
ESSAY

ORIGINAL CITIZENSHIP

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“These original citizens were the founders of the United States.”¹

INTRODUCTION

The phrase “citizen of the United States” is used in the United States Constitution in three different provisions—to set the qualifications for representatives,² senators,³ and the president.⁴ If these sections—the oft-dubbed “bright-line” constitutional rules—are to have any meaning, the United States of America, and citizenship thereof,

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¹ DAVID RAMSAY, A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES 5 (1789).

² See U.S. CONST. art. I, § 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, *and been seven Years a Citizen of the United States*, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” (emphasis added)).

³ See U.S. CONST. art. I, § 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years, *and been nine Years a Citizen of the United States*, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.” (emphasis added)).

⁴ See U.S. CONST. art. II, § 1 (“No person except a natural born Citizen, or *a Citizen of the United States*, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.” (emphasis added)).

must have predated our Constitution. This raises two seemingly obvious yet largely unanswered questions. First, how did one constitutionally become a “citizen of the United States” prior to the ratification of the Constitution on June 21, 1788?⁵ Second, for purposes of citizenship, and the Constitution, when did the United States of America begin?

The answer to the second question seems simple. The likely starting points are finite: the Declaration of Independence was signed on July 4, 1776; the Articles of Confederation were ratified on March 1, 1781; the Treaty of Paris was signed on September 3, 1784; the delegates to the Constitutional Convention signed the Constitution on September 17, 1787; and the Constitution was ratified on June 21, 1788. The first Congress held its initial meeting on March 4, 1789, at Federal Hall in New York City. If a senator needed to have “been nine Years a citizen of the United States” on March 4, 1789, the senator would have needed to be a U.S. citizen since March 4, 1780, at the latest. This date precedes all of the other possible “starting points” except July 4, 1776. Assuming that members of the first Senate met the requisite citizenship qualifications,⁶ simple arithmetic indicates that the United States first existed as a nation when we separated from England.

While Americans are fond of celebrating the birthday of the United States every year on July 4th, this date, as well as the Declaration, has no constitutional significance.⁷ Fireworks and barbecue aside, for legal purposes the practical starting date of the U.S. is 1789, when

⁵ Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001). (“On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution. Under the plain terms of Article VII, that would seem to be enough to bring the Constitution into effect. States that subsequently ratified the Constitution, with or without knowledge of New Hampshire’s decisive action, were electing to join an already existing union.”).

⁶ There was a prominent challenge to the qualifications of one member of the House in 1789. See *infra* note 156 and accompanying text; CASES OF CONTESTED ELECTIONS IN CONGRESS, 1789–1834, at 23 (M. St. Clair Clarke & David A. Hall, eds. 1834) (discussing the case of Representative William Smith).

⁷ See, e.g., *Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79, 108 (1901) (quoting *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159 (1897)) (disavowing any force of law inherent in the Declaration but remarking that “it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence”); see also Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 414 (2006) (arguing that the Declaration is not legally binding).

President Washington was inaugurated and the first Congress met.⁸ Our courts do not take cognizance of the Declaration. Yet to a member of the first Congress or a federal judge in 1789, the United States was not an infant, but was an old, familiar friend, and by 1789, such congressmen and judges had no doubt considered themselves to be U.S. citizens for quite some time. The Constitution merely represented a new form of government for a preexisting country. Article VII concludes that the Constitution was submitted to the states in the year “of the Independence of the United States of America the Twelfth.”⁹ The Constitution includes a direct textual and historical link to the Declaration and the year 1776.¹⁰

The answer to the first question of how one constitutionally became a “citizen of the United States” prior to 1789 is to be found by studying these preceding years of Independence. While in many cases the record and views on citizenship conflict, inevitably a single theory emerges: our traditional view of citizenship cannot be correct. Yet scholars seem to have entirely overlooked this issue.¹¹ Alexander Bickel wrote “the concept of citizenship plays only the most minimal role in the American constitutional scheme,” and he likely assumed that the absence of any discussion of citizenship in the Constitution indicated that this topic was intentionally disregarded.¹² Citizenship, although not addressed, was not ignored. Scholars were not looking in the right places to find the answer.

⁸ See *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 422 (1820) (“Both Governments [under the Articles of Confederation and under the Constitution,] could not be understood to exist at the same time. The new Government did not commence until the old Government expired. . . . In fact, Congress did continue to act as a government until it dissolved on the first of November, by the successive disappearance of its members. It existed potentially until the 2d of March [of 1789], the day preceding that on which the members of the new Congress were directed to assemble.”).

⁹ U.S. CONST. art. VII.

¹⁰ *Id.*

¹¹ While no other article directly addresses this issue, the journal *Constitutional Commentary* posed the question of George Washington’s citizenship as the topic of its second annual contest, asking whether he “was in fact constitutionally eligible for the Presidency.” *Contest: Was George Washington Constitutionally?*, 12 CONST. COMMENT. 137, 137 (1995). This elicited only a single (and light hearted) response. See Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 238 (1995) (addressing whether a citizen of Virginia prior to the ratification of the Constitution—namely George Washington—should be considered a U.S. citizen after the ratification of the Constitution for purposes of Article II).

¹² ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 33 (1975).

Part I of this Essay unites the Constitutional Trinity, from our “unanimous Declaration,”¹³ to the “Confederation and perpetual Union,”¹⁴ to our “more perfect Union.”¹⁵ The continuity of the style “the United States of America” throughout these charters reflects the permanence of the sovereignty of this republic, despite changes in the form of governance. Throughout the early years of our union, a national community was formed—the United States of America—and in this national community resided “citizens of the United States.”

Part II discusses the legal and theoretical doctrines of citizenship as articulated by Lord Coke in *Calvin’s Case* and John Locke in his *Second Treatise on Government*.¹⁶ These theories provided the jurisprudential framework that influenced citizenship in the early years of America. Part III explores how our early republic and the states under the Continental Congress defined citizenship. Immigrants who arrived in the United States *after* the creation of the Declaration received citizenship in accordance with the naturalization policies of the states, as creating such policies was a role that the Continental Congress specifically reserved for the states. The citizenship of those who lived in the United States before the Declaration was primarily determined under two doctrines that derived from Lockean social compact theory.¹⁷ The first theory postulated that by virtue of residing in the United States at the moment of independence and separation from Great Britain, a person automatically became a citizen, regardless of whether that person was a Yankee or a dissenting loyalist. The second theory contended that citizenship and allegiances could not be imposed on anyone, because to do so would be contrary to the spirit of the Declaration. Rather, following independence, a person could choose or “elect” whether he wanted to become a U.S. citizen.¹⁸ Alternatively, he could exercise his right of expatriation within a reasonable period of time, and thereby decline citizenship. For the most part, all states adopted a naturalization policy that mirrored one of these strands.

¹³ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

¹⁴ ARTICLES OF CONFEDERATION of 1777.

¹⁵ U.S. CONST. pmbl.

¹⁶ See generally *Calvin’s Case*, (1608) 77 Eng. Rep. 377 (K.B.) 396-98, (appeal taken from Eng.) (U.K.) (distinguishing between aliens of nations at war with England and friendly nations); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 149-50 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (discussing the relationship of persons with government).

¹⁷ See LOCKE at 384.

¹⁸ See *infra* Section III.B.

Part IV analyzes how these doctrines were applied at three critical junctures: before the ratification of the Constitution, during the first Congress, and following the first Congress. First, in treason cases, in order to distinguish between a disloyal citizen and a foreign alien combatant, a court needed to determine if the accused was a U.S. citizen. Second, because “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members,”¹⁹ early records of contested elections in the House and Senate help explicate the contours of the original understanding of U.S. citizenship for House qualifications. Third, in cases interpreting Jay’s Treaty,²⁰ the courts needed to establish whether a claimant was a citizen at the time of the Revolution in order to determine if certain barriers to recovery existed.

By fully appreciating the status of the first thirteen years of our nation, and the constitutional and legal issues our nascent government faced, the riddle of original citizenship is unraveled.

I. THE BIRTH OF THE UNITED STATES OF AMERICA

Before exploring the concept of a “citizen of the United States,” and when such citizenship began, an antecedent question is: When did the *United States* begin? Our national identity began prior to July 4, 1776. Before the Declaration, the colonists commonly referred to this nation as the “United Colonies.”²¹ The so-called “olive branch petition” to King George on July 8, 1775, was signed by the “Twelve United Colonies.”²² The Continental Congress’s commission for General Washington on June 17, 1775, was issued on behalf of the “United colonies.”²³ In Thomas Jefferson’s second draft of the Declaration on Taking Arms, from July 6, 1775, the Continental Congress spoke on behalf of the “United Colonies.”²⁴ Article I of Benjamin Franklin’s draft of the Articles of Confederation, dated July 21, 1775, styled the confederacy as the “United Colonies of North America.”²⁵

¹⁹ U.S. CONST. art. I, § 5.

²⁰ Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

²¹ DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 22 (2007) (“[I]n the months immediately before July 4, 1776, and even within the text of the Declaration itself, the political bodies represented at the Continental Congress had been generally called the ‘United Colonies.’” (citing Edmund C. Burnett, *The Name “United States of America,”* 31 AM. HIST. REV. 79, 79-81 (1925))).

²² 2 JOURNALS OF THE CONTINENTAL CONGRESS 158, 163 (1775).

²³ *Id.* at 96.

²⁴ *Id.* at 128 (1775).

²⁵ *Id.* at 195 (1775).

From the quill of Thomas Jefferson, the United States was born with “[t]he unanimous Declaration of the thirteen *united States of America*.”²⁶ This “appears to have been . . . the first time” the phrasing of “United States of America” was used, as “no earlier instance of its use in that precise form has been found.”²⁷ Through the Declaration, the United Colonies became the United States of America. This transformation from colonies to states is memorialized in the final paragraph of the Declaration, as “these *United Colonies* are, and of Right ought to be, Free and Independent *States*.”²⁸ The Declaration “introduced ‘the United States of America’ to the world.”²⁹

The official manuscript of the Declaration that all of the delegates signed in July 1776—the version that now resides in the National Archives—highlighted the phrases “United States of America,” “General Congress,” and “Free And Independent States” in a “distinctive italic script that draws attention to their significance.”³⁰ In the broadsides John Dunlap printed—which constituted the first printing of the Declaration—he “highlighted [the same] three terms in its main text by means of capital letters.”³¹ John Hancock sent a copy of the “Dunlap Broadside” to General Washington on July 6, 1776, and it was then read to his troops.³² A “contemporary report in August 1776 noted that when the Declaration was first read out to the Continental troops . . . ‘the language of every man’s countenance was, Now we are a people! We have a name among the states of this world!’”³³ And that name was the United States of America.³⁴

Following the Declaration, the style of this country has remained, almost consistently, the “United States of America.” A subsequent

²⁶ THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776) (emphasis added).

²⁷ Burnett, *supra* note 21, at 79. A pseudonymous letter written by “Republicus” addressed to the people of Pennsylvania on June 26, 1776—two days before the so-called “Committee of Five” submitted the draft of the Declaration to the Continental Congress—proclaimed “I shall rejoice to hear the title of the *United States of America*, in order that we may be on a proper footing to negotiate a peace.” 6 AMERICAN ARCHIVES 1131 (Peter Force, ed. 4th-5th ser., 1846).

²⁸ THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasis added).

²⁹ ARMITAGE, *supra* note 21, at 21-22.

³⁰ *Id.* at 22.

³¹ *Id.*

³² *Declaring Independence: Drafting the Document*, LIBRARY OF CONGRESS, <http://www.loc.gov/exhibits/declara/declara4.html> (last visited Nov. 15, 2010).

³³ ARMITAGE, *supra* note 21, at 17-18.

³⁴ *See also id.* at 22 (“That is what the Declaration of Independence declared: that the former United Colonies were now ‘the United States of America’ because they were ‘free and independent states.’”).

draft of the Articles of Confederation, dated July 12, 1776, changed the style of the confederacy from the previous “United Colonies of North America” to the “The United States of America.”³⁵ The Plan of Treaties with France, dated September 17, 1776, refers repeatedly to the “United States.”³⁶ The Articles of War, dated September 20, 1776, refers to the “armies of the United States.”³⁷ Congress briefly adopted the style of the “United States of North America” in its treaty with France, dated May 19, 1778.³⁸ However, on July 11, 1778, Congress “resolved to drop the word ‘North’ from the title.”³⁹

Under the Articles of Confederation, agreed upon by Congress on November 15, 1777, the name of our nation remained constant. The preamble of the Articles declares that “the Delegates of the *United States of America* in Congress assembled did . . . in the *Second Year of the Independence of America* . . . agree to certain articles of Confederation.”⁴⁰ Thus stressing the continuity of the government, the Articles specifically hold that the government was in fact *continuing* in its second year since the Declaration. This mirrors the English practice of measuring the length of a monarch’s reign by counting the number of years since her coronation. When ratified on March 1, 1781, Article I of the Articles of Confederation provided that the “[s]tile [sic] of this confederacy shall be ‘*The United States of America*.’”⁴¹ The name of this country was not limited to domestic recognition; it was also recognized by the international community—including England, which had previously refused to acknowledge the new name. On September 3, 1783, John Adams, Benjamin Franklin, and John Jay affixed their signatures to the Treaty of Paris between “his Britannic Majesty and the *United States of America*.”⁴²

The Constitution continued this style. On September 17, 1787, its preamble boldly proclaimed that “[w]e the people of the *United States* . . . do ordain and establish this Constitution for the *United States of America*.”⁴³ The goal to “form a more perfect Union”⁴⁴ presupposes

³⁵ 5 JOURNALS OF THE CONTINENTAL CONGRESS 546 (1776).

³⁶ *Id.* at 769.

³⁷ *Id.* at 788.

³⁸ Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6.

³⁹ Burnett, *supra* note 21, at 81.

⁴⁰ ARTICLES OF CONFEDERATION of 1781 pmbl. (emphasis added).

⁴¹ *Id.* art. I (emphasis added).

⁴² Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 (emphasis added).

⁴³ U.S. CONST. pmbl. (emphasis added); *see also*, Steiker et al, *supra* note 11, at 240 (“[The preamble] suggests that the ‘United States’ preceded the particular political structure established by the new Constitution.”).

the existence of a less perfect union—namely the “perpetual Union” under the Articles of Confederation.⁴⁵ Consistent with the date referred to in Preamble to the Articles of Confederation, Article VII of the Constitution concludes that the Constitution was submitted to the states in the year “of the independence of the United States of America the Twelfth.”⁴⁶

Article VI of the Constitution speaks further to this continuity. Clause I provides that “all Debts contracted and Engagements entered into, *before the Adoption of this Constitution*, shall be as valid against the United States under this Constitution, as under the *Confederation*.”⁴⁷ While the United States was previously governed “under the Confederation,” it would now be governed “under this Constitution,” and prior debts are valid.⁴⁸ Similarly, the Supremacy Clause provides that “all Treaties made” under the previous form of government, and those treaties which “shall be made [in the future fall] under the Authority of the United States.”⁴⁹ The constitution considers both types of treaties the “supreme Law of the Land.” The Treaty of Paris, signed on September 3, 1784, as well as other treaties enacted prior to the ratification of the Constitution, remained valid.

“What’s in a name?”⁵⁰ In the case of the United States, 236 years of independence and unity as a nation. The U.S., as a sovereign, has been in continuous existence since 1776. The Declaration simply provides another link in our constitutional chain that stretches from 1776 to the second year of our independence (when the Articles of Confederation were proposed), and to the twelfth year of our independence (when the Constitution was proposed). All of these charters are connected and interrelated. The Declaration, the Articles of

⁴⁴ U.S. CONST. pmb. (emphasis added).

⁴⁵ See also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936) (“The Union existed before the Constitution . . . Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be perpetual, was the sole possessor of external sovereignty and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise.”).

⁴⁶ U.S. CONST. art. VII. Abraham Lincoln began the Gettysburg Address by counting back “[f]our score and seven years ago” from 1863, which was 1776. See Abraham Lincoln, *Address at Gettysburg, Pennsylvania*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 536 (Don E. Fehrenbacher ed., 1989).

⁴⁷ U.S. CONST. art. VI, cl. 1 (emphasis added).

⁴⁸ See Steiker et al., *supra* note 11, at 241 (“It is hard to argue that such debts could have been created unless there was a ‘United States’ prior to the United States ‘under this [particular] Constitution’ to create them.” (quoting U.S. CONST. art VI, cl. 1)).

⁴⁹ U.S. CONST. art. VI, cl. 2.

⁵⁰ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

Confederation, and the Constitution represent three modes of government for one sovereign—our *Constitutional Trinity*. While the form has changed, the “United States of America,” and the citizens of the United States, have remained.

II. THEORIES OF CITIZENSHIP

During the seventeenth and eighteenth centuries, Lord Coke’s seminal opinion in *Calvin’s Case* provided the definitive statement of how one became a subject of the King of England. The case held that a person’s birthright subjectship was immutable, perpetual, and could not be abandoned.⁵¹ Rejecting this theory, the American colonists turned to the social compact theory of John Locke and the doctrine of volitional allegiance to provide an intellectual and philosophical support for their separation with England.⁵² The American Revolution effected a radical change not only in the forms of government, but also in the legal doctrines that justified those governments.

A. *Cokean Perpetual Allegiance*

Calvin’s Case, also known as the *Case of the Postnati*, was a test case to determine the subjectship of the Scots resulting from the union of Scotland and England following the coronation of James I, who was already James VI of Scotland.⁵³ In this case, Robert Calvin, a *postnati*—an infant born after the ascension—was prevented from taking possession of land to which he was lawfully entitled because he was deemed to be an alien,⁵⁴ and therefore could not inherit land in England.⁵⁵ Lord Coke, the chief justice of the Court of Common Pleas, wrote what became the “definitive statement of the law.”⁵⁶ In a lengthy and somewhat confusing opinion, Coke found that the allegiance a person acquires at birth to the sovereign is natural and immutable, and cannot be relinquished or abandoned. A subject born under the protection of the sovereign would remain a subject, even if the sovereign no longer provided any protection. The right of expatriation—that is the right to flee the jurisdiction and abjure one’s loyalty—did not exist

⁵¹ *Calvin’s Case*, 77 Eng. Rep. at 409.

⁵² See LOCKE, *supra* note 16, at 149-50.

⁵³ *Calvin’s Case*, 77 Eng. Rep. at 377.

⁵⁴ *Id.* at 409.

⁵⁵ *Id.* at 399.

⁵⁶ JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 17 (1978).

because subjectship could never be vitiated.⁵⁷ The *antenati*—those born before their territory was lost, in this case, the Scottish—would be bound by an allegiance to both the original sovereign and the conquering power.⁵⁸ Because allegiance was perpetual, subjectship to the original sovereign could never be eliminated. When England conquered Scotland, a subject's initial allegiance to Scotland remained, and a new allegiance became due to the conquering English. Flowing from this perpetual allegiance, Coke reasoned that loyalty need not correspond to the current state of politics, but rather derived from the natural obligations between a subject and whomever wore the crown.⁵⁹

B. Lockean Social Contract Theory

Following the Glorious Revolution, the English Constitution was fundamentally changed. The power of the monarchy was severely limited, while the supremacy of Parliament emerged. The “[d]octrines of consent and parliamentary sovereignty . . . eroded” the holdings of *Calvin's Case*.⁶⁰ This political upheaval corresponded with a “major intellectual revolution” embodied in the theories of John Locke.⁶¹

Locke rejected Coke's notion that allegiance resulted from the inherent sovereignty of the King and contended that individuals and society joined together voluntarily to form social compacts and communities.⁶² Locke also disagreed with Coke regarding expatriation. If an individual could consent to the rule of a sovereign, that person, or even the society as a whole, could also expatriate and withdraw that

⁵⁷ *Calvin's Case*, 77 Eng. Rep. at 409. Based on this theory, even after Jay's Treaty, British ships continued to impress Americans captured at sea, claiming that naturalized citizens born in England were still subjects of the Crown. These events eventually culminated in the War of 1812. See Charles Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 318-19 (1965) (“The executive branch of our Government was confronted with realities rather than theories in the disputes which led to the War of 1812. The British Government, claiming that the allegiance of its subjects was indelible, was boarding American ships to impress into military service American seamen.”).

⁵⁸ *Calvin's Case*, 77 Eng. Rep. at 398.

⁵⁹ *Id.* at 382.

⁶⁰ *Id.* at 52.

⁶¹ *Id.* at 44.

⁶² See LOCKE, *supra* note 16, at 197 (“The reason why men enter into society is the preservation of their property; and the end why they choose and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society, to limit the power, and moderate the dominion, of every part and member of the society.”); see also KETTNER, *supra* note 56, at 44 (“[P]art of [peoples'] natural independence was relinquished in order to protect their most essential liberties.”).

consent.⁶³ Locke's consent-based theory clashed with Coke's views of immutable subjectship.

While Lockean doctrines "were at least superficially integrated," social compact theory had only a minimal impact on the practical application of the law of subjectship in England.⁶⁴ Most British courts continued to rely on *Calvin's Case*.⁶⁵ However, in the American colonies, the "consensual and contractual elements implicit in naturalization and in the new political theories of the later seventeenth century would slowly emerge to dominate ideas of subjectship and allegiance."⁶⁶ The colonists turned to the Lockean view of the contractual basis of society in which allegiance was tied to protection.

James Wilson wrote "[a]llegiance to the king and obedience to the parliament are founded on very different principles. The former is founded on *protection*: the latter, on *representation*."⁶⁷ Similarly, Alexander Hamilton noted that the connection with Great Britain and the colonies was formed "by the ties of blood, interest, and mutual protection," and "[w]hen . . . lives and properties are at stake, it would be foolish and unnatural to refrain from such measures as might preserve them."⁶⁸ Under this view, the colonies would not necessarily be bound by the acts of Parliament unless they so consented. Locke described this reciprocal relationship in terms of a trust, and noted that "governments are dissolved" when the "[t]he legislative acts against the trust reposed in them."⁶⁹

John Adams observed that unlike the case in Ireland, Parliament's authority to rule the colonies was not "founded on the consent and

⁶³ See LOCKE, *supra* note 16, at 194 ("[I]t is in their legislative, that the members of a commonwealth are united, and combined together into one coherent living body. This is the soul that gives form, life, and unity, to the commonwealth . . . when the legislative is broken or dissolved, dissolution and death follows."); see also KETTNER, *supra* note 56, at 54 (arguing that Locke's position might be interpreted to allow a termination of one's obligation to the sovereign).

⁶⁴ See *id.* at 45, 52 (noting that in the nineteenth century, citation to Coke's reports was "virtually mandatory[,]") thereby limiting competing theories of citizenship).

⁶⁵ *Id.* at 45.

⁶⁶ *Id.* at 60. The colonists thought of allegiance "as a contractual, quid pro quo relationship in which the privileges of membership could be claimed as a right by the person who chose to contribute his efforts and talents to the welfare of the community." *Id.* at 107.

⁶⁷ JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, in 2 THE WORKS OF JAMES WILSON 721, 736-37 (Robert Green McCloskey ed., 1967).

⁶⁸ ALEXANDER HAMILTON, *A Full Vindication of the Measures of Congress, etc.*, in ALEXANDER HAMILTON: WRITINGS 10, 16 (Library of America 2001).

⁶⁹ LOCKE, *supra* note 16, at 197.

compact” of the Americans.⁷⁰ Allegiance to the king was earned in reciprocity for protection. James Wilson noted that “the duties of the king and those of the subject are plainly reciprocal: they can be violated on neither side, unless they be performed on the other.”⁷¹ Recognizing this reciprocal duty, one of the grievances against the king in the Declaration was that “[h]e . . . abdicated Government, by declaring [the colonists] out of his Protection and waging War against [them].”⁷² In the words of Locke, “[w]here there is no longer the administration of justice, for the securing of men’s rights . . . there certainly is no government left.”⁷³

This notion formed the legal predicate of the Declaration. Locke’s “theory was beautifully adapted for those who wished to legitimize alterations and revolutions in government”—including the Glorious Revolution and the American Revolution—“without sanctioning as a necessary first step the obliteration of all authority and all obligation.”⁷⁴ Locke distinguished “between the dissolution of the society, and the dissolution of the government.”⁷⁵ “Whenever the society is dissolved, it is certain the government of that society cannot re-

⁷⁰ NOVANGLUS [JOHN ADAMS], *Addressed to the Inhabitants of the Colony of Massachusetts Bay April 3, 1775*, in NOVANGLUS AND MASSACHUSETTENSIS, OR, POLITICAL ESSAYS, at 118, 118 (Hews & Goss 1819).

⁷¹ JAMES WILSON, *Speech Delivered in the Convention for the Province of Pennsylvania* (Jan. 1775), in THE WORKS OF JAMES WILSON, *supra* note 67, at 747, 753-54.

⁷² THE DECLARATION OF INDEPENDENCE (U.S. 1776); *see also*, PA. CONST. of 1776 *reprinted in* 5 AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS 3081, 3081 (Francis Newton Thorpe ed., 1909) (“And whereas the inhabitants of this commonwealth have in consideration of protection only, heretofore acknowledged allegiance to the king of Great Britain; and the said king has not only withdrawn that protection, but commenced, and still continues to carry on, with unabated vengeance, a most cruel and unjust war against them . . . all allegiance . . . to the said king . . . are dissolved.”).

⁷³ LOCKE, *supra* note 16, at 219. Locke also wrote that government may be dissolved “[w]hen he who has the supreme executive power, neglects and abandons that charge, so that the laws already made can no longer be put in execution. This is demonstratively to reduce all to anarchy.”) *Id.*

⁷⁴ KETTNER, *supra* note 56, at 144; *see also* LOCKE, *supra* note 16, at 194 (“Besides this overturning from without, governments are dissolved from within. First, [w]hen the legislative is altered. . . . When any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey; by which means they come again to be out of subjection, and may constitute to themselves a new legislative, as they think best, being in full liberty to resist the force of those, who without authority would impose any thing upon them.”).

⁷⁵ LOCKE, *supra* note 16, at 194.

main.”⁷⁶ Following the dissolution of *society*, “men returned to the state of nature, and all political obligation ceased.”⁷⁷

In contrast, “[t]he world is too well instructed in, and too forward to allow of, this [reversion to the state of nature following the] dissolving of governments.”⁷⁸ When there is a dissolution of government, people do not need to return to the state of nature, and in fact political obligations could continue, though loyalties would be transferred to the new sovereign.⁷⁹ Returning to the state of nature does “not [occur] upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be born by the people without mutiny or murmur.”⁸⁰ Or, as Jefferson phrased it in the Declaration, “[p]rudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes.”⁸¹

One could characterize the transition from rule under King George III to rule under the Declaration as a Lockean dissolution of society. The previous colonial structure, along with all attendant political obligations and allegiances to it, ceased. Through this social compact, a new society was formed. On May 10, 1776, the remnants of the Virginia House of Burgesses, speaking through the presidency of Edmund Pendleton, agreed that the king’s actions had caused a dissolution of their society “in the Lockean sense.”⁸² With this dissolution, all prior allegiances were nullified: “It being their opinion, that the people could not now be legally represented according to the ancient constitution, which has been subverted by the king, lords, and commons of Great Britain, and consequently dissolved, they unanimously dissolved themselves accordingly.”⁸³ In *Bayard v. Singleton*, the North Carolina Supreme Court wrote that the Revolutionary War had created a state of nature in which the former subjects of the Crown were in “a similar situation with a set of people ship-wrecked and cast

⁷⁶ *Id.*

⁷⁷ See KETTNER, *supra* note 56, at 53 (discussing Lockean views of allegiance).

⁷⁸ LOCKE, *supra* note 16, at 193-94.

⁷⁹ *Id.*

⁸⁰ *Id.* at 199.

⁸¹ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁸² KETTNER, *supra* note 56, at 168.

⁸³ VIRGINIA GAZETTE, May 10, 1776, available at <http://research.history.org/DigitalLibrary/VirginiaGazette/VGImagePopup.cfm?ID=5562&Res=HI>; see also KETTNER, *supra* note 56, at 168 (making note of the reaction of the remaining Virginia House of Burgesses).

on a maroon'd island—without laws, without magistrates, without government, or any legal authority.”⁸⁴

In contrast, the evolution from the Declaration to the Articles of Confederation to the Constitution marks dissolutions of government. While the Declaration abjured all allegiances to Britain, this tripartite transformation maintained allegiances to the government of the United States, albeit in a different form. “As long as government continued to operate legitimately, protecting life, liberty, and property, individual subjects were bound.”⁸⁵ Citizenship and allegiances did not change as the form of government evolved. A citizen under the Declaration became a citizen under the Articles, and then became a citizen under the Constitution.⁸⁶ The amendment process, as articulated in Article V of the Constitution, permits future generations to add additional links to our constitutional chain. Rather than effecting a dissolution of government in the Lockean sense—whereby a new charter of government is established—the Constitution, through the consent of the ratification conventions, permits the efficacious evolution of government.

III. CITIZENSHIP FOLLOWING THE REVOLUTION

Locke’s contract theory was aptly suited to explain how those who accepted the sovereignty of the Continental Congress became citizens: they willingly entered into a compact. But what happened to the citizenship of the loyalist dissenters? In this sense, “Locke’s theoretical scheme was thus ill equipped to deal with the difficult problems of choice raised by the American Revolution.”⁸⁷ Two doctrines emerged to explain citizenship for the *antenati*. The first was premised on the state’s imposing citizenship—regardless of the person’s willingness—and the second was based on the granting of citizenship to those who so elected.

A. *Imposing Citizenship Following Independence*

The first doctrine postulated that when the majority chose to declare independence, everyone was required to submit to the newly ordained-and-established government, because the United States was the

⁸⁴ 1 N.C. (Mart.) 42, 43 (1787).

⁸⁵ KETTNER, *supra* note 56, at 143-44.

⁸⁶ See *infra* Part IV.

⁸⁷ KETTNER, *supra* note 56, at 190.

proper successor to the Crown.⁸⁸ In *Ainslie v. Martin*, Chief Justice Parsons of the Massachusetts Supreme Judicial Court adopted this rationale.⁸⁹ At issue in this case was the citizenship of an infant born in Massachusetts in 1774, who left prior to the Declaration, and never returned.⁹⁰ The Court held that the Declaration resulted in an automatic transfer of allegiance. Parsons found 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.”⁹¹ The American government served “as [the King’s] successor, [and therefore] the same government and people [] succeeded to all the crown lands within the territory, as lawfully appertaining to them.”⁹² Accordingly, “all persons, born within the territories of the province of Massachusetts Bay during the reign of the late king, are considered as born within the allegiance of the commonwealth of Massachusetts, as his lawful succes-

⁸⁸ *Id.* at 190-92. The Court in *Penhallow v. Doane’s Administrator* shared the view that U.S. citizenship was imposed upon colonists once the majority declared independence, noting that

[i]f it be asked, in whom, during our revolution [sic] war, was lodged, and by whom was exercised this supreme authority [referring to the powers of “war and peace”]? No one will hesitate for an answer. It was lodged in, and exercised by, Congress; it was there, or no where; the states individually did not, and, with safety, could not exercise it . . . As to war and peace, and their necessary incidents, Congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount, and supreme.

3 U.S. (3 Dall.) 54, 80-81 (1795); see also LOCKE, *supra* note 16, at 194 (“[T]he essence and union of the society consisting in having one will, the legislative, when once established by the majority, has the declaring, and as it were keeping of that will.”).

⁸⁹ See 9 Mass. (1 Tyng) 454, 458 (1813) (“Thus the government became a republic, possessing all the rights vested in the former sovereign; among which was the right to the allegiance of all persons born within the territory of the province of *Massachusetts Bay*.”).

⁹⁰ *Id.* at 455.

⁹¹ *Id.* at 459.

⁹² *Id.*; see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-17 (1936) (“Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.” (citing *Penhallow*, 3 U.S. (3 Dall.) at 80-81)); LOCKE, *supra* note 16, at 194 (“The constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union, under the direction of persons, and bonds of laws, made by persons authorized thereunto, by the consent and appointment of the people; without which no one man, or number of men, amongst them, can have authority of making laws that shall be binding to the rest.”).

sor.”⁹³ In this sense, the establishment of a new republic was intertwined with the instantiation of a new political character—a citizen of the United States. In the words of David Ramsay (a member of the second Continental Congress) following the separation with England, Americans present during the Declaration “became coequal citizens, and, collectively, assumed all the rights of sovereignty.”⁹⁴ Those who were “parties to this solemn act” became citizens and “were the founders of the United States.”⁹⁵

A different strand of citizenship doctrine resembled a hybrid of Lockean and Colean theories. People could become citizens either through consent or through conquest.⁹⁶ Locke’s social contract theory accounted for those persons who voluntarily accepted the new government, while the doctrine of conquest from *Calvin’s Case*—whereby those conquered owed obedience to the conquerors even if they dissented from their rule—accounted for loyalist dissenters.⁹⁷

In *Read v. Read*,⁹⁸ the Virginia Supreme Court adopted this theory and noted that “loyalists became citizens—albeit unwilling—not because of their birth or residence in America, but because they had been conquered.”⁹⁹ Those who refused to assent to the new government were “legitimated . . . by virtue of the implied compact only.”¹⁰⁰ This holding evinces glimpses of *Calvin’s Case*, viewing citizenship as perpetual and subject to change only in form. In the same sense that an *antenatus* of Scotland obtained a new allegiance to England following the conquest, an *antenatus* of the colony of Virginia obtained new citizenship to the Commonwealth of Virginia under the authority and auspices of the Declaration and the Continental Congress. Combining both of these theories, the majority could consent to the new government while the dissenting loyalists had citizenship imposed on them,

⁹³ *Ainslie*, 9 Mass. (1 Tyng) at 459 (emphasis omitted).

⁹⁴ RAMSAY, *supra* note 1, at 4. This “anti-Smith tract” was prepared to challenge the qualifications of William Smith in the House of Representatives. See 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, at 195 n.2 (Merrill Jensen & Robert A. Becker eds., 1976). The reliability of Ramsay’s dissertation as a historical document, rather than as a political broadside, is suspect.

⁹⁵ RAMSAY, *supra* note 1, at 5.

⁹⁶ See KETTNER, *supra* note 56, at 192.

⁹⁷ *Id.*

⁹⁸ 9 Va. (5 Call) 160, 201 (1804).

⁹⁹ KETTNER, *supra* note 56, at 192.

¹⁰⁰ *Id.*

often against their will.¹⁰¹ This holding sounds in Coke, though it is in tension with Lockean theory.

B. *Citizenship by Election*

The doctrine of citizenship through imposition—which essentially coerced a loyalist dissenter to assume a new allegiance—presented theoretical difficulties for Americans. These doctrines conflicted with the spirit of the Declaration, which was predicated on consent to a social compact. If Americans were not willing to swear allegiance to King George III against their will, then they should not have considered their allegiance to a new American sovereign sworn without their consent. As Locke phrased it, “[w]hen any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey.”¹⁰²

In response to the shortcoming in both of these theories, the states developed a “doctrine of the right of election.”¹⁰³ The premise was simple: “Citizenship in the new republics was to begin with individual consent.”¹⁰⁴ Ramsay wrote that “[c]itizenship, acquired by tacit consent, is exclusively confined to the cases of persons who have resided within the United States since the declaration of independence.”¹⁰⁵ The binding choice of loyalty had to be made within a certain period of time. As articulated by William Tilghman, who argued on behalf of the petitioner in *M’Ilvaine v. Cox’s Lessee* “[i]n revolutions, every man has a right to take his part. He is excusable, if not bound in duty to take that part which in his conscience he approves.”¹⁰⁶

During the “period of governmental disorganization, accompanying independence . . . individuals had some time to consider their choice of allegiance.”¹⁰⁷ An election of loyalty occurred, “explicitly, when they acknowledged the legitimacy of the new states or, implicitly, when they accepted the protection of the new constitutions and

¹⁰¹ Of course, only a small percentage of the populace expressly offered consent to adopt this new government. Further, it is quite tragic and slightly ironic that while most slaves, native Indians, and women could not become citizens, certain loyalists were essentially conscripted into citizenship. Nevertheless, these doctrines laid the intellectual and philosophical groundwork for the extension of citizenship and equality to all in theory, if not in practice. Tragically, the promise of citizenship for all people was not realized until the ratification of the Fourteenth Amendment.

¹⁰² LOCKE, *supra* note 16, at 194.

¹⁰³ KETTNER, *supra* note 56, at 193.

¹⁰⁴ *Id.* at 194.

¹⁰⁵ RAMSAY, *supra* note 1, at 7-8 (emphasis omitted).

¹⁰⁶ 6 U.S. (2 Cranch) 280, 281 (1805).

¹⁰⁷ KETTNER, *supra* note 56, at 194.

laws.”¹⁰⁸ The length of the period of election depended “upon when legitimate, protective laws came into being in the respective states.”¹⁰⁹ “Americans acknowledged the right of the state to dictate the timing of election” while only the individual “would be responsible for making the choice between subjectship and citizenship.”¹¹⁰ If a person chose not to exercise election, he could exercise the complementary right of expatriation by departing the United States and swearing allegiances to another sovereign. Following the Revolution, “most Americans necessarily accepted the right of expatriation.”¹¹¹ Once the election was made and acknowledged by the state, with certain exceptions, a citizen generally could not change his status.¹¹² Following the Revolution, most states started to adopt the election doctrine.¹¹³

IV. CITIZEN OF THE UNITED STATES

In the wake of the Declaration, citizenship of the United States, a previously unrecognized political construct, was born. While in the past “subjectship” defined one’s allegiance to the king,¹¹⁴ “[t]he status of ‘American citizen’ was the creation of the Revolution.”¹¹⁵ In the words of Ramsay, Americans had, following the Revolution, “changed from subjects to citizens” and the “difference [was] immense.”¹¹⁶ Citizenship, in contrast with Cokean subjectship, was not based on perpetual allegiance, but rather flowed from individual consent. This new status was created to “govern membership in a free society: republican citizenship ought to rest on consent; it ought to be uniform and without invidious gradations; and it ought to confer equal rights.”¹¹⁷

This Part considers how this citizenship was understood at three distinct points in our early history. First, in treason cases, the court

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 208.

¹¹¹ GORDON S. WOOD, *EMPIRE OF LIBERTY* 248 (2009).

¹¹² *See* *Shanks v. DuPont*, 28 U.S. (3 Pet.) 242, 247 (1830) (noting that the Treaty of Paris “took the actual state of things as its basis” for purposes of election so that “all those . . . who then adhered to the American states, were virtually absolved from all allegiance to the British crown”).

¹¹³ *See* KETTNER, *supra* note 56, at 194 (“Citizenship in the new republics was to begin with individual consent.”).

¹¹⁴ *Id.* at 187 (“Citizenship supplanted subjectship as the source of protection shifted from George III to the independent states.”).

¹¹⁵ *Id.* at 208.

¹¹⁶ RAMSAY, *supra* note 1, at 3.

¹¹⁷ KETTNER, *supra* note 56, at 10.

needed to determine whether the accused was a foreign alien levying war against the United States, or a disloyal citizen engaged in sedition. Central to this decision was the application of a concept of citizenship to the status of the defendant. Second, while the Constitutional Convention largely ignored issues of citizenship, members of the first Congress shed light on this issue in challenges to the qualifications of an elected representative. Third, in adjudications of Jay's Treaty, courts needed to ascertain whether claimants of property and damages were U.S. citizens, both at the time of the Revolution and prior to the Treaty of Paris. Each of these historical epochs reflects a consistent application of the doctrine of citizenship through election.

A. *Treason Prosecutions*

The first Articles of War, enacted by the Continental Congress on June 30, 1775, provided for punishment for treason by those under the authority of the Continental Army.¹¹⁸ The question of allegiance was an initial inquiry in any treason prosecution, as “[t]reason indictments necessarily included a statement that the accused in fact owed allegiance to the state.”¹¹⁹ A person deemed to be a subject of England could wage war against America, and could not be found guilty of treason, for his loyalty lay with the crown. In contrast, a disloyal citizen of the United States could be prosecuted for treason, for his loyalty was to the United States. The treason statute, broadly construed, applied to “[a]nyone, alien or citizen, permanent resident or visitor, who enjoyed the protection of the government.”¹²⁰

The leading treason case is *Respublica v. Chapman*, a Pennsylvania Supreme Court case decided by Chief Justice M’Kean in 1781.¹²¹ Samuel Chapman was born in Bucks County, Pennsylvania, and on De-

¹¹⁸ See BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON* 29-30 (1964) (explaining that people could be punished for, among other offenses, mutiny, sedition, providing supplies to the enemy, and harboring an enemy).

¹¹⁹ KETTNER, *supra* note 56, at 181.

¹²⁰ CHAPIN, *supra* note 118, at 71.

¹²¹ 1 U.S. (1 Dall.) 53 (Pa. 1781). *Chapman* was selected for inclusion in the U.S. Reports even though it was decided seven years before the Constitutional Convention, and the case has been cited in numerous Supreme Court opinions. See Eugene Volokh, *Little-Known Weird Legal Fact Leads to Glitch in Court of Appeals Opinion*, THE VOLOKH CONSPIRACY (May 8, 2006, 1:27 pm), <http://volokh.com/2006/05/08/little-known-weird-legal-fact-leads-to-glitch-in-court-of-appeals-opinion> (“Volume 1 of U.S. Reports is occupied entirely by cases from Pennsylvania . . . [because] Alexander Dallas, the entrepreneur who published the cases, included the other courts’ cases to make the volumes [of Supreme Court cases] more salable, since the U.S. Supreme Court produced relatively few cases in its early years.”).

ember 26, 1776, following what must have been an eventful Christmas, he “departed and joined the enemy.”¹²² In a proclamation dated June 15, 1778, the Supreme Executive Council of Pennsylvania ordered the “attainder of divers traitors.”¹²³

The resolution of this case hinged on whether Chapman was ever a U.S. citizen. If he was, the attainder was valid, and he would be considered a traitor. If not, and he remained a British citizen, the attainder was ineffective. In that situation, Chapman could be punished as a foreign enemy but he could not be considered a traitor. The attorney general alleged that Chapman was “an inhabitant and subject of” Pennsylvania, and thus a traitor.¹²⁴ Chapman replied that he was a “subject of the king of Great Britain” and had never “been a subject or inhabitant of” Pennsylvania.¹²⁵

Chapman’s counsel argued that “on the 26th December, 1776, there was no government established in Pennsylvania, from which [Chapman] could receive protection; and consequently, there was none to which he could owe allegiance—protection and allegiance being political obligations of a reciprocal nature.”¹²⁶ In Chapman’s view, because no government existed when he fled Pennsylvania, he could not have received any protection and thus owed no loyalty to the state. The attorney general countered that “[b]y the declaration of independence, on the 4th July, 1776, every State in the union was solemnly declared to be free and independent,” and on “the 26th day of December, 1776 . . . [Chapman] was certainly a subject of the state of Pennsylvania, under the constitution agreed to on the 28th day of September preceding.”¹²⁷ This argument—that Chapman became a citizen as a result of the majority’s consenting consenting to the new union—mirrored the position taken by the Supreme Judicial Court of Massachusetts in *Ainslie v. Martin*.¹²⁸ Chief Justice M’Kean sought to determine whether Chapman “was to be considered as an inhabitant and subject of the Commonwealth of Pennsylvania, at the time of his departure.”¹²⁹

¹²² *Chapman*, 1 U.S. (1 Dall.) at 53.

¹²³ *Id.*

¹²⁴ *Id.* (emphasis omitted).

¹²⁵ *Id.* (emphasis omitted).

¹²⁶ *Id.*

¹²⁷ *Id.* at 54, 55.

¹²⁸ 9 Mass. (1 Tyng) 454 (1813).

¹²⁹ *Chapman*, 1 U.S. (1 Dall.) at 53.

M’Kean found that even though an official constitution had not been established, “a formal compact is not a necessary foundation of government; for, if an individual had assumed the sovereignty, and the people had assented to it, whatever limitations might afterwards have been imposed, still this would have been a legal establishment.”¹³⁰ M’Kean continued:

Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity; unless there is a power to execute them. But that is not the case at present . . . for before the meeting of Council in March, 1777, all its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of High Treason might have been committed by any person, who was then a subject of the Commonwealth.¹³¹

The Court found that Chapman owed allegiance from the date that the legislature had convened.¹³² Despite the fact that following a civil war “the voice of the majority must be conclusive, . . . the minority have, individually, an unrestrainable right to remove with their property into another country . . . and, in short, that none are subjects of the adopted government, who have not freely assented to it.”¹³³ This represented the period of election. Chapman exercised his right of election, and expatriated from Pennsylvania a month before the first statute had been passed under the new Constitution, and three months prior to the point where all three branches of the government were in operation.

Cognizant of the climate in which he judged—the Revolution was still raging throughout the colonies—Chief Justice M’Kean noted that

[t]his construction, it may be said, is favorable to traitors, and tends to prejudice of the Commonwealth. But we cannot be influenced by observations of a political nature in the exposition of the law; it is our duty to seek for, and to declare, the true intention of the Legislature; the policy of that intention, it is their duty to consider.¹³⁴

¹³⁰ *Id.* at 56.

¹³¹ *Id.* at 57 (emphasis omitted).

¹³² *Id.*

¹³³ *Id.* at 58.

¹³⁴ *Id.* at 59.

Still, M’Kean charged, “[i]t is better to err on the side of mercy, than of strict justice.”¹³⁵ With this charge favorable to the accused, the jury acquitted Chapman.¹³⁶

Citizenship by election emerged as the dominant view in later court decisions. In North Carolina, following the Declaration, people had an inherent right to elect their choice of citizenship resulting from the state of nature formed by the Revolution.¹³⁷ North Carolina solemnized this election in an act passed in April of 1777, offering all residents “the option of taking an oath of allegiance, or of departing the state.”¹³⁸ The New York Supreme Court later adopted a similar view in *Jackson v. White*, holding that “[e]very member of the old government must have the right to decide for himself, whether he will continue with a society which has so fundamentally changed its condition.”¹³⁹ Ultimately, this view was adopted by the United States Supreme Court in *M’Ilvaine v. Coxe’s Lessee*.¹⁴⁰

B. *Citizenship of the United States as Determined by State Law*

While the Constitutional Convention featured spirited discussion about how long a person needed to be a U.S. citizen in order to serve in Congress, there was sparse debate over how citizenship should be defined. On August 13, 1787, Gouverneur Morris “moved to add to the end of the section [governing the citizenship qualifications] a proviso that the limitation of seven years should not affect the rights of any person now a Citizen.”¹⁴¹ This motion essentially sought to credit determinations of *state* citizenship when considering U.S. citizenship. In other words, if a person was a citizen under state law, the requirements of being a citizen of the United States for seven years in order to qualify for Congress need not apply.

¹³⁵ *Id.* at 60.

¹³⁶ *Id.*

¹³⁷ See *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 8 (1787) (recognizing a landowner’s decision pursuant to an act of the legislature to return to Great Britain and thereby remain a British subject).

¹³⁸ *Hamilton v. Eaton*, 11 F. Cas. 336, 339 (Cir. Ct. D.N.C. 1792)(No. 5,980) (Ellsworth, J.); see also RAMSAY, *supra* note 1, at 5 (“Those who refused [to take oaths] were ordered to depart, as being patrons unfriendly to the revolution.”).

¹³⁹ 20 Johns. 313, 322 (N.Y. Sup. Ct. 1822).

¹⁴⁰ 6 U.S. (2 Cranch) 280, 284 (1805) (“When the Revolution was proposed, he had a right to chuse [sic] his side.”).

¹⁴¹ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 439 (W.W. Norton & Co. 1987) (1840).

John Mercer of Maryland seconded this motion, noting that “[i]t was necessary . . . to prevent a disfranchisement of persons who had become Citizens under and on the faith & according to the laws & Constitution from being on a level in all respects with natives.”¹⁴² Mercer was referring to citizenship granted by state constitutions under the Declaration and later the Articles of Confederation. James Wilson, himself an immigrant, “who was instrumental in framing the Constitution and who served as one of the original Members of [the Supreme] Court,”¹⁴³ sided with Morris and Mercer. Wilson noted that the Pennsylvania Constitution gave “to foreigners after two years residence all the rights whatsoever of citizens,” and the Articles of Confederation made “the Citizens of one State Citizens of all.”¹⁴⁴ From these laws, Wilson argued that Pennsylvania was obligated to “maintain the faith thus pledged to her citizens of foreign birth.”¹⁴⁵

Roger Sherman disagreed with Morris, Mercer, and Wilson, arguing that “[t]he U[nited] States have not invited foreigners nor pledged their faith that they should enjoy equal privileges with native Citizens. The Individual States alone have done this.”¹⁴⁶ Though the states had granted citizenship, Sherman argued that the United States need not recognize this citizenship.

Madison criticized Sherman’s contention and asserted that the delegates are the “Agents” of the states that “appoint[ed] this Convention,” and will “ratify its proceedings.”¹⁴⁷ Madison further explained that “[i]f the new Constitution then violates the faith pledged” to any naturalized citizens, “the States [would] be the violators” of the Constitution.¹⁴⁸ The United States should thus respect the naturalization and citizenship decisions of the states. Wilson also read the Comity Clause of the Articles of Confederation and “inferred the obligation Pen[nsylvania] was under to maintain the faith thus pledged to her citizens of foreign birth.”¹⁴⁹ Likewise, Mercer agreed that the United States should not begin its existence by a “breach of faith.”¹⁵⁰

¹⁴² *Id.*

¹⁴³ *Victor v. Nebraska*, 511 U.S. 1, 10 (1994).

¹⁴⁴ MADISON, *supra* note 141, at 441; *see also* PA. CONST. of 1776 § 42 (“Every foreigner of good character who comes to settle in this state . . . shall not be capable of being elected a representative until after two years residence.”).

¹⁴⁵ MADISON, *supra* note 141, at 441.

¹⁴⁶ *Id.* at 440.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 441.

¹⁵⁰ *Id.*

Thomas Pinckney of South Carolina disagreed with Madison, and “remarked that the laws of the States had varied much the terms of naturalization in different parts of America; and contended that the United States could not be bound to respect them.”¹⁵¹ In other words, he argued that the United States need not give credence to the naturalization laws of the states.

The Convention voted down Morris’s provision by a vote of six to five, with Connecticut, New Jersey, Pennsylvania, Maryland, and Virginia voting “aye,” and New Hampshire, Massachusetts, Delaware, North Carolina, South Carolina, and Georgia voting “no.”¹⁵² While the delegates to the Convention defeated this provision by a close vote, the first Congress expressly repudiated it. Only two years later during its vital term,¹⁵³ based on the arguments on James Madison, the first Congress adopted the position that pledges made by the states prior to the ratification of the Constitution determine qualifications for the House.¹⁵⁴

In the first congressional election, the American people elected nine representatives and senators who were not born in the United States, four of whom had signed the Constitution in Philadelphia.¹⁵⁵ Yet it was the election of William Smith, who was born in South Carolina but grew up in Europe, which resulted in the first constitutional challenge in the House of Representatives under the Qualifications Clause of Article I.¹⁵⁶

Smith was born in South Carolina to a family that traced its lineage to the first settlers of the colony. In 1774, he left for Geneva to pursue an education, and stayed there until 1778.¹⁵⁷ He later traveled

¹⁵¹ *Id.*

¹⁵² *Id.* at 442. Rhode Island was not represented at the Constitutional Convention, and New York did not cast a vote on this issue.

¹⁵³ James Madison told Thomas Jefferson that the First Congress was “in a wilderness without a single footstep to guide us. Our successors will have an easier task.” WOOD, *supra* note 111, at 55 (quoting THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS (Merrill Jenson & Robert A. Becker eds., 1976)).

¹⁵⁴ See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 861 (1994) (noting Madison’s leadership on this issue) (citing 1 ANNALS OF CONG. 420–23 (Joseph Gates ed., 1834)).

¹⁵⁵ See *Biographical Directory of the United States Congress*, U.S. CONGRESS, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Nov. 15, 2010) (providing a directory in which one can enter names of relevant congressmen—in this case Burke, Butler, Fitzsimons, Jackson, Johnston, Laurence, Morris, Paterson, and Tucker—to access their biographies).

¹⁵⁶ CASES OF CONTESTED ELECTIONS IN CONGRESS, 1789–1834, *supra* note 6, at 23.

¹⁵⁷ *Id.* at 26.

to Paris—where he “resided two months as an American gentleman [and] was received in that character by Dr. Franklin [and] Mr. Adams”—and London, where he studied law.¹⁵⁸ He returned to the U.S. in 1783, and upon “his arrival at Charleston, he was received by his countrymen as a citizen of the State of South Carolina.”¹⁵⁹ Smith was elected as a member of the State Legislature and Privy Council.¹⁶⁰ After his election to the House in 1788, his seat was contested on the grounds that he had not yet been “seven year a citizen of the United States.”¹⁶¹

In September 1779, the South Carolina Legislature determined that it was in “the interest of the State that [young men who were sent abroad for their education] should be allowed to continue in Europe till they were twenty-two years of age.”¹⁶² The legislature also determined that a double tax should be imposed upon those young men who chose not to return, but expressly preserved their citizenship rights.¹⁶³ Because Smith

was admitted to offices of trust, to which aliens were not admissible, and as he was admitted to them without having the rights of citizenship conferred upon him, in pursuance of [the 1784 naturalization] act, it followed clearly that the people of South Carolina and the Legislature acknowledged him to be a citizen *by virtue of the revolution*.¹⁶⁴

Smith argued that his guardians in South Carolina who represented him stood “*in loco parentis*,” and offered that they were “residents . . . at the declaration of independence.”¹⁶⁵ Smith proclaimed that

the declaration of independence affected him as much, though at Geneva, as it did those in Carolina; his happiness, that of his dearest connexions, his property, were deeply interested in it: his fate was so closely connected with that of Carolina, that any revolution in Carolina was a revolution of him. Though a minor, as soon as he heard of the independence of America, he considered himself an American citizen.¹⁶⁶

According to this strand of volitional allegiance, no election was necessary; citizenship was imposed by virtue of the Declaration.

Ramsay, the challenger, countered that the state “could not confer citizenship on Americans who were absent when independence

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 26-27.

¹⁶¹ *Id.* at 23.

¹⁶² *Id.* at 26.

¹⁶³ *Id.* at 27.

¹⁶⁴ *Id.* at 28 (emphasis added).

¹⁶⁵ *Id.* at 29.

¹⁶⁶ *Id.*

was declared . . . and anterior to their returning and joining their country under its new and independent Government."¹⁶⁷ Ramsay disputed that birth in the United States before the Revolution conferred citizenship, as those "who have neither done nor hazarded anything for our independence" should not be allowed to claim citizenship merely "from the circumstance of their having been born in this country."¹⁶⁸ Ramsay would have required some form of election, whereby Smith affirmatively returned to the United States to assert his loyalties.¹⁶⁹

Representative James Madison weighed in on this issue, and delivered nearly four pages of remarks. He began by stating that "from a consideration of the principles established by the revolution, the conclusion I have drawn is, that Mr. Smith was, on the declaration of independence, a citizen of the United States."¹⁷⁰ Madison sought to rely on the "laws and constitution of South Carolina" and to be "guided by principles of a general nature."¹⁷¹ Madison reasoned from an "established maxim" that the place of birth is "the most certain criterion" of citizenship, and this rule "applies in the United States."¹⁷²

Madison noted that there are two allegiances that a citizen owes: "the primary allegiance which we owe to that particular society of which we are members, and the secondary allegiance we owe to the sovereign established by that society."¹⁷³ While the latter is ephemeral, the former is fixed. What happened "when the dissolution of [the allegiance of the American people] took place by the declaration of independence?"¹⁷⁴ The "primary allegiance" was retained, and owed to the "new community" based on the "community in which [the citizen] was born."¹⁷⁵

If a person was born in the colony of South Carolina, following July 4, 1776, the primary allegiance was now owed to the newly formed state of South Carolina. However, a citizen was "absolved from the

¹⁶⁷ *Id.* at 32. These arguments concerning citizenship for those outside the United States during the time of the Declaration of Independence closely track Ramsay's position in *A Dissertation on the Manner of Acquiring the Character and Privileges of a Citizen of the United States*. See generally RAMSAY, *supra* note 1.

¹⁶⁸ CASES OF CONTESTED ELECTIONS IN CONGRESS, 1789–1834, *supra* note 6, at 32.

¹⁶⁹ *Id.* at 31.

¹⁷⁰ *Id.* at 32.

¹⁷¹ *Id.*

¹⁷² *Id.* at 33.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

secondary allegiance he had owed to the British sovereign.”¹⁷⁶ Madison noted that

[w]hen that society separated from Great Britain, [Smith] was bound by that act, and his allegiance transferred to that society, or the sovereign which that society should set up Mr. Smith being, then, at the declaration of independence, a minor, but being a member of that particular society, he became, in my opinion, bound by the decision of the society, with respect to the question of independence and change of Government.”¹⁷⁷

Smith, an *antenatus*, was entitled to citizenship upon the Declaration, in accordance with the laws of South Carolina, regardless of where he resided.

Several members disagreed with Madison. Representative Boudinot “expressed an apprehension” that “the natives of America who had deserted their country’s cause during the late war” would be permitted to serve in Congress.¹⁷⁸ Representative Jackson remarked that America “at the time of the revolution, was not properly to be compared to a people altering their mode or form of Government.”¹⁷⁹ Rather, the “whole allegiance or compact [was] dissolved”¹⁸⁰ and there was a “total reversion to a state of nature.”¹⁸¹ During this period of limbo, those living in America “had no general or Federal government, or form of constitution, and yet were in arms.”¹⁸²

The Supreme Court of Pennsylvania’s holding in *Respublica v. Chapman* addresses this issue, and contends that the period of election could begin following the establishment of a functional government.¹⁸³ When the naturalization act was passed in 1779, South Carolina had a functioning government. Even if South Carolina had been in a veritable state of nature following the Declaration, by 1779 it had already established a valid government.

After hearing the passionate speeches regarding Smith’s citizenship, the House found “upon mature consideration, that William Smith had been seven years a citizen of the United States at the time

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 34.

¹⁷⁸ *Id.* at 35.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 36.

¹⁸¹ *Id.* at 35.

¹⁸² *Id.* at 36.

¹⁸³ 1 U.S. (1 Dall.) 53, 59 (Pa. 1781).

of his election.”¹⁸⁴ The resolution passed thirty-six to one, and “Mr. Smith was confirmed in his seat.”¹⁸⁵

While the Constitutional Convention narrowly rejected Gouverneur Morris’s position—reliance on state law as the basis for U.S. citizenship—the first Congress effectively adopted it by a nearly unanimous margin. Although the Continental Congress “did not naturalize foreigners, it adopted resolutions obliging the states to do so.”¹⁸⁶ In this sense, the central government delegated the power to the states, and the first Congress’s vote in the Smith case reflects that principle.

As Madison remarked, “Mr. Smith was a citizen at the declaration of independence, a citizen at the time of his election, and, consequently, entitled to a seat in this Legislature.”¹⁸⁷ If Smith was entitled to a seat in the legislature, according to Article I, then he was a citizen of the United States. Madison’s syllogism indicates that a person with citizen status, according to the law of the state, at the time of the Declaration, became a citizen of the United States for purposes of the Constitution—even though this choice of citizenship predated our great charter by thirteen years.

C. Interpretation of Jay’s Treaty

The Supreme Court later adopted the *Chapman* view of citizenship through election. In *M’Ilwaine v. Coxe’s Lessee*, the Court considered whether Daniel Coxe was a citizen of the United States or a citizen of Britain for purposes of a claim under the terms of Jay’s Treaty.¹⁸⁸ If he were British, his estate would be unable to inherit lands by descent.¹⁸⁹ Coxe, a resident of New Jersey, chose to fight for the king during the Revolution, and considered himself a British subject.¹⁹⁰ Unlike Samuel Chapman, who fled from Pennsylvania before the establishment

¹⁸⁴ CASES OF CONTESTED ELECTIONS IN CONGRESS, 1789–1834, *supra* note 6, at 37.

¹⁸⁵ *Id.*

¹⁸⁶ KETTNER, *supra* note 56, at 219. I will address the Continental Congress’s delegation of other powers in future works.

¹⁸⁷ CASES OF CONTESTED ELECTIONS IN CONGRESS, 1789–1834, *supra* note 6, at 35.

¹⁸⁸ 6 U.S. (2 Cranch) 280, 280 (1805). Justice Cushing, writing for the Court, remarked in a preliminary footnote that “Chief Justice [Marshall] did not sit in this cause, having formed a decided opinion on the principal question, while his interest was concerned.” *Id.* at 280 n.<dagger>. Marshall’s recusal could have stemmed from his advocacy in a British debt case. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 199 (1796) (representing a Virginia debtor, John Marshall argued for the validity of a Virginia statute passed during the Revolution, which discharged debts to British subjects).

¹⁸⁹ *M’Ilwaine*, 6 U.S. (2 Cranch) at 280.

¹⁹⁰ *Id.* at 282.

of the government,¹⁹¹ Coxe resided in New Jersey after the establishment of its Constitution on July 2, 1776, and following the enactment of its treason statute by the legislature on October 4, 1776.¹⁹² At the Supreme Court, Coxe's estate argued that he was an American citizen, contending that the New Jersey Constitution had established a new society at independence, rendering all inhabitants citizens.¹⁹³

M'Ilvaine contested this claim, and argued that Coxe's actions showed that his allegiances were with Great Britain. Relying on *Chapman*, M'Ilvaine argued that Coxe exercised his right of expatriation by aligning with Britain after a reasonable period to make his election.¹⁹⁴ Coxe contended that he had resided in New Jersey beyond a reasonable period of election, received protection from the state, and thus owed allegiance.¹⁹⁵ Even though Coxe was attainted in 1778 for disloyalty, he was still a citizen, and an attainder could not serve as an impediment to recovery under Jay's Treaty.¹⁹⁶ Coxe argued that in light of the penalties he received as a result of the attainder "resulting from his civil relation to the commonwealth," he should be entitled to benefit from that relation.¹⁹⁷ Both attorneys "sustained the right to elect citizenship as an inherent and necessary consequence of the Revolution," but only differed over the timing of the election.¹⁹⁸

The place of Coxe's birth was not dispositive, as citizenship could be modified based on the election, and was not perpetual or immutable—thus, this holding rejects the reasoning from *Calvin's Case*.¹⁹⁹

Now . . . those residing at the time of the revolution in the territory separating itself from the parent country, are subject to the new government, and become members of the new community, on the ground either of tacit consent, evidenced by their abiding in such territory; or on the principle that every individual is bound by the act of the majority.²⁰⁰

The *M'Ilvaine* Court held that after the government was established and the treason statute was enacted, Coxe "became a member of the new society, entitled to the protection of its government, and

¹⁹¹ *Republica v. Chapman*, 1 U.S. (1 Dall.) 53, 54 (Pa. 1781).

¹⁹² *M'Ilvaine*, 6 U.S. (2 Cranch) at 282.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 283, 285.

¹⁹⁵ *Id.* at 309.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 300.

¹⁹⁸ KETTNER, *supra* note 56, at 202.

¹⁹⁹ *M'Ilvaine v. Coxe's Lessee*, 6 U.S. (2 Cranch) 280, 290 (1805).

²⁰⁰ *Id.* at 312 (emphasis omitted).

bound to that government by the ties of allegiance.”²⁰¹ The treason statute was “conclusive upon the point, that the legislature of that state by the most unequivocal declarations, asserted its right to the allegiance of such of its citizens as had left the state, and had attempted to return to their former allegiance.”²⁰² The determination of U.S. citizenship under Jay’s Treaty “was left necessarily to depend upon the laws of the respective states, who in their sovereign capacities had acted authoritatively upon the subject.”²⁰³ Accordingly, Coxe was not an alien, and his estate was entitled to recover.

Chancellor James Kent considered the principles in *M’Ilvaine v. Coxe’s Lessee* to be authoritative in his 1827 commentaries.²⁰⁴ Justice Story advanced those same principles in *Inglis v. Trustees of Sailor’s Snug Harbor*, where he argued in dissent that following the Revolution, individuals had time to select their loyalties, and that the Treaty of Paris constituted the cutoff date for the period of elections.²⁰⁵

While these cases disagree on the duration of the period of election, they all indicate that the United States began with the Declaration, and the period of election concluded well before the Constitution was ratified in 1789. If one resided in the United States at the time of Independence, and made an election within a reasonable time after the establishment of a civil government, that person became a “citizen of the United States.” *Original citizenship* was born.

CONCLUSION

The period from 1776 to 1789 did not constitute a constitutional interregnum—some kind of legal black hole—that our laws disregard. Rather, this period laid the theoretical and legal groundwork to create the status of American citizenship, and directly affected the interpretation of our Constitution. This simple, yet previously unrecognized conclusion provides new insights into our legal heritage and challenges the current state of our constitutional jurisprudence.

²⁰¹ *M’Ilvaine v. Coxe’s Lessee*, 8 U.S. (2 Cranch) 209, 212 (1808).

²⁰² *Id.* at 212-13.

²⁰³ *Id.* at 215.

²⁰⁴ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 33-35 (Leslie B. Adams, Jr. ed., Legal Classics Library 1986) (1827).

²⁰⁵ 28 U.S. (3 Pet.) 99, 159-60 (1830) (Story, J., dissenting). Justice Story’s dissent centered not on principles of citizenship, but on interpreting the technicalities of the will. His view was later adopted by the Court in *Shanks v. DuPont*, 28 U.S. (3 Pet.) 242, 247 (1830), which held that the Treaty of Paris had fixed “the state of things as it existed at that period.”

The Declaration cannot be ignored. For over a century, the Supreme Court has held that while the Declaration “may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty . . . it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.”²⁰⁶ Justice Scalia has written that “[t]he Declaration of Independence . . . is not a legal prescription conferring powers upon the courts.”²⁰⁷ Justice Elena Kagan reaffirmed this reasoning during her Supreme Court confirmation hearings in an exchange with Senator Coburn, remarking that the Declaration lacks the force of law.²⁰⁸ So does the Declaration of Independence have the force of law? Yes, at least with respect to notions of “citizenship.” While this proposition may seem unimportant at first blush today—the Fourteenth Amendment constitutionalized American Citizenship in 1868—it shows that one of the canonical doctrines of the Supreme Court is misplaced.

A more complete understanding of the significance of the Declaration—and the laws that the Continental Congress and the states passed “in pursuance of” and “under the Authority of” the Declaration—sheds new light on the Constitution.²⁰⁹ Like “citizenship of the United States,” which is based on doctrines that emerged from our Independence, other portions of our Constitution are premised on powers and rights predating 1789—including a state’s reserved powers,²¹⁰ a state’s sovereign immunity,²¹¹ the privileges or immunities of

²⁰⁶ *Cotting v. Kansas City Stockyards*, 183 U.S. 79, 107 (1901).

²⁰⁷ *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

²⁰⁸ See *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination* WASHINGTONPOST.COM, (2010), <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf> (“I think you should want me to act on the basis of law, and—and that is what I have upheld to do, if I’m fortunate enough to be . . . confirmed, is to act on the basis of law, which is the Constitutions [sic] and the statutes of the United States.”).

²⁰⁹ The nature and scope of laws—in the words of the Supremacy Clause of Article VI—passed “in pursuance of” and “under the Authority of” the Declaration of Independence, will be analyzed in future works.

²¹⁰ See *New York v. United States*, 505 U.S. 144, 157 (1992) (“The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, *reserve power to the States*.” (emphasis added)).

²¹¹ See *Alden v. Maine*, 527 U.S. 706, 764 (1999) (Souter, J., dissenting) (“The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (“In determining the sense in which Georgia is a sovereign State, it may be useful to turn our attention to the political situation we were in, *prior to the Revolution, and to the political rights which emerged from the Revolution*.” (emphasis added)).

United States citizenship,²¹² preexisting enumerated rights,²¹³ and the rights retained by the people.²¹⁴ In order to fully understand these doctrines, one needs to understand that they have existed since 1776. The relevant history for originalist inquiries stretches back further than we may have thought. Whether other provisions of our Constitution should be understood differently in light of original citizenship will be explored in future works.

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²¹² *McDonald v. Chicago*, 130 S.Ct. 3020, 3078 (2010) (Thomas, J., concurring) (“The Clause is thus best understood to impose a limitation on state power to infringe upon *pre-existing* substantive rights.” (emphasis added)); see also Josh Blackman & Ilya Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL’Y 1 (2010) (encouraging originalists to embrace the clause); Alan Gura, Ilya Shapiro & Josh Blackman, *Extending the Right to Keep and Bear Arms: The Tell-Tale Privileges or Immunities Clause*, 2009–2010 CATO SUP. CT. REV. 163, 164–68 (analyzing the interpretation of privileges or immunities clause in *McDonald v. Chicago*).

²¹³ *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008) (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”).

²¹⁴ See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (“And in my view that right [of parents to direct the upbringing of their children] is also among the ‘othe[r] [rights] retained by the people’ which the Ninth Amendment says the Constitution’s enumeration of rights ‘shall not be construed to deny or disparage.’” (emphasis added) (quoting U.S. CONST. art. IX)).