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## I N T R O D U C T I O N

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WHAT POLITICAL COMMITMENTS, if any, does a foreign-born person make upon joining the American polity by taking on the formal status of citizen? That question, among others, was raised by a case decided by the United States Supreme Court in 1943. It was an unusually volatile case, and Justice Felix Frankfurter, during the Court's consideration of the case on December 5, 1942, articulated what can only be described as a personal testament of faith by way of answering the question.<sup>1</sup> Naturalization is a process whereby, in Frankfurter's words, one must "shed old loyalties and take on the loyalty of American citizenship." What made his remarks so personal was his own status as an American by choice rather than by birth. Born in Vienna, he came to the United States in 1894, at the age of 12. He was unique among the justices in having become an American by process of naturalization, and he tried to convey to his fellow justices the meaning of becoming an American.

"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." Frankfurter described himself "[a]s one who has no ties with any formal religion," his commitment to Jewish belief or observance of Jewish rituals long since having ceased.<sup>2</sup> He admitted, however, that "perhaps the feelings that underlie religious forms [for others] for me run into intensification of my feelings about American citizenship."

He went on to read his colleagues a letter he had received from Professor Salvemini of Harvard, which referred to the "grand function" Salvemini had performed in taking the oath of citizenship. "[Y]ou are asked to give allegiance to the Constitution of your adopted country, that is, to an ideal life. Thus I took the 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." The justice 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."

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It is tempting to identify the intense feelings about American citizenship displayed by Frankfurter and Salvemini with ordinary patriotism—love of country. Patriotic Frankfurter surely was,<sup>3</sup> and for many persons of my generation (I came to adulthood in the 1960s), the meaning of patriotism was permanently sullied by its joinder with American involvement in Vietnam. The “new patriotism” promoted later by President Reagan only served to confirm one’s doubts about such “love” of country. But the sentiments expressed by Frankfurter and Salvemini are in fact more complex. After all, their devotion to country comes through identifying it with what one would hope to be its highest ideals. There is something terribly naive about describing the Constitution as incarnating “an ideal life.” But might there not be something equally distorting in denying (and refusing to share wholeheartedly) its aspirational vision, revealed most clearly in the Preamble, of a “more perfect Union” where “domestic Tranquility” is achieved because the “Blessings of Liberty” are used in behalf of “the general Welfare” in order to “establish Justice”?

This book is written out of the ambivalence registered in the last paragraph, where “patriotism,” measured as commitment to constitutional ideals, struggles against a wariness about a too-eager willingness to celebrate one’s own country, including the celebration of its Constitution. The book is intended to make clearer the ambiguities of “constitutional faith,” i.e., wholehearted attachment to the Constitution as the center of one’s (and ultimately the nation’s) political life. I write not in the belief that I can resolve these ambiguities—there will be many more questions than answers in the pages to come—but out of a conviction that there is an important conversation to be initiated about what it means to be “an American” in the late twentieth century. Of course, that is not a new question. J. Hector St. John Crèvecoeur, writing two centuries ago in *Letters from an American Farmer*, asked, “What is the American, this new man?” Our status as a country of immigrants has made the United States especially obsessed with self-referential questioning. One can converse across the generations with Calvinist ministers, Thomas Jefferson, Henry David Thoreau, Herman Melville, Frederick Douglass, and Abraham Lincoln, to name only some of the most distinguished contributors to American self-consciousness.

It is my obvious conviction, though, that the conversation is not merely “historical,” to be safely distanced somewhere in the past.

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Though my own concerns are no doubt linked in some ways to details of personal autobiography, I assume that in fact my persona is not so idiosyncratic that its concerns are without resonance in at least some of my readers. In particular, I assume that there are many persons who share a very strong sense of “being” American, but are without an equally confident sense of what that means, especially in regard to what, if any, political commitments that identity entails.

Consider, for example, the vivid words of Frances Wright, described recently as “an Americanized Englishwoman of the 1820s”:

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.<sup>4</sup>

Wright’s citation to “constitutional regulations” suggests one way of answering Crevecoeur’s (and her) question. Indeed, only twenty years ago Whittle Johnson—after asking, “What, then, does it mean to be an American?”—responded confidently: “To be an American means to be a member of the ‘covenanting community’ in which the commitment to freedom under law, having transcended the ‘natural’ bonds of race, religion, and class, itself takes on transcendent importance.”<sup>5</sup> The central “covenant” of the community, from this perspective, is the Constitution. Indeed, the neoconservative writer Irving Kristol, adopting Johnson’s argument, has recently cited the Constitution as part of the holy “trinity” of the American civil religion, along with the Declaration of Independence and the Flag.<sup>6</sup> Pledging faith in the Constitution, therefore, presumably defines one as a “good American,” a full member of our political community.

As a professor of constitutional law (a term whose ambiguities will be explored in Chapter Five below), I have significant reservations about defining “Americanism” in terms of constitutional fidelity. Too many problems emerge to allow such ebullient answers as are given even by serious scholars like Johnson or Kristol. Indeed, the central aim of this book is to identify and discuss the problems that emerge if one seriously grapples with the Constitution’s role as what might be termed the “constituent agent” of our identity as Americans. My con-

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cern is not so much to make a linear argument aimed at moving the reader toward some purportedly ineluctable conclusions (e.g., “this, and this alone, is the one best way to perceive the Constitution”) as to attempt what I hope will become a common exploration of what is at stake in taking the Constitution seriously as a presence in one’s life or, conversely, in rejecting that presence and relegating it instead to the status of any other legal document that occasionally imposes itself, through a court, into one’s personal life but is not otherwise of genuine significance.

Frances Wright speaks of “wedding” principle to heart. A central feature of weddings, of course, is the exchange of vows in which the “meaning” of marriage, in some sense, is reduced to a set of propositional utterances outlining what duties one is in theory taking on. Similarly, we have on many occasions tried to simulate such vows within the polity through the particular form of pledges of allegiance or political loyalty oaths whose implicit message is that the commitments of community membership (citizenship) can be reduced to words. Perhaps the most famous example of such a reduction is the Pledge of Allegiance, which includes a commitment “to the republic for which it stands.” As we shall see in both Chapters Two and Four, it may be no small matter to pledge one’s allegiance to maintaining a “republic” or to assert one’s “attachment” to the principles of the Constitution. In any case, this is an age that finds the taking of (and adhering to) such categorical oaths, or the making of unequivocal attachments, increasingly difficult, whether in one’s “personal” life, as in marriage, or in one’s “public” life, as in citizenship. Chapter Three therefore is devoted to an extended treatment of our feelings about a variety of oaths and affirmations.

One of the things we all now know about marriage is that there is no guarantee that it will endure through time. Early passion may turn into hollow form or outright desertion. We are more reticent in regard to the endurance of political communities. Yet of course history is a relentless tale of the rise, decline, and fall of such communities. Hegel’s comment is all too relevant: “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 enough to be any longer the bond of a nation!”<sup>7</sup> To try to discover what bonds us (or could bond us) into a coherent political community, especially after the triumph

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of a distinctly (post)modernist sense of the contingencies of our own culture and the fragility of any community memberships, is the core of this book. To treat this theme fully would require a much different (and longer) book than the one now in your hands. It will be enough if I can establish with some clarity the importance of the general question—What, indeed, does it mean to be an American?—and indicate the role of more specific questions about the Constitution in answering the larger one.

I hope that the ensuing discussion will be helpful to lawyers and social scientists in the detached analysis of social orders across time and space. Indeed, the central thesis of Chapter One, which elaborates a variety of “constitutional faiths,” is that the typology there presented helps to illuminate the entire structure of American constitutional discourse over the past 200 years. But the major point of this preface is to embed the abstractions that will follow in a decidedly more personal concern about what it means to live in *this* social order at this time—the United States as it careens toward the twenty-first century. Can we speak cogently to one another about this, so that the inevitable imperfection of language nonetheless works to join us in common conversation (and, ultimately, political community)? This concern explains why I devote the final chapter to inquiring about the possibility of one’s signing the Constitution in our time as an act of “personal ratification” of what is presumptively embedded within it.

Every text has a subtext, and perhaps the subtext of this book is a paraphrased version of the title of a Raymond Carver collection of stories on modern life and love, “What we talk about when we talk about law.” One of the things we talk about is our own difficulty in defining (or recognizing) law, so “sophisticated” (or merely cynical) have we become about the ambiguities and outright contradictions connected with the concept. And *how* we talk about law (or love), at the end of the twentieth century, is suitable to our ambivalences and confusions, for the conversations are often halting and ineloquent, with silences that become independent parts of the conversation. But even some of the refugees from Carver-land find themselves entering relationships and enunciating wedding vows, with whatever self-conscious irony, as a means of fending off the end of conversation itself, what Clifford Geertz has recently described as a life “marooned in a Beckett-world of colliding soliloquy.”<sup>8</sup>

I hold open the possibility that the ultimate conclusion of these

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meditations on “constitutional faith” might be that we indeed live in such a “Beckett-world.” Yet I take it that most of us prefer to believe that some kind of dialogue remains more or less possible, the question being whether we can find a common language in which to speak and ask our questions. This book is written in the belief that such a dialogue is worth attempting.