PROTECTING MINORITIES FROM DE FACTO STATELESSNESS: BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES

MICHAEL SULLIVAN*

Birthright citizenship is the subject of intense political debate in the United States because of its connection to the debate over unauthorised immigration and the inclusion of national minorities. Similar debates have taken place in other common law countries, leading to the restriction of jus soli birthright citizenship in the United Kingdom, Australia, New Zealand and Ireland. The Supreme Court of the United States and United States Department of State's interpretation of the Citizenship Clause in § 1 of the Fourteenth Amendment ensures that all 'persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States', including the children of unauthorised immigrants. This article argues that the rule of jus soli birthright citizenship in the United States is rooted in an older understanding of the birthright of native-born British subjects, and later, American citizens, to enjoy the birthright of protections and an ever-expanding set of rights based on where they were born, regardless of the status of their parents. Stated in a way that included the children of slaves and immigrants as citizens based on their birthplace alone, jus soli birthright citizenship in the United States remains a powerful tool of inclusion for marginalised minority groups.

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I INTRODUCTION

The practice of *jus soli* birthright citizenship is the subject of intense political contestation in the United States given its connection to the hotly contested political debate over illegal immigration. The Supreme Court of the United States ('Supreme Court') and the United States Department of State's interpretation of the Citizenship Clause in § 1 of the *Fourteenth Amendment* of the *United States Constitution* ('*US Constitution*') ensures that all 'persons born or naturalized in

* Michael Sullivan is Associate Professor of International Relations at St Mary's University in San Antonio, Texas. He is the author of *Earned Citizenship* (Oxford University Press 2019).

the United States, and subject to the jurisdiction thereof, are citizens of the United States'.[1] This includes the children of unauthorised immigrants. The practice of conferring the rights of political membership on all individuals born under the protection of the sovereign predates the ratification of the *Fourteenth Amendment*. In Anglo-American law, the concept of a birthright to political membership can be traced back to Edward Coke's *Calvin's Case* in 1608.[2] This aspect of birthright political membership remained in force in the US through its independence and the ratification of the *Fourteenth Amendment*. It persists in subsequent US diplomatic interpretations of birthright citizenship as a 'common law rule' embodied in the Citizenship Clause of the *Fourteenth Amendment*.[3] The common law rule of birthright citizenship that was entrenched in the *Fourteenth Amendment* continues to protect the children of unauthorised immigrants against efforts to make them de facto stateless in their country of birth and upbringing.[4]

In this article, I make two linked arguments. My central argument is that national American citizenship is directly connected to antecedent notions of allegiance and protection in the Anglo-American common law as applied during the colonial period. The rule of citizenship by territorial birth remained largely the same before, during and after the American Revolution. I argue that birthright citizenship is not only entrenched in the text of § 1 of the *Fourteenth Amendment* to the *US Constitution* but in a more ancient common law understanding of the birthright of native-born British subjects and later American citizens. Once this rule was stated in a way that included African-Americans, Indigenous persons and other minorities as citizens based on their birthplace alone, *jus soli* birthright citizenship became a powerful tool of inclusion for marginalised minorities, preventing majorities from denying them the benefits of citizenship. While the main focus of this article is on developments in the United States, the article is relevant to the history of *jus soli* birthright citizenship as a means of protecting the rights of national minorities, including the children of immigrants in other jurisdictions. Reaching beyond the scope of existing accounts of the historical development of American citizenship, this article defends a broad normative vision of the *jus soli* as an instrument of protection for minorities that extends to US territories and argues for its preservation and extension beyond the United States.

II Birthright Citizenship and National Minorities: An Overview

The practice of granting political membership, as subjects, and later, citizens, to all persons born within a country's territorial jurisdiction can be traced back to the principle of allegiance and protection set forth in *Calvin's Case* by Edward Coke

1 *Constitution of the United States of America*, amendment XIV, § 1.

2 *Calvin v Smith* [1608] 7 Co Rep 1a; 77 ER 377 ('*Calvin's Case*').

3 United States Department of State, *Acquisition by Birth in the United States* (Foreign Affairs Manual No 8 FAM 301.1, CT:CITZ-50, 21 January 2021) [a(1)] <https://fam.state.gov/fam/08fam/08fam030101.html>.

4 Linda Kerber, 'Birthright Citizenship: The Vulnerability and Resilience of an American Constitutional Principle' in Jaqueline Bhabha (ed), *Children Without a State: A Global Human Rights Challenge* (MIT Press 2014) 255, 269. Here, I use Jacqueline Bhabha's understanding of de facto statelessness as applying to undocumented immigrants who cannot readily call upon their rights of nationality in the only country where they ever lived, even though they may be de jure nationals by descent elsewhere: see Jacqueline Bhabha, 'Preface' in Jacqueline Bhabha (ed), *Children Without a State: A Global Human Rights Challenge* (MIT Press 2014) xiii, xiii.

in 1608.[5] Ann Dummett and Andrew Nicol in their book — *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (1990) — argued that the common law's long-standing reliance on *jus soli*, or the rule of birthplace, stemmed from the heterogeneous nature of the English nation from which it evolved.[6] A common allegiance and identity was required to bring together a variety of peoples living in the same territory. In *The New Politics of Immigration and End of Settler Societies* (2016), Catherine Dauvergne argues that in the United States and Great Britain's dominions, including the settler states of Canada, the United Kingdom, Australia and New Zealand, *jus soli* birthright citizenship had the added benefit of encouraging immigrant integration and bridging diverse ethnic groups into a shared political identity.[7]

However, in the 20th and 21st centuries, *jus soli* birthright citizenship has been called into question in Great Britain and each of its former dominions, as political debates about birthright citizenship have been shaped by broader disputes about immigration and social welfare policy. In Britain (effective 1983),[8] Australia (effective 1986),[9] Ireland (effective 2004)[10] and New Zealand (effective 2006),[11] changes to citizenship attribution rules were designed as immigration control measures targeting non-citizen parents. Australia, New Zealand, the United Kingdom and Ireland each primarily accord citizenship to persons at birth based on their parent's citizenship and legal permanent residence there and have a residency requirement for children of non-permanent residents to obtain citizenship ranging from three years in Ireland[12] to 10 years in the United Kingdom and Australia.[13] While a child may enjoy some local legal protections during this time, 10 years provides immigration authorities with ample time to deport non-permanent resident parents with native-born children.[14]

Canada has retained a broad application of *jus soli* birthright citizenship as s 3 of its *Citizenship Act* affords it to all persons born in the country, with the exception of the children of foreign diplomats.[15] However, both Liberal and Conservative Canadian governments have considered changes to the *Citizenship Act* that limit citizenship by territorial birth.[16] As recently as 2018, the

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5 *Calvin's Case* (n 2).

6 Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfield Publishers 1990) 21–22.

7 Catherine Dauvergne, *The New Politics of Immigration and End of Settler Societies* (Cambridge University Press 2016) 20.

8 Zig Layton-Henry and Czarina Wilpert, *Challenging Racism in Britain and Germany* (Palgrave Macmillan 2003) 73.

9 Gianni Zappalà and Stephen Castles, 'Citizenship and Immigration in Australia' (1999) 13(1) *Georgetown Immigration Law Journal* 273, 284.

10 Eithne Luibhéid, *Pregnant on Arrival: Making the Illegal Immigrant* (University of Minnesota Press 2013) 149.

11 Caroline Sawyer, 'The Loss of Birthright Citizenship in New Zealand' (2013) 44 *Victoria University of Wellington Law Review* 653, 654; 'Types of Citizenship: Birth, Descent and Grant', *New Zealand Government* (Web Page, 15 March 2022) <https://www.govt.nz/browse/passports-citizenship-and-identity/nz-citizenship/types-of-citizenship-grant-birth-and-descent/>.

12 Olivia Kelly, 'Citizenship Waiting Times to be Reduced for Children', *Irish Times* (online, 8 June 2021) <https://www.irishtimes.com/news/crime-and-law/citizenship-waiting-times-to-be-reduced-for-children-1.4586944>.

13 Thomas Janoski, *The Ironies of Citizenship* (Cambridge University Press 2010) 30–31.

14 Zappalà and Castles (n 9) 284.

15 *Citizenship Act 1985* (1985) Revised Statutes of Canada c C-29, s 3 (Canada).

16 Margaret Young, 'Canadian Citizenship Act and Current Issues' (Working Paper No BP-445 E, Law and Government Division of the Government of Canada, October 1997) <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp445-e.html>.

Conservative Party of Canada adopted a policy platform supporting limitations on *jus soli* citizenship.[17] These proposed policy changes have never been implemented into law but they continue to be raised in debates about the future of immigration and citizenship laws in Canada, motivated by fears that non-residents could obtain social welfare or immigration benefits from Canada simply by giving birth to a Canadian child or inheriting Canadian citizenship.[18]

Jus soli is also the prevalent mode of citizenship attribution at birth in Latin America, arising from a different political and legal tradition than the Anglo-American common law states. Upon gaining their independence, most of Spain's former colonies chose *jus soli* to break with the former colonial order and to prevent Spain from asserting authority over persons born in newly independent states.[19] Latin American states also shared a settler state experience with Anglo-American North America, whereby *jus soli* facilitated the rapid integration of new immigrants by the second generation.[20] Spain's former possessions in South America enshrined *jus soli* citizenship in their constitutions to 'create "citizens out of colonial subjects" and to forge "national communities from colonial societies marked by stark social distinctions"', all the while excluding those born outside the Americas with questionable allegiances to now-foreign sovereigns.[21] In practice, this nation-building project meant eradicating pre-existing Indigenous rights, land claims and identities, with the aim of encouraging immigration and rapidly integrating the children of immigrants into a homogenous imagined political community.[22] Brazil followed this pattern upon its independence, rejecting the prior Portuguese rule of citizenship by descent in favour of a qualified *jus soli*, which excluded African slaves who constituted a quarter of the population at the time of its independence.[23] Regardless of the tradition in which it is situated, the prevalence of *jus soli* citizenship in the Americas makes de jure statelessness rare in the Americas compared to the Eastern Hemisphere, where, in most

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17 Janice Dickson, 'Scheer Defends Birthright Policy, Says Ending "Birth Tourism" is Objective', *Toronto Star* (online, 27 August 2018) <https://www.thestar.com/news/canada/2018/08/27/scheer-defends-birthright-policy-says-ending-birth-tourism-is-objective.html>.

18 Alyse Kotyk, 'More Than Half of BC Residents Think Birth Tourism Degrades Value of Canadian Citizenship: Poll', *CTV News* (online, 4 September 2020) <https://bc.ctvnews.ca/more-than-half-of-b-c-residents-think-birth-tourism-degrades-value-of-canadian-citizenship-poll-1.5093202>.

19 David Fitzgerald, 'Nationality and Migration in Modern Mexico' (2005) 31(1) *Journal of Ethnic and Migration Studies* 171, 175 citing Eduardo Trigueros Savaria, 'La Nacionalidad Mexicana: Notas para el Estudio del Derecho Internacional Privado' (1940) 28 *Jus: Revista de Derecho y Ciencias Sociales*; Diego Acosta, *The National Versus Foreigner in South America: 200 Years of Migration and Citizenship Law* (Cambridge University Press 2018) 33–38.

20 Fitzgerald (n 19) 179; Olivier Willem Vonk, *Nationality Law in the Western Hemisphere* (Brill Nijhoff 2014) 9. While *jus sanguinis*, or citizenship by descent, is the primary rule of citizenship attribution in the Eastern Hemisphere, there are some modifications that favour the eventual inclusion of a third generation of immigrants. France is notable for its tradition of double *jus soli*, whereby a child born in France of foreign parents who had themselves been born in France acquires French citizenship irrevocably. This principle was originally designed in 1889 to end immigrant exemptions from military service. Yet, in the wake of the Algerian Civil War and independence movement, the double *jus soli* facilitated the integration of the French-born children of Algerians who left for France after Algeria's independence: Dieter Gosewinkel, *Struggles for Belonging* (Oxford University Press 2021) 33.

21 Acosta (n 19) 37 quoting Nancy P Appelbaum, Anne S Macpherson and Karin A Rosemblatt, 'Introduction: Racial Nations' in Nancy P Appelbaum, Anne S Macpherson and Karin A Rosemblatt (eds), *Race and Nation in Modern Latin America* (University of North Carolina Press 2003) 1, 4.

22 ibid 53–54.

23 ibid 38.

countries, newborn children inherit their citizenship status, or lack thereof, from their parents.[24] Nevertheless, irregularities in birth registration sometimes lead to instances of de facto statelessness characterised by a lack of access to the political and social rights of citizenship in the absence of documented citizenship.[25] This problem has only become more prevalent amidst the operational constraints resulting from the COVID-19 pandemic since 2020.[26]

In the Caribbean, countries like the Dominican Republic and the Bahamas, which have transitioned from a predominantly *jus soli* citizenship rule to a *jus sanguinis* citizenship rule, have seen a marked increase in de facto statelessness in their territory, where native-born residents cannot access social and political rights.[27] In both countries, persons of Haitian ancestry (who face considerable discrimination as economic migrants) make up the bulk of persons who are affected by the abandonment of the *jus soli* rule, which occurred first in the Bahamas at independence in 1973 and then, more significantly, in the Dominican Republic in 2010.[28] In the latter case, the Dominican Republic amended its *Constitution* to exclude children born to parents who illegally reside in Dominican territory from *jus soli* citizenship, mainly affecting the children of Haitian labourers who already suffer from racism and economic marginalisation.[29] In the absence of documentation, Dominican citizens of Haitian descent are targeted for deportation, simply because of the colour of their skin.[30]

Unlike in the former British dominions, which are common law jurisdictions that transitioned from a *jus soli* birthright citizenship rule to a regime dominated by *jus sanguinis* or citizenship by descent, based on the immigration and nationality status of one's parents, in the United States, territorial birthright citizenship is explicitly entrenched in the *Constitution* and rooted in the nation's historical democratisation. The Citizenship Clause of the *Fourteenth Amendment* of the *US Constitution* is the centrepiece of the United States' commitment to legal equality emerging out of the American Civil War ('Civil War') and post-war reconstruction. Even before the Civil War, the struggle by emancipated African-Americans for recognition as free and equal citizens augmented existing legal arguments for *jus soli* citizenship in the United States.[31] Nevertheless, *jus soli* birthright citizenship is still politically contested in the United States, where debates about birthright citizenship and the future status of its estimated 11 million unauthorised immigrants and their children are linked. Legislative efforts to reinterpret the Citizenship Clause of the *Fourteenth Amendment* of the *US Constitution* to exclude the children of irregular immigrants continue.[32] The US

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24 Kristy Belton, 'Heeding the Clarion Call in the Americas: The Quest to End Statelessness' (2017) 31(1) *Ethics and International Affairs* 17, 18.

25 Polly Price, 'Jus Soli and Statelessness: A Comparative Perspective from the Americas' in Benjamin Lawrence and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 27, 42 ('Jus Soli and Statelessness').

26 Carla Abou-Zehr et al 'The COVID-19 Pandemic: Effects on Civil Registration of Births and Deaths and on Availability and Utility of Vital Events Data' (2021) 111 *American Journal of Public Health* 1123.

27 Price (n 25) 31, 39.

28 Kristy Belton, *Statelessness in the Caribbean: The Paradox of Belonging in a Postnational World* (University of Pennsylvania Press 2017) 57, 87.

29 ibid 87–88, 97–98.

30 ibid 96.

31 Martha S Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge University Press 2018) 9–10.

32 See, eg, *Birthright Citizenship Act of 2021* (2021) HR 140 (USA).

proposals mirror the effect of 2010 changes to *jus soli* in the Dominican Republic as they apply to the children of undocumented immigrants, which have led to an increase in cases of de facto statelessness among native-born children.[33] Most US legal analysts believe that a constitutional amendment would be required to alter US territorial birthright citizenship and that there is insufficient political support to realise this constitutional change in the United States.[34]

III THE BIRTHRIGHT AT THE ORIGINS OF AMERICAN POLITICAL MEMBERSHIP

In the United States, efforts to restrict *jus soli* birthright citizenship have centred on reinterpreting the Citizenship Clause of the *Fourteenth Amendment*, which currently allows nearly every person born subject to the jurisdiction of the United States, including the children of unauthorised immigrants, to become US citizens at birth.[35] In their book *Citizenship Without Consent* (1985), which still influences the debate about birthright citizenship in the United States, Peter Schuck and Rogers M Smith argued that 'America's liberal democracy is based on the notion of political membership by consent and that [birthright citizenship] for aliens is inconsistent with this commitment'.[36] Political debates concerning *jus soli* birthright citizenship are so heated because they have broader implications for immigration policy and those who oppose Schuck and Smith's argument fear that policymakers will use it to deny US citizenship to the children of unauthorised immigrant parents.[37] Schuck and Smith have since moderated their critique of *jus soli* citizenship, both as a normative and interpretive matter. With the repeated failure of legislation to repeal birthright citizenship in the US, Smith contends that 'the nation can be said to have effectively consented to a reading of the *Fourteenth Amendment* that confers *jus soli* birthright citizenship on children of aliens never legally admitted to the United States'.[38] Similarly, Schuck now argues that Congress' lack of collective 'inclination to eliminate the traditional rule' reflects 'the advantages of the traditional rule' of territorial birthright citizenship, 'which is clear, easily administered, inclusive, and avoids illegal status for the future generations of long-term residents'.[39]

A *Calvin's Case: The Origins of Birthright Citizenship*

Birthright citizenship in the United States is rooted in a practice developed in England and transferred to America during the colonial period. The modern practice of birthright citizenship can be traced back to *Calvin v Smith* (1608), a case arising out of a disputed right to inheritance occasioned by the union between

33 Polly Price, 'Jus Soli and Statelessness: A Comparative Perspective from the Americas' in Benjamin Lawrence and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 27, 31.

34 Christian Joppke, *Citizenship and Immigration* (Polity Press 2010) 38; Dauvergne (n 7) 20, 103–105.

35 Elizabeth F Cohen, 'Reconsidering US Immigration Reform: The Temporal Principle of Citizenship' (2011) 9(3) *Perspectives on Politics* 575, 575.

36 Peter Schuck and Rogers M Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (Yale University Press 1985).

37 Leo Chavez, *Anchor Babies and the Challenge of Birthright Citizenship* (Stanford University Press 2017) 13.

38 Rogers M Smith, 'Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008' (2009) 11(5) *University of Pennsylvania Journal of Constitutional Law* 1329, 1331.

39 Peter Schuck, *One Nation Undecided: Clear Thinking about Five Hard Issues that Divide Us* (Princeton University Press 2017) 168–69.

Scotland and England in the crown of James VI and I, respectively.[40] In this case, Edward Coke argued that those born under the ligeance and obedience of the sovereign, regardless of their parents' political status in the realm, were deemed to be natural born subjects to the duties and beneficiaries of the rights of allegiance. In this case, both the time and place of a subject's birth was also important, as this determined whether the young Scottish plaintiff, Robert Calvin, was born subject to the allegiance of James VI and I as both the sovereign of England and Scotland for the purpose of determining his political membership and capacity to inherit land in England.[41] In short, membership in the community so defined, along with its attendant status, obligations and rights, was based first in divine ordinance and natural inheritance that transcends political boundaries and subsequently in a relationship of consent between the sovereign and his subject.

Even under the dominion of a powerful centralised monarchy, the privileges accorded to those deemed to be subjects by birth contained the germ of what were to be viewed as natural rights in John Locke's formulation and the rights of Englishmen as they were understood by the Founding Fathers of the United States ('Founders').[42] First, the elevation of the rule of birthright citizenship above 'judicial and municipal law[s]' ensured the universality and permanence of the rights conferred by this standard for the benefit of those born under the jurisdiction of the realm.[43] According to Coke, 'the obedience and ligeance of the subject to his sovereign be due by the law of nature … [as] parcel of the laws, as well of England, as of all other nations, and is immutable'.[44] This meant that an unpopular or powerless minority group — in this case, James VI's subjects in Scotland, but later extending to ethnic and racial minorities in America — could not be disenfranchised through a popular action of the privileges inhering from allegiance to the sovereign. Second, by rendering the bonds of allegiance between subject and sovereign prior to the emergence of body polities and laws, Coke established a rule that would ensure the continuity of a 'natural community of allegiance' through the change in regime effectuated by the American Revolution.[45] Third, the rule of birthright subjectship stated in *Calvin's Case* established the basis for a national community of allegiance that took precedence over customary and feudal allegiances in England and the colonies.[46] Fourth, the rule of birthright citizenship established the basis by which individuals would be guaranteed what was later described in international human rights law as the 'right to a nationality' and the civil and political rights attached to this status.[47] Fifth, the feudal context of birthright citizenship in *Calvin's Case* has an advantage over modern doctrines of political consent: it binds the sovereign to provide for the protection of all persons born under their jurisdiction, whereas political majorities have had more freedom to discriminate against unpopular minority groups through their

40 *Calvin's Case* (n 2).

41 Elizabeth Cohen, *The Political Value of Time: Citizenship, Duration and Democratic Justice* (Cambridge University Press 2018) 40.

42 Polly J Price, 'Natural Law and Birthright Citizenship in Calvin's Case (1608)' (1997) 9 *Yale Journal of Law Journal and the Humanities* 73, 88 ('Natural Law and Birthright Citizenship').

43 *Calvin's Case* (n 2) 382.

44 ibid 394.

45 James H Kettner, *The Development of American Citizenship* (University of North Carolina Press 1978) 20, 23. See, eg, *Ainslie v Martin*, 9 Mass 454 (1813); Michael A Heimos, 'Not to Confound Predicaments' in Matthew Ward and Matthew Hefferan, (eds), *Loyalty to the Monarchy in Late Medieval and Early Modern Britain* (Springer Publishing 2019) 127, 128.

46 Price, 'Jus Soli and Statelessness' (n 25) 131.

47 Price, 'Natural Law and Birthright Citizenship' (n 42) 77.

immigration and naturalisation laws.[48] Finally, this move has had lasting normative potential reaching beyond the limitations of its historical context. The rule of birthright citizenship provided a powerful legal tool for counteracting attempts to apply the ancient Anglo-Saxon 'corruption of blood principle' in later English and American law.[49] By eliminating birthright citizenship, children born in the United States to unauthorised immigrants would be made to suffer in perpetuity for the misdeeds of their parents.[50] Hence, despite its archaic provenance, the rule of birthright citizenship as articulated in *Calvin's Case* contains tools that are normatively defensible in light of our current constitutional regime's commitment to values of inclusion and equal protection.

IV Taking Their Birthright Elsewhere — Maintaining the 'Rights of Englishmen' in America

The standard of birthright citizenship established in *Calvin's Case* was transported to the American colonies as part and parcel of the cherished rights of Englishmen binding colonists from Boston to Savannah into a common 'natural community of allegiance' from the first settlements, despite their religious, cultural and ideological differences.[51] Indirectly, throughout the first century of American settlement, the founding charters, covenants and statutes of the various colonies collectively affirmed the validity of English sovereignty and law on all matters 'except for certain matters of feudal land law and ecclesiastical law'.[52] Thousands of miles from England, religious dissenters who would be persecuted by the Crown at home swore their continued allegiance as 'loyal subjects of our dread sovereign Lord King James'.[53] The same community of dissenters later represented themselves as 'freeborn subjects of the State of England endowed with all and singular privileges belonging to such', recognising the validity of the standard of citizenship established 30 years earlier.[54] As the political and legal systems of the colonies matured during the colonial period, a common proto-national identity was formed around a shared adherence to the ideas of the common law that the first colonists brought with them from England, though they were not uniformly applied across the colonies.[55] The American colonists also devised their own naturalisation practices to incorporate other European settlers. The result by the time of the Revolution was the creation of an American community of allegiance that continued to protect the 'birthright' of native-born citizens while extending the customary 'rights of Englishmen' to individuals and groups from a broader range of ethnicities, national origins and religious convictions.[56]

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48 John Salmond, 'Citizenship and Allegiance' (1902) 18(1) *Law Quarterly Review* 49, 55, 63; *Plyler v Doe*, 457 US 202 (1982).

49 Max Stier, 'Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter' (1992) 44(3) *Stanford Law Review* 727.

50 Michael RW Houston, 'Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis of Granting Citizenship to Children Born of Illegal Immigrants' (2000) 33(3) *Vanderbilt Journal of Transnational Law* 693, 719.

51 Kettner (n 45) 23, 65.

52 William B Stoebuck, 'Reception of English Common Law in the American Colonies' (1969) 10(2) *William and Mary Law Review* 393, 422.

53 Donald Lutz, *Documents of Political Foundation Written by Colonial Americans* (Institute for the Study of Human Issues 1986) 65.

54 ibid 103.

55 Stoebuck (n 52).

56 Kettner (n 45) ch 4.

So long as the colonies were left free to develop their identity and institutions, including their own vision of membership, the colonists could continue to claim their liberties as Englishmen and as members of their particular colonies.[57] The former claim was codified in the British *Naturalization Act of 1740*, which 'plainly assumed that Americans were entitled to the rights of natural-born Englishmen' as they were understood in *Calvin's Case*.[58] In America, the colonists held fast to Coke's traditional common law formulation of their birthright as English subjects under the protection of the royal sovereign throughout the colonial era.[59] The assertion of imperial authority over the colonies following the French and Indian War challenged their claims to dual citizenship as heirs to the birthrights of Englishmen and members of their colonial communities.[60] Parliament and its theoretical apologists, especially William Blackstone, denied the colonists' birthright as heirs to the common law and the rights of Englishmen while residing in America.[61] In response, the colonists affirmed their allegiance to the Crown while forcefully asserting the rights pertaining to this status.[62] In 1762, James Otis opened this line of defence by referring to the British *Naturalization Act of 1740* and its declaration that 'the subjects in the colonies are intitled to all the privileges of the people of Great Britain', whether they be native-born or naturalised into this status.[63]

The *Declaration of Independence* specified a list of 'usurpations' committed by the King in express violation of 'the circumstances of our emigration and settlement here'.[64] A number of the offences cited involved violations of the rights associated with the colonists' status as British subjects established in *Calvin's Case* and the British *Naturalization Act of 1740*.[65] The result, as it was conceived of by later jurists a generation after the ratification of the *US Constitution*, was that:

> [t]his people, in union with the people of the other colonies, considered the several aggressions of their sovereign on their essential rights as amounting to an abdication of his sovereignty. The throne was then vacant; but the people, in their political character, did not look after another family to reign; nor did they establish a new dynasty; but assumed to themselves, as a nation, the sovereign power ... It was, therefore, then considered as the law of the land, that all persons born within the territories of the government and people, although before the declaration of independence, were born within the allegiance of the same government and people, as the successor of the former sovereign, who had abdicated his throne.[66]

After the American Revolution, society had not truly dissolved among those who remained resident within the American colonies, nor had it passed into a state

57 ibid.
58 ibid 134.
59 Stanley Katz, 'The American Constitution: A Revolutionary Interpretation' in Richard Beeman (ed), *Beyond Confederation* (University of North Carolina Press 1987) 35–36.
60 Kettner (n 45) 34.
61 ibid 59.
62 Thomas Martin, 'Nemo Potest Exuere Patriam: Indelibility of Allegiance and the American Revolution' (1991) 35(2) *American Journal of Legal History* 205, 210.
63 James Otis, *A Vindication of the Conduct of the House of Representatives of the Province of Massachusetts Bay* (Edes and Gill 1762) 51.
64 'Declaration of Independence: A Transcription', *United States National Archives and Records Administration* (Web page) <https://www.archives.gov/founding-docs/declaration-transcript> ('Declaration of Independence').
65 Otis (n 63) 51–52. See generally Kettner (n 45) ch 6.
66 *Ainslie v Martin* (n 45) 457–59.

of nature at this point.[67] Instead of founding a new people, the locus of the community of allegiance conceptualised in *Calvin's Case* passed to the newly independent states, which had long assumed the practical duty of protection and the right of allegiance over those born and naturalised in the American colonies.

V CITIZENSHIP BY BIRTHRIGHT AND CONSENT IN THE FOUNDING ERA AND EARLY REPUBLIC

There is no formal definition of national US citizenship in the original *Constitution*. The clauses that refer to the institution of US citizenship in reference to native-born and naturalised citizens are stated without further explanation in the text of the document. This was partly a matter of expediency. Ambiguities enabled the Founders to reach a settlement while minimising contention over issues of federalism and citizenship that preoccupied later interpreters.[68] Throughout the antebellum period before the *Fourteenth Amendment* resolved the issue, courts and legislatures alike had to refer to their best interpretation of the sources that the Founders had at their disposal: common law precedent, the customary usages of local communities and treatises in international public law all informed the views of the Founders on this subject.[69]

The clauses in the original *US Constitution* that refer to citizenship are sparse on details.[70] What is clear, however, is a distinction between two classes of citizenship. The *US Constitution* specifically provides for the establishment of a 'uniform rule of naturalization' by Congress in art I, § 8, cl 4. Since the common law was only accorded the status of law after ratification insofar as it was not overruled by the *US Constitution* or federal statute, this provision essentially severed the institution of *naturalised citizenship* from the underdeveloped practice in common law, which the colonial authorities had never regarded as suitable for American principles or necessities. The *US Constitution* also, however, recognises the institution of birthright citizenship in art II, §1, cl 5 by restricting the presidency to 'a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this *Constitution*'.

While this wording is mentioned without further discussion in the text of the *US Constitution*, an examination of the broader context in which it was written reveals the significance of the distinction between 'native-born' citizenship and naturalised citizenship. In the few passages in which the authors of *The Federalist* refer to naturalisation and citizenship status, two principal concerns are cited. First, the authors of *The Federalist* were concerned about the implications of the state-national dimensions of citizenship status. Since full faith and credit were accorded to the citizens of one state in any other state, a state with a liberal rule of naturalisation could enable 'aliens who had rendered themselves obnoxious' to imperil the good of the nation as a whole.[71] The nation had to put on a common

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67 ibid 454.

68 Kettner (n 45) 254 citing *Osborn v Bank of United States,* 22 US 738 (1824).

69 *Wong Kim Ark v United States*, 169 US 649, 654–55, 663–65 (1898).

70 Akhil Reed Amar and John C Harrison, 'The Citizenship Clause', *National Constitution Center: Interactive Constitution* (Web Page, 2022) <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/700>.

71 James Madison, 'The Federalist No 44, [22 January 1788]', *United States National Archives and Records Administration* (Web Page) <https://founders.archives.gov/documents/Madison/01-10-02-0244>.

front towards outsiders through the use of a uniform rule of admission into the status of citizenship.[72] Second, and more importantly for understanding why being a 'natural-born citizen' might have been of significance to the new Republic, the authors of *The Federalist* were fearful of the implications of 'prepossessions and habits incident to foreign birth and education' upon public officials in the new Republic.[73]

Prior to the Civil War, US citizenship status bore few civil and political benefits that could not be obtained by non-citizens. The primary controversy related to citizenship that preoccupied the Founders and other statesmen in the early Republic involved the implications of the novel state-national citizenship status created for the benefit of legacy members of the state body polities. One important exception always existed. In Anglo-American law, the ability to bequeath and inherit title to real property was reserved for subjects and citizens.[74] The breach in allegiance with Great Britain and the subsequent division of loyalties had created a large number of native-born American property owners with questionable titles. This forced jurists to consider the question of how citizenship was to be conferred in light of the principles of the new constitutional order. These cases demonstrate the compatibility between the common law principle of *jus soli* and the 'consensual principles' of the new constitutional order.

One of the first Loyalist inheritance cases to reach the US Supreme Court, *M'Ilvaine v Coxe's Lessee* (1808) involved a native-born New Jersey resident who had attempted to transfer his allegiance to Great Britain after the Revolutionary War.[75] The Court was asked to consider two arguments at this time that would have grounded allegiance to the state of New Jersey and, since the ratification of the *US Constitution*, to the United States, on consent alone. First, the plaintiff contended that 'Daniel Coxe was born an alien to the state of New Jersey' and when the Revolution commenced, 'had a right to chuse his side in a reasonable time and could not be made a citizen against his will'.[76] The Court rejected this contention on grounds that were indistinguishable from common law claims to perpetual allegiance, albeit grounded in New Jersey laws passed prior to and during the Revolution that forbade residents who had derived protection from its laws from exercising a 'right of election'.[77] This law, and its subsequent affirmation by the Supreme Court, affirms the continued authority of the communities of allegiance that existed in the states prior to, during and after the Revolution and denies the existence of a state of nature or the creation of a new people during this period.[78] The allegiance formerly due by the people of the several colonies to the English sovereign was held in this case to be transferred, upon the occurrence of the Revolution, to the government of their respective state authorities.

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72 See eg, Alexander Hamilton, 'The Federalist No 32, [2 January 1788]', *United States National Archives and Records Administration* (Web Page) <https://founders.archives.gov/documents/Hamilton/01-04-02-0189>.

73 James Madison and Alexander Hamilton, 'The Federalist No 62, [27 February 1788]', *United States National Archives and Records Administration* (Web Page) <https://founders.archives.gov/documents/Hamilton/01-04-02-0212>.

74 Polly J Price, 'Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm' (1999) 43(2) *American Journal of Legal History* 152, 157–66.

75 *M'Ilvaine v Coxe's Lessee*, 8 US 209 (1808).

76 ibid.

77 ibid 212.

78 ibid 214–15.

The US Supreme Court's decision in *Shanks v DuPont* (1830) adapted the common law principle of birthright citizenship to conform to more equitable and inclusive ends.[79] Writing for the majority, Supreme Court Justice Joseph Story not only affirmed the continued authority of a 'natural community of allegiance' from birth existing in the states following the Revolution but also extended the scope of its power to secure the equal protection of rights to a new class of vulnerable individuals. Whereas the defendant sought to exclude a native-born American woman from her rights of inheritance on account of her marriage to a British subject, Story referred to 'the general principles of the laws of nations' to expand the common law protection of birthright citizenship to married women as individuals, irrespective of the allegiance of their husbands. The result was a more inclusive view of the benefits of birthright citizenship: although limited to inheritances, the protections arising from birth under the protection of a sovereign inhered in the individual in perpetuity and could not be denied on account of gender or marital status.[80]

Unfortunately, *Shanks v DuPont* was not the final word in this matter in the United States and *jus soli* alone did not always ensure that women born in the United States could independently retain their birthright citizenship and inheritance rights throughout their lives.[81] Much later, under the terms of § 3 of the *Expatriation Act of 1907* ('*Expatriation Act*'), American women who married non-citizen spouses were deemed to have taken the nationality of their husband, regardless of their intent.[82] This act was motivated in part by suspicions about the allegiances of US-born women who married foreign spouses, with a punitive impulse against American women who would introduce 'foreign racial or ethnic elements into the body politic'.[83] The *Expatriation Act* led to cases where US-born women became unable to return to the United States, even if their foreign-born husband died or the marriage ended in divorce.[84] The *Married Women's Independent Citizenship Act of 1922* ('*Cable Act*') was intended to rectify this problem by granting US resident women the option of retaining their premarital citizenship.[85] This option was not fully extended to US-born women who married 'aliens ineligible for citizenship' on account of race until 1931.[86] While a full inquiry into this matter is beyond the scope of this article, the *Expatriation Act*'s impact on the citizenship of US-born women is an instance that demonstrates the fragility of the US *jus soli* tradition in the face of popular and legislative opposition to the citizenship claims of persons deemed insufficiently attached to the United States.

79 *Shanks v Dupont*, 28 US 242 (1830).

80 ibid 247. Note that the syllabus states that the incapacities of married women 'provided by the common law … do not reach their political rights nor prevent their acquiring or losing a national character': at 248.

81 Kif Augustine-Adams, '"With Notice of the Consequences": Liberal Political Theory, Marriage, and Women's Citizenship in the United States' (2002) 6(1) *Citizenship Studies* 5, 15.

82 Candace Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (University of California Press 1998) 57–58.

83 Nancy F Cott, 'Justice for All? Marriage and Deprivation of Citizenship in the United States' in Austin Sarat and Thomas Kearns (eds), *Justice and Injustice in Legal Theory* (University of Michigan Press 2009) 77, 87.

84 Bredbenner (n 82) 172–73; 'Ex-Head of Amtorg Leaves Under Ban', *New York Times* (New York, 3 May 1931) 25.

85 Nancy F Cott, 'Marriage and Women's Citizenship in the United States, 1830–1934' (1998) 103 *The American Historical Review* 1440, 1464.

86 ibid 1469.

VI *DRED SCOTT* AND JUSTICE TANEY'S DENIAL OF THE BIRTHRIGHT CITIZENSHIP TRADITION

Although it is rarely discussed in this context, the notorious landmark *Scott v Sandford* ('*Dred Scott*') case marked the climax of the contest between a common law and a consensual view of America's national identity, form of citizenship and system of law. The political theory of the founding of the United States set forth in the majority opinion and its concurrences in *Dred Scott* closely aligns with that of the innovating force in the antebellum period that sought to dispense with 'English' common law precedent in favour of a new 'American' political order, constructed solely on their interpretation of the precepts and principles of the *US Constitution*. Justice Roger B Taney's view of the national community and its members was thoroughly grounded in a political conception of justice that permitted no deviation into tradition or metaphysical conceptions of the person and their rights, as shown in the opening passage of his opinion:

> The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in this *Constitution*, and ... [have] no rights or privileges but such as those who held the power and the Government might choose to grant them. It is not the province of the Court to decide upon the justice or injustice, the policy or impolicy of these laws.[87]

To seal this political act of excluding native-born African-Americans from the rights and status of citizenship, Justice Taney collapsed the two extant categories of citizenship by birth and citizenship by consent into a single rule, governed by 'the provisions of the *Constitution* and the principles on which it was founded'.[88] In the absence of any other explicit guideline in the text of the *US Constitution* for conferring citizenship on new members consistent with the principle of consensual membership, Justice Taney based his view on the Founders' meaning of citizenship on the rule for creating citizens through naturalisation in art I, § 8, cl 4. This guideline had been interpreted since its inception as applying only to 'free white persons'.[89] By doing away with the more inclusive common law rule, Justice Taney sought to make it easier to deny citizenship to disfavoured US residents and subject peoples.[90]

The dissenting parties in *Dred Scott* also looked to the precepts established in the text of the *US Constitution* as their guide for determining who was entitled to US citizenship. But unlike the majority of the Court, the dissenters did not presume that the Founders intended to change the status quo definition of citizenship to conform to the consensual and republican political theory of the American Revolution where no direct evidence in the text of the *Constitution* existed to support this view. Rather, Justice Benjamin Robbins Curtis stated emphatically that no definition of citizenship or procedure for conferring the status to new native-born members existed under the *US Constitution* and that the naturalisation rule prescribed therein could not be extrapolated to the case of native-born citizens.[91] In the absence of any overriding constitutional or statutory precedent

87 *Scott v Sandford*, 60 US 393, 404–405 (1857).
88 ibid 406.
89 ibid 419.
90 ibid 418.
91 ibid 576–88.

establishing a rule for conferring citizenship to new members by birth, Justice Curtis affirmed that the common law rule was still binding.[92] What the common law stated in this case was that 'free persons born within either of the colonies were subjects of the King' and that by the transferal of the King's sovereignty to the states and then to the Federal Government of the United States ('US Government'), 'all such persons ceased to be subjects, and became citizens of the several States'.[93] Beyond the civil and political rights pertaining to citizenship, Curtis suggested that slavery itself was no more than a statutory ordinance that might be permitted by the grants of authority authorised by the *US Constitution* but not by its 'foundation in the law of nature or the unwritten common law'.[94]

In essence, two political and jurisprudential theories were in contest in *Dred Scott*. The party of innovation in both cases interpreted the founding of the United States as a clean break with the past to establish a new 'republican' political order. A sovereign American people was invented upon the ratification of the *US Constitution* to serve a political goal. The mutuality of protection and obligation between the sovereign and a new citizen, at birth or naturalisation, was transformed from a natural right under the common law to a contract dependent on mutual consent. The party of tradition in both cases interpreted the founding of the United States as a means of restoring and revitalising the principles of liberty and the equal protection of the law that were embedded in their common law inheritance. They denied that a change in sovereignty could effect a dissolution of the underlying political order to which they owed perpetual allegiance or their birthright as subjects. Thus, the right to equal protection was elevated above the terms of a mere contract whose assent could be withdrawn to new native-born members at the pleasure of the people.

VII Reconstructing Birthright American Citizenship During and After the Civil War

During the Civil War, prominent voices in the Republican Party sought to construct a theory of national citizenship that would include the native-born descendants of slaves and immigrants as citizens of the United States at birth. As early as 1862, President Abraham Lincoln's Attorney-General Edward Bates defined a view of citizenship that essentially restated both of the common law precepts established in *Calvin's Case*, which were in opposition to Justice Taney's view. As the authoritative response of the Lincoln Administration and the Republican Party to the view of citizenship set forth in *Dred Scott*, Bates' opinion bears careful examination as a window into the intent of the framers of §1 of the *Fourteenth Amendment*.

Bates' overriding principle in the brief was '[o]nce a citizen, whether *natus* or *datus*, (as Sir Edward Coke expresses it,) always a citizen'.[95] This was not a fact of law in Bates' opinion nor a positive grant under the terms of the compact supposedly established by the *US Constitution*. Rather, Bates argued that 'native-born citizens' enjoyed their status according to 'the universal principle, common

92 ibid 578–79.
93 ibid 576.
94 ibid 624 quoting *Rankin v Lydia*, 9 Ky 467, 570 (1820).
95 Edward Bates, 'Opinion on Citizenship' (Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, With the Annual Message of the President, No 278, United States Department of State, 29 November 1862) 1369 <https://history.state.gov/historicaldocuments/frus1873p1v2/d278>.

to all nations and as old as political society, that the people born in a country do constitute the nation, and, as individuals, are natural members of the body-politic'.[96] In so doing, Bates reaffirmed the pre-constitutional and immutable status of native-born citizens against efforts by the party of innovation to abrogate this status and replace it with a positive grant in the text or interpretation of the *Constitution* or by Congressional statute.

Bates then challenged the party of innovation's view political theory of the founding of the United States and its accompanying definition of American citizenship. He attributed the controversy over who was entitled to the privileges and immunities of American citizenship to those 'testing the political status and governmental relation of our people' according to their conformance with republican standards, without taking into sufficient account the 'organic' roots of the American political order.[97] Instead, he argued for an essential continuity between the pre-extant common law rule of subjecthood and the constitutional rule of citizenship, in that:

> The *Constitution* itself does not make the citizens; it is in fact made by them. It only intends and recognizes such of them as are natural — home-born; and provides for the naturalization of such of them as were alien — foreign-born; making the latter, as far as nature will allow, like the former … [i]n the United States it is too late now to deny the political rights and obligations conferred and imposed by nativity.[98]

Based on this view of the effect of the *US Constitution* on the pre-extant form of citizenship, Bates established for the Lincoln Administration that according to 'the law of birth at the common law of England, clear and unqualified; and now both in England and America ... every person born in the country is ... *prima facie* a citizen'.[99]

Lincoln's Attorney-General's opinion ultimately set the stage for the Reconstruction Congress' response to the theory of citizenship in *Dred Scott* through the incorporation of the common law rule of birthright citizenship into the *US Constitution* in § 1 of the *Fourteenth Amendment*.[100] When Senator Lyman Trumbull introduced a motion to alter the language of § 1 to provide for the conferral of citizenship to all native-born citizens not subject to a foreign power, he appealed to the same rationale as Bates, citing Blackstone's definition of natural liberty in support of his amendment.[101] But the adoption of this rule was no foregone conclusion. Some senators were concerned that by adopting the common law rule, native Americans and Asians would be counted among those entitled to birthright citizenship. Senator Peter Godin van Winkle of West Virginia immediately rose to oppose Trumbull's proposal, on the grounds that:

> They are not citizens by birth, for the common law of England is not of force under the national *Constitution* ... there is no more perfect right possessed by communities and societies of every kind than that of excluding from citizenship or membership such persons as they deem proper ... I do not believe one word of what the chairman of the Judiciary Committee read from Blackstone [on the subject of natural liberty

96 ibid 1371.
97 ibid.
98 ibid 1370–71.
99 ibid 1371.
100 Earl M Maltz, *The Fourteenth Amendment and the Law of the Constitution* (University of North Carolina Press 2003) 56.
101 36 *Congressional Globe* 474–75, 497–500 (1866).

> inhering to all men from birth] ... I think it is mere twaddle, and if closely examined will be so pronounced by everyone who gives sufficient attention to the subject.[102]

Other senators rose to oppose entrenching the common law rule in the *Civil Rights Bill* as a function of the US Government's obligation to guarantee 'a republican form of government in every State in the Union'[103] against the inclusion of potential citizens of Chinese origin that they deemed to 'be incapable either of understanding it or of carrying it out'.[104] At length, Senator Garrett Davis of Kentucky argued that the naturalisation procedure was the only constitutional way to confer citizenship, concluding '[t]hat the fundamental, original, and universal principle upon which our system of government rests, is that it was founded by and for white men'.[105] Altogether, the strategy of the opponents of the birthright citizenship provision in the *Fourteenth Amendment* was to deny the validity of any antecedent common law rule that would contradict the political rule of citizenship by consent established at the time of the founding of the United States. They interpreted the republican doctrine of popular sovereignty to enable the sovereign people to exclude any group from citizenship that could not secure the approval of the majority. All that changed was the group of native-born residents that were singled out for exclusion, presaging nearly a century of discriminatory legislation designed to limit the number of non-whites who were entitled to the full privileges and immunities of citizenship.

Senator Trumbull and those supporting his measure to recognise all native-born residents as citizens acknowledged the authority of the *US Constitution* but interpreted the form of citizenship and rights pertaining thereto given its underlying common law principles. When he first proposed his amendment to the *Civil Rights Bill* that formed the basis for the *Fourteenth Amendment*, Senator Trumbull declared, without any reference to either the *Constitution* or statute, that 'the law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a European'.[106] A more comprehensive response was offered by Senator James F Wilson of Iowa. First, he appealed to the authority of the common law in order to make three points: the definition of American citizenship extended beyond the rule for creating naturalised citizens set forth in the *Constitution*; the rule set forth in the English common law is 'founded in the reason and nature of government' and it never made 'any distinction on account of race or color in declaring that all persons born within its jurisdiction are natural-born subjects'; and most importantly, this rule continues in force under a new sovereign.[107] Second, he appealed to 'the old moorings of equality and human rights' inhering in a metaphysical conception of the law of nature, the principles underlying the founding documents and the judicial opinions of the early Republic.[108] Finally, he tied these two guarantees of the rights pertaining to natural-born citizens together under a single doctrine taken from James Kent's *Commentaries on American Law*, that the rights of Englishmen and Americans are one and the same and are natural, inherent and inalienable, found in both countries' constitutions from their common origin.[109] The successful campaign to explicitly

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102 ibid 497.
103 ibid 501.
104 ibid 499.
105 ibid 575.
106 ibid 498.
107 ibid 1116.
108 ibid 1115.
109 ibid 1118.

entrench birthright citizenship into the *Constitution* through the *Fourteenth Amendment* was a defence of minority rights against an exclusionary vision of citizenship by consent.

VIII The Controversy over Allegiance and Expatriation in Great Britain and the United States

In *Calvin's Case,* which set the terms of *jus soli* birthright citizenship in the Anglo-American common law tradition, political membership was defined in terms of perpetual allegiance and subjection to the sovereign in exchange for their protection and property rights in their realm. The United States as a nation successfully challenged this proposition during its Revolution, accusing George III of impeding the population of the colonies by blocking immigration and preventing settlement in the territories reserved for Indigenous peoples.[110] In the decades that followed, the United States fell back on a form of republican territorial birthright citizenship substituting the people and their sovereignty over states and, in some cases, the Republic, for the King, and reaffirming the US citizenship of native-born Americans that sided with Britain during the Revolutionary War.[111] A major difference between *jus soli* as practiced in the United States and Great Britain involved the right of expatriation. The impressment of UK-born sailors on US ships on the pretence that UK-born immigrants to the United States owed perpetual allegiance to the British sovereign regardless of their naturalisation in the United States helped to precipitate the War of 1812.[112] This issue continued to fester between the War of 1812 and the Civil War. On the other side, both the Union and the Confederacy's position that immigrants from Britain and all other countries owed duties of local allegiance and protection to their country of residence, including wartime military service, resulted in protests by British diplomatic representatives, who insisted that their subjects in America were still their subjects and ought to be exempted from the draft.[113] A compromise was reached during the Civil War between US Secretary of State William Seward and his British counterpart, Lord John Russell, allowing resident aliens, including British subjects, to avoid conscription by leaving the US within 65 days before 12 July 1863.[114] The US Government would deem those who remained, or who voted in a US election, to have transferred their allegiance to the US, rendering them liable to serve in the union's military forces, without any UK objections.[115]

In conjunction with the Citizenship Clause of the *Fourteenth Amendment*, which clarified that all persons born subject to the jurisdiction of the United States

110 Declaration of Independence (n 64); Nancy Green, 'Expatriation, Expatriates, and Expats: The American Transformation of a Concept' (2009) 114 *American Historical Review* 307, 311.

111 Green (n 110) 311.

112 Alexander Cockburn, *Nationality, or, the Law relating to Subjects and Aliens: Considered with a View to Future Legislation* (W Ridgway 1869) 74–76; Ben Herzog, *Revoking Citizenship: Expatriation in America from the Colonial Era to the War on Terror* (New York University Press 2015) 30.

113 Paul Quigley, 'The American Civil War and the Transantlantic Triumph of Volitional Citizenship' in Jörg Nagler, Don H Doyle and Marcus Gräser (eds), *The Transnational Significance of the Civil War* (Palgrave Macmillan 2016) 38–39.

114 Richard Lyons, 'Dispatch 416: Lyons to Russell, 11 May 1863' in James J Barnes and Patience P Barnes (eds), *The American Civil War Through British Eyes: February 1863 to December 1865* (Caliban Books 2005) 51.

115 Michael Sullivan, *Earned Citizenship* (Oxford University Press 2019) 92.

were citizens at birth, the *Expatriation Act of 1868* clarified that this unchosen status could be rejected by US citizens upon the age of majority. Limitations on the right to expatriate persisted, however, affecting young men when the United States was at war.[116] Though this statute does not rise to the level of a constitutional amendment, it formalised changes that the courts and leading antebellum jurists such as James Kent and Joseph Story had already read into the doctrine of birthright citizenship in order to accommodate it to American circumstances and republican principles.[117] Both the US *Expatriation Act of 1868* and the UK *Naturalization Act of 1870* preserved the normative core of birthright citizenship in the common law of both the US and the UK as relationships of protection and allegiance between the subject/citizen and their sovereign/state, while accounting for the reality of mass immigration by providing for a qualified right to choose one's citizenship upon maturity.[118]

IX The Chinese Exclusion Cases and Inclusive Potential of *Jus Soli* Birthright Citizenship

A succession of state, and later, Supreme Court, decisions, affirmed the continuity between the common law rule of birthright citizenship and the *Fourteenth Amendment*'s Citizenship Clause. The rule was affirmed without question until another case came to light in which the citizenship claims of an unpopular class of individuals was called into dispute in *United States v Wong Kim Ark* (1898) ('*Wong Kim Ark*'), a Supreme Court decision that directly addressed the issue of birthright citizenship in the common law and the *Fourteenth Amendment* and its scope. Wong Kim Ark was born in 1873 in San Francisco, California.[119] He returned to China as an adult to found a family and travelled to and from California several times in the early 1890s before he was detained upon his return to the United States in 1895 as part of a test case to challenge birthright citizenship for the US-born children of Chinese immigrants.[120] Although Wong Kim Ark's case and claim to *jus soli* citizenship by birth in the United States is not nearly as well-known as *Dred Scott*, it is facially similar as a case about citizenship claims and racial discrimination.

When asked how far the *Fourteenth Amendment*'s Citizenship Clause extended, the *Wong Kim Ark* Court responded that the 'opening sentence of the *Fourteenth Amendment*' was intended to 'allay doubts and to settle controversies which had arisen'[121] about the scope of common law rules governing the conferral of citizenship, thereby ensuring that all individuals of 'Caucasian, African or Mongolian descent' born under the jurisdiction of the US Government would be recognised as members of the natural community of allegiance of the United States.[122] Furthermore, the *Wong Kim Ark* Court affirmed that § 1 of the *Fourteenth Amendment* 'makes their citizenship dependent upon the place of their

116 Herzog (n 112) 57–60.
117 *Expatriation Act of 1868* (1868) Pub L No 249, 15 Stat 223 (USA).
118 Cockburn (n 112) 3, 12; See generally I-Mien Tsiang, *The Question of Expatriation in America Prior to 1907* (John Hopkins Press 1942).
119 Carol Nackenoff and Julie Novkov, *American by Birth: Wong Kim Ark and the Battle for Citizenship* (University Press of Kansas 2021) 109.
120 ibid.
121 *Wong Kim Ark* (n 69) 688.
122 ibid 682.

birth, or the fact of their adoption, and not upon the constitution or law of any state or the condition of their ancestry'.[123]

This case clarified that the *Fourteenth Amendment* granted citizenship to the children of immigrants, irrespective of their parents' eligibility for citizenship. This built on *Calvin's Case* and common law precedents that predated the ratification of the *US Constitution*, interpreting them in a more inclusive manner. The natural community of allegiance into which citizens were 'born or adopted' was now to be understood as extending across the United States and transcending the positive law of any state or locality. The net effect of the *Fourteenth Amendment*'s Citizenship Clause as interpreted by the *Wong Kim Ark* Court helped to elevate the citizenship claims of individuals born into the natural community of allegiance of the United States above the vagaries of the positive law and/or public opinion. This is not to say that *Wong Kim Ark*'s victory was complete, as for a half century after the Supreme Court's decision, native-born individuals of Chinese descent and their children struggled to prove their citizenship to immigration inspectors who were instructed 'to judge Chinese applicants "excludable until they could be proven otherwise"'.[124] The Supreme Court's affirmation of the *jus soli* citizenship status of the native-born children of immigrants in *Wong Kim Ark* was a major victory but it did not completely vindicate the rights of the children of immigrants for bureaucrats and hostile political majorities who still regard them as 'anchor babies' who are undeserving of citizenship.[125]

X Colonial and Imperial Exclusions: The Limits of *Jus Soli* Birthright Citizenship

Even after the *Fourteenth Amendment*'s Citizenship Clause was ratified in 1868 and interpreted by the US Supreme Court to apply to the US-born children of Chinese immigrants in 1898, the US Government generally rejected the citizenship claims of US-born Indigenous persons until 1924. A prior ruling by the US Supreme Court, *Elk v Wilkins* (1884), denied that the Citizenship Clause conferred *jus soli* citizenship on Indigenous people born in the United States on the theory that the United States did not consent to extending citizenship to them.[126] The majority of the Court held that Indigenous US residents could be naturalised as US citizens under certain conditions, which confirmed their assimilation and separation from their tribe, but only with the express consent of the US Government, which would decide 'the question whether any Indian tribes, or any members thereof, have become so advanced in civilization, that they should be let out of the state of pupilage'.[127] This was consistent with the practice of Canada, another common law settler state jurisdiction, which provided for a process of enfranchising Indigenous persons based on the approval of an Indian agent, a missionary and another British subject who attested to their literacy and

123 ibid 677 quoting *The Slaughterhouse Cases*, 16 Wall 36, 38 (1873).
124 Julie Novkov and Carol Nackenoff, 'Civic Membership, Family Status, and the Chinese in America, 1870s–1920s' (2016) 48(2) *Polity* 165, 179 quoting Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (Oxford University Press 2012) 85.
125 Chavez (n 37) 80–85.
126 Schuck and Smith (n 36) 83–84; *Elk v Wilkin*s, 112 US 94, 109 (1884).
127 *Elk v Wilkins* (n 126) 106; LC Green, 'North America's Indians and the Trusteeship Concept' (1975) 4 *Anglo American Law Review* 137, 139.

assimilation into white society.[128] The Canadian process was contingent on the Indigenous person's separation from their tribe, leading some Indigenous nations to forbid their members from seeking enfranchisement to prevent the extinction of their tribe's political identity.[129]

In the United States, the strictures of the naturalisation process meant that some US-born Native Americans continued to be denied US citizenship status despite pledging and displaying their allegiance to the United States by enlisting in the US military and serving in combat in the Spanish American War and First World War.[130] Their service-based claims to citizenship were only recognised after the First World War, when the US Congress enacted legislation on 6 November 1919 authorising honourably discharged veterans to apply for US citizenship, 'without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property'.[131]

Native American US residents were among the last communities of US-born persons to attain recognition as *jus soli* citizens of the United States at birth on account of their race and political status. In 1924, Congress voted to enact the *Citizenship Act of 1924*, naturalising all 'non-citizen Indians born within the territorial limits of the United States: Provided, That the granting of such citizenship shall not in any manner or otherwise affect the right of any person to tribal or other property', without their consent.[132] This left the residents of unincorporated territories living under US jurisdiction as non-citizen nationals. The last of these legacies of imperial expansion and second-class American subjects are found today in American Samoa and Swains Island, which continue to be outside the realm of full American citizenship by territorial birthright.

In *Fitisemanu v United States* (2021) ('*Fitisemanu*'), the history of birthright citizenship and the inclusionary *Wong Kim Ark* precedent came up again as the Tenth Circuit Court of Appeals denied the claims of American Samoans to *jus soli* birthright citizenship in the United States.[133] This case deals with the claims of national minorities who are living in US territories with the subordinate political status of US nationals, which means they lack the full political rights of US citizenship. Regrettably, the majority in that case chose to prefer the colonial and exclusionary *Insular Cases* over the inclusive and anti-racist *Wong Kim Ark* framework for understanding the potential US citizenship claims of persons born in American Samoa.[134] The ruling also suggests that it would be wrong to impose birthright citizenship, and American citizenship more generally, on American Samoa against the will of its people. There is value in 'defer[ring] to the preferences of Indigenous peoples, so that they may chart their own course', if they are doing so in a way that is consensual and democratic.[135] Writing for the majority, Judge Carlos Lucero re-interprets the exclusionary *Insular Cases* as a

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128 Coel Kirkby, 'Paradises Lost: The Constitutional Politics of Indian Enfranchisement: 1857–1900' (2020) 56(3) *Osgoode Hall Law Journal* 606, 612–13.

129 ibid 625–26.

130 Willard H Rollings, 'Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965' (2004) 5(1) *Nevada Law Journal* 126, 134; W Bruce White, 'The American Indian as Soldier, 1890–1919' (1976) 7(1) *Canadian Review of American Studies* 15, 19.

131 *An Act Granting Citizenship to Certain Indians* (1919) HR 5007 (USA).

132 *An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians* (1924) HR 6355 (USA).

133 *Fitisemanu v United States* (10th Cir, No, 20-4017, 15 June 2021) ('*Fitisemanu*').

134 ibid 13.

135 ibid 16.

means of providing this deference, citing Rogers M Smith's article on 'Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century' in support of his position, even though Smith actually argues that there is no necessary tension between accommodating distinct cultural land tenure practices and granting American Samoans constitutional birthright citizenship.[136]

Judge Lucero's ruling acknowledges that he has 'little evidence' that most of the American Samoan people are currently opposed to a grant of constitutional birthright citizenship or the added rights that this would grant them both in their territory and in the mainland United States.[137] Moreover, it is not desirable to base the citizenship claims of individuals on the interests of hereditary elites in their community or to shield illiberal inheritance practices from constitutional scrutiny, as justified by the majority in the *Fitisemanu* ruling.[138] The case for constitutional birthright citizenship for American Samoans marks the culmination of efforts to equitably grant citizenship to everyone born subject to the jurisdiction of the United States.

A *Colonial Exclusions in Great Britain and Its Dominions*

The US imperial project, beginning with its domination of Indigenous nations and culminating in its empire over conquered nationals who were denied constitutional birthright citizenship, stands in uneasy tension with its republican self-image and commitment to extending self-governance to all persons subject to its jurisdiction after breaking free of the British Empire. Elsewhere in the common law world, Britain and its dominions made no pretence to extend equitable rights to all subjects. While Britain recognised all persons under their allegiance as subjects at birth, their rights were differentiated by race and residence. While the English common law was used as early as 1772 as a precocious instrument of liberty by judges that freed slaves brought to England by their masters, Black British subjects elsewhere did not gain their legal freedom until after Parliament enacted the gradual *Slave Emancipation Act of 1833*.[139] Moreover, on their road to self-determination as semi-autonomous dominions, the settler colonies that coalesced into Canada and Australia demanded the right to exclude British subjects by race and ethnicity, irrespective of their common allegiance to the Crown.[140]

From the outset of their colonisation, the Indigenous peoples of the British dominions were encouraged by Indian agents to think of themselves as being in a family relationship with the British sovereign as subjects and children of a common mother (Queen Victoria) or father charged with their protection as wards of the state.[141] Their status as subjects from birth was never called into question throughout the Empire, but the rights that followed from this status were circumscribed by the governments of Australia and Canada. This left Indigenous

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136 ibid 12, 16; Rogers M Smith, 'Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century' in Gerald L Neuman and Tomiko Brown-Nagin (eds), *Reconsidering the Insular Cases: The Past and Future of the American Empire* (Harvard University Press 2015) 122, 124.

137 *Fitisemanu* (n 133) 8.

138 ibid 7–9.

139 See, eg, *Somerset v Stewart* (1772) 98 ER 499.

140 Julie Evans et al, *Equal Subjects, Unequal Rights: Indigenous People in British Settler Colonies, 1830–1910* (Manchester University Press 2003) 121, 139, 149–50.

141 ibid 33, 43–44.

peoples in Australia and Canada without the civil, political and social rights enjoyed by white settler citizens in the dominions until the 1960s.[142]

XI CONCLUSION

The common law in general and the ancient institution of *jus soli* birthright citizenship have served as a powerful tool for extending the protection of the law to unpopular minorities, with jurists who were willing to wield its inclusionary principle of common subjection against the grain of racial discrimination in the legislatively enacted immigration and citizenship laws of the United States, Great Britain and its dominions in the 19th and 20th centuries. In particular, the common law *jus soli* birthright tradition protected the citizenship claims of former slaves and the children of immigrants who were barred from naturalisation under racially discriminatory citizenship laws. It was not sufficient, however, to protect the rights of Indigenous subjects and colonised peoples who stood within the common relationship of allegiance and protection set forth by Edward Coke as a hallmark of *jus soli* political membership. Indigenous and non-white colonial subjects were left outside the expanding civil, political and social rights of citizenship in both the United States and the British dominions of Canada and Australia throughout the 19th and the first part of the 20th century. Even though the *Wong Kim Ark* decision extended the protection of birthright citizenship to the children of Chinese immigrants, it failed to include the 'children of members of the Indian tribes owing direct allegiance to their several tribes'.[143] The US Congress rendered this exception obsolete with the *Indian Citizenship Act of 1924*, granting US citizenship to members of Indigenous tribes who were born in the United States.[144] This Act eliminated a major remaining category of racialised exceptions to *jus soli* citizenship, though US nationals born in American Samoa remain in need of inclusion as constitutionally protected birthright US citizens.[145]

This article has argued that birthright citizenship is entrenched, not only in the text of § 1 of the *Fourteenth Amendment* to the *US Constitution*, but in a more ancient understanding of the birthright of native-born British subjects residing in America, and later, American citizens, to enjoy the birthright of protections and an ever-expanding set of rights based on where they were born. Once this rule was stated in a way that included African-Americans, Indigenous persons and other minorities as citizens based on their birthplace alone, *jus soli* and birthright citizenship became and remains a powerful tool of inclusion for marginalised minorities, preventing majorities from denying them the benefits of citizenship.

142 John Chesterman and Brian Galligan, *Citizens Without Rights*: *Aborigines and Australian Citizenship* (Cambridge University Press 1997) 60, 79–83; Kiera L Ladner and Michael McCrossan, 'The Electoral Participation of Aboriginal People' (Working Paper No E92.L32, Elections Canada, 2007) 11.

143 *Wong Kim Ark* (n 69) 693.

144 Kevin Bruyneel, 'Challenging American Boundaries: Indigenous People and the "Gift" of US Citizenship' (2004) 18(1) *Studies in American Political Development* 30, 36–40.

145 Kim Rubinstein and Jacqueline Field, 'What is a "Real" Australian Citizen?' in Benjamin N Lawrance and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 100, 108.