global system of highly unequal nation-state citizenships as legitimate — even as she cautions us about presuming that those citizenships are being transcended.⁶³ In some ways Spiro does the most of the three. He helps us to see how even such tradi-

⁶¹ See, e.g., Deborah Schildkraut, *Defining American Identity in the Twenty-First Century: How Much “There” is There?*, 69 J. POL. 597 (2007).

⁶² MOTOMURA, *supra* note 19, at 166, 188.

⁶³ BOSNIAK, *supra* note 6, at 6.

tional state functions as security and policing, along with social assistance and senses of meaningful membership, might be and indeed are fulfilled through a variety of means, including international, regional and subnational governmental rulemaking and adjudicatory bodies; transnational corporate, labor, and consumer organizations; new, boundary-crossing forms of civil society; and the vast array of networks and associations that now exist partly in cyberspace, but also as vivid parts of millions of people's everyday lives.⁶⁴

But Spiro does not devote much attention to the political tasks involved in constructing and maintaining thriving communities. While the other authors do not do so either, this neglect is particularly problematic for his argument, because it leads him to underestimate factors working to maintain existing national states and working against sustainable success for the other kinds of communities that he rightly sees as emerging. Much in the spirit of all three of these writers, I have previously argued that we should seek to create a world of interlocked "moderate" political peoples, in which states do not claim absolute sovereignty over the lives of their members, only "semi-sovereign" authority over certain arenas — a stance that would and should make it easy for such states to agree that their citizens can simultaneously be members of other communities, with obligations to those communities that should be honored. It is appropriate today to accept differentiated forms of civic status and to seek to make them substantially equal but not uniform.⁶⁵ But creating such a world of "semi-sovereign" states and equal but differentiated citizenships is enormously difficult politically.

Most people wish to believe that they belong to communities that can provide for their physical security and promote their economic prosperity while giving them a share of political power, and they also want to believe that those community memberships have ethical worth. Most leaders wish to have constituents who are loyal to them and to the communities the leaders head whenever conflicts arise with other leaders and communities. These facts mean that though leaders may relinquish claims to absolute sovereign power for their states and to the exclusive allegiance of their members when the leaders believe they can thereby gain wealth and power for their core constituents and themselves, they are likely to resist developments that threaten their interests — and they will do so by trying to persuade members that their physical security, economic welfare, and sources of moral value will be endangered if they do not embrace and support their political

⁶⁴ SPIRO, *supra* note 1, at 137–52.

⁶⁵ See ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* 130–35, 154–74, 202–03 (2003).

community and state more fully. Because most people have been socialized to believe that their safety, prosperity, indeed their very senses of identity and worth, are all bound up with the well-being of particular preexisting societies, many are likely to respond to leaders who tell them that any extensive embrace of new arrangements is dangerous and immoral. Politics is, moreover, a competitive game. Even if some current leaders and citizens support various changes, others can be expected to oppose them; and some will do so skillfully. And they will have one very strong moral argument on their side: so far, at least, human beings have not found ways to meet their needs and pursue their aspirations without being organized into particular communities. If we think it right to strive to meet many of those needs and aspirations, we must give the political requirements for sustaining those communities some normative weight.⁶⁶

So even though Bosniak is right to see dangers in all types of “bounded solidarity,” she is also right to doubt that it is politically feasible to eliminate them entirely; nor, in the absence of viable alternatives, does it seem right to try to do so. Scholars, policymakers, and citizens therefore have to confront the political task of devising more desirable forms of (less sharply) bounded solidarities. Conversely, even though Motomura may well be right to argue that Americans would be wise to treat legal immigrants, at least, as “Americans in waiting” in many ways, that case cannot be made by appealing chiefly to the interests of current American citizens. We must begin to build acceptance even among the existing American citizenry of the idea that new, modified, less sovereign, and more interconnected forms of political membership are in the interest of a number of the valued identities they feel themselves to possess, not simply and not necessarily their identities as Americans. And though Spiro is right to argue that a number of long-term trends are creating contexts in which more people are willing to create and embrace such “post-sovereign state” forms of membership and governance, the road beyond national citizenships is still likely to be far harder to construct and traverse than he contends. Political and legal supporters of that road therefore need to be aware of all the many challenges they face.

They must, for example, work to create regional trade agreements, international economic institutions, and multilateral treaties and domestic policies governing migration that work to advance the economic interests of all involved, rather than chiefly the wealthier classes in the more powerful participating states. Such policies are likely to include extending to immigrant aliens most of the rights of citizens, as all these writers wish, but such measures cannot be enacted unless the

⁶⁶ See *id.* at 19–71.

economic and cultural anxieties of the existing citizenry are successfully addressed. Advocates of change must also strive to develop multilateral security institutions that are effective, but that are not merely the instruments of strong states. And especially in economic and security matters, but also in other regards, new institutions and transnational associations must be structured, if not as plebiscitary democracies, at least in ways that permit those most affected to believe they have mechanisms that provide some meaningful voice in their own governance and enforceable protections for their rights. Moreover, proponents of more desirable forms of political membership must recognize that membership statuses are always highly differentiated, but that every differentiation may represent a form of invidious discrimination. We must self-consciously confront continuing tasks of making contextual judgments about which kinds of differentiated citizenship — by race, gender, ethnicity, sexual orientation, religion, national origin, age, disability, local, state, territorial, or multiple state residency, and more — are appropriate accommodations to the great range of legitimate human affiliations and pursuits, and which kinds are divisive and oppressive. In those judgments it is possible to gain some guidance from history, legal precedents, and political and moral philosophy, but it is likely that all such guides will need to be recurrently rethought and redefined.

That is a daunting list of assignments, and it is doubtful that they can be pursued successfully without greater attention to a political task none of these writers features: the generation of appropriate “stories of peoplehood,” narratives of community identity and membership that people are likely to find compelling in the twenty-first century. Communities cannot persist unless they are backed up by force, but they also cannot long survive on the basis of force alone. A critical mass of members must believe in the worth of their society, with worth defined not only in terms of wealth and political power but also in more directly normative ways — in terms of what I have called “ethically constitutive stories,” accounts that link community membership to features of persons’ own identities that are held to have normative value.⁶⁷ These features can include shared political principles, a valorized common ancestry or history, a rich culture or distinctive language, a common religious faith, and much more. The particular ethically constitutive stories that can win support vary for different groups with different histories in different contexts. But no forms of society can long endure if they are not supported by ethically constitutive accounts

⁶⁷ See *id.* at 59.

that can motivate and justify the demands those societies place upon their members.⁶⁸

If the leaders and members of existing states are to be persuaded to relinquish further aspects of their claims to sovereignty, then, those seeking to persuade them will need to develop moving accounts of why the new, interlocked, “different and more complex” forms of community and membership that Spiro sees emerging are associations in which persons can see their identities, aspirations, and normative ideals expressed and realized. Deeply entrenched and long-inspiring stories of America as the “last, best hope of earth” and a unique “city on a hill” must, for example, be combated (to put it bluntly) with some sort of narrative that explains why participation in NAFTA, NATO, the UN, the WTO, the International Court of Justice, the International Criminal Court, and other types of “post-national” arrangements represents the fulfillment of their participants’ identities and aspirations, more fully than traditional allegiances to America first, if not America alone. If readers are having a hard time envisioning what such narratives of transnational community should look like, that is understandable — and that difficulty dramatizes the reality that fostering powerful senses of commitment to these new associations is no easy task.

The challenge is all the greater because, as Spiro recognizes, communities “are in fact defined by difference,” so stories valorizing communities are always structured at least in part in particularistic ways that can militate against the merging of those communities with others.⁶⁹ Even worse, as all three authors recognize, the political pressures to present particular communities as distinctive and superior to all alternatives have often meant that communities have been defined in chauvinistic racial, religious, and cultural terms that make affiliations with many others on terms of equality seem not only unnecessary but actually corrupting.⁷⁰ Even if membership in sovereign nation-states is becoming less compelling to millions of people, they may still prove to be most attracted to other forms of community built upon doctrines that justify human bigotry. That is why efforts to promote human rights around the globe are so important.

Yet it is not sufficient simply to decry the tendency of particularistic memberships to promote unjust exclusions and discriminations. Again, as all these authors acknowledge, there is no realistic prospect that human beings can meet their needs without the division of the world into a variety of particular societies. If it is morally important

⁶⁸ See *id.* at 72–125.

⁶⁹ SPIRO, *supra* note 1, at 131.

⁷⁰ See BOSNIAK, *supra* note 6, at 135–39, 206 n.11; MOTOMURA, *supra* note 19, at 166; SPIRO, *supra* note 1, at 7–8, 162–63.

to meet human needs, it is impossible to dismiss the endeavors, even the dangerous endeavors, that are necessary for those societies to be created and sustained. So it is necessary somehow to develop compelling stories that celebrate and valorize memberships in a diverse range of particular communities without presenting any of them as so superior as to justify absolute sovereignty, total allegiance, or harsh treatment toward those viewed as the community's "outsiders" (even if they reside within it).⁷¹ Again, if it is hard to see what those kinds of stories of membership should look like, that fact only underscores that their creation is a vital but difficult labor for proponents of post-national, post-sovereignty citizenships that we have only begun to undertake.

And because even a world of semi-sovereign states linked to many other forms of human political association will be a world with a range of particular political identities and memberships, we will continue to have numerous nonuniform, multiply varied types of citizenship, crafted in the context of doctrines making claims for the distinctive worth of each. We will therefore continue to encounter intellectually and politically frustrating challenges as we strive to construct different civic statuses in ways that are reasonably equal and just. Those tasks are so difficult that we will feel strong pressures simply to define citizenship in formally identical, "universalistic" terms, as Americans often sought to do in the civil rights era. But as Bosniak shows, there can in reality be no genuinely "universalistic" citizenship in a world of differentiated communities and identities, and that is the only world we are ever likely to have.

The difficulties of these tasks do not mean that constructive changes cannot happen. As, again, all these books show, changes are occurring, and there are opportunities to shape those changes in better rather than worse ways.⁷² My point is that if desirable directions for transformations are to be found, there is much work to be done, including the often inadequately understood task of generating politically potent stories of membership and identity that can win and sustain support for forms of citizenship suitable to the conditions of the twenty-first century. In their different ways, these authors all help readers to understand and prepare for the challenges the world now faces, but reflection on what they have shown only underscores that there is much more to do.

⁷¹ See SMITH, *supra* note 65, at 132–35.

⁷² For further reflections on such possibilities, see, for example, Stephen D. Krasner, *The Case for Shared Sovereignty*, J. DEMOCRACY, Jan. 2005, at 69.