# The American Founding and the Social Compact

Edited by
Ronald J. Pestritto
and Thomas G. West

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# From Subjects to Citizens: The Social Compact Origins of American Citizenship

*Edward J. Erler*

> Under the constitution of the United States there are citizens, but no subjects.
>
> —James Wilson[1]

The Framers of the U.S. Constitution understood citizenship to be grounded in social compact. Because "all men are created equal," no one has a claim by right of nature to rule another human being. Rule must therefore result from the consent of each individual who is to be ruled. The form that consent takes is social compact. In the Framers' understanding, the requirement of consent derived from the principles of natural right that were said to inform the new American regime. In theory, citizenship was a simple matter; in practice, however, it became an extraordinarily complex issue. In examining the issue of citizenship, it is necessary to give full recognition to the revolutionary origins of America and to the radical character of that revolution. The core of the American Revolution was the appeal from convention to nature as the ground of political right, and in the course of this appeal a new (and revolutionary) ground for American citizenship was established. As Harry V. Jaffa recently noted, "[t]he idea of compact is at the heart of American constitutionalism. It is at the heart of the philosophical statesmanship that made the Revolution, of which the Constitution is the fruit. In the most fundamental respect, compact is an inference from the proposition 'that all men are created equal'."[2] The current debate about citizenship is vitiated by the fact that it completely ignores social compact, the central idea that animated both the Framers of the Constitution and the architects of the

Fourteenth Amendment. Current scholarship finds citizenship rooted in the notion of birthright citizenship that was first articulated in 1608 in *Calvin's Case*, the first case that systematically delineated the basis for British citizenship. As it emerged from the decision in *Calvin's Case*, birthright citizenship entailed perpetual allegiance to the natural person of the king. It would be difficult to imagine a more antirepublican basis for citizenship, yet this is said by mainstream scholarship to be the foundation of American citizenship. I will argue, however, that the principles of the American Revolution explicitly rejected this view of citizenship and established social compact as the foundation of republican citizenship, a foundation derived directly from the principles of natural right rather than the English common law. I also maintain that the Framers of the Fourteenth Amendment explicitly rejected birthright citizenship in defining American citizenship.

## THE FOURTEENTH AMENDMENT AND THE DECLARATION OF INDEPENDENCE

Although the Constitution refers to "citizens of the United States," citizenship is nowhere defined in the Constitution. The issue of citizenship was, of course, crucial to the debate over the Fourteenth Amendment, although surprisingly enough it did not receive nearly the attention lavished on the other provisions of the amendment—especially privileges and immunities and due process. Indeed, the citizenship clause was almost an afterthought, introduced late in the debate. Despite the fact that the Thirteenth Amendment had abolished slavery, many members of the thirty-ninth Congress believed that a more explicit recognition of the citizenship of the newly freed slaves was required. After all, the Supreme Court's decision in *Dred Scott* (1857) had declared that no black of African descent—slave or free—could ever be a citizen of the United States. The mere declaration of freedom in the Thirteenth Amendment was, many members of the thirty-ninth Congress argued, insufficient to settle the issue of citizenship. Prior to 1866, it was widely assumed that state citizenship was primary and federal citizenship derivative; every citizen of a state was automatically a citizen of the United States by virtue of his state citizenship. There had always been considerable uncertainty about this assumption, however, since the federal government has exclusive authority to establish uniform rules of naturalization and some federal cases had

ruled in favor of the primacy of national citizenship. In any case, it was necessary to reverse this presumption in a decisive manner in order to prevent states from denying state citizenship to the newly freed slaves and thereby preventing them from becoming federal citizens and claiming the whole panoply of civil rights that are the necessary incidents of federal citizenship.

As one perceptive observer of the Fourteenth Amendment debates remarked:

> [T]he Republican Party was forced to investigate the meaning of citizenship in the nation and the rights which appertained to that status. . . . They defined United States citizenship as incorporating all the civil rights necessary to secure the natural rights of man. They so defined United States citizenship because it was the only effective way they could apply the principle of the Declaration of Independence which declares that all men are equal before the law in the inalienable rights of life, liberty and property.[3]

One of the most powerful statements confirming this analysis was made by Representative Thaddeus Stevens, a prominent member of the Joint Committee on Reconstruction, on May 8, 1866:

> I beg gentlemen to consider the magnitude of the task which was imposed upon the committee. They were expected to suggest a plan for rebuilding a shattered nation—a nation which though not dissevered was yet shaken and riven. . . . It cannot be denied that this terrible struggle sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now.[4]

Thus, for Stevens, Reconstruction should look forward to a completion of the founding. The founding was incomplete because of the compromises with slavery. Insofar as the Constitution of 1787 tolerated the continued existence of slavery, it remained an incomplete expression of the principles of the Declaration of Independence. The Framers had been compelled to provide protections for slavery in the Constitution because compromise with the slave-holding states was a necessary condition of securing a national government. And, as the most thoughtful of the Federalists understood, without a strong national government the prospects of ever ending slavery were remote. Thus, the prudential compromises in the Constitution

designed to protect slavery were actually in the service of eventual abolition. But as Jaffa has well noted, "there is nothing in the Constitution itself by which one can discover the 'prudence' of the Constitution—that is to say, by which one can distinguish the compromises of the Constitution from the principles of the Constitution."[5] The "prudence" of the Constitution comes to light only when it is read in terms of the principles of the Declaration. The compromises with slavery were justified only to the extent that they were necessary and to the extent that they provided the foundation for eventual emancipation. Adoption of the Declaration, of course, made the eventual abolition of slavery a moral imperative.

On February 15, 1866, Representative William A. Newell commented on the relation of the Declaration and the Constitution, noting that "[t]he framers of the Constitution did what they considered best under the circumstances. They made freedom the rule and slavery the exception in the organization of the Government. They declared in favor of the former in language the most emphatic and sublime in history, while they placed the latter, as they fondly hoped, in a position favorable for ultimate extinction."[6] Newell here was echoing the words of Abraham Lincoln, whose omnipresent spirit animated the deliberations of the thirty-ninth Congress. Lincoln maintained that the Constitution, understood properly in the light of the principles of the Declaration of Independence, had put slavery "in course of ultimate extinction."[7] The task of the thirty-ninth Congress was not, as some contemporary commentators allege, to frame a new constitution or to perpetrate a constitutional revolution, but to complete the original Constitution by fulfilling the principles of the Declaration.[8] Thus the framers of the Thirteenth and Fourteenth Amendments looked upon the Civil War as in some sense the second battle of the Revolutionary War. That is to say, they considered the Revolutionary War and the Civil War as two battles in the same war, both battles fought to vindicate the principle that the "just powers of government" are based on the "consent of the governed." The Revolutionary War vindicated that principle for most, but the continued existence of slavery and its recognition in the Constitution rendered the founding incomplete. The Civil War was fought to extend the principle of consent to all the governed, and with the adoption of the Thirteenth and Fourteenth Amendments, the Constitution for the first time came into formal harmony with the principles of the Declaration of Independence. The idea that the thirty-ninth Congress was engaged in completing the founding was expressed so frequently during debates that one can hardly doubt that it was the ruling paradigm.[9]

The first definition of citizenship actually occurred in the Civil Rights Act of 1866, which provided that: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." This statutory attempt to reverse the constitutional ruling in *Dred Scott* caused concern among many legislators. Certainly a constitutional amendment would be less vulnerable to attack than a legislative enactment and would have the additional benefit of making its provisions immune to repeal or change by simple legislative majorities.[10] It was this consideration that supplied the immediate impetus for the Fourteenth Amendment.

In the Fourteenth Amendment the language of the Civil Rights Act had transmogrified into "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Whatever the status of citizenship before the Fourteenth Amendment, this new language clearly made "national citizenship primary and state citizenship secondary."[11] All citizens were first citizens of the United States and citizens of states merely by residence. The primacy of federal citizenship signaled a fundamental change in the federal relationship. Another conspicuous change was that the phrase in the Civil Rights Act excluding "Indians not taxed" was dropped. Senator Jacob Howard of Ohio, a member of the Joint Committee on Reconstruction and the author of the citizenship clause, was forced to defend the new language against the charge that it would make Indians citizens of the United States. Senator Howard assured several tenacious skeptics that "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States."[12] Thus, said Howard, "the word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States."[13] Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, spoke in support of Howard's exegesis, contending that "subject to the jurisdiction thereof" simply meant "[n]ot owing allegiance to anybody else . . . subject to the complete jurisdiction of the United States." Indians, he concluded, were not "subject to the jurisdiction" of the United States because they owed allegiance—even if only partial allegiance—to their tribes. Thus two requirements were set for U.S. citizenship: a citizen had to be born or naturalized in the United States *and* subject to its jurisdiction. Birth within the territorial limits of the

United States, as the case of the Indians seemed to indicate, did not make one automatically "subject to the jurisdiction" of the United States. And "jurisdiction" did not mean simply subject to the laws of the United States or subject to the jurisdiction of its courts. Rather, "jurisdiction" meant exclusive "allegiance" to the United States. Not all who were subject to the laws owed allegiance to the United States. As Senator Howard remarked, the requirement of "jurisdiction," understood in the sense of "allegiance," "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States."[14]

Most remarkable, however, was Senator Howard's contention that "every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States."[15] In the context, "national law" refers to "positive law," the law of the Constitution or statutory law. And almost everyone certainly would have understood the phrase "natural law" to refer to the social compact basis of citizenship, the basis for citizenship adumbrated in the Declaration of Independence and other public documents of the founding era. The frequent references in the debates to "the rights of human nature," the "sacred rights of human nature," the "natural rights which necessarily pertain to citizenship," the "inalienable rights of life and liberty," and other similar phrases indicate that the principles of the Declaration of Independence were assumed to be the principled basis for federal citizenship.[16] Two constitutional scholars have boldly remarked—without the slightest consciousness of hyperbole—that "[t]he fourteenth amendment was intended to bridge the gap between positive law and higher law by empowering the national government to protect the natural rights of its citizens."[17] And in chronicling the overall strategy of the republicans, these commentators argue that

> The Republican effort to establish a positive law basis for fundamental rights began with the thirteenth amendment, which eliminated the discrepancy between the natural right of personal freedom and positive laws establishing slavery. In the Civil Rights Act, they turned to the problem of providing statutory protection for the rights of the freed slaves. Finally in the fourteenth amendment, they sought to constitutionalize the higher law.[18]

This latter phrase is precisely what Senator Howard meant by the confluence of natural law and national law. In short, the republican strategy was

to complete the founding by bringing the Constitution into formal harmony with the principles of the Declaration of Independence.

Almost two years prior to the Declaration, Jefferson had written in the *Summary View of the Rights of British America* that the king was merely the "chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government erected for their use, and consequently subject to their superintendence."[19] "Our ancestors," Jefferson claimed, "before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to all men, of departing from the country in which chance, not choice has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness." The right of expatriation is therefore a natural right derived from the "universal law" of nature, and it was the exercise of this natural right that impelled the "Saxon ancestors" to leave "their native wilds and woods in the North of Europe" and to establish on "the island of Britain . . . that system of laws which has so long been the glory and protection of that country."[20] Their American descendants in turn exercised this same natural right to expatriate themselves in their quest for "public happiness." Once arrived in America, it was only natural for these expatriates to adopt a system of laws and government to which they were accustomed. In 1803, St. George Tucker captured the essence of the matter when he wrote that the status of the laws established in the colonies could be decided "upon the ground of compact alone." "A people," he continued,

> about to establish themselves in a new country, remote from the parent state, would . . . stand in need of some municipal laws, and want leisure, and experience to form a code adapted to their situation and circumstances. The municipal laws of the parent state being better known to them, than those of any other nation, a recurrence to them would naturally be had, for the decision of all questions of right and wrong, which should arise among them, until leisure and experience should enable them to make laws better adapted to their own peculiar situation. The laws of the parent state would . . . acquire a tacit authority . . . [and] the colonists themselves could be the only competent judges.[21]

Acceptance of the laws of England was a matter of choice to be understood on the "ground of compact alone." That is to say, it was to be understood as a matter of the free and deliberate choice of the colonists. The

clear implication of Jefferson's argument is that British rule had always been based on the consent of the governed, and the king was merely the "chief officer of the people" authorized by consent rather than divine right.

## PATERNAL SOVEREIGNTY, DIVINE RIGHT, AND BIRTHRIGHT SUBJECTSHIP: *CALVIN'S CASE*

Jefferson's argument would have been familiar to any reader of John Locke. For Locke, the rightful origin of civil society is consent—"[t]he only way whereby any one devests himself of his Natural Liberty."[22] And, according to Locke, it is a compact only "which did, or could give *beginning* to any *lawful Government* in the World."[23] Locke denies that there is such a thing as "natural subjection." By nature men are "free, equal and independent: and no one can be "subjected to the Political Power of another, without his own *Consent*."[24] Consent is the only legitimate method of exchanging natural liberty for civil society. No one is born owing allegiance. Birthright citizenship, which incurs perpetual allegiance to a prince without consent, is simply a violation of "the Law of right Reason."[25] In a passage that must have been all too familiar to Jefferson, Locke argues: "For there are no Examples so frequent in History, both Sacred and Prophane, as those of Men withdrawing themselves, and their Obedience, from the Jurisdiction they were born under. . . and *setting up new Governments* in other places. . . . All which are so many Testimonies against Paternal Sovereignty."[26]

The idea of "Paternal Sovereignty," of course, had been the main theme of the works of one of Locke's principal protagonists, Sir Robert Filmer. But the idea of paternal sovereignty also played a prominent role in "the first comprehensive theory of English subjectship"[27] articulated by Sir Edward Coke in his famous opinion in *Calvin's Case* (1608).[28] The issue in *Calvin's Case* was the status of those born in Scotland after the accession of James VI of Scotland in 1603 to the throne of England as James I. Robert Calvin was born in Scotland three years after the union of the two kingdoms and as an infant was disseised of a property to which he was heir in England. Since aliens were prohibited by law from owning property in England, the question was whether Calvin was an alien or a natural-born subject within the allegiance of James I. The case was fraught with political difficulties and involved two of the most prominent

jurists of the age. Francis Bacon, James's solicitor general, argued for Calvin on behalf of the crown before the Exchequer Chamber; and Edward Coke, as chief judge of the Court of Common Appeals, published an opinion that became the authoritative statement defining allegiance and subjectship in the British empire. Both Bacon and Coke, whatever differences they may have had regarding royal prerogative, argued that allegiance attached to the king's natural person was ultimately grounded in divine law and natural law—in Bacon's phrase, "both in nature, and above nature." Both jurists understood that *Calvin's Case* was one "of exceeding great consequence."[29]

In 1604, James I proposed that Parliament undertake the complete union of Scotland and England, including the naturalization of all Scottish subjects and the unification of the laws of both kingdoms.[30] In 1606, the commissioners of Union, whose membership included Bacon, recommended two bills to the Parliament. The first declared that all Scots born after the union of the kingdoms were de jure English subjects and the second proposed the naturalization of all Scots born before 1603. Both bills received a particularly hostile reception in the House of Commons and were rejected. In 1605, in the wake of the abortive Gunpowder Plot, in which a group of Catholic conspirators attempted to assassinate James I, a new oath of allegiance was promulgated demanding acknowledgment that James I was the "lawful and rightful King" and requiring subjects to swear: "I do from my heart abhor, detest, and adjure, as impious and heretical, this damnable doctrine and position, that princes which be excommunicated or deposed by the Pope may be deposed or murdered by their subjects or any other whatsoever."[31] Excommunication was a license for regicide among Catholics and had been used as a powerful weapon by the pope in the battles between church and crown. In 1606, Pope Paul V countered by expressly forbidding Catholics to take the oath. Thus the struggle between the pope and the kings of England, which began at least with King John, continued seemingly unabated with James I.

James had ascended to the throne of Scotland as a committed Protestant and remained so after his accession to the throne of England. He was an adherent of divine right and harbored pretensions to "absolute *Monarche.*"[32] The religious question and the unsettled political relations between England and Scotland forced the issues of "naturall allegiance" and "naturall duetie" to the forefront of England's political consciousness. It was against this volatile background that *Calvin's Case* was decided. Although Bacon insisted that this was "no feigned or framed case; but a true case between true

parties,"[33] the case was clearly an attempt to diffuse a theological-political crisis as much as it was to settle a legal claim. Although the decision in *Calvin's Case* failed to prevent the furious storms that were to wrack the British constitutional system in short order, Coke's decision in *Calvin's Case* had a profound influence on the development of the theory of citizenship that has come to be known as *jus soli*. Coke and Bacon agreed that it was necessary to ground subjectship in the law of nature, attaching allegiance to the natural person of the king rather than his political person or capacity. Both seemed to understand the peculiar problem of political allegiance in the Christian world, and, while presenting arguments that appeared to support James's claim to rule by divine right, both jurists portrayed the divine law as collapsing into natural law and ultimately into the common law. Bacon and Coke argued the formal compatibility of natural law and divine law, but this formal compatibility mostly appears in the formula that natural law is confirmed by the divine law. The parliamentary opponents of unification, on the other hand, argued that subjectship was exclusively a matter of positive law.

The word "citizen" or "citizenship" naturally never occurs in Coke's opinion in *Calvin's Case*—it is always "subject" or "subjectship." While there is a kind of reciprocal obligation involved in the relation of subject and king—"power and protection draweth ligeance"—subjectship is not based on consent; it results from the mere accident of birth. Coke stated:

> Ligeance is a true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born, he oweth by birth-right ligeance obedience to his sovereign . . . for as the subject oweth to his king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects, "*regere et protegere subditos suos*," so as between the sovereign and subject there is "*duplex et reciprocum ligamen*."[34]

In short, "*ligentia naturalis* . . . originally is due by nature and birth."[35] Coke summons Aristotle—"nature's secretary"—before the bar to provide evidence that ligeance is a conclusion of natural law. Coke cites the *Nicomachean Ethics*, Book Five, to this effect: "*jus naturale est, quod apud omnes homines eandem habet potentiam* [natural right is that which has the same power among all human beings]."[36] The exact source of the quote is uncertain, but it appears to be a paraphrase of the beginning of Book V, chapter vii. Coke surely knew, however, that Aristotle spoke not of a universal natural law binding everywhere and always, but of a natural right

that everywhere has the same power or force (*dynamis*). And of natural right, Aristotle says that even though it has everywhere the same *dynamis*, it is nonetheless changeable. Coke however maintains that

> Whatsoever is due by the law or constitution of man, may be altered; *ergo* natural ligeance or obedience to the sovereign is not due by the law or constitution of man. Again, whatsoever is due by the law of nature, cannot be altered; but ligeance and obedience of the subject to the sovereign is due by the law of nature; *ergo* it cannot be altered.[37]

Coke concludes from Aristotle "that God and nature is one to all, and therefore the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his sovereign or superior."[38] Aristotle's *Ethics*, however, provides little support for Coke's notion of natural law as a universally binding law, especially as it applies to the citizens rather than subjects. Coke is preparing the ground, of course, for the argument that while allegiance to the king's natural persona is a conclusion of natural law, binding in both England and Scotland, these two kingdoms are separate and distinct in respect to their municipal law and with regard to the king's political persona.

Coke also summons evidence to buttress his case from Book One of Aristotle's *Politics*: "And Aristotle . . . proveth that to command and to obey is of nature, and that magistracy is of nature: for whatsoever is necessary and profitable for the preservation of the society of man is due by the law of nature; but magistracy and government are necessary and profitable for the preservation of the society of man; therefore magistracy and government are of nature."[39] Aristotle, of course, argued that man is by nature a political animal and that the *polis* exists by nature because it is the final cause of all human associations. While the *polis* is last in the order of temporal causality, it is first in the order of final causality; and it is natural because it is a final cause. And while the *polis* exists by nature, its establishment requires human art; it does not "grow" spontaneously from nature. Thus, Aristotle remarks, "the one who first constituted [a city] is responsible for the greatest of goods."[40] Each of the subordinate associations, as in every compound, has its rule marked in the economy of nature, where the naturally superior element rules over the inferior. Thus, master rules slave, husband rules wife, and parents rule children. But Book One of the *Politics* is incomplete in the sense that it does not, as Coke seems to suggest, identify the natural ruler of the *polis* or the political community. It is true, as Aristotle indicates, that kings ruled villages or tribes as a kind

of natural extension of the family and that as a consequence early *poleis* were monarchical. But the tribe or village is a subpolitical association that exists only to meet daily recurring needs. The *polis*, on the other hand, is the self-sufficient community that exists not for the sake of mere life, but for the good life. Only the self-sufficient *polis*, as the final cause of all associations, is fully political.

The concept of "natural ligeance" as articulated by Coke is entirely foreign to Aristotle. For Aristotle, citizenship is relative to the regime and is not something that is attached to the "natural" person of the ruler. From Aristotle's point of view Coke's analysis stops short of political rule. It is sufficient for Coke, however, to assert that monarchy is the form of rule dictated by natural law and divine law.

> The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature. . . . The apostle in Romans c.ii. saith, "cum enim gentes, quae legem non habent, naturaliter ea quae legis sunt faciunt [When gentiles who have not the law do by nature what the law requires, they are a law unto themselves]." And this is within that command of the moral law, "honora patrem," which doubtless doth extend to him that is "pater patriae."[41]

This derivation of rule from scripture and natural law does not rise to the level of political rule articulated by Aristotle. The monarchical rule that characterizes the family is the rule of a partial, nonpolitical (or subpolitical) association. Monarchy conceived as "pater patriae" is not a political regime. This is why there are no citizens—only subjects—in Coke's natural and divine law account of monarchy. Political rule properly understood requires citizens who participate in deliberation and decision-making. Monarchy as understood by Coke contemplates only natural subjects who are incapable of the kind of self-rule that characterizes citizens understood in the Aristotelian sense.

In Book Three of the *Politics*, Aristotle poses something of a paradox: while the *polis* exists by nature, citizens exist only by convention; the *polis* requires citizens, but there are no citizens by nature. It is law, not nature, that determines citizenship. Among other things, Aristotle remarks that custom defines a citizen as the offspring of parents who are both citizens, sometimes even requiring two or three generations of citizen ancestors. But this definition cannot account for the first citizens—or for the citi-

zenship of the lawgivers themselves. Those who become citizens of a new regime did not descend from citizen parents; they became citizens by the operation of law.[42] No citizens are like the "*gegenai*" of the myth of autochthony in Plato's *Republic* who simply spring from the earth and therefore have an indissoluble attachment to it as "citizens" by nature. Coke's opinion seeks to articulate a similar ground in nature for subjectship. The attachment is not to the earth or political territory, but to the natural person of the king. In the ancient world, the potential conflict between the obligations owed to the gods and to the laws was minimal because obligations to the gods and the laws were one and the same. After the advent of Christianity, however, the question of obligation or allegiance became problematic. Christianity is a universal religion and creates obligations superior to the laws of any particular community, even though it may be Christian doctrine to obey laws and rulers. Christians are first citizens of the universal City of God and only secondarily of any particular political community. Aristotle, of course, could not have anticipated the existence of a universal religion in which men's dearest interests were in another world and where men achieved their salvation, not as members of a political community, but as individuals. The political problem was exacerbated by the conflicting claims of the various sects within Christianity. England had been wracked by religious conflict before, during, and long after Coke's time. What Coke and Bacon tried to do, I believe, was to articulate a ground for political obligation that was independent of the religious question. If allegiance and obligation could attach to the natural person of the king, rather than his political person, questions of allegiance and questions of religion could be separated and the theological-political problem abated, if not solved.

It is not impossible that both Coke and Bacon were aware that in Christian ages natural right must speak the language of natural law (i.e., in terms of a law binding everywhere and always). But for natural law understood in this sense to be effective, sovereignty had to reside in the people rather than in kings. Coke obviously could not make this argument, even had he been aware of its necessity. It remained for the American Founding to resolve these tensions on a political level by the separation of church and state. The Framers understood the argument that "all men are created equal" as the most powerful argument against both divine right of kings and the natural right to rule asserted on behalf of kings. Deriving the "just powers" of government from the consent of the governed was the method of translating subjects into citizens and replacing the divine right

of kings with popular sovereignty. God's rule of the universe may be monarchical, but from the point of view of the Declaration of Independence it is impious to believe that God's omnipotence can be translated into merely human hands. Far from being a dictate of divine and natural law, divine right of kings is a doctrine supported neither by nature nor by reason. As Jaffa has recently noted:

> [T]he characteristic understanding of political obligation from the end of the ancient city until the American Revolution was of a movement of authority from above—from God to emperor or king, and from him to his vassals and to their subjects. In its most abbreviated form it was called . . . the divine right of kings. In the Declaration of Independence this order is reversed: All legitimate authority is derived from the exercise of the rights with which every human soul has been equally endowed by its Creator. There is no intrinsic obligation to obey any authority to which he has not given consent.[43]

Jaffa characterizes this reversal as perhaps the greatest "[o]f all the revolutions in human consciousness."[44] Subjectship in Coke's account depends upon the accident of birth, not reasoned choice. For Jefferson and the founding generation, however, the natural law or natural right basis of citizenship was "choice," not "chance." Nature has given all men, Jefferson argued, the "right . . . of departing from the country in which chance, not choice has placed them."[45]

According to Coke, the king has "two capacities in him: one a natural body, being descended of the blood royal of the realm;" the other "a politick body or capacity." The natural body is a creation of God; the politick is merely the "policy of man." The natural body is mortal and visible, the "politick" is invisible and immortal; the natural body is ensouled, but the politick "hath no soul, for it is framed by the policy of man."[46] James I has both a natural persona and a dual political capacity, being the king of both England and Scotland. To which persona is "ligeance" due? If "ligeance" is natural—as it must be if paternal rule is natural—then "ligeance" in Coke's argument is due the natural person of the king. Thus, the problems of allegiance associated with the king's dual political persona as king of England and Scotland are rendered nugatory—or at least manageable. Those born within the king's protection owe "natural ligeance" and since this "natural ligeance" derives from natural law, it is eternal—even though the king's natural persona is mortal. Since it is the political persona of the king that is eternal, subjectship has a peculiarly apolitical

character. Indeed, the notion of "subjectship" itself is apolitical in the Aristotelian sense and involves a radical depreciation of the political. This is the reason that there are no citizens in the regime articulated by Coke, only subjects.

While the king can create "denizens," resident aliens with the privileges of natural subjects, it requires an act of Parliament to "naturalize" subjects; natural-born subjects attach to the natural persona of the king, but "naturalized" subjects are created by law and become part of the king's political persona. And while the king can create denizens he cannot make them "inheritable." This is reserved to the Parliament as an essential aspect of creating "naturalized" subjects. Neither can the king "make any inheritable . . . that by the common law cannot inherit."[47] Coke ruled that Calvin, although born in Scotland, owed "natural-born allegiance" to King James I as a "*post-nati*" and was therefore a "natural-born subject" of England and inheritable. Those born in Scotland before the accession of James I—the "*ante-nati*"—remained aliens incapable of inheriting property under the common law. One commentator correctly remarked that "Calvin's case is a case study of a constitution in crisis. The Commons' argument had been explicitly framed in terms of the superiority of the common law over the royal prerogative in matters of naturalization. . . . Coke straddled both sides. He gave the rule of the decision for the king but the substance of his opinion for the Commons."[48]

According to Coke, "the ligeance of a natural-born subject [is] not local, and confined only to England." Rather, ligeance is a quality of "the mind and soul of man, and cannot be circumscribed within the predicament of *ubi*."[49] If, for example, an enemy invader should occupy English territory "and have issue there, that issue is no subject to the king of England, though he be born upon his soil, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the king."[50] The idea of "natural ligeance" is thus not confined by geography or political boundaries—"ligeance is a quality of the mind, and not confined within any place."[51] "Ligeance," however, does not give the king absolute law-making power in those places where "ligeance" is due. In the case of Scotland, where the king "hath a kingdom by title of descent" and where the laws of that kingdom provide for his descent, "he cannot change those laws of himself, without consent of parliament." When a king conquers a Christian kingdom, where "he hath '*vitae et necis potestatem*,' he may at his pleasure alter and change laws of that kingdom, but until he doth make an alteration of those laws, the ancient laws of that kingdom

remain." In the case where a Christian king conquers a "kingdom of an infidel, and brings them under his subjection, there *ipso facto* the laws of the infidel are abrogated" because those laws necessarily violate the divine and natural law. "Also," Coke concludes, "if a king hath a Christian kingdom by conquest, as Henry 2, had Ireland" and having given them "the laws of England for the government of that country, no succeeding king could alter the same without parliament. And in that case while the realm of England and that of Ireland were governed by several laws, any that was born in Ireland was no alien to the realm of England."[52] It was this latter point, with its suggestion of a kind of commonwealth arrangement between England and its colonies, that provoked considerable attention in America more than a century and a half later.

## SOCIAL COMPACT AND BIRTHRIGHT CITIZENSHIP

Birthright citizenship has no more status in the social compact theory of citizenship than "natural subjectship." The argument, based on natural human equality, is at one and the same time the rejection of Coke's natural law and divine law justifications for "natural ligeance." According to Locke, "those who would perswade us, that *by being born under any Government, we are naturally Subjects to it*, and have no more any title or pretence to the freedom of the State of Nature, have no other reason . . . to produce for it, but only because our Fathers or Progenitors passed away their natural Liberty, and thereby bound up themselves and their Posterity to a perpetual subjection to the Government, which they themselves submitted to."[53] Locke's argument here contrasts starkly with Blackstone's who, along with Locke, was one of the most cited authors during the American Founding. Blackstone, in his *Commentaries on the Laws of England*, still adhered to Coke's reasoning in *Calvin's Case*, and in fact cited Coke as his authority. Natural-born subjects, according to Blackstone, are those "born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it." As in Coke, allegiance has a twofold character: "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject." Although birthright allegiance "is founded in reason and the nature of government," the concept is an inheritance from the "feodal system"—it derives from the "mutual trust or confidence subsisting between the lord and

vasal." And "[b]y an easy analogy the term of allegiance was soon brought to signify all other engagements, which are due from subjects to their prince."[54] Blackstone's account of "birth-right ligeance" was identical with that of Coke in *Calvin's Case*. He says:

> Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth [citing *Calvin's Case*]. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance of the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other.[55]

The allegiance due from a natural-born subject is permanent because it is "intrinsic" and "primitive." One could hardly imagine a doctrine further removed from the theory of the social compact origins of citizenship.

One recent commentator has argued that "Coke's report of *Calvin's Case* was one of the most important English common-law decisions adopted by courts in the early history of the United States. Rules of citizenship derived from *Calvin's Case* became the basis of the American common-law rule of birthright citizenship, a rule that was later embodied in the Fourteenth Amendment of the U.S. Constitution."[56] The author, however, admits that the rule adumbrated in *Calvin's Case* was feudal and "Coke's doctrine of tying allegiance to the natural body of the King was archaic even by the end of the eighteenth century and should never have had even theoretical significance in the former colonies. When one considers *Calvin's Case* in the detail it deserves, it is plain that the importance placed upon territory of birth was not logically, politically, or historically inevitable."[57] Indeed, we are told that the rule of *jus soli* that emerged from *Calvin's Case* was merely "an historical accident." Yet, the claim is that the American conception of citizenship grew directly from these feudal origins and entered the United States through the wholehearted embrace of Blackstone and the English common law. This argument, of course, utterly ignores Locke and his influence on the American Founders. There

can be little doubt that the American Founders rejected "birth-right ligeance" in favor of the social compact origins of citizenship and political obligation. After all, the American Revolution was a massive repudiation of the idea that "[n]atural allegiance is perpetual" and "cannot be divested without the concurrent act of that prince to whom it was first due." The notion that there is an unmodified rule running from *Calvin's Case* to the Fourteenth Amendment ignores the most crucial dimensions of the American Founding.

The status of the common law in the American Founding is, of course, a matter of enduring controversy. Nevertheless, one would almost certainly have to accept the proposition that anything in the common law that contravened the principles of the Declaration of Independence was repealed by the revolution. Madison remarked that "no support" can be given to "the doctrine that the common law is binding on these states as one society. The doctrine on the contrary, is evidently repugnant to the fundamental principle of the revolution."[58] Both Jefferson and Madison opposed the idea that the common law system had survived the revolution. In 1824 Jefferson reflected on the significance of the revolution and its break with British constitutionalism. "Our Revolution," Jefferson wrote, "commenced on more favorable ground. It presented us an album on which we were free to write what we pleased. We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts."[59] The appeal to nature led Jefferson to a different conclusion than the one reached by Coke in *Calvin's Case*. Based on an incomplete analysis of Aristotle and biblical texts, Coke, as we have seen, concluded that the law of nature designated natural rulers—the "*Pater patriae*" to whom allegiance was due in return for protection. Jefferson, following the inimitable Locke, concluded that by nature "all men are created equal," and that by nature there were no human beings so superior as to claim rule over others by right of nature. In the Declaration of Independence natural human equality was said to be a "self-evident truth" drawn from the "laws of nature and nature's God." It is a dictate of natural right, therefore, that all political obligation must be derived from the voluntary consent of each individual. In the absence of natural rulers, no one can rightfully be ruled without his consent. Citizenship is therefore based on consent, not "birth-right allegiance" or "birth-right subjectship"—nor, as we shall see, "birth-right citizenship." As we will also see, a necessary component of the social compact theory is

the right of expatriation—"a right, which nature has given to all men, of departing from the country in which chance, not choice has place them." Needless to say, "expatriation" has no place in the scheme of perpetual "birth-right subjectship" any more than the natural right to revolution, which is the perfect antithesis to "perpetual subjectship."

Madison wrote that "compact, express or implied is the vital principle of free Governments as contradistinguished from Governments not free; and that a revolt against this principle leaves no choice but between anarchy and despotism."[60] This was a view that Madison frequently expressed. In a letter to Nicholas P. Trist, Madison repeated his view that "the idea of compact . . . is a fundamental principle of free Government" and explained that

> [t]he original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, by which the people in their social state agree to a Government over them. These two compacts may be considered as blended in the Constitution of the U.S.[61]

And in an attempt "to go to the bottom of the subject," Madison wrote in 1835, it is necessary to "consult the Theory which contemplates a certain number of individuals as meeting and agreeing to form one political society, in order that the rights and the safety & the interest of each may be under the safeguard of the whole." The "first supposition," Madison continues, is that the compact "must result from the free consent of *every* individual." Society arises, therefore, from the unanimous consent of its members. While its establishment requires unanimity, it must operate on the basis of majority rule where "the will of the majority was to be deemed the will of the whole." The principle of majority rule is either a part of the original compact or it is "a law of nature, resulting from the nature of political society itself, the offspring of the natural wants of man." In either case, "it is evident" that "the *lex majoris partis*"

> operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed.[62]

Majority rule is therefore the practical substitute for unanimity. But majority rule itself can operate only within certain bounds; it can do only what "could be *rightfully* done by the unanimous concurrence of the members." Thus even unanimous consent has boundaries or limits: it can do only what is "rightful," that is, what is just or prescribed by "the laws of nature and nature's God."

Unanimous consent specifies the ends of government. Majority rule determines the means by which the ends are secured. But, as always, the means must be proportioned to the ends. The majority cannot invade the rights of the minority—this would be a case where the means destroyed the ends. Nor can unanimous consent "rightfully" do what is intrinsically unjust. The protection of the "reserved rights of individuals," those prepolitical natural rights that were understood to be the dictates of human nature, becomes the end for which governments are instituted and can never be treated as means to some other end. Madison gives only one example of a reserved right—the right of conscience. The right of conscience is the most important of the reserved rights simply because it is the necessary precondition of civil society itself. Jaffa states that "[t]he Founding Fathers knew that government by majority rule was not possible where questions of religious belief might be put to a vote. For majority rule to become compatible with minority rights, sectarian religious differences had to be excluded from the political process."[63]

Once civil society has been established by the voluntary and unanimous consent of its members, new members can be added only with the consent of those who already constitute civil society. Those who were not parties to the original compact remain in the state of nature with respect to the new body politic. Since, as we have seen, the majority can act "as a plenary substitute" for unanimous consent, adding new members to an established community does not require unanimous consent. As Madison notes, "[i]n the case of naturalization a new member is added to the social compact, not only without a unanimous consent of the members, but by a majority of the governing body, deriving its powers from a majority of the individual parties to the social compact."[64] Naturalization thus proceeds by reciprocal consent. No individual can be ruled without his consent, nor can any individual join an already established community without its consent. Naturalization is thus the product of contract—an offer on one side and an acceptance on the other. Of course, no community is obliged to accept new members; the determination to add new members is a matter of prudence and will be dictated by the safety and happiness of the body politic.

One of the reserved rights not mentioned in Madison's essay "On Sovereignty," but discussed elsewhere by Madison, is the right of expatriation. "The case of individuals expatriating themselves," Madison writes, "may well be deemed . . . as a right impliedly reserved."[65] Madison regarded the right of expatriation as a part of the "original right" of revolution that can be exercised by the people as a whole when "all the constitutional remedies fail, and the usurpations of the General Government become so intolerable as absolutely to forbid a longer passive obedience & non-resistance." However, when the people as a whole manifest a "defect of their ability to resist," the right of revolution, as it were, devolves upon the individual: "the individual citizen may seek relief in expatriation or voluntary exile, a resort not within the reach of large portions of the community."[66] As an original right, the right of expatriation is a natural right, the individual's counterpart to the right of revolution possessed by the people at large. The right of expatriation, of course, cannot be used as a pretext to escape legitimate obligations that have been incurred or to escape from punishment for crimes and the like. It is only a right to escape "intolerable" government, measured not by a subjective standard but the objective standard of natural right. However conceived, it is certain that the right of expatriation—no less than the right of revolution—is antithetical to the concept of birthright citizenship, which carries with it the obligation of perpetual allegiance.

The Constitution itself does not define citizenship, although it does specify that the president must be a "natural-born citizen" and members of the House and Senate must have been citizens of the United States for seven years and nine years, respectively. Congress has the exclusive power "[t]o establish an uniform Rule of Naturalization," and a necessary inference from this power is that Congress also has exclusive power to regulate immigration as well as define the qualifications for citizenship. As a practical matter, however, until the adoption of the Fourteenth Amendment, state citizenship determined federal citizenship—those who were citizens of states were automatically deemed citizens of the United States. Nevertheless, the privileges and immunities clause of Article IV clearly implied a federal citizenship that was independent of state citizenship: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Privileges and immunities belong to federal citizens, since the guarantee "in the several States" cannot be an incident of state citizenship. For a variety of reasons—most of them having to do with the issue of slavery—the citizenship issue was not definitively addressed

until the "framers of the Fourteenth Amendment made national citizenship primary and state citizenship secondary."[67]

In his essay on "Sovereignty," Madison mentioned a dispute about citizenship that took place in the first Congress. "At the period of our Revolution," Madison wrote,

> it was supposed by some that it dissolved the social compact within the Colonies, and produced a state of nature which required a naturalization of those who had not participated in the revolution. The question was brought before Congress at its first session by Dr. Ramsay, who contested the election of William Smith; who, though born in South Carolina, had been absent at the date of Independence. The decision was, that his birth in the Colony made him a member of the society in its new as well as it original state.[68]

William Smith was a newly elected representative from South Carolina. Doctor Ramsay, who lost the election to Smith, charged that Smith did not meet the constitutional requirements to be a representative because he had not been a citizen of the United States for seven years. Smith's ancestors had been among the earliest settlers in South Carolina, and, at the age of twelve, he had been sent abroad to be educated in Britain and Geneva. Both his parents had died before the beginning of the American Revolution and Smith did not return until 1783. Ramsay's charge was that only those who were present during the revolution were properly citizens of the United States. His petition stated in part that "no man can be born a citizen of a Government which did not exist at the time of his being born; nor can parents leave to their children any other political character than that which they themselves possessed."[69] The question of what constitutes a regime is, of course, an enduring topic in political philosophy, and it was this precise issue that was debated here. Is the regime the same or different after a revolution? Do those who held allegiance to the previous regime automatically become citizens of the new regime? Is allegiance determined in the same way under a monarchy and a republic?

On May 22, 1789, James Madison rose on the floor of the House of Representatives to defend Smith. The matter should be settled, Madison stated, "from a consideration of the principles established by the revolution."[70] Smith was, Madison concluded, "on the declaration of independence, a citizen of the United States; and unless it appears that he had forfeited his right, by some neglect or overt act, he had continued a citizen until the day of his election to a seat in this House." The decision, Madison averred, should be guided both by the laws and constitution of South

Carolina and "by principles of a general nature." Concerning the general principles, Madison argued that it "is an established maxim, that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States." The charges against Smith, Madison continued, suppose that "when this country separated from Great Britain, the tie of allegiance subsisted between the inhabitants of America and the King of that nation." This, according to Madison, is a fundamental error. The allegiance of the American people to the British sovereign was dissolved "by the declaration of independence." But this was only a "secondary allegiance"; the primary allegiance of "each person" was "to the particular community in which he was born," and this allegiance was retained as a "right of birth" and continued in the "new community." Thus Smith's primary allegiance was as a citizen of South Carolina. "When that society separated from Great Britain," Madison continued, "he was bound by that act, and his allegiance transferred to that society, or the sovereign which that society should set up; because it was through his membership of the society of South Carolina that he owed allegiance to Great Britain."

Thus we see the great distance that the notion of U.S. citizenship has traveled from *Calvin's Case*. Madison argues that primary allegiance in America was never to the natural person of the king, but to the society that was established by "an original compact." The charge against Smith would be valid only if the primary allegiance owed particular societies was also dissolved by the Declaration. But, according to Madison, the "original compact" was not dissolved by the separation from Great Britain. Thus, the revolution did not put each individual "into a state of nature," because "the colonies remained as a political society" and merely "detached" themselves "from their former connexion with another society." Even if, Madison contends,

> South Carolina should think proper to revise her constitution, abolish that which now exists and establish another form of Government; surely this would not dissolve the social compact. It would not throw them back into a state of nature. It would not dissolve the union between the individual members of that society. It would leave them in perfect society, changing only the mode of action, which they are always at liberty to arrange.

Madison seems to imply that at the time of the revolution each individual "had the power of making an option between the contending parties.

Whether this was a matter of right or not however, is a question which need not be agitated in order to settle the case before us." The question is moot because Smith did not exercise the option, either explicitly or tacitly, to retain his allegiance to Great Britain. He is therefore bound by the decisions of South Carolina. Since South Carolina regards him as a citizen, his primary allegiance is not in question.

As a practical matter, as Madison noted, state citizenship was decisive in determining the transition to federal citizenship. Since the government was to convene immediately upon the ratification of the Constitution, the seven- and nine-year citizenship requirements for the House of Representatives and Senate respectively must have derived from state citizenship—otherwise there would have been no eligible citizens to fill the congressional offices. The Constitution specifies that the president must be "a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution." This means that the first presidents must have been citizens of a state at the adoption of the Constitution, and state citizenship was therefore deemed sufficient to confer U.S. citizenship. Thereafter, presidents must be "natural born" citizens of the United States. The reliance on state citizenship seems to have been necessary as a transition measure. For a variety of reasons—most of them having to do with the presence of slavery—the Constitution did not specify the conditions of American citizenship.[71]

In practice, of course, the new form of citizenship had to draw on some elements of the common law. Citizenship based on social compact would draw on the principles of *jus soli* as its point of departure, but it would require consent as its active agency, thus rejecting any notion of perpetual allegiance. Allegiance would take on the volitional character of the social contract, as expatriation would become an ordinary and necessary ingredient of citizenship based on social compact. Early court cases on the subject of expatriation were inconclusive, however. The general sense, as summarized by Chancellor Kent, was that, although expatriation was in some sense recognized to be a natural right, its exercise was conditioned by "the permission of government, to be declared by law." In the absence of "legislative regulation," Kent concluded, "the rule of the English common law remains unaltered."[72] Whether Kent's conclusion that the common law remains unaltered is subject to some doubt, since the retention of the common law rule would mean the continuation of "perpetual allegiance." However much the courts may have equivocated on the issue of expatriation, there is no question that the common law concept of

perpetual allegiance was rejected *in toto* by the principles of the American Revolution.

Perhaps the most representative early case is *Inglis v. The Trustees of Sailor's Snug Harbor* (1830). This case, like *Calvin's Case*, sought to determine the citizenship of Inglis as preliminary to deciding the question of whether he "was or was not capable of taking lands in the State of New York by descent."[73] Although Inglis was born in the United States, the exact date of his birth was unknown. It was an established fact that his parents removed him from the country during the Revolutionary War when they withdrew to England with British troops as they evacuated New York. Justice Smith Thompson, who wrote the opinion of the Court, averred that if Inglis had been born before July 4, 1776, and had been removed by his parents, he would have been "an alien, unless his remaining in New York during the war changed his character and made him an American citizen."[74] If Inglis had been born in New York after July 4, 1776, then he would be putatively an American citizen, unless he had been born within the area of New York controlled by the British army, in which case he would have been born within the allegiance of the king of Britain. As Thompson noted, "[t]he rule as to the point of time at which the American antenati ceased to be British subjects differs in this country and in England. . . . The English rule is to take the date of the Treaty of Peace in 1783. Our rule is to take the date of the Declaration of Independence. . . . The settled doctrine of this country is, that a person born here, who left the country before the Declaration of Independence and never returned here became thereby an alien and incapable of taking lands subsequently by descent in this country." Those who were born in the United States and elected to leave the country after the Declaration but before the Treaty of Peace likewise became aliens. Thompson concluded that the "right of election must necessarily exist in all revolutions like ours, and is . . . well established by adjudged cases. The only difficulty that can arise is to determine the time when the election should have been made."[75]

In general, prior cases had determined that the right of election must take place within a reasonable time and, in any case, must have occurred after July 4, 1776, and before the date of the first exercise of legislative sovereignty on the part of the new state governments. Anyone remaining after that date was considered to have given tacit consent and thereby to have acquired the obligations of allegiance to the new government. In *Respublica v. Chapman* (1781), the Pennsylvania Supreme Court determined this date to be February 11, 1777, the date specified by Pennsylvania legislation.

"[T]hose who framed," the acting Chief Justice McClean argued, "thought the separation from Great Britain worked a dissolution of all government, and that the force, not only of the acts of Assembly but of the common law and statute law of England, was actually extinguished by that event."[76] This case, the chief justice said, presents "an old government being dissolved, and the people assembling, in order to form a new one. When such an instance occurs," he noted, "the voice of the majority must be conclusive, as to the adoption of the new system; but, all the writers agree, that the minority have individually, an unrestrainable right to remove with their property into another country; that a reasonable time for the purpose ought to be allowed; and, in short, that none are subjects of the adopted government, who have not freely assented to it."[77] In a similar case decided by the New York Supreme Court in 1822, the end of the election period was set as April 20, 1777, when "organized government" was established in that state. Before that date "every member of the old society had a right to determine upon adhering to his old allegiance, and withdraw himself; or to abide among us, and thus tacitly, or expressly, yielding his assent to the change, and becoming a member of the new society."[78]

In *Kilham v. Ward* (1806), the Massachusetts Supreme Court specified April 30, 1779, as the date certain for determining alienage because that was the date expressly designated by the legislature. "In consequence of the Declaration of Independence," it was argued,

> the old government was dissolved, and the majority had a right to form a new one; but the minority had undoubtedly a right to remove. This seems consonant to the rules of reason, and the principles of natural law. All persons, therefore, who were then within the United States, and were parties to that declaration, must be considered as agreeing to the new political compact, and by virtue of it became citizens of the established government. As to those who were absent, *animo rivertendi*, to entitle them to the same privilege, it was necessary for them to return within a reasonable time, and by some overt act assent to the compact.[79]

Other state cases held to the same general principles for determining what constituted a reasonable time for election.

In *Inglis*, the Supreme Court decided that the facts of the case were incontestable: "[I]t was the fixed determination of Charles Inglis, the father, at the Declaration of Independence, to adhere to his native allegiance. And John Inglis, the son, must be deemed to have followed the

condition of his father, and the character of a British subject attached to and fastened on him also, which he has never attempted to throw off by any act disaffirming the choice made for him by his father."[80] Not being an American citizen, then, Inglis could not inherit.

Justice Joseph Story wrote a separate opinion in *Inglis* that is memorable for its comprehensiveness and lucidity. After rehearsing the common law basis for determining subjects and aliens, Story avers that "[t]he case of the separation of the United States from Great Britain is, perhaps, not brought within any of the descriptions already referred to." Before the revolution, all the colonies were part of the British empire and "all the colonists were natural-born subjects, entitled to all the privileges of British-born subjects." In each of the colonies there were governments established by the authority of the crown and subordinate to it. The Declaration of Independence "proclaimed the colonies free and independent States; treating them not as communities in which all government was dissolved and society was resolved into its first natural elements, but as organized States, having a present form of government, and entitled to remodel that form according to the necessities or policy of the people." The dissolution of the political connection between the colonies and Great Britain absolved the colonists "from all allegiance to the British crown." But the governments of the States were not dissolved—this "would have led to a subversion of all civil and political rights and a destruction [of] all laws." Rather, the States retained their corporate identities; some "proceeded to act and legislate before the adoption of any new constitution, some . . . framed new constitutions, and some . . . have continued to act under their old charters."[81]

The perpetual allegiance of the common law had been overthrown. Yet "it could not escape the notice of the eminent men of that day that most distressing questions must arise; who were to be considered as constituting the American States on the one side, and 'the State of Great Britain' on the other? The common law furnished no perfect guide, or rather, admitted of different interpretations."[82] What was certain, however, was that the republicanism of the Declaration made allegiance strictly dependent on "some overt act or consent." The general principle, as Justice Thompson had concluded, was "to consider all persons, whether natives or inhabitants upon the occurrence of the Revolution, entitled to make their choice either to remain subjects of the British crown or to become members of the United States. This choice was necessarily to be made within a reasonable time."[83] What was reasonable varied in the individual states, as we have seen. But it

would be difficult to argue that "a reasonable time" could extend beyond the Treaty of Peace in 1783. On the basis of the decision in *Inglis*, it is clear beyond any possible doubt that the notion of perpetual allegiance had been rejected because of the American Revolution. Allegiance was now based on consent and was the product of social contract. In republican government allegiance is held in trust, not in perpetuity.

The question of expatriation, however, has been a vexing question in American jurisprudence. Both Madison and Jefferson regarded the right of expatriation as intrinsic to social compact as an aspect of the right of revolution. And while there was widespread agreement that the right of expatriation replaced the common law notion of perpetual allegiance, no legislation regulating the subject was passed until 1868. A serious attempt to pass legislation specifying the conditions for expatriation occurred in 1818, but the effort ultimately failed because, even though almost everyone agreed that there was a natural right to expatriation, there were significant doubts as to whether Congress possessed the power to specify its exercise. It was frequently acknowledged that "the right of expatriation was recognized by the declaration of our independence in 1776, and founded on the immutable principles of self government," and it was a frequently rehearsed argument that the common law doctrine of perpetual allegiance was of feudal origin and unsuitable as a ground of republican citizenship.[84] It was also argued that the Constitution, in granting exclusive power to Congress to provide uniform rules of naturalization, necessarily recognized the right of expatriation. Presumably the implicit recognition of this right authorized Congress to specify the conditions of its exercise as well. But the proponents of the bill failed and the legislative recognition of the right of expatriation did not occur for another half-century.

In 1868, the Reconstruction Congress passed the Expatriation Act as a companion piece to the Fourteenth Amendment's specification of citizenship. The act simply provided, in pertinent part, that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Senator Howard, whom we have already seen as the author of the Fourteenth Amendment's citizenship clause, stated that the principles of the Declaration of Independence—alluded to in the language of the act—meant that "the right of expatriation . . . is inherent and natural in man as man."[85] The notion of birthright citizenship was frequently described as an "indefensible feudal doctrine of indefeasible allegiance." One member of the

House of Representatives gave expression to the general sense of the Congress when he concluded that "[i]t is high time that feudalism were driven from our shores and eliminated from our law, and now is the time to declare it."[86]

Representative Frederick Woodbridge of Vermont, one of the principal proponents of the legislation, argued that the doctrine of perpetual allegiance "is based upon the feudal systems under which there were no free citizens . . . and the individual man [had] no personal rights; and it was from this source and system that Blackstone derived his idea of indefeasible and perpetual allegiance to the English Crown." But "the old feudal doctrine stated by Blackstone and adopted as part of the common law of England, that once a citizen by accident of birth [,] expatriation under any circumstances less than the consent of the sovereign is an impossibility. The doctrine . . . is not only at war with the theory of our institutions, but is equally at war with every principle of justice and of sound public law."[87] With the passage of the Expatriation Act of 1868, it seemed that birthright citizenship had finally been banished from the American regime. Representative Woodbridge's unequivocal repudiation of Blackstone makes it virtually impossible to maintain that, after the passage of the Expatriation Act, the common law was the basis of American citizenship. It is similarly difficult to believe that the Framers of the Fourteenth Amendment intended to adopt the common law rule of citizenship in the light of their many protestations that citizenship derived from consent. If it were true, as we saw Chancellor Kent argue, that the common law was in force until repealed by legislative acts, then the Expatriation Act certainly contemplated such a repeal.

Citizenship was now the province of all who were born or naturalized in the United States and subject to its jurisdiction. As Senators Howard and Trumbull remarked in defense of the Fourteenth Amendment's citizenship clause, "subject to the jurisdiction" meant owing allegiance exclusively to the United States; and allegiance is established by reciprocal contract—an offer on the part of government promulgated in uniform rules of naturalization and individual choice on the part of those seeking citizenship. Allegiance is not simply a matter of geography; not all who are born within the geographical limits of the United States are born within the allegiance or jurisdiction of the United States. In the Fourteenth Amendment, there are two requirements: birth or naturalization in the United States *and* within the jurisdiction of the United States. If all persons who are born in the United States were ipso facto born within its jurisdiction,

then the jurisdiction clause would be rendered superfluous. But a singular requirement of a written constitution is that no interpretation can render any part of the constitution without force or meaning. For example, children born in the United States to illegal alien parents are not born within the jurisdiction of the United States, because their parents, although subject to the jurisdiction of its laws and courts, are not within the jurisdiction of the United States in terms of allegiance. As in the case of *Inglis v. Trustees of Sailor's Snug Harbor,* the allegiance of the children properly follows that of the parents. No one can become a citizen without the permission of the United States, nor can any individual be made a citizen without his or her consent. This reciprocity is the necessary and sufficient ground of citizenship based on the consent of the governed.

## NOTES

1. *Chisholm v. Georgia*, 2 U.S. (2 Dall) 419, 456 (1793) (Wilson, J.).

2. Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham, Md.: Rowman & Littlefield, 2000), 37.

3. Robert J. Kaczorowski, *The Nationalization of Civil Rights* (New York: Garland Publishing, 1987), 34, 103; see William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988), 71–80; Harold M. Hyman and William Wiecek, *Equal Justice Under Law: Constitutional Development 1835–1875* (New York: Harper & Row, 1982), 400–404; Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, N.C.: Duke University Press, 1999), 6, 56.

4. *Congressional Globe*, 39th Cong., 1st Sess., 2459 (1866).

5. Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, D.C.: Regnery Gateway, 1994), 21; see 34, 62, 71, 293–94, 301.

6. *Congressional Globe*, 39th Cong., 1st Sess., 866.

7. Lincoln, "Speech at Chicago," July 10, 1858, in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, N.J.: Rutgers University Press, 1953), 2:492; see also "House Divided Speech," June 16, 1858, in *Collected Works*, 2:461.

8. The late Justice Thurgood Marshall said that he did not consider "the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government and its respect for the individ-

ual freedoms and human rights, we hold as fundamental today. . . . While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment." "Speech to the San Francisco Patent and Trademark Trade Association," Maui, Hawaii, May 6, 1987. Printed in *Harvard Law Review* 101 (1987): 1, 2.

9. In addition to the speeches cited in the text, see inter alia, *Congressional Globe*, 39th Cong., 1st Sess., 571 (Rep. Morrill); 573 (Sen. Trumbull); 574 (Rep. Johnson); 673–74; 680; 682; 684–85 (Sen. Sumner); 726–28 (Rep. Walker); 739 (Sen. Lane); 1012 (Rep. Plants); 1077–78 (Sen. Nye); 1089 (Rep. Bingham); 1262 (Rep. Broomall); 2510 (Rep. Miller); 2802 (Sen. Stewart); 2961 (Sen. Poland); 3032 (Sen. Johnson); 3037 (Sen. Yates).

10. *Congressional Globe*, 39th Cong., 1st Sess., 2459 (Rep. Stevens): "a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed"; 2462 (Rep. Garfield); 2498 (Rep. Broomall); 2896 (Sen. Doolittle).

11. Kaczorowski, *The Nationalization of Civil Rights*, 199.

12. *Congressional Globe*, 39th Cong., 1st Sess., 2890 (Sen. Howard).

13. *Congressional Globe*, 39th Cong., 1st Sess., 2895.

14. *Congressional Globe*, 39th Cong., 1st Sess., 2890. A leading textbook, Thomas A. Aleinikoff, David Martin, and Horoshi Motomura, *Immigration and Citizenship: Process and Policy* (4th ed.) (St. Paul, Minn.: West Group, 1998), 14, quotes the language of the Fourteenth Amendment with a parenthetical explanatory remark: "All persons born or naturalized in the United States and subject to the jurisdiction thereof [which may exclude the children of foreign ambassadors, and means little, if anything, more than that], are citizens of the United States and of the state wherein they reside." But the debate in the thirty-ninth Congress clearly demonstrated that "allegiance" was a requirement in addition to birth or naturalization. Indians were excluded as were the children born in the United States of those who were merely sojourners. Interpreting the "jurisdiction" clause as automatically including all persons who are born within the territorial limits of the United States simply renders the jurisdiction clause superfluous. Illegal aliens, for example, are not within the jurisdiction of the United States and neither are their children who are born in the United States. Even under the pure theory of birthright citizenship, allegiance (not territory) was decisive (see below the discussion of *Calvin's Case*). The exclusion of Indians from citizenship by the operation of the "jurisdiction" clause indicates that territory is not the principal factor in determining citizenship. In 1870, a Senate resolution instructed the Judiciary Committee to investigate whether the Fourteenth Amendment conferred citizenship upon Indians. The committee report, published on December 14, 1870, concludes "that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment to the Constitution." Indeed, "the Indian tribes were . . . excluded by the restricting phrase, 'and subject to the jurisdiction,'

and that such has been the universal understanding of all our public men since that amendment became a part of the Constitution" (Senate Report No. 268, 41st Congress, 3rd Sess. [1870], 9–10). It would, of course, be chimerical to believe that the Framers of the Fourteenth Amendment intended to confer citizenship on the children of illegal aliens born in the United States, but not on Native Americans born in the United States. See Edward J. Erler, "Immigration and Citizenship: Illegal Immigrants, Social Justice and the Welfare State," in *Loyalty Misplaced: Misdirected Virtue and Social Disintegration*, ed. Gerald Frost (London: Social Affairs Unit, 1997), 77–81.

15. *Congressional Globe*, 39th Cong., 1st Sess., 2890. See also 2765 (Sen. Howard).

16. See *Congressional Globe*, 39th Cong., 1st Sess., 477 (Rep. Saulsbury); 600 (Sen. Trumbull); 680, 687 (Rep. Sumner); 1088 (Rep. Woodbridge); 1090 (Rep. Bingham).

17. Daniel A. Farber and John E. Meunch, "The Ideological Origins of the Fourteenth Amendment," *Constitutional Commentary* 1 (1984): 236.

18. Farber and Meunch, "Ideological Origins," 255.

19. Thomas Jefferson, "A Summary View of the Rights of British Americans," in *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York: Library of America, 1984), 105.

20. Jefferson, "Summary View," 105.

21. St. George Tucker, "Of the Unwritten or Common Law of England; and Its Introduction Into, and Authority within the United States," Note E, in *Blackstone's Commentaries: With Notes of Reference, to The Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. With An Appendix to Each Volume . . .*, ed. St. George Tucker (Philadelphia: William Young Birch, and Abraham Small, 1803; reprint, New York: Augustus M. Kelley Publishers, 1969), 2:384.

22. John Locke, *Second Treatise*, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), para. 95.

23. Locke, *Second Treatise*, 99.

24. Locke, *Second Treatise*, 95.

25. Locke, *Second Treatise*, 118.

26. Locke, *Second Treatise*, 115.

27. James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978), 17.

28. 2 *Howell's State Trials* 559 (1608). Coke's opinion is reported at 607.

29. 2 *Howell's State Trials* 575. The delicate political character of the case was indicated by Bacon in his peroration: "Some things I may have forgot, and some things perhaps I may forget willingly; for I will not press any opinion or declaration of late time which may prejudice the liberty of this debate; but '*ex dictis, et ex non dictis*,' upon the whole matter I pray judgment for the plaintiff."

30. Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991), 138, praises James I ("our most wise king") who "endeavour[ed] the Union of his two Realms of *England* and *Scotland*. Which if he could have obtained, had in all likelihood prevented the Civill warres, which make both those kingdomes, at this present, miserable."

31. Quoted in Polly J. Price, "Natural Law and Birthright Citizenship in Calvin's Case (1608)," *Yale Journal of Law and the Humanities* 9 (Winter 1997): 126.

32. James I, "The Trew Law of Free Monarchies: or the Reciprock and Mutuall Duetie Betwixt a Free King, and His Naturall Subjects," in *Political Writings of King James VI and I*, ed. Johann P. Sommerville (Cambridge: Cambridge University Press, 1994), 64; Zera S. Fink, *The Classical Republicans: An Essay in the Recovery of a Pattern of Thought in Seventeenth Century England* (Evanston, Ill.: Northwestern University Press, 1945), 46.

33. 2 *Howell's State Trials* 576.

34. 2 *Howell's State Trials* 614.

35. 2 *Howell's State Trials* 615.

36. 2 *Howell's State Trials* 629. Translation supplied by Thomas G. West.

37. 2 *Howell's State Trials* 652.

38. 2 *Howell's State Trials* 629.

39. 2 *Howell's State Trials* 629–30.

40. Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 1253a-30.

41. 2 *Howell's State Trials* 629. See Edward Erler, "The First Amendment and the Theology of Republican Government," *Interpretation: A Journal of Political Philosophy* 27, no. 3 (Spring 2000): 234–35.

42. Aristotle, *The Politics*, Book III, chap. 2.

43. Jaffa, *A New Birth of Freedom*, 301; see also 44, 124, 146, 153.

44. Jaffa, *A New Birth of Freedom*, 135.

45. Jefferson, *Summary View*, 105.

46. 2 *Howell's State Trials* 626.

47. 2 *Howell's State Trials* 619.

48. Harvey Wheeler, "Calvin's Case (1608) and the McIlwain-Schuyler Debate," *American Historical Review* 61, no. 3 (April 1956): 591.

49. 2 *Howell's State Trials* 621, 619.

50. 2 *Howell's State Trials* 617.

51. 2 *Howell's State Trials* 623.

52. 2 *Howell's State Trials* 638–39.

53. Locke, *Second Treatise*, 116.

54. William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press), 1765–69; reprint (Chicago: University of Chicago Press, 1979), 1:354–55.

55. Blackstone, *Commentaries*, 357–58.

56. Price, "Natural Law and Birthright Citizenship," 74.
57. Price, "Natural Law and Birthright Citizenship," 138.
58. Madison, "The Report of 1800," in *The Papers of James Madison*, ed. David B. Mattern, et al. (Charlottesville, Va.: University Press of Virginia, 1991), 17:328.
59. Jefferson to John Cartwright, June 5, 1824, in *Thomas Jefferson: Writings*, 1491.
60. Madison to Daniel Webster, March 15, 1833, in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1900–1910), 6:605.
61. Madison to N. P. Trist, February 15, 1830, in *Writings of James Madison*, 9:355.
62. Madison, "Sovereignty," in *Writings of James Madison*, 9:570–71.
63. Jaffa, *A New Birth of Freedom*, 437; see also 17, 118. Locke, *A Letter Concerning Toleration*, ed. James H. Tully (Indianapolis: Hackett Publishing, 1983), 26. Jefferson, *Notes on the State of Virginia*, in *Thomas Jefferson: Writings*, 285: "our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God."
64. Madison, "Sovereignty," 9:571.
65. Madison to N. P. Trist, 9:356.
66. Madison to N. P. Trist, 9:353.
67. Kaczorowski, *The Nationalization of Civil Rights*, 199.
68. Madison, "Sovereignty," 9:570
69. 1 *Annals of Congress* 419, ed. Gales and Seaton (May 22, 1789).
70. 1 *Annals of Congress* 420. Madison's speech appears at 420–23.
71. See John P. Roche, *The Early Development of United States Citizenship* (Ithaca, N.Y.: Cornell University Press, 1949), 2, 26. The problem was illustrated by Jefferson even before the adoption of the Constitution when he wrote in the *Notes on the State of Virginia* that slaves are "one half the citizens" of America (288). The question of who were citizens of the United States necessarily involved the question of slavery.
72. James Kent, *Commentaries on American Law* (New York: Da Capo Press, 1971), 2:42.
73. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Peters) 99, 120 (1830).
74. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Peters) 99, 120.
75. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Peters) 122.
76. *Respublica v. Chapman*, 1 Dall. 52, 58 (1780).
77. *Respublica v. Chapman*, 1 Dall. 58.
78. *Jackson v. White*, 20 Johns. 313, 323 (1822).
79. *Kilham v. Ward*, 2 Mass. 236 (1806).
80. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Peters) 124.
81. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Peters) 157–58.
82. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Peters) 159.

83. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Peters) 160.

84. *Annals of Congress*, 15th Cong., 1st Sess., 1042.

85. *Congressional Globe*, 40th Cong., 2nd Sess., Appendix, 561.

86. *Congressional Globe*, 40th Cong., 2nd Sess., Appendix, 868 (Rep. Woodward). Representative Bailey of New York described birthright citizenship as "the slavish feudal doctrine of perpetual allegiance," 967. Similar arguments were pervasive throughout the debate.

87. *Congressional Globe*, 40th Cong., 2nd Sess., Appendix, 1130–31.