

# Natural Law and Birthright Citizenship in *Calvin's Case* (1608)

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## I. INTRODUCTION

Great empires and humble nations alike have made similar choices in determining who will be citizens. The world's nations emphasize one or the other of only two methods for determining citizenship at birth. Most nations assign citizenship at birth according to the citizenship of at least one of the parents. A few nations, including the United States, assign citizenship on the circumstance of place of birth—within the territorial boundaries of the nation—regardless of the citizenship of the parents. While the United States also permits the children of its citizens born abroad to be considered U.S. citizens from birth, the predominant mode of birthright citizenship in this country, and the only one grounded in the Constitution,<sup>1</sup> is that which bestows citizenship upon anyone born on United States soil.

The roots of United States conceptions of birthright citizenship lie deep in England's medieval past. This Article explores *Calvin's Case* (1608)<sup>2</sup> and the early modern common-law mind that first articulated a theoretical basis for territorial birthright citizenship. Involving all the important English judges of the day, *Calvin's Case* addressed the question of whether persons born in Scotland, following the descent of the English crown to the Scottish King James VI in 1603, would be considered "subjects" in England. *Calvin's Case* determined that all

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1. See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."). At least in this century, it has been presumed that the 14th Amendment to the United States Constitution requires that all persons born within the territorial boundaries of the United States, including the children of illegal aliens, be granted citizenship.

2. *Calvin v. Smith*, 77 Eng. Rep. 377 (K.B. 1608).

persons born within any territory held by the King of England were to enjoy the benefits of English law as subjects of the King. A person born within the King's dominion owed allegiance to the sovereign and in turn was entitled to the King's protection.<sup>3</sup> *Calvin's Case* is the earliest, most influential theoretical articulation by an English court of what came to be the common-law rule that a person's status was vested at birth, and based upon place of birth. In the view of Sir Edward Coke, one of the judges deciding *Calvin's Case*, the court's determination was required by the divine law of nature, which was "indeed . . . the eternal law of the Creator"<sup>4</sup> and "part of the law of England."<sup>5</sup>

Coke's report of *Calvin's Case* was one of the most important English common-law decisions adopted by courts in the early history of the United States. Rules of citizenship derived from *Calvin's Case* became the basis of the American common-law rule of birthright citizenship,<sup>6</sup> a rule that was later embodied in the Fourteenth Amendment of the U.S. Constitution and which is now the subject of heated political and legal debate. Remarkably, the rule of birthright citizenship derived from *Calvin's Case* remained a status conferred by the common law, as opposed to statutory or constitutional law, for centuries. Until 1898 in the United States, and as late as 1949 in Britain, there were still some cases in which the determination of nationality depended upon the common-law rule of birth within a territory.<sup>7</sup>

Only two years prior to *Calvin's Case*, the English King granted to the colonists of Virginia a charter that guaranteed them the "rights" of Englishmen: The colonists were to "have and enjoy all Liberties, Franchises, and Immunities . . . to all Intents and Purposes, *as if they had been abiding and born, within this our Realm of England.*"<sup>8</sup> In

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3. See 77 Eng. Rep. at 409.

4. *Id.* at 391.

5. *Id.* at 392.

6. This was the view in the 19th century of Chancellor James Kent, and also of the U.S. Supreme Court in several opinions. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); see also *infra* text accompanying notes 346-67. Though the scope of this Article does not permit a thorough examination of the reception of *Calvin's Case* in the early United States, a forthcoming article by the author will address this issue.

7. See 169 U.S. at 649 (declaring that because the Constitution does not define meaning of words "citizen of the United States," except by declaration in 14th Amendment that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," courts must resort to common-law rules of acquisition of citizenship familiar to Framers). See generally CLIVE PARRY, *BRITISH NATIONALITY: INCLUDING CITIZENSHIP OF THE UNITED KINGDOM & COLONIES AND THE STATUS OF ALIENS* (1951).

8. BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 54 (1971) (quoting VA. CHARTER) (emphasis added).

*Calvin's Case*, by contrast, judges resolved the question of whether persons in Scotland were by birth "subjects" of the English King by turning to the common law rather than to charters or other royal proclamations. Today, the determination of national status in most parts of the world, as for the Virginia colonists in 1606, is a matter of positive law—either statutory or constitutional. But *Calvin's Case* began a three-century period in which the rule determining citizenship in the English-speaking world, a rule based on place of birth, was self-consciously the product of judicial decisions.

This Article is the first study to set the decision in *Calvin's Case* within the broader context of continental legal and political thought and to provide a sustained discussion of the natural law origins of birthright citizenship in the common law. In particular, this Article highlights the role of natural law in the decision in *Calvin's Case*, a role that had far-reaching effects on the development of birthright citizenship in the United States. James I's plans to unite Scotland and England, following his inheritance of the crown of England in 1603, sparked a wide-ranging search for a legal solution to the question of which persons were entitled to the rights and entitlements of English law. Lawyers, in both the civil- and common-law traditions, contributed to the substantial literature on uniting the laws of the two kingdoms. The political debate preceding *Calvin's Case* searched for examples of how other legal systems resolved the question of the relationship of subjects within kingdoms united by descent.

This Article will also consider the political writings of Thomas Craig and Jean Bodin to show that legal thinkers outside of England provided solutions similar to that attained in *Calvin's Case*. For Craig, the basis for determining status at birth was the *jus feudale*—Craig arrived at this rule without reference to the English precedent that Coke discussed in *Calvin's Case*.<sup>9</sup> Coke, on the other hand, relied not on a general *jus feudale* pre-dating or underlying English common law but on natural law. Nonetheless, their conclusions were the same: James's Scottish subjects born in Scotland *after*, but not before, he ascended to the throne of England were to be considered subjects in England as well.

Bodin's theories of sovereignty<sup>10</sup> suggest that he would probably have shared Coke's view of the status of James's Scottish subjects in

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9. THOMAS CRAIG, *DE UNIONE REGNORUM BRITANNIAE TRACTATUS* 339 (Charles Sanford Terry trans., Scottish Historical Society 1909) (1605) [hereinafter CRAIG, *DE UNIONE*].

10. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 175 (Kenneth McRae ed., Harv. Univ. Press 1962) (Richard Knolles trans., 1st Eng. ed. 1606). Bodin's *Republique* was translated as *Commonwealth* in 16th- and 17th-century England. In the references to follow, Bodin's *Republique* will be cited to the English translation of 1606.

England. For both Bodin and Coke, natural law or unwritten, fundamental law—law that was beyond the reach of the customary or municipal law—determined who was a subject. Because the law of nature was, by definition, the same in Scotland and in England, differences in the municipal laws of the two countries were irrelevant. In addition, Bodin's *Republique*, like *Calvin's Case*, emphasizes a mutuality of obligation between the sovereign and the subject.

As suggested below, Craig's *De Unione* and Bodin's *Republique* indicate that in 1608 political theorists and lawyers trained in both the civil and common law could arrive at similar resolutions of the problem in *Calvin's Case* without citing a single civil- or common-law rule. Indeed, a unifying factor in Bodin's *Republique*, Craig's *De Unione*, and Coke's report of *Calvin's Case* is that the duty of allegiance that made one a subject, and that would unite all of the King's subjects regardless of the existence of diverse laws within separate kingdoms, was emphatically *not* a creation of positive law. Although these works are from three different kingdoms and claim three different sources of law, they share an underlying similarity of political thought. This similarity leads one to pause when considering Coke's claim that the justices in *Calvin's Case* consulted "no strange histories, cited no foreign laws, [and] produced no alien precedents" in reaching their decision.<sup>11</sup> To accept this claim at face value is to miss a critical confluence of ideas between legal thinkers of civil- and common-law backgrounds that would, in subsequent centuries, further the establishment of the unique English rule of territorial birthright citizenship.<sup>12</sup>

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11. 2 A COMPLETE COLLECTION OF STATE TRIALS 612 (Thomas Bayly Howell ed., London, T.C. Hansard 1816) [hereinafter STATE TRIALS]; see also *Calvin v. Smith*, 77 Eng. Rep. 377, 381 (K.B. 1608).

12. This Article has by necessity avoided considering the role of *Calvin's Case* in some of the related developments in the history of the period, most notably the constitutional crises to come, including the beheading of the English King in 1649. However, in some respects, to examine these topics would have been disappointing. Contrary to expectations raised by our historical perceptions of later periods, in 1608 in *Calvin's Case*, Francis Bacon and Edward Coke exhibited no personal antagonism toward each other, and, indeed, agreed on certain basic propositions of sovereignty and English law. Cf. RICHARD HELGERSON, FORMS OF NATIONHOOD: THE ELIZABETHIAN WRITING OF ENGLAND 73-74 (1992) (recounting Bacon's and Coke's frequent clashes over royal prerogative and common law). Furthermore, Coke chooses to hinge allegiance to the crown on the law of nature, not to the body politic, thereby avoiding an opportunity to develop what we would view as a compact theory of sovereignty. *Id.* at 76. And finally, Coke embraces wholeheartedly the crown's position on the status of the *postnati*; only later would Coke become a great antagonist of the English monarchy. See generally STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMON LAW," (1979). These seeming inconsistencies, though fascinating, must remain unexplored in this Article.

### *The Jus Soli and the Jus Sanguinis*

Before examining the issues in *Calvin's Case*, it is useful to have some understanding of current methods for assigning citizenship or nationality at birth. The territorial rule derived from *Calvin's Case* rendered the status of British colonists different from that of colonists of other European countries. *Calvin's Case* led to what is today known in international law as the *jus soli*, the rule under which nationality is acquired by the mere fact of birth within the territory of a state.<sup>13</sup> The other great rule for assigning nationality at birth, the *jus sanguinis*, is identified with the civil law. It holds that, regardless of the place of birth, nationality is acquired by descent following the status of at least one parent (usually the father).<sup>14</sup> The United States, Great Britain, and many Latin American countries traditionally have favored the *jus soli* over the *jus sanguinis* as a rule for acquisition of citizenship by birth.<sup>15</sup> By contrast, the *jus sanguinis* has been the favored rule in almost all European nations.<sup>16</sup>

No nation relies exclusively on one of these principles to determine who is a natural-born subject or citizen.<sup>17</sup> In Britain, even before *Calvin's Case*, various acts and proclamations provided that a child born out of the territory of England could also be a natural-born subject, as long as the child's parents owed allegiance to the sovereign of England.<sup>18</sup> This is an example of the *jus sanguinis* operating alongside the *jus soli*. In the history of both Britain and the United States, the *jus sanguinis* has always been established by statute, never

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13. See JOHN MERVYN JONES, BRITISH NATIONALITY LAW 9-10 (1956); see also RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 31-33 (2d ed. 1994).

14. See JONES, *supra* note 13, at 10; see also DONNER, *supra* note 13, at 31-33.

15. Great Britain abandoned the *jus soli* in 1981. In England, a newborn is now granted citizenship at birth only if at least one parent is a citizen or permanently settled in Britain. However, the child can acquire citizenship if one of the child's parents acquires citizenship while the child is still a minor. British Nationality Act, 1981, ch. 61, §§ 1, 3 (Eng.). A related and controversial issue in recent history has been the British treatment of persons born in Hong Kong prior to the end of British sovereignty there. Persons born in Hong Kong under British rule have been considered British subjects but without right of abode in Britain. See Mark F. McElreath, *Degrading Treatment From East Africa to Hong Kong: British Violations of Human Rights*, 22 COLUM. HUM. RTS. L. REV. 331, 336-41 (1991); Roda Mushkat, *Hong Kong as an International Legal Person*, 6 EMORY INT'L L. REV. 105 (1992).

16. See PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 4, 74, 95-96 (1979).

17. See ANN DUMMETT & ANDRES NICOL, SUBJECTS, CITIZENS, ALIENS AND OTHERS 7 (1990).

18. See, e.g., *De Natis Ultra Mare*, 1351, 25 Edw. 3, ch. 2 (Eng.). The statute *De natis ultra mare* permitted children to acquire subject status by birth according to descent, a classic example of the *jus sanguinis*. Accordingly, territorial birth was not the only method to acquire natural-born subject status in England, from at least as early as 1351.

by judge-made law.<sup>19</sup> This fact underscores the uniqueness of the *jus soli* as a feature or creation of the common law and suggests the importance of *Calvin's Case* in the development of the rule.

Both the *jus soli* and the *jus sanguinis* are in the first instance products of medieval law. However, the rule we refer to today as the *jus soli* is emphasized in this Article because of its emergence as a common-law "rule" and its unique influence in common-law countries.<sup>20</sup> *Calvin's Case*, as this Article will relate, was shaped by the prevalent political theories of the time, including the belief in the authority of divine law. In subsequent centuries, this common-law rule of the *jus soli* itself changed in response to changing political exigencies.

Given the present controversy in the United States over the status and rights of both legal and illegal immigrants, this work of legal history may have some contemporary relevance. A proposed constitutional amendment to abolish birthright citizenship for the children of illegal aliens is currently before Congress. Its advocates claim that amendment is necessary to eliminate incentives for illegal immigration.<sup>21</sup> The constitutional amendment would deny the children of illegal aliens automatic U.S. citizenship by virtue of birth within one of the fifty states. Instead, it would permit citizenship status only for children who have at least one parent who is a citizen or legal resident of the United States. Children of illegal aliens would retain

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19. For example, in 1698 the British Parliament naturalized the children of subjects who were born abroad while the parents were in the King's service. An Act to Naturalize the Children of Such Officers and Soldiers, and Others the Natural-Born Subjects of This Realm, Who Have Been Born During the War, the Parents of Such Children Having Been in the Service of This Government, 1698, 10 Will. 4, ch. 20 (Eng.). A few years before, Parliament passed an act to naturalize the children of royalists born abroad during the interregnum, An Act for the Naturalizing of Children of His Majesty's English Subjects, Born in Foreign Countries During the Late Troubles, 1676, 29 Car. 2, ch. 6 (Eng.). See also British Nationality Act, 1981, ch. 61, §§ 1, 3 (Eng.); DUMMETT & NICOL, *supra* note 17, at 37-38 (citing other acts of Parliament). In the United States, in the Naturalization Act of 1790, Congress provided that "the children of citizens of the United States, that may be born beyond the sea, . . . shall be considered as natural born citizens . . ." Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795). For contemporary law conferring citizenship at birth outside the territorial United States, see 8 U.S.C. § 1401(c)-(e), (g) (1995).

20. John W. Salmund concluded that "feudalism" created the rule of the *jus soli* and that it substituted this rule for the *jus sanguinis*—the important contribution of "feudalism" as a system of governance being that the status of "subject" was not hereditary. See John W. Salmund, *Citizenship and Allegiance: Nationality in English Law*, 18 LAW Q. REV. 49, 53 (1902). This theory is intriguing. *Calvin's Case*, however, suggests the "substitution" is more complicated, but the topic is beyond the scope of this Article.

21. H.R.J. Res. 56, 104th Cong. (1995). Members of the House also proposed two bills that would amend the Immigration and Naturalization Act to accomplish the same goals. H.R. 705, 104th Cong. (1995); H.R. 1363, 104th Cong. (1995). As of this writing, all of the proposals were pending before the House Judiciary Committee.

the citizenship of their parents.<sup>22</sup> Testimony concerning the proposed constitutional amendment before the House Judiciary Committee pitted law professors from Yale and Columbia in a debate over the historical origins and meaning of the citizenship clause of the Fourteenth Amendment.<sup>23</sup> Although the proposed amendment did not reach a floor vote during that legislative session, in late 1996 the Republican Party established in its platform the goal of eliminating birthright citizenship for children of illegal aliens.<sup>24</sup> A national commentator likened the Republican move as a return to the era of *Dred Scott*.<sup>25</sup>

In *Calvin's Case*, there are perhaps larger stories to be told, such as the development of ideas of nationhood<sup>26</sup> and the impending constitutional crises between the English King and the Commons later in the seventeenth century. These larger stories are themselves related to concepts of allegiance and the role of natural law in determining the obligations of subject and sovereign.<sup>27</sup> This Article focuses more narrowly upon the rule of status acquisition articulated in *Calvin's Case* because the significance of natural law in the articulation of this rule has not been emphasized in the history of birthright citizenship. In addition, this examination furthers our understanding of the development of common-law rules from a wider, comparative perspective. While it may also help us to understand better the

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22. See *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the Comm. of the Judiciary*, 104th Cong., 1st Sess. 32, 1995 WL 13415440 (1995) [hereinafter *Joint Hearing*] (statement of Rep. Anthony C. Beilenson (D-Cal.)).

23. Compare *Joint Hearing*, *supra* note 22, at 103, 1995 WL 13415441 (statement of Prof. Gerald L. Neuman, Columbia University School of Law), with *id.* at 94, 1995 WL 13415487 (statement of Prof. Peter H. Shuck, Yale Law School). The two professors separately addressed the question whether the rule of birthright citizenship established in the 14th Amendment could be altered by Congress. Professor Shuck suggests that Congress could alter birthright citizenship. See PETER H. SHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985). The more widely held view is that birthright citizenship can only be altered by constitutional amendment. See, e.g., *Joint Hearings*, *supra* note 22, at 74, 1995 WL 13415481 (statement of Assistant Attorney General Walter Dellinger, Office of Legal Counsel); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). This Article does not revisit that particular debate; instead, this inquiry looks further into the history of the rule at issue to consider, among other issues, its basis in natural law theory of the early modern period.

24. See Robert Pear, *Citizenship Proposal Faces Obstacle in the Constitution*, N.Y. TIMES, Aug. 7, 1996, at A13.

25. See A.M. Rosenthal, *Dred Scott in San Diego*, N.Y. TIMES, Aug. 9, 1996, at A15.

26. See, e.g., HELGERSON, *supra* note 12 (1992).

27. See, e.g., Thomas Brown, *The Case of Allegiance to a King in Possession*; Dudley Diggs, *The Unlawfulness of Subjects Taking Up Arms Against Their Sovereign*; William Sherlock, *The Case of the Allegiance Due to Sovereign Powers*; and William Sherlock, *A Vindication of the Case of Allegiance due to Sovereign Powers*, in CLASSICS OF ENGLISH HISTORY IN THE MODERN ERA (David S. Berkowitz et al. eds., 1978).

surprisingly dominant role of courts in fashioning the United States rule of birthright citizenship, this Article will focus upon the earliest stages of that development for the range of ideas and societal influences within which the rule developed.

## II. SUBJECTS AND ALIENS IN ENGLAND PRIOR TO 1608

### A. Robert Calvin's Legal Problem

With the end of the Tudor dynasty following the death of Elizabeth in 1603, James VI of Scotland inherited the throne of England as James I, thereby uniting the two kingdoms in the "union of the crowns."<sup>28</sup> At once there was considerable debate concerning the extent of union effected by the succession of the Scottish King to the crown of England.<sup>29</sup> James, however, considered a regal union alone to be insufficient.<sup>30</sup> Upon his arrival in England, James advocated a closer unity between the laws, institutions, economies, and churches of England and Scotland to protect and strengthen the Stuart dynasty.<sup>31</sup>

In the early years of his reign, James himself led a sizable literary effort advocating a closer union.<sup>32</sup> Of particular importance were the discussions of naturalization contained in proposals to unite the laws of the two countries, written by both common lawyers and civil lawyers.<sup>33</sup> Civil lawyers, also known as "civilians," were a relatively

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28. As Brian Levack relates, the union of 1603 was limited in scope: "It was a strictly dynastic, regal, and personal union, not an incorporating union of the two kingdoms." BRIAN LEVACK, *THE FORMATION OF THE BRITISH STATE, 1603-1707*, at 1 (1987) [hereinafter LEVACK, *FORMATION*]. Scotland and England were not united into one kingdom until the Treaty of Union of 1707, which finally joined the two kingdoms into one body politic. *Id.* at 214.

29. See BRUCE GALLOWAY, *THE UNION OF ENGLAND AND SCOTLAND, 1603-1608*, at 1 (1986); JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870*, at 16 (1978).

30. In a speech to his first Parliament in March, 1604, James said, "I am the Husband and the whole Isle is my lawfull Wife; I am the Head; and it is my Body; I am the Shepherd and it is my flocke; I hope therefore no man will be so unreasonable as to think that I am a Christian King under the Gospel should be a polygamist and husband to two wives; that I being the Head should have a divided and monstrous Body." JOHN DUNCAN MACKIE, *A HISTORY OF SCOTLAND* 187 (1984) (quoting James I).

31. See James I, *Speech Before Parliament (Mar. 19, 1604)*, reprinted in *THE POLITICAL WORKS OF JAMES I* 292 (Charles McIlwain ed., 1918) [hereinafter *WORKS OF JAMES I*]; JOSEPH ROBSON TANNER, *CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, A.D. 1603-1625*, at 24-30 (1930); see also LEVACK, *FORMATION*, *supra* note 28, at 2. At James's urging an Act of 1604 appointed commissioners to consider various proposals for a "more perfect" union. See TANNER at 23.

32. See GALLOWAY, *supra* note 29, at 30-38; LEVACK, *FORMATION*, *supra* note 28, at 3.

33. See generally Brian Levack, *The Proposed Union of English Law and Scots Law in the Seventeenth Century*, 20 *JURID. REV.* 97 (1975) [hereinafter Levack, *Proposed Union*]; Brian Levack, *English Law, Scots Law, and the Union, 1603-1707*, in *LAW-MAKING AND LAW-*



small group of professionals who studied Roman law—the *Corpus Juris Civilis* as systematized and interpreted in the twelfth and succeeding centuries by scholars, notably the glossators and, later, the post-glossators or commentators.<sup>34</sup> Civilians had earned the degree of Doctor of Civil Law at Oxford, Doctor of Laws at Cambridge, or an equivalent degree at a continental university, and their professional practice as lawyers was primarily in the ecclesiastical courts, the High Court of Admiralty, and the High Court of Chivalry.<sup>35</sup> Civil lawyers in the early seventeenth century in England were closely identified with crown interests because they relied on royal patronage for their professional livelihood.<sup>36</sup>

The most pressing question of political debate soon became the legal status of James's Scottish subjects in England. According to English law, were Scots aliens or were they subjects, capable of possessing and asserting at least some of the rights of English subjects, including holding land and suing in English courts? These political issues were fully debated in Parliament beginning in 1604, but the matter was not settled there.<sup>37</sup> Instead, the King's men "determined to settle the point out of Parliament in the regular way, by resorting to the English courts of justice."<sup>38</sup>

In 1607, two civil suits were initiated in the King's Bench and Chancery over two estates in England conveyed to a Scottish child, named as Robert "Calvin" in the pleadings, though evidence indicates the child's true name was Robert "Colville."<sup>39</sup> Robert was born in Scotland after 1603, the year in which the English throne descended to James. Robert's guardians, John and William Parkinson, initiated the suits, claiming that Robert had been forcibly dispossessed of both estates. The defendants in the King's Bench were Nicholas and Robert Smith. Robert Calvin complained that the defendants

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MAKERS IN BRITISH HISTORY 105 (Alan Harding ed., 1980).

34. The reception of the *Corpus Juris Civilis* and the work of the glossators and commentators in the 12th and succeeding centuries has been amply described. See WINFRIED TRUSEN, ANFANGE DES GELEHRTEN RECHTS IN DEUTSCHLAND: EIN BEITRAG ZUR GESCHICHTE DER FRUHREZEPTION (1962); see also BRACON ON THE LAWS AND CUSTOMS OF ENGLAND xxxvi (Samuel E. Thorne ed. & trans., 1968).

35. See BRIAN LEVACK, THE CIVIL LAWYERS IN ENGLAND, 1603-1641, at 2-3 (1973).

36. *Id.* at 8, 43-49, 65.

37. See 2 STATE TRIALS, *supra* note 11, at 559-76; see also Francis Bacon, *A Speech . . . concerning the Article of Naturalization*, in 10 THE WORKS OF FRANCIS BACON 307-35 (James Spedding et al. eds., Garrett Press 1968) (1868) [hereinafter WORKS OF FRANCIS BACON]; Harvey Wheeler, *Calvin's Case (1608) and the McIlwain-Schuyler Debate*, 61 AM. HIST. REV. 587-88 (1956).

38. 2 STATE TRIALS, *supra* note 11, at 560. It is generally accepted that the suit was contrived by the crown, and some contemporaries thought the judgment itself was rigged. See GALLOWAY, *supra* note 29, at 148-49.

39. See GALLOWAY, *supra* note 29, at 148.

“unjustly, and without judgment, have disseised him of his freehold in Haggard” (Haggerston, parish of St. Leonard in Shoreditch).<sup>40</sup> One “Bingley” was the defendant in the Chancery case on a similar writ concerning an estate in Bishopsgate, St. Buttolph’s.<sup>41</sup> The defendants in both cases responded with a plea “in disability of Robert Calvin’s person” that the writs were inadmissible because Calvin was an alien.<sup>42</sup> Calvin was an alien, they argued, because he had been born “within [James’s] kingdom of Scotland, and out of the allegiance of the said lord the King of his kingdom of England.”<sup>43</sup> If Calvin were an alien, he would, according to English law, be unable to be seised of a freehold in England.<sup>44</sup> The defendants’ plea thus made the status of persons born in Scotland after the accession of James I to the throne of England the paramount legal issue.

The two cases were adjourned to the Exchequer Chamber to be heard by all the King’s Bench and Common Pleas justices as well as the Lord Chancellor and barons of the Exchequer. In June 1608, fourteen justices assembled for arguments in the case. Coke reports that “the five judges of the King’s Bench, who adjourned this case into the Exchequer Chamber, rather adjourned it for weight than difficulty.”<sup>45</sup> Serjeants Laurence Hyde and Richard Hutton represented the defendants.<sup>46</sup> James’s own Solicitor General, Francis Bacon, along with Attorney General Henry Hobart, argued the plaintiff’s position on behalf of the crown.<sup>47</sup> All but two of the justices determined that persons born in Scotland after the accession of James to the throne of England (the *postnati*, as they were referred to in the case) were to be regarded not as aliens in England but as natural-born subjects, qualified to inherit English land.<sup>48</sup> The *postnati* as subjects born into the allegiance of James after he became King of England owed their allegiance to the sovereign of England as well as Scotland.<sup>49</sup> By contrast, the *antenati*, those born before 1603, were

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40. See *Calvin v. Smith*, 77 Eng. Rep. 377, 378 (K.B. 1608).

41. See GALLOWAY, *supra* note 29, at 148.

42. See 77 Eng. Rep. at 379.

43. *Id.* at 380.

44. *Id.* at 405-06.

45. *Id.* at 410.

46. *Id.* at 379.

47. *Id.*; see also DANIEL R. COQUILLETTE, FRANCIS BACON 155 (1992).

48. See 2 STATE TRIALS, *supra* note 11, at 560-61; see also *Calvin v. Smith*, 77 Eng. Rep. 377, 380-81 (K.B. 1608).

49. The kingdoms remained distinct until the Act of Union of 1707. There was never a union of legal systems. The laws of the two kingdoms, categorized generally as a civil-law system in Scotland and a common-law system in England, remain separate to this day. In fact, as Chancellor Kent of New York noted in the early 19th century, England and Scotland recognized the respective judgments of their courts under doctrines of international law and comity, in the

born into the allegiance of a King with no relation to the English throne. Therefore, unless the *antenati* were naturalized by statute, these Scottish subjects of James remained aliens as a matter of English law.<sup>50</sup>

Several accounts of *Calvin's Case* were published,<sup>51</sup> but by far the most influential was that of Sir Edward Coke, Chief Justice of the Common Pleas. Coke's published reports were widely accessible to lawyers of later ages, and Coke's report of *Calvin's Case* was the first comprehensive statement in England of the law of naturalization. *Calvin's Case* established a territorial rule for acquisition of subject status at birth:

Every one born within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of—therefore, according to our common law, owes allegiance to—the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.<sup>52</sup>

Birth within the King's territory was not, however, the sole method for acquiring subject status at birth. A rule derived from the statute *De Natis Ultra Mare* of 1351 permitted children born abroad of English parents to be considered natural-born subjects.<sup>53</sup> But the rule that presumed anyone born within the territory of the King to be a natural-born subject of the King remained a part of English law until 1981.<sup>54</sup>

For Coke, as this Article will show, the decision turned on the allegiance owed by those born in the King's territories to their sovereign's "natural body,"<sup>55</sup> as opposed to his body politic. Coke equated a subject's relationship to a King with other personal

same way that they treated judgments of other foreign nations. See 2 KENT, COMMENTARIES ON AMERICAN LAW 93-99 (New York, O. Halsted 1827) (citing examples of marriages and divorces as recognition of foreign judgments within domestic courts).

50. 77 Eng. Rep. at 399.

51. See 2 STATE TRIALS, *supra* note 11, at 559.

52. HERBERT BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW 31 (London, W. Maxwell & Son, 2d ed. 1885).

53. *De Natis Ultra Mare*, 1351, 25 Edw. 3, ch. 2 (Eng.); see also 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 87-89 (1926).

54. See British Nationality Act, 1981, ch. 61, §§ 1, 3 (Eng.); JONES, *supra* note 13. Prior to 1981, British law conferred subject status at birth within Great Britain unconditionally. See British Nationality Act, 1948, 11 & 12 Geo. 6, ch. 56, § 4 (Eng.); Naturalization Act, 1870, 33 Vict., ch. 14, § 4 (Eng.). The ancient common-law exceptions to this presumption at birth—notably for the children of foreign diplomats and children of aliens born within English territory while it might be under hostile occupation—were recognized in *Calvin's Case*, as discussed below.

55. *Calvin v. Smith*, 77 Eng. Rep. 377, 388-89, 391 (K.B. 1608). The medieval theory of the King's two bodies, one "natural" and the other "political," is discussed in more detail in this Article. See *infra* section III.

relationships, such as master-servant and parent-child.<sup>56</sup> The most important constitutional aspect of the case is its support for the idea that a King ruled by the law of nature, thereby requiring “natural” allegiance of all subjects wherever they may be located. The case emphasized the allegiance due to a sovereign solely by virtue of the circumstances of birth; the inquiry was never concerned with conscious choice of allegiance or membership in a corporate body. The *postnati*, therefore, owed allegiance to a King who happened also to be King of England, by virtue of their birth in Scotland after the English crown descended to James. In effect, by determining that the Scottish *postnati* were subjects in England, the decision established that a merger of England and Scotland had taken place to some degree at a political level, as well as through medieval dynastic law.<sup>57</sup>

Those historians who have considered the legal precedents for Coke’s opinion in the case generally maintain that the outcome was inevitable.<sup>58</sup> Indeed, most lawyers of the day agreed that the *postnati*, at least, were *de jure* subjects at the time of James’s proclamation of union—well before *Calvin’s Case* was brought before the English justices. English lawyers had consistently held for some time that birth within the kingdom, including territories held by an English King, qualified one as a natural-born subject.<sup>59</sup> Even lawyers for the defendants in *Calvin’s Case* admitted that the status of “subject” or “alien” was determined by whether a person was born owing allegiance to the King, as indicated by the Latin phrase *ad fidem Regis*.<sup>60</sup>

Coke also claimed continuity of the rule announced in *Calvin’s Case* with English legal precedent. Coke addressed two reasons why the

56. See LEVACK, *FORMATION*, *supra* note 28, at 183.

57. In a logical progression not fully understandable today, this fact accorded the *postnati* certain rights within England available to English subjects, but it did not require that the two bodies politic be merged into one commonwealth of laws. See GALLOWAY, *supra* note 29, at 157; David Martin Jones, *Sir Edward Coke and the Interpretation of Lawful Allegiance in Seventeenth-Century England*, 7 HIST. POL. THOUGHT 321, 326-27 (1986).

58. See 9 HOLDSWORTH, *supra* note 53, at 80; 1 FREDERICK POLLOCK & FREDERIC MAITLAND, *HISTORY OF ENGLISH LAW* 441 (2d ed. 1911).

59. See GALLOWAY, *supra* note 29, at 106 (noting that Sir Henry Spelman, who opposed some parts of union plan, agreed on this point). At least one civilian in the year before *Calvin’s Case* also defined the English rule this way. John Cowell in *The Interpreter* (1607), defined “alien” as “one born in a strange country . . . . A man born out of the land, so it be within the limits of the King’s obedience, beyond the seas, or of English parents, out of the King’s obedience (so the parents at the time of the birth, be of the King’s allegiance) is no alien in account, but a subject to the king.” JOHN COWELL, *THE INTERPRETER: OR BOOK CONTAINING THE SIGNIFICATION OF WORDS* (Cambridge, John Legate 1607) (citing statute *De Natis Ultra Mare*).

60. See *Calvin v. Smith*, 77 Eng. Rep. 377, 383, 388, 391 (K.B. 1608). As discussed below, the Latin phrase “*ad fidem Regis*” as used by Coke suggests, in translation, “to [or toward or for] the faith of the king.”

judges in *Calvin's Case* had consulted "no strange histories, cited no foreign laws, [and] produced no alien precedents"<sup>61</sup> in reaching their decision:

[T]he one, for that the laws of England are so copious in this point, as, God willing, by the report of this case shall appear; the other, lest their arguments, concerning an alien born, should become foreign, strange, and an alien to the state of the question, which, being *quaestio juris* concerning freehold and inheritance in England, is only to be decided by the laws of this realm.<sup>62</sup>

To view the outcome simply as inevitable, however, is to misunderstand the political situation of the time, and to underestimate the heavy hand of a rule thought to be compelled by the law of nature. If, indeed, such compelling precedent existed that the King's advocates readily instituted the suit in order to bypass Parliament through a judicial determination of the matter,<sup>63</sup> then the length and complexity of both Coke's and Lord Chancellor Ellesmere's opinions are puzzling. It seems this was not a case to which precedent easily applied. Ellesmere thought the matter "to be rare . . . [and] of great import and consequence."<sup>64</sup> Coke found "the weight and consequence of the cause, both *in praesenti et perpetuis futuris temporibus* justly deserved. . . . [It] was the longest and weightiest that ever was argued in any Court."<sup>65</sup>

In fact, as considered in the following sections, the legal precedent—as that term was understood at the time—should have been enough to resolve the question in favor of the *postnati* with little debate. The problem the justices faced was not a lack of precedent but an unsettled theory of sovereignty under which the question of who is a subject and who is an alien had to be reconciled. The justices were called upon to determine the essence of allegiance within the theory of the King's two bodies—a theory argued by the defendants in *Calvin's Case* as well as by those in the Commons who were opposed to any closer union with Scotland.<sup>66</sup> The theory of the

61. 2 STATE TRIALS, *supra* note 11, at 612.

62. *Id.*

63. Francis Bacon in his brief for the plaintiff asserted that the case was "used by His Majesty to give an end to this question." 7 WORKS OF FRANCIS BACON, *supra* note 37, at 639.

64. 2 STATE TRIALS, *supra* note 11, at 659.

65. *Calvin v. Smith*, 77 Eng. Rep. 377, 381 (K.B. 1608).

66. See GALLOWAY, *supra* note 29, at 106; 7 WORKS OF FRANCIS BACON, *supra* note 37, at 651, 665. The most complete history of this theory in English political thought is ERNST KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957). Kantorowicz's work was pathbreaking, among other reasons, for noting that political and religious authority in the early modern period often were so closely related as to be indistinguishable. The Church became the "corpus mysticum," and in a parallel development, political

King's two bodies, an idea that had developed over centuries and was firmly established under the influence of Tudor common lawyers,<sup>67</sup> was a serious challenge to the received law of naturalization. This challenge was met, in turn, with ideas not drawn entirely from English common law. A closer examination of the theory of sovereignty challenging the English customary law, and Coke's method of resolving the issue in line with the past, reveal a significant expansion of the dialogue concerning the nature of sovereignty and allegiance over the sixteenth and early seventeenth centuries. Partly as a result of the unique challenge posed by the Stuart succession, continental ideas of sovereignty and allegiance contributed to the resolution of *Calvin's Case*, despite its apparent congruence with English law.

### *B. Terminology in 1608*

Before considering the conceptual roots of *Calvin's Case*, it is useful to summarize the basic categories used to describe a person's status in early seventeenth-century England. Today, detailed categories of "nationals" and "citizens" vary from country to country. In the United States, for example, a "national of the United States" can be either a citizen of the United States or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.<sup>68</sup> For purposes of this Article, however, there are only five recognized distinctions to be understood in the context of *Calvin's Case*: "subject," "alien," "denizen," "natural-born subject," and "naturalized subject."

In 1608 in England (and indeed in the law of Great Britain until the mid-twentieth century),<sup>69</sup> one was either a subject, an alien, or a denizen. Subjects, in turn, were either "natural-born" or "naturalized." A subject owed fealty or allegiance to a monarch, and the status was derived from feudal conceptions of governance.<sup>70</sup> An alien, by contrast, was not necessarily an enemy of the monarch, but was "one born in a strange country."<sup>71</sup> An alien could become a denizen if he were "enfranchised here in England by the Prince's charter, and enabled . . . to do as the King's native subjects do: namely, to purchase, and to possess lands, to be capable of any office or dignity."<sup>72</sup> A

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theories of the early modern period also incorporated the "corpus mysticum" of Christ to explain the sovereignty in the body of the king. As a result, a parallel view of kingship related to ideas of church governance by a mystical head prevailed throughout Europe at this time.

67. See KANTOROWICZ, *supra* note 66, at 1-20.

68. United States Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(22) (1996).

69. See JONES, *supra* note 13, at 3.

70. See 9 HOLDSWORTH, *supra* note 53, at 72.

71. See COWELL, *supra* note 59 (defining "alien").

72. *Id.* (defining "denizen").

natural-born subject, as the name suggests, was a person who was born into the King's allegiance, either by birth within England or by birth within a territory held by the king.<sup>73</sup> A naturalized subject was similar to a denizen, but the former status could be conferred only by act of Parliament,<sup>74</sup> and sometimes by virtue of being a member of a territory that had been conquered by the monarch of England,<sup>75</sup> although in 1608 the terms natural-born and naturalized appear to have been used rather imprecisely.<sup>76</sup>

Today, as a matter of international law, we are accustomed to think of national status in terms of citizenship. The words "citizenship" and "nationality" have similar meanings, although the overlap between the two terms is not complete.<sup>77</sup> As a matter of international law and human rights, the link between political rights and nationality has been described in the following terms:

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area

. . . .<sup>78</sup>

In England, by contrast, the proper term for a British national remains "subject." The term "citizen" was not used in English legal discourse in 1608, and indeed in most of Europe "citizen" was not used as a legal term outside of the Byzantine empire until well into the early modern period.<sup>79</sup> "Subject," in contrast to the "citizen" of ancient Rome, was a legal relationship originating from feudal law

73. See KETTNER, *supra* note 29, at 13.

74. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*362. Coke in *Calvin's Case* described the process of denization as requiring "letters patent" of the king—"for that the King by his letters patent may make a denizen, but cannot naturalize him to all purposes, as an Act of Parliament may do; neither can letters patent make any inheritable in this case, that by the common law cannot inherit." *Calvin v. Smith*, 77 Eng. Rep. 377, 385 (K.B. 1608).

75. See KETTNER, *supra* note 29, at 23-24.

76. See, e.g., Francis Bacon, *A Speech Concerning the Article of Naturalization*, in 10 WORKS OF FRANCIS BACON, *supra* note 37, at 314.

77. See WEIS, *supra* note 16, at 4-5; see also RICHARD W. FLOURNOY, JR., & MANLEY O. HUDSON, A COLLECTION OF NATIONALITY LAWS OF VARIOUS COUNTRIES AS CONTAINED IN CONSTITUTIONS, STATUTES AND TREATIES vii (1983).

78. Quoted from the January 19, 1984, advisory opinion of the Inter-American Court of Human Rights, *reprinted in* 5 HUM. RTS. L.J. 161, 167 (1984).

79. See DUMMETT & NICOL, *supra* note 17, at 9; PETER RIESENBERG, CITIZENSHIP IN THE WESTERN TRADITION: PLATO TO ROUSSEAU 203-52 (1992).

and politics.<sup>80</sup> "Citizen" was the preferred term in the American colonies after independence,<sup>81</sup> probably derived from French uses of the term and explained in part by the need of the colonists to distinguish membership in the new United States from their previous status as subjects of the King of Britain.

In 1608, however, the status of "subject" did not carry with it a defined sense of political membership or participation. *Calvin's Case*, of course, predated both the Petition of Right of 1628<sup>82</sup> and the Bill of Rights of 1689.<sup>83</sup> In 1608, the status of subject was primarily a duty, namely, the duty of allegiance. It did provide some rights, however, including the right to hold land in the King's dominion and to sue in the King's courts. The language of rights attaching to a subject's status was used in both Scottish<sup>84</sup> and continental political and legal thought of the time.<sup>85</sup>

Although not expressly using the term "rights" in *Calvin's Case*, however, the judges clearly had specific legal entitlement in mind. For Coke, the legal entitlement attaching to the status of subject included "the King's legal protection,"<sup>86</sup> the "ability to sue any action real or personal,"<sup>87</sup> "protection and government due by the law of na-

80. See Salmond, *supra* note 20, at 49.

81. See 2 KENT, *supra* note 49, at 33-40, 39, 42. Kent stated that the terms subject and citizen were, "in a degree, convertible terms as applied to natives; and though the term 'citizen' seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, 'subjects,' for we are equally bound by allegiance and subjection to the government and law of the land." 2 KENT, COMMENTARIES ON AMERICAN LAW 258 (note) (New York, Clayton & Van Norden, 3d ed. 1836).

82. See The Petition of Right, 1628 (Eng.), reprinted in CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625-1660, at 66 (Samuel R. Gardiner ed., 3d ed. 1958). In this document, drafted by Edward Coke and presented to Charles I, the English Parliament specified some of the most important rights of Englishmen.

83. Bill of Rights, 1689, 1 W. & M., ch. 2 (Eng.), reprinted in 4 THE FOUNDERS' CONSTITUTION 123 (Philip Kurland & Ralph Lerner eds., 1987). James II's abuse of the prerogative led to his abdication in the Glorious Revolution of 1688. The event inspired the Bill of Rights of 1689.

84. Thomas Craig, for example, wrote:

If any one supposes that any statute exists depriving Scotsmen of the power to enjoy the same rights and privileges as the English, let him indicate the statute and the Parliament by which it was passed. . . . What is permitted to one subject cannot be denied to the other, and we Scotsmen demand nothing more than that we should be treated as fellow subjects.

CRAIG, DE UNIONE, *supra* note 9, at 335-36.

85. Jean Bodin, for example, wrote:

It is then the acknowledgment and obedience of the free subject towards his sovereign prince, and the tuition, justice, and defense of the prince towards the subject, which maketh the citizen. . . . But the most notable privilege that the citizen has above the stranger, is, that he had power to make his will, and to dispose of his goods, according to the customs.

BODIN, *supra* note 10, at 64-65.

86. *Calvin v. Smith*, 77 Eng. Rep. 377, 393 (K.B. 1608). —

87. *Id.* at 393. Note, however, that at least some aliens could also sue in the King's courts. The full quotation from which the above "right" of a subject is derived is as follows: "If a man be attainted of felony or treason, he hath lost the King's legal protection, for he is thereby



ture,"<sup>88</sup> a "union of protection of both kingdoms, equally belonging to the subjects of either of them,"<sup>89</sup> and capacity to inherit "any lands in any of the said kingdoms."<sup>90</sup> Lord Chancellor Ellesmere, who also reported the decision of the Exchequer Chamber in *Calvin's Case* (though his report was less well-known in subsequent centuries than was Coke's report), stated that a subject "ought by reason and law to have all the freedoms, privileges, and benefits pertaining to his birth-right in all the King's dominions."<sup>91</sup> Though not yet precisely delineated in English legal discourse, some of the "freedoms, privileges and benefits" enjoyed by a subject included "that no man may be deprived of his possessions, nor be placed in confinement, until he have been duly summoned before and condemned by a lawful tribunal."<sup>92</sup> When used in this Article the association of rights with the status of subject is to be understood in this limited sense.

### C. Coke's View of Precedent

To appreciate better the problem raised by *Calvin's Case*, it is necessary to understand both the state of the law of subjects and aliens prior to 1608 and the judges' probable views concerning the relationship of prior cases and statutes to the controversy in *Calvin's Case*. In the late sixteenth and early seventeenth centuries, the judges of the King's Bench and Common Pleas had begun to use the term precedent when referring to prior, privately published judicial decisions, as well as to statutes and charters.<sup>93</sup> There was as of yet no doctrine of precedent in the modern sense. Coke was perhaps the first English judge to have used the term with frequency to refer to the substantive result or rule laid down in a prior case that had some factual similarity to the case at hand.<sup>94</sup> Coke reported general principles stated by the courts but with little factual comparison and little distinction between what today is categorized as *ratio decidendi* (the holding) versus *obiter dictum* (dictum).<sup>95</sup> In *Calvin's Case*, Coke

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utterly disabled to sue any action real or personal (which is a greater disability than an alien in league hath) . . . ." *Id.*

88. *Id.* at 394.

89. *Id.*

90. *Id.* at 405-06.

91. 2 STATE TRIALS, *supra* note 11, at 691.

92. See, e.g., CRAIG, DE UNIONE, *supra* note 9, at 321. Craig, a Scottish lawyer trained in the civil law, took this to be a fundamental principle of English common law (drawn, of course, from the Magna Carta) that did not differ from the law of Scotland. *Id.*

93. See Theodore F.T. Plucknett, *The Genesis of Coke's Reports*, 27 CORNELL L. Q. 190, 212 (1942).

94. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1732 (1994).

95. *Id.*

does not convey the sense that judges are bound by prior decisions. Rather, precedents merely gave evidence of a legal principle or rule that may or may not contribute to the resolution of a particular case.

Coke's use of the term "precedent" in *Calvin's Case* was purely to stress continuity with the past—a desire to show consistency with historical legal practices, but with no reciprocal view that historical examples (whether cases, statutes, or custom) were controlling, nor that the reasoning of any case was binding. In fact, some statutes became part of the customary law of England because jurists viewed them to be merely restatements or clarifications of the common law. Coke, in particular, frequently took the earliest statutes to be what we would view today as declaratory judgments—customary law that had been "elaborated, summarized and enforced by statute."<sup>96</sup> On the other hand, some of Coke's contemporaries, and perhaps Coke himself, at times took the view of Lord Chancellor Ellesmere:

Some laws, as well statute law as common law, are obsolete and worn out of use: for, all human laws are but *leges temporis*: and the wisdom of the judges found them to be unmeet for the time they lived in, although very good and necessary for the time wherein they were made.<sup>97</sup>

In *Calvin's Case*, at least, Coke referred to "custom" more so than "precedent," and custom is probably closer to what he meant by precedent than our present-day notion of the term.<sup>98</sup>

96. J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 261 (1987). Pocock showed that notions of a higher law in the 17th century, frequently associated with the "ancient constitution," were inseparable from the history and customs of feudalism. Pocock, looking for the origins of English historical thought, focused on "the common-law mind" as a peculiar mentality of 17th century common lawyers. Pocock regards the appeal to the "ancient constitution" as an appeal to custom, not to immutable abstract political principles. On the origins of the Whig theory of history, see *id.* at 228-32, 255-58 (discussing 17th-century English theory that common law was validated by its sheer antiquity and that no presently ruling monarch could trench on rights guaranteed by immemorial custom of realm). On contemporary concerns for codification of customary and statutory law in the early 17th century, including the views of Coke and Francis Bacon, see Barbara Shapiro, *Codification of the Laws in Seventeenth Century England*, 1974 WIS. L. REV. 428.

97. See 2 STATE TRIALS, *supra* note 11, at 674 (Lord Chancellor Ellesmere's report of *Calvin's Case*).

98. Coke's report of *Calvin's Case* sheds more light on the then-contemporary use of the word precedent:

Now are we come to the examples, resolutions, and judgments of former times; wherein two things are to be observed, first, how many cases in our books do over-rule this case in question, [and second] that for want of an express text of law *in terminis terminantibus* and of examples and precedents in like cases (as was objected by some) we are driven to determine the question by natural reason.

*Calvin v. Smith*, 77 Eng. Rep. 377, 399 (K.B. 1608). Yet Coke followed that statement with a slightly different use of the word precedent: "There be multitudes of examples, precedents, judgments, and resolutions in the laws of England, the true and unstrained reason whereof doth decide this question." *Id.* at 400. Precedents, in this latter statement, were considered on par

In 1605, Sir Thomas Craig, a Scottish lawyer trained in the civil law, wrote about the working of precedent in English customary law. As in Scotland, Craig wrote, judges of English common-law courts “give the first place to the provisions of statutory or Parliament-made law, provided the subject at issue is dealt with, permitted, or prohibited in any statute. . . . [If] statute law offers nothing to instruct a judicial decision, recourse is had in England to common law.”<sup>99</sup> This “common” or “customary” law, according to Craig, was the “system of law the English kings at their coronation solemnly promise to respect as unchangeable and inviolable.”<sup>100</sup> If neither statute nor common law avail “to satisfy the judge,”<sup>101</sup> then next in order of preference come maxims, local custom, and finally “the precedents set by previous judicial decisions.”<sup>102</sup> Of these precedents, Craig wrote:

If no guidance can be obtained from custom, general axioms, or prescription, then the precedents set by previous judicial decisions in similar cases, and particularly in the Court of King’s Bench, must be followed, on which fresh cases when they arise must be decided if the circumstances are similar. Against a decision based on precedents there is no effective exception or reply other than proof that the circumstances of the two cases differ; and the smallest detail of difference frequently avails to break down the alleged similarity of fact. . . . If one party to the action can produce a case where the judgment supports his own contention, the other argues with all his might that the circumstances of the case before the court are distinguishable from those of the precedent quoted. It is left to the judge to pronounce which is right, and to state the points of resemblance or difference between the two cases.<sup>103</sup>

Craig based his conclusions on observation only, disclaiming any first-hand experience with the English courts.<sup>104</sup> Nonetheless, Craig confirms the importance of statutes in the English courts, although his view does not fully resonate with Coke’s view that statutes may

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with other “examples, judgements, and resolutions in the laws of England,” including royal charters and acts of Parliament.

99. CRAIG, *DE UNIONE*, *supra* note 9, at 320-21.

100. *Id.* at 321. For Craig, the entire common law of England was probably customary law. Craig most likely did not recognize a distinction between custom, in the sense of local common law, and usage as a course of dealing generally adopted by persons, because Scots law did not make the distinction between custom and usage as in English law of the period. See J.T. Cameron, *Custom as a Source of Law in Scotland*, 27 *MOD. L. REV.* 306, 307, 312 (1964).

101. CRAIG, *DE UNIONE*, *supra* note 9, at 323.

102. *Id.* at 325.

103. *Id.* at 325-26.

104. *Id.* at 304.

themselves only embody or evidence the ancient, customary law of England.

*D. Precedent for the Problem of the Postnati*

Returning to the legal precedent, or examples from England's history, available to the judges in *Calvin's Case*, we know that as early as the thirteenth century in a treatise by Henry de Bracton,<sup>105</sup> subject status was a corollary of allegiance. A subject's duty of allegiance to his King was much like the feudal vassal's duty of fealty to his lord.<sup>106</sup> Aliens, on the other hand, did not owe allegiance to the King and accordingly had few rights, although an alien could become a denizen, which meant that he had been "enfranchised here in England by the Prince's charter, and enabled . . . to do as the King's native subjects do: namely, to purchase, and to possess lands, to be capable of any office or dignity."<sup>107</sup> The concept that a person who owed fealty to another King could be "an alien by birth" is clearly present. Bracton described an appropriate plea in defense of an action for land, if the plaintiff were an alien:

[I]f he be an alien by birth who is of fealty to the King of France, and he brings an action against some one who is of fealty to the King of England, no answer shall be made to such a person at least until the lands shall be common, nor even if the King has allowed him to plead, because as an Englishman is not heard, if he implead any one concerning lands and tenements in France, so ought not a native of France and a born alien who is of fealty to the King of France to be heard, if he impleads any one in England.<sup>108</sup>

Thus a subject's duty of allegiance to the King was not a duty arising from a relationship concerning a specific piece of land, but was territorial in nature from an early period.<sup>109</sup>

Moreover, the geographical boundaries of the English King's territories were constantly changing throughout the medieval period, and the rules determining subject status changed accordingly. During

105. HENRICI DE BRACON, *LEGIBUS ET CONSUEUDINIBUS ANGLIAE* (Travers Twiss trans. & ed., London, Longman & Co. 1878), cited in *Calvin's Case*, 77 Eng. Rep. 377, 383, 396 (K.B. 1608).

106. See 9 HOLDSWORTH, *supra* note 53, at 72.

107. COWELL, *supra* note 59 (defining "denizen"). According to Bacon, the legal status of denizen was granted by King's charter and was well recognized in the 15th and 16th centuries. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 648-49.

108. 6 BRACON, *supra* note 105, at 375.

109. Some historians find evidence of this territorial basis as early as 1290 in the case of Elyas de Rababyn, in which the rule was assumed to be that all persons born on English soil were the King's subjects. See 9 HOLDSWORTH, *supra* note 53, at 75 (citation omitted).

the reign of Edward III, two fourteenth-century statutes established fairly clear rules concerning the acquisition of the status of "subject by birth." One, a statute of 1368, provided that persons born in any of the King's territories were subjects in England.<sup>110</sup> The statute was claimed to be based in judicial precedents which came from a time when the King had large continental possessions.<sup>111</sup> The 1351 statute *De Natis Ultra Mare* allowed children born outside of the King's territories to inherit land as natural subjects if the parents were "of the faith and ligeance of the King of England."<sup>112</sup> The statute *De Natis* established:

[T]he law of the Crown of England is, and always hath been such, that the children of the kings of England, in whatsoever parts they be born . . . be able and ought to bear the inheritance after the death of their ancestors, [and that] all children inheritors, which from henceforth shall be born without the ligeance of the king, whose fathers and mothers at the time of their birth be and shall be *ad fidem Regis* [of the faith and ligeance] of the King of England, shall have and enjoy the same benefits and advantages . . . as the other inheritors afore said in time to come . . .<sup>113</sup>

By at least the fourteenth century, then, birth in England was not the exclusive avenue for acquiring the status of a natural-born subject. In *Calvin's Case*, however, no statute specifically addressed the status of James's Scottish subjects.

In the early sixteenth century, the rule was firmly developed that aliens could not inherit land in England. In fact, one of the few exceptions to the "olde custome of the realme"<sup>114</sup>—that the eldest son is the only heir to his father's estate—was that if a younger son were a natural-born subject whose elder brother was born before the act of denization, the younger would be the heir. Thus, in *Doctor and Student*, Christopher St. German wrote: "Also if an alien have a son that is an alien and after is made Denizen and hath another son, and

110. Children Born Beyond the Sea, if Inheritable in England, 1368, 42 Edw. 3, ch. 10 (Eng.); 9 HOLDSWORTH, *supra* note 53, at 76. Acquisition of the status of subject by birth was, at least by the 17th century, explicitly limited to persons who were "freeborn." See Sir Edward Coke, Speech Before Parliament (May 9, 1628), in 3 COMMONS DEBATES 1628, at 349 (Robert C. Johnson et al. eds., 1977) [hereinafter COMMONS DEBATES].

111. See 9 HOLDSWORTH, *supra* note 53, at 76; see also *Calvin v. Smith*, 77 Eng. Rep. 377, 403 (K.B. 1608).

112. *De Natis Ultra Mare*, 1351, 25 Edw. 3, ch. 2 (Eng.); see also 9 HOLDSWORTH, *supra* note 53, at 75.

113. 9 HOLDSWORTH, *supra* note 53, at 75-76.

114. CHRISTOPHER ST. GERMAN, *DOCTOR AND STUDENT* 49 (Theodore F.T. Plunknett & J.L. Barton eds., 1974).

after purchases lands and dies, the younger son shall inherit as heir and not the eldest."<sup>115</sup> The status of denizen, which could be conferred by the King without act of Parliament, gave the person and his heirs the right to acquire land and sue in the English courts, but it had no retroactive operation.<sup>116</sup> Coke later agreed with the characterization of the status of a denizen described in *Doctor and Student*:

The difference between a naturalization and denization: by a denization, which the King may grant of himself without a Parliament, the party himself, and children born after, are made capable of all rights and privileges as freeborn Englishmen; by a naturalization those children which he had before are also included.<sup>117</sup>

Despite the fact that the civilian John Cowell's 1607 law dictionary, *The Interpreter*, was condemned by James I in 1610 because it drew its arguments "from the Imperial Laws of the Roman emperors,"<sup>118</sup> there is little reason to doubt that Cowell's definition of the English law concerning aliens was correct and widely held: An alien was "one born in a strange country," but:

[A] man born out of the land, so it be within the limits of the King's obedience, beyond the seas, or of English parents, out of the King's obedience (so the parents at the time of the birth, be of the King's allegiance) is no alien in account, but a subject to the king.<sup>119</sup>

Further evidence that this formulation was generally accepted before the time of *Calvin's Case* can be drawn from the fact that both the plaintiff and the defendants cited Littleton, along with the statute *De Natis*, for the rule: "Alien is he which is born out of the allegiance of our lord the king."<sup>120</sup> According to the defendants in *Calvin's Case*, however, Robert Calvin was born into the allegiance not of the King of England, but of the King of Scotland. For this reason, they argued, the judges could not simply declare that under the common law the *postrnati* were subjects of England, though they might become

115. *Id.*

116. See 9 HOLDSWORTH, *supra* note 53, at 77.

117. See Sir Edward Coke, Speech Before Parliament (May 9, 1628), in 3 COMMONS DEBATES, *supra* note 110, at 349.

118. Daniel Coquillette, *Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607*, 61 B.U. L. REV. 1, 80-81 (1981). Coquillette relates that a powerful group within the House of Commons found Cowell's dictionary intolerable because it set forth a particularly expansive jurisdiction for the Admiralty courts, dominated by civil lawyers. *Id.*

119. COWELL, *supra* note 59. One historian claims widespread agreement, during the parliamentary debates preceding *Calvin's Case*, with the proposition that natural subject status was not limited to birth within the kingdom of England. See GALLOWAY, *supra* note 29, at 149.

120. 7 WORKS OF FRANCIS BACON, *supra* note 37, at 652, 665.

denizens by charter, or they might become naturalized subjects by Act of Parliament.

Ireland, Wales, Normandy, and Gascony, won and lost periodically by English kings in previous centuries, provided other examples the judges could consult. Persons born in Ireland after its conquest by Henry II were considered natural-born subjects, "capable of and inheritable to lands in England."<sup>121</sup> Although originally assimilated by conquest, thus differing from the situation of the union of the crowns, subsequent English monarchs acquired the conquered territories of Ireland through descent. Similarly, Wales, though soon assimilated as part of the kingdom of England, was for a time (before Edward I) held only as "parcel in tenure," and persons born in Wales before Edward I were "capable and inheritable of lands in England."<sup>122</sup>

Moreover, medieval English history provided two other examples in which persons born in territories outside of England were not considered aliens in England. Like James I, Henry II acquired Gascony, Guienne, and Anjou through "a title in blood and by descent," and Edward III acquired the crown of France in like manner.<sup>123</sup> The *praerogativa Regis* of Edward II indicates that persons born in Normandy while under the reign of the English King were to be considered natural-born subjects.<sup>124</sup> A statute from the reign of Edward III indicated that "an exchange was made between an Englishman and a Gascoign, of lands in England and in Gascoign; *ergo*, the Gascoign was no alien, for then had he not been capable of lands in England."<sup>125</sup>

These examples were not precisely parallel to James's situation, of course. Henry II inherited Anjou from his father, then married Eleanor of Aquitaine (Gascony, Guienne), and after that became King of England. Further, although Edward III claimed the crown of France, he cannot be said to have "acquired" it to quite the same extent as Henry VI. Conspicuously absent in all of these precedents, though, is any allusion to or discussion of a source of the rule in divine law or the law of nature.

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121. *Calvin v. Smith*, 77 Eng. Rep. 377, 405 (K.B. 1608) (citation omitted).

122. *Id.* at 403 (citations omitted).

123. *See id.* at 403-05; 7 WORKS OF FRANCIS BACON, *supra* note 37, at 672-73 (discussing status of persons in these territories).

124. *See* 2 STATE TRIALS, *supra* note 11, at 571 (citation omitted); *see also* 77 Eng. Rep. at 401.

125. 77 Eng. Rep. at 401 (citation omitted).

What was the legal status of Scots in England prior to the union of the crowns? Thomas Craig, writing in 1605, described the situation in this manner:

On the strictest grounds of equity I do not hesitate to say, that for three or four centuries past we have been most unfairly treated by our neighbors, who have regarded us as foreigners, and have compelled us to be naturalized to qualify for the enjoyment of English citizenship. [T]here is [now] no English law or statute in which Scotsmen are debarred from title to or possession of property validly acquired in England. . . . Are the goods of Scotsmen who have acquired property in England by inheritance, purchase, or exchange, or have died in England testate or intestate, to be treated as the property of aliens and be swept into the Exchequer as so much treasure trove? Our wise King will never allow Scotsmen, his own kin, to be treated as foreigners in his own dominions, to be liable to heavier burdens than the English, or to be deprived of property which they have acquired by marriage or some other equitable title.<sup>126</sup>

Craig shows us, again, that disposition of property was of primary importance in the question behind the status of James's Scottish subjects in England.

Before the English justices in the Exchequer Chamber decided Robert Calvin's status, members of Parliament debated extensively the status of the *postnati*.<sup>127</sup> The King's men proposed bills to naturalize all of James's Scottish subjects, including the *postnati*, but the bills failed to gain approval in Parliament.<sup>128</sup> As a result, the English rights of Scottish subjects were settled by the judges of the realm. The parliamentary debates, the subject of the next section, are important for an understanding of *Calvin's Case* because leaders of the opposition in the Commons also represented Calvin's opponents in the suit before the justices. Thus, one would expect that this confrontation might provide clues to the formation of the defendants' arguments in *Calvin's Case*. Another important point to be gleaned from the debates concerns evidence that English lawyers and lawmakers sought a resolution to the problem of the *postnati* from continental legal practices.

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126. CRAIG, DE UNIONE, *supra* note 9, at 338-39.

127. For a summary of the parliamentary debates, see *Le Case Del Union, Del Realm, D'Escose, ove Angleterre*, 72 Eng. Rep. 908 (n.d.); 2 STATE TRIALS, *supra* note 11, at 559-76.

128. See GALLOWAY, *supra* note 29, at 71-73, 117-19.



### III. THE LEGAL THEORY OF THE KING'S TWO BODIES

#### A. *The Parliamentary Debates, 1606-1607*

The Commissioners of Union,<sup>129</sup> whose members included Francis Bacon, Thomas Craig, and Lord Chancellor Ellesmere, recommended two bills to the Parliament in 1606.<sup>130</sup> The first simply declared that under existing law the *postnati* were *de jure* English subjects. The second was a charter of naturalization for all Scots born before 1603, the *antenati*.<sup>131</sup>

Both bills were defeated, after provoking substantial hostility in the Commons. To those opposed to any closer union with the Scots, the declaration concerning the *postnati* must have seemed to be the first step toward James's "perfect union," cleverly implemented by prerogative under the guise of the common law. In particular, there was substantial opposition in both kingdoms to proposals for uniting the laws of the two countries,<sup>132</sup> and in a speech to the Commons in support of the acts Bacon had referred to a possible union of laws:

[A]ccording to true reason of estate, Naturalization is in order first and precedent to union of laws; in degree, a less matter than union of laws; and in nature, separable, not inseparable, from union of laws. For Naturalization doth but take out the marks of a foreigner, but union of laws makes them entirely as ourselves.<sup>133</sup>

Opposition to the acts was also expressed with fears that an influx of "hungry Scots" would flood England.<sup>134</sup> Nicholas Fuller, a Puritan

129. The Commission, comprised of both civil and common lawyers, was established by Act of Parliament to eliminate "hostile" laws between the two kingdoms. On the Commission generally, see THE JACOBAN UNION: SIX TRACTS OF 1604, at xxii-xxiii (Bruce R. Galloway & Brian P. Levack eds., 1985) [hereinafter JACOBAN UNION].

130. See *Le Case del Union, del Realm, D'Escose, ove Angleterre*, 72 Eng. Rep. 908 (n.d.); 2 STATE TRIALS, *supra* note 11, at 562; see also 1 SAMUEL L. GARDINER, HISTORY OF ENGLAND 326 (London, Longman, Green 1883).

131. See GARDINER, *supra* note 130, at 326; see also GALLOWAY, *supra* note 29, at 74.

132. See 2 STATE TRIALS, *supra* note 11, at 559-60; see also LEVACK, FORMATION, *supra* note 28, at 85-87, 89; Levack, *Proposed Union*, *supra* note 33, at 100. Pamphlets and treatises from civilian writers that argued the two kingdoms' laws were essentially similar and thus would be easy to unite into one body of law were particularly objectionable to most common lawyers, who generally perceived that Scotland had a civil-law system. Examples of these works include JOHN COWELL, INSTITUTIONES JURIS ANGLICANI (London, John Legate 1605); ALBERICO GENTILI, *De Unione Regnorum Britanniae*, in REGALES DISPUTATIONES TRES (London, apud T. Vautrollericum 1605); JOHN HAYWARD, A TREATISE OF UNION OF THE TWO REALMES OF ENGLAND AND SCOTLAND (London, F.K. for C.B. 1604).

133. See 10 WORKS OF FRANCIS BACON, *supra* note 37, at 314.

134. See GARDINER, *supra* note 130, at 331.

agitator and recognized leader of those opposing an extension of the privileges of English subjects to the Scots, thought that patronage opportunities within England ought to be reserved only for English subjects.<sup>135</sup> Another Parliamentarian compared England to a rich pasture threatened with a herd of famished cattle.<sup>136</sup>

Five common lawyers, two of whom, Serjeants Richard Hutton and Laurence Hyde, would continue to oppose the naturalization of the *postnati* as counsel for the defendants in *Calvin's Case*,<sup>137</sup> led the legal attack on the proposition that the *postnati* were English subjects as a matter of common law. From Bacon's and Coke's summaries of the issues in *Calvin's Case*, it appears that the legal arguments made by counsel for the defendants were substantially the same as those presented in the debate over the Naturalization Act in the Commons.<sup>138</sup> Because we do not have a complete report of the defendants' arguments before the Exchequer Chamber, the legal debates in Parliament over the Naturalization Act are all the more important.

The legal arguments that the *postnati* were aliens in England were threefold. (1) Whoever is born out of the "ligeance" of King James of his kingdom of England is an alien as to the kingdom of England, applying equally to the *postnati* and the *antenati*. (2) Allegiance in each kingdom is due to the King's body politic of that kingdom. The allegiance due by a King's subject, therefore, is several and divided between the two kingdoms. The allegiance due by Scots to James's Scottish body politic does not establish that Scots are subjects of the King in England. (3) A subject born out of the reach of the laws of England cannot be a natural-born subject of the King in England and take advantage of the protections or rights afforded by English law. The defendants equated birth and jurisdiction on the question of inheritance. They claimed that a subject who was not at the time and in the place of his birth inheritable to the laws of England could not be inheritable to the laws of England, even if he later owes allegiance to a King who is also King of England.<sup>139</sup>

Viewed from the parliamentary debates, the defendants in *Calvin's Case* seem to have had two motives. One was a general opposition to closer union with Scotland, and the other was parliamentary fear of the legal theory of absolute monarchy prevalent in Europe at that

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135. See 10 WORKS OF FRANCIS BACON, *supra* note 37, at 307.

136. See *id.* at 306.

137. See 2 STATE TRIALS, *supra* note 11, at 561.

138. For a summary of the parliamentary debates, see 2 STATE TRIALS, *supra* note 11, at 561-76. See also *Le Case del Union, del Realm, D'Escose, ove Angleterre*, 72 Eng. Rep. 908 (n.d.).

139. The summary of the defendants' legal arguments is largely Broom's. See BROOM, *supra* note 52, at 6-7.

time and believed to be espoused by James I.<sup>140</sup> The legal theory of absolute monarchy posed a very real problem to the resolution of *Calvin's Case*. In 1598, prior to his accession to the English throne, James wrote in *The Trew Law of Free Monarchies* that because kings derive their authority directly from God, not from laws enacted by a Parliament, they were not subject to positive law.<sup>141</sup> James derived many of his ideas from Bodin, who himself was widely followed by supporters of absolute monarchy in Europe in the late sixteenth and early seventeenth centuries.<sup>142</sup> Bodin and James (at least in 1598) both advocated that the absolute power of the monarch lies in the King's right to give laws without the consent of his subjects, and thus, the king, as a matter of natural law, was the final source of positive law.<sup>143</sup> James's English subjects may reasonably have feared that the new King viewed the union of the crowns in 1603 to make all of James's subjects, in England and Scotland, subject to one law—his.

According to Bacon, the thrust of the defendants' case was that the allegiance required of a subject was allegiance to the "kingdom of England," the King's other body, not to the person of the King.<sup>144</sup> The accepted *ad fide[m] Regis* formulation, however, clearly precluded a limitation of this type. The defendants' challenge to the nature of a subject's allegiance was a very complex idea involving corporate governmental capacities attributed to the King's person. The strength of the defendants' argument was that their resolution of the case did not require past precedent to be contradicted or ignored.

The debates in the Commons over the Naturalization Act initially challenged the applicability of the statute *De Natis*. Following the Commissioners' proposals, leaders of the opposition in the Commons selected persons trained in civil law as well as common lawyers to present grounds for opposition to the Naturalization Act, with the civilians to argue "the law of nations, and of reason, and the stories of other countries, and the civil law elsewhere put in use upon unions."<sup>145</sup> Sir Edwin Sandys considered the case "proper to be

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140. An overview of the legal theory of absolute monarchy, discussed below, is provided in Berman, *supra* note 94, at 1667-73. Many scholars, however, think that parliamentary fear of absolute monarchy is exaggerated, and it is a major historiographic debate today. See, e.g., GLENN BURGESS, *ABSOLUTE MONARCHY AND THE STUART CONSTITUTION* (1994).

141. See *WORKS OF JAMES I*, *supra* note 31, at 53-54; see also Berman, *supra* note 94, at 1667.

142. See Berman, *supra* note 94, at 1668-69.

143. See *id.* at 1669-70.

144. See *7 WORKS OF FRANCIS BACON*, *supra* note 37, at 652.

145. See *2 STATE TRIALS*, *supra* note 11, at 563.

consulted with the law of nations, which is called *jus gentium*; for there being no precedent for it in the law."<sup>146</sup>

The civilians participating in the debates apparently did not discuss any rule of citizenship claimed to derive from the post-classical texts of Roman law that were glossed and commented upon in the West from the late eleventh through the fifteenth centuries.<sup>147</sup> Nor did any reference to ancient Roman practice appear in the arguments in *Calvin's Case*,<sup>148</sup> except for a remark by Bacon that no "Roman rule" was relevant to the question at hand: The judges had to decide whether subjects "which grow unto the King by descent" were naturalized, while Roman citizenship "did never follow by conquest, during all the growth of the Roman empire; but was ever conferred by charters or donations, sometimes to cities and towns, sometimes to particular persons, and sometimes to nations, until the time of Adrian the emperor, and the law *In orbe Romano*."<sup>149</sup>

It appears that all of the participants understood that a rule of acquisition of citizenship derived from the ancient law of Rome—because it was conferred on persons in new territories by "charters or donations"—was far removed from the question whether the *postnati* of Scotland were *de jure* natural-born subjects according to the customary laws of England.<sup>150</sup> Coke was familiar with canon law and Roman law as applied in various types of cases in the English ecclesiastical courts and royal prerogative courts, including the High Court of Star Chamber, the High Court of Chivalry, the High Court of Admiralty, and the Court of Requests. But he considered them to be "foreign" bodies of law in the sense that they were particular customs that had been incorporated into the common law, compared to the common law traditionally applied in the courts of Common

146. *Id.* Presumably Sandys meant that there was no precedent from the common law of England. Sandys opposed James's union plans in general and was a leader of the opposition to the Naturalization Act. Perhaps, then, Sandys meant there was no *favorable* precedent for those opposing the Act. See Theodore K. Rabb, *Sir Edwin Sandys and the Parliament of 1604*, 69 AM. HIST. REV. 646 (1964).

147. On the transformation and contributions of classical Roman law texts to European law generally, see Harold J. Berman & Charles J. Reid, *Roman Law in Europe and the Jus Commune*, 20 SYRACUSE J. INT'L L. & COM. 1 (1994).

148. John Bennet may have made some reference to it when he said that the King had the power under the "Civil Law" to naturalize subjects. *Le Case del Union, del Realm, D'Escose, ove Angleterre*, 72 Eng. Rep. 908, 910 (n.d.).

149. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 661. On the ancient Roman law of citizenship, see John W. Salmond, *Citizenship and Allegiance*, 17 LAW Q. REV. 270 (1901).

150. Sir Thomas Craig, who was trained in the civil law in France, did not mention the ancient Roman law of citizenship in his treatise on the union of England and Scotland, in which he specifically addressed the status of James's Scottish subjects in England. Rather, Craig would resolve the question according to the *jus feudale*, as discussed in Section V of this Article.

Pleas, King's Bench, and Exchequer.<sup>151</sup> But even that law was not exclusively English common law, as evidenced by Coke's frequent use of maxims derived from the civil law.<sup>152</sup>

The Earl of Northampton noted that the civil lawyers had suggested little precedent to resolve the status of the *postnati*.<sup>153</sup> Thus, the debate centered on the significance of the statute *De Natis*. Common lawyers opposed to the Naturalization Act argued that allegiance proceeded from the laws of England and not the person of the king, citing language in *De Natis* referring to the "ligeance of England," which meant that allegiance was "tied to the kingdom, and not to the person of the king."<sup>154</sup> James as King of Scotland received a different allegiance from his Scottish subjects than he did from his English subjects as King of England, because James in essence possessed two political bodies—"the person of the King possessing both kingdoms possesseth the people and the laws of them distinct, as the kingdoms are themselves."<sup>155</sup> No one could be born "a subject of two allegiances," and therefore Scots born in Scotland could not be natural subjects in England.<sup>156</sup>

In essence, these common lawyers attempted to limit allegiance to the territory of England by considering the foundation for the obligation of allegiance. Their contention was that allegiance was a function of the laws of the kingdom, a positive law notion that in some respects separated English common law from the crown. By linking allegiance to the laws of England, the common lawyers attempted to contradict the rule apparently settled since the reign of Edward III that a person did not have to be born within the territory of England to be a natural-born subject.

But their formulation fell easily before the language *ad fidem Regis* in the statute *De Natis*. The formulation *ad fidem Regis* meant that

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151. See Berman, *supra* note 94, at 1679; Berman & Reid, *supra* note 147, at 8. Coke's particular hostility toward the Admiralty jurisdiction has been noted. See LEVACK, *supra* note 35, at 78-79.

152. On the relationship between maxims and juristic rules derived from the civil law of Rome, see PETER STEIN, *REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS* 153-79 (1966).

153. See 2 *STATE TRIALS*, *supra* note 11, at 566. The civil lawyers, in general, believed that the determination of a person's status by birth was a question of the "law of nations." See John Doddridge, *A Brief Consideration of the Union*, in *JACOBAN UNION*, *supra* note 129, at 142, 147.

154. 2 *STATE TRIALS*, *supra* note 11, at 567. They also argued that "*lex et ligeancia* came out of one root, and as it is called *lex a ligando*, so it is called *ligeance, a ligatione*, which proveth allegiance to be tied to laws." *Id.*

155. *Id.* at 568.

156. See *id.*

allegiance was to the person of the King.<sup>157</sup> This, at least, was the response of ten of eleven judges consulted on the question.<sup>158</sup> Chief Justice Popham, Sir Thomas Flemming, and Coke delivered opinions to the Lords in Parliament determining that allegiance was to the person of the King and not to the laws of England.<sup>159</sup>

Following the consultation with the judges, it was surely evident to the opposition faction that the *ad fidem Regis* formulation excluded arguments concerning allegiance other than to the King's person. It is not surprising that Hutton and Hyde, as counsel for the defendants in *Calvin's Case*, conformed their arguments accordingly. They employed a combination of the ideas of the civilians and common lawyers presented in the parliamentary debates. The civilians may have suggested little precedent from the law of nations, as the Earl of Northampton reported,<sup>160</sup> but the civil lawyers made a unique contribution to the debate in the form of a maxim derived from the *Digest of Justinian*.

### B. A Maxim from the Civil Law

In the parliamentary debates, a civilian consulted on the matter, Sir John Bennet,<sup>161</sup> admitted that the civil law provided no resolution to the problem of the status of the *postnati*, but for "other unions lesser then kingdoms," Bennett said that the maxim "*cum duo jura concurrunt in una persona aequum est ac si essent in diversis*" (when two rights meet in one person, it is the same as if they were in different persons) showed that "the customs of every place remain still distinct and divided."<sup>162</sup> In contemporary law, there are numerous examples of the principle embodied in the maxim *cum duo jura*—one person may simultaneously exercise several distinct legal capacities or functions.<sup>163</sup> Bennet noted that the maxim was used to

157. Coke found legal ligeance in feudal oaths to the King recorded in Britton during the rule of Edward I. See *Calvin v. Smith*, 77 Eng. Rep. 377, 385 (K.B. 1608). Coke maintained, however, that legal allegiance was first a duty of allegiance to the person of the King by the law of nature. *Id.* at 393-94.

158. See 2 STATE TRIALS, *supra* note 11, at 560, 568, 576.

159. See *id.* at 568-70.

160. See *id.* at 566.

161. Bennet was a member of the Commons from 1597 to 1611, and his career as a civil lawyer, including a place on the High Commission, required substantial royal patronage. See LEVACK, *supra* note 35, at 209-10. Although Bennet concluded that the *postnati* were not naturalized by operation of law, he "affirmed that it was in the power of the King by the Civil Law to naturalize them, and give them the privileges." *Le Case del Union, del Realm, D'Escose, ove Angleterre*, 72 Eng. Rep. 908, 910 (n.d.).

162. See 2 STATE TRIALS, *supra* note 11, at 565.

163. For example, an executor of a will may also be a beneficiary. As another illustration of this principle, while one person may serve on the board of directors of two or more different corporations, the fact that one person holds the several directorships creates no relationship

distinguish between two ecclesiastical entities joined under one person, "as one parson of two churches, [or] one dean of two deaneries."<sup>164</sup> Since the customs of the two countries remained divided after the union of the crowns, Bennet seemed to argue that each entity bestowed separate rights upon its own subjects. Hence, the *postnati* of Scotland had no better claim to natural-born subject status in England than did the *antenati*.

In *Calvin's Case* the defendants argued that James had two distinct capacities—his "body politic" and his natural body. Because there had been no union of the laws of Scotland and the laws of England, James's body politic remained different for each of his kingdoms. Because allegiance was due to the King's body politic and not his natural body, the defendants argued that the plaintiff owed allegiance to James's *Scottish* body politic but not to James's *English* body politic. That the two kingdoms (and their laws) remained distinct within James's political capacities was shown by reference to the maxim Bennet discussed in the parliamentary debates, "*Quando duo jura concurrunt in una persona, aequum est accessent in diversis*."<sup>165</sup> The defendants argued the maxim established that parishioners in two parishes under one bishop did not thereby become related to each other.<sup>166</sup> Ellesmere denied the distinction between James's capacities and characterized the defendants' case differently: "The subjects of each several kingdom are bound to him by distinct allegiance, according to the several laws of the kingdom where they were born. And all this is grounded upon this rule of fiction in Law: *Quando duo jura . . .*"<sup>167</sup>

The maxim *cum duo jura* was critical to the defendants' characterization of *ad fidem Regis* and therefore to their resistance to the legal theory of absolute monarchy. By contending that *ad fidem Regis* meant allegiance to the political aspect of the King's body, the defendants' position fit within the accepted rule of territorial birth while maintaining that this allegiance was required by the customary laws of England.<sup>168</sup> The King might very well have two capacities, as English law had recognized for several centuries,<sup>169</sup> but because the English and Scottish bodies politic remained distinct, the *ad fidem*

whatsoever between the corporations. They remain legally quite distinct.

164. See 2 STATE TRIALS, *supra* note 11, at 565.

165. See *Calvin v. Smith*, 77 Eng. Rep. 377, 380 (K.B. 1608).

166. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 657.

167. See LOUIS KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 240 (1977).

168. See *id.*

169. See KANTOROWICZ, *supra* note 66, at 1-3.

*Regis test* worked to deny subject status in England to the *postnati* of Scotland.

Bennet's introduction of the maxim into the parliamentary debate on naturalization was not its first appearance in English legal discourse. The maxim was used in an ecclesiastical context a few years earlier in *Acton's Case*.<sup>170</sup> There the question was whether a statute of Henry VII<sup>171</sup> forbidding a cleric from holding a plurality of benefices prohibited two chaplains of a widowed baroness from acquiring additional benefices upon her marriage to another nobleman.

In *Acton's Case* the chaplains had argued that their holdings did not exceed any statutory limit because the Act did not apply to rights retained in elevation of status: "If a bishop is translated to an archbishopric, or a baron is created an earl, now he has both these dignities, and as it is commonly said, *Quando duo jura concurrunt in una persona, aequum est ac si essent in diversis*."<sup>172</sup> Coke's answer, in *Acton's Case*, was that the maxim was not contrary to the Act: "[B]ut yet within this Act he can have but as many as an archbishop, or an earl may have; for although he has sundry dignities, yet he is but one and the same person to whom the attendance and service shall be done . . . ."<sup>173</sup> Therefore, the two chaplains could retain the benefices granted them by the baroness prior to her remarriage, and they could take additional benefices resulting from her marriage to another noble.

Coke subsequently considered the maxim in *Calvin's Case*.<sup>174</sup> The maxim's use in *Calvin's Case* provides an example of an English court directly borrowing a maxim from the civil law and converting it to an entirely different use. The maxim appears in several late medieval collections of *Brocardica iuris*, collections of maxims compiled by the scholars who glossed the *Corpus Juris Civilis*,<sup>175</sup> and is cited there to the *Digest of Justinian*.<sup>176</sup> Bartolus derived the maxim in essential-

170. *Acton's Case*, 76 Eng. Rep. 1107, 1108, Y.B. 45 Eliz., Hil. 20 (C.P. n.d.).

171. *Spiritual Persons Abridged from Having Pluralities of Livings, and from Taking of Fermes*, 1529, 21 Hen. 8, ch. 13 (Eng.).

172. 76 Eng. Rep. at 1108.

173. *Id.*

174. *See Calvin v. Smith*, 77 Eng. Rep. 377, 380, 394 (K.B. 1608).

175. For a thorough study of the introduction of *regulae iuris* and the relationship to maxims used in English courts, see STEIN, *supra* note 152.

176. *See* BROCARDICA IURIS (Paris, Etienne Jehannot for Denis Roce ca. 1495) (available at Harvard Law School Special Collections); BROCARDICA IURIS (Paris, Etienne Jehannot for Durand Gerlier ca. 1499) (available at Harvard Law School Special Collections); MODUS LEGENDI ABBREVIATURAS 155a (Cologne, apud Petrum Horst 1577) (available at Harvard Law School Special Collections). In all of these collections the citation is to DIG. 34.9.22 (Tryphoninus, Libro Quinto Disputationum).



ly the form used by Bennet from a case concerning challenges to a will by a minor's guardian when the guardian stood to gain from the will in another capacity.<sup>177</sup> Bennet, however, used the maxim in the very different context of ecclesiastical pluralities: "[A]s one Parson of two Churches, one Dean of two Deaneries; the Customes of every place remain still distinct and divided."<sup>178</sup> The subsequent use of the maxim in English customary law, and in *Calvin's Case* in particular, illustrates how "much of medieval canon law passed over—often unnoticed—into the law of the state."<sup>179</sup>

### C. *The Debate Moves to the Courtroom*

The arguments presented to the Exchequer Chamber in *Calvin's Case* echoed the parliamentary debates of the preceding year. With the understanding that subject status acquired by birth prior to 1608 was not limited to the territorial boundaries of England, Bacon argued that *Cobledike's Case*<sup>180</sup> also provided support for the proposition that the *postnati* of Scotland were natural subjects in England. In the reign of Edward I, Constance de N. swore out a writ against Roger de Cobledike, claiming that a freehold held by Cobledike had descended to her as rightful heir.<sup>181</sup> In defense, Cobledike argued that the plaintiff was a "French woman, and not of the ligeance, nor of the faith of England," and demanded judgment. Cobledike's ar-

177. "*Qui ex necessitate officii testamentum accusat, ab eo quod propuo nomine meriuit, non repellitur: Item quando plura iura concurrunt in persona unus, perunde est, ac si concurrunt in persona diversorum.*" ("He who by necessity of office challenges a testament is not repelled from that which he has received in his own name. Similarly, when several rights concur in one person, it is the same as when rights concur in several persons."). 4 BARTOLUS DE SAXOFERRATO, OMNIA, QUAE EXTANT, OPERA at fol. 106ra (Venice, apud Iuntas 1602) (commentary to DIG. 34.9.22 (Tryphoninus, Libro Quinto Disputationum)). The point of this passage is that someone who has an official responsibility to challenge a will is not disqualified from taking under its terms.

178. *Le Case del Union, del Realm, D'Escose, ove Angleterre*, 72 Eng. Rep. 908, 910 (n.d.). There is some early precedent for the ecclesiastical use of the maxim: CODE JUST. 6.35.2 (Severus & Antoninus 208) encompasses issues parallel to DIG. 34.9.22 (Tryphoninus, Libro Quinto Disputationum), and the GLOSSA ORDINARIA (ca. 1240) alleges that this rule also answers a canon-law problem about benefices.

179. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 45 (1993). There is a large scholarly literature, much of it by Richard Helmholz, on the ways in which civil and canon law had a bearing on the history of English law. See, e.g., RICHARD HELMHOLZ, CANON LAW AND THE LAW OF ENGLAND (1987); Richard Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 DUKE L. J. 1207; Richard Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962 (1990).

180. Coke's citation of *Cobledike's Case*, see *Calvin v. Smith*, 77 Eng. Rep. 377, 388 (K.B. 1608), refers to a case from the time of Edward I, in Hengham's reports, which at that time were "written in parchment, in an ancient hand." *Id.*

181. See *id.*; 9 HOLDSWORTH, *supra* note 53, at 77.

gument that the opposing party was “not of the ligeance and faith of England” was held insufficient because it “referred ligeance and faith to England, and not to the king.”<sup>182</sup> The plea was amended (and later accepted) to state that the plaintiff was “not of the ligeance of England nor of the faith of the king.”<sup>183</sup> This plea suggests that a King’s subject in another territory was not an alien in England, but that Constance did not qualify as a subject of the King. Like the statute *De Natis*, the allegiance was *ad fidem Regis*, or “to the faith of the king,” strengthening the argument that allegiance was a personal tie between the subject and the King’s natural body instead of to the kingdom of England.<sup>184</sup>

Bacon also noted the several examples from English history in which the King’s subjects in other territories were not considered aliens in England.<sup>185</sup> Bacon found evidence in the *praerogativa Regis* that persons born in territories subject to the King but not in England were natural-born subjects,<sup>186</sup> and, citing Bracton, claimed this status was not altered by a loss of the province due to a change in sovereignty, as consistent practice would require.<sup>187</sup>

Ellesmere agreed with Bacon’s characterization of the rule concerning aliens:

[F]or where there is but one sovereign, all his subjects born in all his Dominions be born *Ad fidem Regis*; and are bound to him by one bond of Faith and Allegiance: And in that, one is not greater nor lesser than another; nor one to be preferred before another: but all to be obedient alike; and to be ruled alike; yet under several laws and customs. . . . And therefore all that have been born in any of the King’s Dominions since he was King of England are capable and inheritable in all his Dominions without exceptions.<sup>188</sup>

Coke, too, had little trouble with the formulation of the rule to be applied:

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182. 77 Eng. Rep. at 388.

183. *Id.*

184. Ellesmere, too, thought *Cobledike’s Case* to establish this point. See 2 STATE TRIALS, *supra* note 11, at 688.

185. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 672-73; Calvin v. Smith, 77 Eng. Rep. 377, 403-05 (K.B. 1608).

186. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 675 (internal quotes omitted) (citation omitted); 2 STATE TRIALS, *supra* note 11, at 571 (citing same).

187. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 675 (citation omitted). Bacon noted that Parliament could always change this result by statute, “for we can make an act of Parliament of separation if we like not their consort.” *Id.* at 659.

188. KNAFLA, *supra* note 167, at 237.

An alien is a subject that is born out of the ligeance of the king, and under the ligeance of another; and can have no real or personal action for or concerning land: but in every such action the tenant or defendant may plead that he was born in such a country which is not within the ligeance of the king.<sup>189</sup>

Coke further noted, and Ellesmere agreed,<sup>190</sup> that *Cobledike's Case* "did overrule this case of Calvin, in the very point now in question; for that the plea in this case doth not refer faith or ligeance to the King indefinitely and generally, but limiteth and restraineth faith and ligeance to the kingdom."<sup>191</sup> Thus, according to Coke, it was not a bar to the plaintiff's action that Scotland had a separate Parliament and laws and remained a distinct kingdom within the union of the crowns.

Despite the precedent of recognizing, albeit through statute, the subject status of persons in the French possessions of Henry II and Edward III,<sup>192</sup> and the general agreement that one was not an alien according to English law if birth were *ad fidem Regis*,<sup>193</sup> Coke could not easily rule in favor of the plaintiff. While not challenging the rule derived from the statute *De Natis*, counsel for the defendants argued that the necessary allegiance for birth *ad fidem Regis* was to the King's body politic and the laws of England. They argued that the *postnati* could not be considered naturalized subjects with respect to the laws of England because they were not subject to the territorial reach of laws enacted by the English Parliament. It was not sufficient that the *postnati* of Scotland happened to owe allegiance to a King who was also England's monarch.

Bacon argued that legal precedent, as that word was understood at the time, permitted the assembled judges of the realm simply to declare that the *postnati* were subjects in England. This argument posed a problem in *Calvin's Case* because the English legal concept of sovereignty had changed substantially since the fourteenth century when most of the applicable law of naturalization had developed. This development in the notion of sovereignty took the form of the theory

189. *Calvin v. Smith*, 77 Eng. Rep. 377, 396 (K.B. 1608). Coke cites Littleton for this rule: "*Alienigena est alienae gentis seu alienae ligeantiae, qui etiam dicitur peregrinus, alienus, exoticus, extraneus . . . Extraneus est subditus, qui extra terram, i.e. potestatem Regis natus est.*" *Id.* ("An alien-born is someone of a foreign race or foreign lineage, who is also called 'foreigner,' 'alien,' an 'exotic,' or an 'outsider' (*extraneus*). The outsider is a subject who was born outside the realm, that is, outside the power of the king.")

190. See KNAFLA, *supra* note 167, at 241-42.

191. 77 Eng. Rep. at 388.

192. See *id.* at 402-04.

193. See *id.*, at 383, 388, 391 (K.B. 1608); 7 WORKS OF FRANCIS BACON, *supra* note 37, at 665 (quoting statute *De Natis*).

of “the King’s two bodies,” a conception not entirely new to English political thought but one that had undergone substantial development at the hands of Tudor common lawyers. In essence, the theory addressed the problem of continuity necessary for perpetuating hereditary kingdoms; namely, what happened to sovereignty upon the King’s death. English jurists held that the body politic survived death and was transferred immediately to another body natural according to the laws of succession. No coronation was necessary to bestow the sovereignty of the body politic upon the new monarch.<sup>194</sup> The legal fiction of the King’s two bodies had been used in English political thought for some time, but it took on very distinctive characteristics in the late Tudor and early Stuart periods.<sup>195</sup> The theory of “the King’s two bodies” was applied for the first time to the law of subjects and aliens in *Calvin’s Case*.

#### *D. Francis Bacon’s Proposal: The Law of Nature*

Bacon, as counsel for the plaintiff, disagreed with the proposition that allegiance must be either to the King’s body politic or his body natural. Bacon argued that while the King might have a body politic for some purposes—to resolve questions of the validity of a prince’s acts before ascending the throne as sovereign<sup>196</sup>—the common law of England had always held that the two were inseparable. Bacon quoted from Plowden: “There is in the King not a body natural alone, nor a body politic alone, but a body natural and politic together: *Corpus corporatum in corpore naturali, et corpus naturale in corpore corporato.*”<sup>197</sup> (The corporate body subsists in a natural body, and the natural body in a corporate body.) Bacon denied that the *cum duo jura* maxim held otherwise, and denied that the maxim was applicable to English common law:

It is a rule of the civil law, say they . . . when two rights do meet in one person, there is no confusion of them, but they remain still in the eye of law distinct, as if they were in several persons: and

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194. See 77 Eng. Rep. at 388-89; KANTOROWICZ, *supra* note 66, at 13.

195. See KANTOROWICZ, *supra* note 66, at 1-6.

196. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 667.

197. *Id.* at 667. Bacon’s principal disagreement with the defendants’ distinction in the King’s two natures was that the body politic would “swallow up” the body natural. Bacon explained that the King’s body politic was not a pure “corporation”:

[L]et us see what operations the King’s natural person hath upon his crown and body politic: of which the chiefest and greatest is, that it causeth the crown to go by descent; which is a thing strange and contrary to the course of all corporations, which evermore take in succession and not by descent.

*Id.* at 668. Thus, Bacon relied upon “the law of reason” (e.g., “a corporation can have no wife”), for “the corporation of the crown utterly differeth from all other corporations within the realm.” *Id.*

they bring examples of it of one man bishop of two sees . . . . [B]ut [this rule] receiveth no forced or coined but a true and sound distinction or limitation, which is, that it evermore faileth and deceiveth in cases where there is any vigor or operation of the natural person.<sup>198</sup>

Bacon made no further reference to this maxim, nor did he explain on what ground it was inapplicable. Rejecting the idea that allegiance was to the King's body politic, however, did not avoid the defendants' additional claim that allegiance was due by the laws of England.<sup>199</sup> Allegiance might be to the King's natural body, but if this allegiance were a function of the laws of James's separate bodies politic, Robert Calvin would still be an alien in England.

Bacon's answer was that allegiance was due not by the law of either England or Scotland alone but by the law of nature, itself a part of the law of England, as it was part of the laws of all nations:

Law no doubt is the great organ by which the sovereign power doth move, and may be truly compared to the sinews in a natural body . . . . But towards the King himself the law doth a double office or operation: the first is to entitle the king, or design him . . . . The second is . . . to make the ordinary power of the King more definite or regular. . . . But I demand, do these offices or operations of law evacuate or frustrate the original submission, which was natural? Or shall it be said that all allegiance is by law? No more than it can be said, that *potestas patria*, the power of the father over the child, is by law. And yet no doubt laws do diversely define of that also; the law of some nations having given the fathers power to put their children to death; others, to sell them thrice . . . . Yet no man will affirm, that the obedience of the child is by law, though laws in some points do make it more positive: and even so it is of allegiance of subjects to hereditary monarchs, which is corroborated and confirmed by law, but is the work of the law of nature.<sup>200</sup>

In support of the claim that allegiance was due to a sovereign by the law of nature, Bacon offered "divers acts of Parliaments" that titled the King "our natural sovereign and liege lord."<sup>201</sup> Further, according to Bacon, "allegiance began before laws": "The original age of kingdoms was governed by natural equity . . . . [K]ings were more ancient than lawgivers [and] the first submissions were simple

198. *Id.* at 657.

199. *See Calvin v. Smith*, 77 Eng. Rep. 377, 380, 389, 391 (K.B. 1608).

200. 7 WORKS OF FRANCIS BACON, *supra* note 37, at 646-47.

201. *Id.* at 647. Bacon did not specify particular acts, although Broom has suggested some possibilities. *See BROOM*, *supra* note 52, at 9 n.2.

...<sup>202</sup> Bacon's arguments are particularly noteworthy because they strongly resonate with Bodin's writings concerning the source of the obligation of allegiance.<sup>203</sup> Bacon's analogy of the source of the duty of allegiance in the law of nature, similar to the operation of natural law within families, also appears in Bodin's *Republique*.<sup>204</sup>

An additional step remained. In order to find that the allegiance due by the law of nature to the King's natural body meant that James's Scottish and English subjects were mutually naturalized, Bacon argued:

For, my lords, by the law of nature all men in the world are naturalized one towards another. . . . It was civil and national laws that brought in these words, and differences, of *civis* and *exterus*, alien and native. And therefore because they tend to abridge the law of nature, the law favoureth not them, but takes them strictly . . . . So by the same reason, all national laws whatsoever are to be taken strictly and hardly in any point wherein they abridge and derogate from the law of nature.<sup>205</sup>

Bacon offered no further proof that natural law required this result. Perhaps the paucity of evidence reveals a difficulty in refuting the defendants' two-body theory of allegiance and overcoming the prevailing notion that the nerves of England's body politic—an idea favoring a positive law of allegiance—should determine the status of the *postnati*.

Bennet's maxim, first introduced in the parliamentary debates, was used later by the defendants in *Calvin's Case* to support the distinction between the King's two bodies. This indicates some interaction between the civilians and common lawyers opposing the Naturalization Act.<sup>206</sup> For the plaintiff, Francis Bacon cited the maxim and noted that "the words whereof are taken from the civil law; but the matter of it is received in all laws; being a very line or rule of reason, to avoid confusion."<sup>207</sup>

202. 7 WORKS OF FRANCIS BACON, *supra* note 37, at 666.

203. See BODIN, *supra* note 10, at 67-68, 84-86, 114-15, 153, 156, 159-60, 218-19.

204. See *id.* at 8, 10-11.

205. 7 WORKS OF FRANCIS BACON, *supra* note 37, at 664.

206. More civil lawyers apparently supported James's union plans than opposed, most likely because they placed their hopes of political advancement in the crown in an age of jurisdictional challenge from the King's Bench and Common Pleas. See LEVACK, *supra* note 35, at 2-5. It is difficult to determine the number of civilians opposing the Naturalization Act because Moore's report does not specify who they were, other than to note that the rule proposed by Bennet supported the opposition in the Commons. See 2 STATE TRIALS, *supra* note 11, at 566.

207. 2 STATE TRIALS, *supra* note 11, at 584.

According to Coke in *Acton's Case*, the maxim was "commonly said."<sup>208</sup> While the context in which it was commonly said remains unclear, *Acton's Case* and Bennet's speech in Parliament are strong evidence that its common use was ecclesiastical.<sup>209</sup> Although the application of the maxim in *Acton's Case* is not quite Bennet's "as one Parson of two churches, one Dean of two Deaneries," both instances are far different still from the maxim's source in Bartolus. In *Calvin's Case* it was used to determine the rights of subjects in separate kingdoms. The transformation is one from ecclesiastical governance to political governance of non-clerics.<sup>210</sup>

In any event, although the *cum duo jura* maxim does not appear to have been used in the medieval theory of the King's two bodies before *Calvin's Case*,<sup>211</sup> the common lawyers' use of this maxim in connection with their peculiar theory of sovereignty is not surprising. The theory of the King's two bodies, as it was developed by the time of Bracton, seems to have originated in ecclesiastical notions of the *corpus mysticum* and Christ's two natures.<sup>212</sup> In essence, the theory of the King's two capacities addressed a problem of continuity necessary for perpetuating hereditary kingdoms: namely, what happened to sovereignty upon the King's death—a problem confronting continental civilian thinkers as well.<sup>213</sup>

From Plowden's *Reports* it is evident that common lawyers in the late Tudor period were familiar with this dual concept of sovereignty.<sup>214</sup> According to Plowden,

208. *Acton's Case*, 76 Eng. Rep. 1107, 1108 (C.P. n.d.).

209. For another mention of the maxim, see WILLIAM CAWLEY, *LAWS OF ELIZABETH, JAMES, AND CHARLES I CONCERNING JESUITS* (London, J. Wright and R. Chiswell 1680). See also BROOM, *CONSTITUTIONAL LAW*, *supra* note 52, at 6.

210. The maxim would be used through the 18th century in rules relating to marriage and descent. See *Jones v. Davies*, 158 Eng. Rep. 573 (Ex. Ch. 1861); *Jones v. Davies*, 157 Eng. Rep. 1386 (Ex. 1860); HERBERT BROOM, *A SELECTION OF LEGAL MAXIMS* 530 (Philadelphia, T. & J.W. Johnson & Co., 8th ed. 1882).

211. A similar idea may be found in Plowden's *Reports*: "Yet [despite the unity of the two bodies] his Capacity to take in the Body natural is not confounded by the Body politic, but remains still." See KANTOROWICZ, *supra* note 66, at 12 (quoting Plowden).

212. On sources of the *corpus mysticum* in Roman and canon law, see *id.* at 16, 43, 147, 267-68.

213. *Id.* at 273, 298.

214. See *id.* at 20 (quoting Plowden). English civil lawyers writing around the time of *Calvin's Case* also used "body politick," but not in the context of the King's person. See HAYWARD, *supra* note 132, at 15 ("For, as in a natural body, no sudden change is without some peril, so in a politic body, it is so much the greater. . ."). Cowell, in his *Interpreter*, used "body politic" in a more general sense of "corporation." He included a "religious company" in his general definition of "corporation" as a "*universitatum, or collegium, a body politick authorized by the King's charter.*"

that by the Common Law no Act which the King does as king, shall be defeated by his Nonage. For the King has in him two Bodies, viz., a Body natural, and a Body politic. His Body natural . . . is a Body mortal, subject to all Infirmities that come by Nature or Accident . . . and to the like Defects that happen to the natural Bodies of other People. But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public weal . . . what the King does in his Body politic, cannot be invalidated or frustrated by any Disability in his natural Body.<sup>215</sup>

The *cum duo jura* maxim also made sense in the theory of the King's two bodies because, again from Plowden, the two bodies were inseparable:

So that he has a Body natural, adorned and invested with the Estate and Dignity royal; and he has not a Body natural distinct and divided by itself from the Office and Dignity royal, but a Body natural and a Body politic together indivisible; and these two Bodies are incorporated in one Person, and make one Body and not divers, that is the Body corporate in the Body natural, *et e contra* the Body natural in the Body corporate. So that the Body natural, by this conjunction of the Body politic to it . . . is magnified, and by the said Consolidation hath in it the Body politic.<sup>216</sup>

Thus, in 1608, ample precedent existed for the distinction between the King's two bodies—enough that Coke readily admitted the dual capacity of the king.<sup>217</sup> However, the theory had apparently not been used before to determine who was a subject and who was an alien. Coke found the defendants' plea "a mere stranger in this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of . . . . In a word, this little plea is a great stranger to the laws of England . . . ." <sup>218</sup> The core of the defendants' challenge, the innovative application of the two-body theory to the law of subjects and aliens, placed the origins of allegiance inside the province of human law in a way that the language *ad fidem Regis* would otherwise prohibit. Because the basic theory of the King's two bodies was not unprecedented in the common law, the addition of the maxim *cum duo jura* to the

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215. See *id.* at 7 (quoting Plowden); see also *Calvin v. Smith*, 77 Eng. Rep. 377, 388-89 (K.B. 1608).

216. See KANTOROWICZ, *supra* note 66, at 9 (quoting Plowden).

217. See 77 Eng. Rep. at 388.

218. 77 Eng. Rep. at 381.



theory posed substantial difficulties for the justices in the Exchequer Chamber.

#### IV. THE RESOLUTION OF *CALVIN'S CASE*

The theory of the King's two bodies presented two questions that had to be settled in order to decide *Calvin's Case*. The first question, to which of the King's two capacities a subject's allegiance was due, was answered by Coke by his determination that allegiance was due to the King's natural body by the law of nature.<sup>219</sup> The second question was related to the first: Would allegiance to the King's natural body be sufficient to make one a natural subject within a separate body politic?

Coke's affirmative answer to this second question required an understanding of sovereignty that had much in common with civilian legal thought. The difficulties posed by the second question required an understanding of the meaning of "body politic" as applied to the government of England in the early seventeenth century. The King's body politic arose from a mystical notion of immortality and immutability attributed to the crown to provide for continuity of sovereignty upon succession.<sup>220</sup> When applied to the kingdom, however, body politic meant that part of the kingdom which was "framed by the policy of man,"<sup>221</sup> a notion widely used by civilians and common lawyers alike to refer to the public and private laws of the realm. The laws of England were the sinews and nerves of the body politic, with the King as its head.<sup>222</sup> The defendants in *Calvin's Case* understood "body politic" to have positive law connotations. The defendants pointed to "municipal laws of this realm [that have] prescribed the order and form" of allegiance, or legal obedience.<sup>223</sup>

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219. Ellesmere denied that the King had two separable capacities to which allegiance might be due. Both Ellesmere and Bacon thought this a "dangerous distinction," and accordingly Ellesmere found that the plaintiff was *de jure* a natural subject by virtue of his allegiance to the person who was also sovereign of England under the *ad fidem regis* formulation. Ellesmere's conclusion seems to be squarely in line with the development of the law of subjects and aliens prior to *Calvin's Case*. See KNAFLA, *supra* note 167, at 246; 7 WORKS OF FRANCIS BACON, *supra* note 37, at 666-67. Coke also thought the distinction between the King's two bodies was dangerous; he claimed, in fact, that it was treason to separate the two. Coke's position, however, was that allegiance was to the natural body, to which the body politic was inseparably attached. See 77 Eng. Rep. at 390.

220. See KANTOROWICZ, *supra* note 66, at 16, 43, 147, 267-68.

221. 77 Eng. Rep. at 388, 389. Coke did not clearly distinguish this meaning of "body politic" from the term as applied to the capacities of the king, for he followed this definition with: "and . . . [it] is called a mystical body." *Id.* at 388 (citation omitted).

222. See, e.g., HAYWARD, *supra* note 132, at 8, 15; 2 STATE TRIALS, *supra* note 11, at 566; 77 Eng. Rep. at 388-89.

223. 77 Eng. Rep. at 383.

Coke, on the other hand, resoundingly rejected the idea that the allegiance owed at birth was tied to municipal law. Instead, Coke maintained that it was required by the divine law of nature.<sup>224</sup>

Coke's resolution of the case essentially followed that suggested by Bacon—allegiance was due by the law of nature to the King's natural body, and since both Scottish and English subjects owed allegiance to the same sovereign, Scots who were born into the allegiance of James at the time he was also King of England were natural subjects in England. Coke's contribution was to spell out more clearly why this last proposition should be so. Although the two countries might have different laws, Scots were subject to the same natural law of allegiance as the English. Despite finding clear authority in *Cobledike's Case* that if Robert Calvin were *ad fidem Regis* he was "no alien," Coke agreed with the defendants that the question still to be resolved implicated the theory of the King's two bodies.<sup>225</sup> Coke reached a result consistent with past English practice by recognizing that persons born in territories acquired by an English sovereign "in blood and by descent" were natural subjects in England.<sup>226</sup>

According to Coke, the mutual oath between a liege lord and his subject was natural ligeance. Natural ligeance existed between the King and his subjects, with the King offering protection in return for loyalty.<sup>227</sup> To support his claim that every subject from birth was presumed by law to be sworn to the natural person of the king, Coke pointed to the banishment of the Spencers by Edward II, allegedly for the offending words:

that homage and oath of ligeance was more by reason of the King's crown (that is, of his politic capacity) than by reason of the person of the King . . . [so that] if the King do not demean himself by reason in right of his Crown, his lieges be bound by oath to remove the king.<sup>228</sup>

In addition, Coke discussed the nature of hereditary sovereignty in England in order to show that this feudal notion of allegiance could not be to the King's body politic. The King "holdeth the kingdom of

224. *See id.* at 393, 394.

225. *See id.* at 389 ("[S]eeing the King hath but one person, and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, it is necessary to be considered, to which capacity ligeance is due.").

226. *Id.*

227. *See id.* (citation omitted). In this passage, Coke also noted that a body politic can "neither make or take homage."

228. *Calvin v. Smith*, 77 Eng. Rep. 377, 390 (K.B. 1608); *see also* BROOM, *supra* note 52, at 15-16. Bacon likened this to the poison of a scorpion, "by which Act doth plainly appear the perilous consequence of this distinction concerning the person of the King and the crown." 7 WORKS OF FRANCIS BACON, *supra* note 37, at 669-70.

England by birth right inherent, by descent from the blood Royal, whereupon succession doth attend.”<sup>229</sup> Because the sovereign’s title was “by the descent” and “without any essential ceremony or act to be done *ex post facto*” (e.g., coronation), there could be no interregnum.<sup>230</sup> Hence, the body politic, or laws of the realm, added nothing to James’s rightful claim to sovereignty. Nonetheless, his rightful claim to sovereignty was the basis for the allegiance owed by his subjects: “[S]o as for these special purposes the law makes him a body politic, immortal and invisible, whereunto our ligeance cannot appertain.”<sup>231</sup>

Coke next turned to the source of this allegiance. The law of nature, part of the law of England, required the allegiance of a subject to his “natural liege Sovereign.”<sup>232</sup> Coke wrote that “[t]he law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature.”<sup>233</sup> Coke further wrote:

And the reason hereof is, for that God and nature is one to all, and therefore the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior. . . . This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws.<sup>234</sup>

Coke cited Aristotle’s *Politica* as evidence that power to command obedience for the profit of society was of the law of nature and before any municipal laws. Further, according to Coke, Fortescue provided evidence that before there were any municipal laws, English kings had decided cases according to natural equity—more evidence that the law of nature existed before the development of much of what seven-

229. 77 Eng. Rep. at 389.

230. *Id.* at 389-90. Coke referred to the example of Henry VI. Several persons were convicted of treason despite the fact that the King was not crowned until the eighth year of his reign. *Id.* at 390.

231. *Id.* at 391.

232. *Id.* at 391-92. Coke also called this the *lex aeterna*, the “moral law,” citing Bracton, Fortescue, and St. German’s *Doctor and Student* for the proposition that the natural law was part of the law of England. *Id.* See generally Coquillette, *supra* note 118, at 22-23. Medieval natural law theory, with its firm anchor in religious thought, is far removed from and not to be confused with contemporary natural law theory. On recent debate of natural law theory as a contemporary construct, see Lloyd L. Weinreb, *The Case For Natural Law Reexamined*, 38 AM. J. JURIS. 1 (1993). Whether the rule of territorial birthright citizenship may be supported by contemporary natural law theory is beyond the scope of this Article.

233. 77 Eng. Rep. at 392.

234. *Id.* at 392.

teenth-century lawyers considered to be the common or customary law of England.<sup>235</sup>

The critical result was that allegiance to the English sovereign, and for a time, acquisition of and rights associated with citizenship in the former American colonies, were considered not to be the subject of municipal or positive law-making. Coke stated:

Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature, (for that law only consisted in commanding or prohibiting, without any certain punishment or penalty), yet the very law of nature itself never was nor could be altered or changed. And therefore it is certainly true, that *jura naturalia sunt immutabilia*.<sup>236</sup>

More importantly, *Calvin's Case* also established by implication the rule of the *jus soli* itself as a divine institution, ordained by the laws of God and nature. The *antenati* remained aliens even though they currently owed allegiance to the person who was King of England. "Calvin the plaintiff," Coke wrote, was "naturalized by procreation and birth-right."<sup>237</sup> This was because, according to Coke, one's status is "vested by birthright:"

[F]or as the *antenati* remain aliens as to the Crown of England, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent cannot make him a subject to that Crown to which he was alien at the time of his birth. . . . [A]ll those that were born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization due and *vested by birthright*, cannot by any separation of the Crowns afterward be taken away: nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter *ex post facto*.<sup>238</sup>

The conservative English approach to the status of the Scots favored *de jure* naturalization of only the *postnati*. In this way, the effects (perceived or real) of Scots invading England as land and office holders would be gradual, because only those persons born after 1603 would be entitled to hold land or office, barring individual

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235. *See id.*

236. *Id.* at 392-93.

237. *Id.* at 394.

238. *Id.* at 409 (emphasis added).

acts of denization by James I. The decision in *Calvin's Case* thus drew a distinction based upon time of birth, permitting Scottish children, but not their Scottish parents, to be natural subjects, thereby grounding the rule firmly in what we know today as the *jus soli*. Thus, the time of birth was “of essence,”<sup>239</sup> and it, too, became part of the divine law embraced by Coke:

But if enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the king, though he be born within his dominions, for that he was not born under the King's ligeance or obedience. *But the time of his birth is of the essence of a subject born; for he cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance and obedience of the king.* And that is the reason that *antenati* in Scotland (for that at the time of their birth they were under the ligeance and obedience, of another king) are aliens born, in respect of the time of their birth.<sup>240</sup>

The distinction appears to us today almost ludicrous: Scottish parents owed the same allegiance to James as did their children, but unless they had been *born* owing that allegiance, that is, born after 1603, they were not natural subjects. Thus, to some extent an historical accident—the failure of the Tudor line and descent of the English crown to James Stuart of Scotland—established the *jus soli* as a product of natural law in a way that the *jus sanguinis*, in England at least, never was.

### *The Law of Nature*

Having found allegiance due to the King's natural body by the law of nature, Coke still faced the problem that troubled Bacon—why the law of nature also required subjects in a King's various territories to be naturalized as to each other. Said another way, the problem was to explain why James's Scottish subjects born *after* he inherited the English throne were entitled to be treated as Englishmen when in England, while James's Scottish subjects born *before* 1603 were not so

239. *Id.* at 399.

240. *Id.* (emphasis added). The first sentence of this excerpt also shows the critical importance of birth *ad fidem Regis*: An enemy, even one born within the King's territories, was excluded from the status of natural-born subject. The requirement that one owed allegiance at birth, then, provided exceptions from the rule of the *jus soli* for enemy aliens within a territory under hostile circumstances. Though subjects swore allegiance to the sovereign by formal oath periodically, see CRAIG, DE UNIONE, *supra* note 9, at 271, for purposes of their status as natural-born subjects, Coke said they were “presumed by law” to have sworn their oath to the King. See *Calvin v. Smith*, 77 Eng. Rep. 377, 389 (K.B. 1608). In cases of insurrection or swearing allegiance to another sovereign, however, the presumption could be dispelled.

entitled. Coke's answer, drawn from the law of nature, and, he claimed, the law of "all other nations," was that the allegiance due to James from his Scottish subjects born after 1603 was now the same as that due from his English subjects.<sup>241</sup> Those born before 1603 were born into a different allegiance and could only become subjects in England by act of positive law subsequent to their birth. Further, because this law of nature was "immutable," the result for the *postnati* was not changed by the fact that Scotland had a different legal system from England. Because there was only "one ligeance" to one king, and the primary allegiance that mattered was that acquired at birth, Calvin was not an alien in England.<sup>242</sup>

Surprisingly, then, although Coke cited the statute *De Natis* and *Cobledike's Case*, among other precedents, the law of determining natural-born status as developed from the fourteenth century was not central to Coke's resolution of the case. Rather, Coke based his holding upon an "immutable" natural law that preceded any municipal or judicial law in England. At least for the legal basis of allegiance, in contrast to the theory of the King's two bodies, Coke endorsed a more unified notion of sovereignty in holding for the plaintiff in *Calvin's Case*. The result, nonetheless, was that the *postnati* enjoyed the protections of English law, even though all Scottish subjects while in Scotland were out of the jurisdictional reach of the English Parliament.<sup>243</sup> Thus Coke added a horizontal link between the Scottish *postnati* and English subjects to the vertical relationship between subject and sovereign. According to Coke,

[I]f the obedience and ligeance of the subject to his sovereign be due by the law of nature, if that law be parcel of the laws, as well of England, as of all other nations, and is immutable, and that [the] *postnati* and we of England are united by birth-right in obedience and ligeance (which is the true cause of natural subjection) by the law of nature, it followeth that Calvin the plaintiff . . . cannot be an alien born. . . . [F]or . . . the law hath wrought . . . a union of ligeance and obedience of the subjects of both kingdoms, due by the law of nature. . . . [A]nd this in substance is but a uniting of the hearts of the subjects of both kingdoms one to another, under one head and sovereign.<sup>244</sup>

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241. See 77 Eng. Rep. at 394.

242. See *id.*

243. On the later development of the right of protection owed to the subject from the reciprocal obligation, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 513 (1991).

244. 77 Eng. Rep. at 394.

Coke thus created a rule to determine status at birth that was “immutable” and hence could not be changed by human laws.<sup>245</sup>

Scotland, by contrast, resolved the status of James’s English subjects by statute. In 1607, the Scottish Parliament passed an act that provided for naturalization not only of the English *postnati* but of the *antenati* as well, with the only limitation for the *antenati* being that they could not hold office of crown, judiciary, or Parliament except by exercise of the royal prerogative.<sup>246</sup> The Scottish Parliament enacted the naturalization charter with considerable resentment over the defeat of James’s proposals to the English Parliament concerning naturalization of the Scots and over James’s refusal to naturalize all Scots by prerogative power.<sup>247</sup> The resentment, in fact, made the Act something of a rhetorical gesture: The naturalization provisions were “suspendit and . . . of na strength force nor effect heireftir Ay and quhill and unto the speciall tyme that the Estaittis of England be thair Acts and statutis in Parliament decerne grant and allow the same.”<sup>248</sup>

The English Parliament, of course, did not enact a naturalization bill; instead, the matter was determined by the judges in *Calvin’s Case*. Little is known of the effect of the Scottish naturalization statute after the decision in *Calvin’s Case*. Had the Scottish courts instead determined the status of English subjects by judicial decree, the juxtaposition with *Calvin’s Case* would have provided an unparalleled opportunity for comparative legal history on the law of citizenship in the two kingdoms. In any event, the fact that the English Parliament failed to enact any statute naturalizing the Scots permitted the English judges to decide the matter, thus ushering natural law into what would later become the rule of the *jus soli*.

Chancellor Ellesmere, in his report of the case, best explained the nature of allegiance that made the Scottish *postnati* subjects together with the English:

This bond of allegiance, whereof we dispute, is *vinculum fidei*; it bindeth the soul and conscience of every subject severally and respectively, to be faithful and obedient to the king; and as a soul or conscience cannot be framed by policy; so faith and allegiance cannot be framed by policy, nor put into a politic body. An oath must be sworn by a natural body; homage and fealty must be done by a natural body, a politic body cannot do it. . . . As the

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245. See *id.* at 382.

246. See GALLOWAY, *supra* note 29, at 129.

247. See *id.* at 119, 129.

248. This provision from the “Act Anent the Unioun of Scotland and England” passed by the Scots Parliament on August 11, 1607, is quoted in GALLOWAY, *supra* note 29, at 129.

King nor his heart cannot be divided, for he is one entire King over all his subjects, in whichsoever of his kingdoms and dominions they were born, so he must not be served or obeyed by halves; he must have entire and perfect obedience of his subjects . . . . [A]nd he, that is born an entire and perfect subject ought by reason and law to have all the freedoms, privileges, and benefits pertaining to his birthright in all the King's dominions . . . .<sup>249</sup>

Coke's assertion that the determining factor in *Calvin's Case* was "a union of ligeance *and obedience* of the subjects of both kingdoms, due by the law of nature to their Sovereign"<sup>250</sup> should not be read to support Bacon's claim that the sovereign was not subject to municipal laws,<sup>251</sup> even though allegiance was not dependent upon municipal law. And though Coke also said that the reciprocal obligations of subject and sovereign are not "tied to municipal laws,"<sup>252</sup> if Coke meant that there was no legal limit upon a King's actions, this would be an astonishing outcome, given that in coming years Coke would champion the parliamentary cause against royal prerogative, highly irritating Bacon in the process.

At the time of *Calvin's Case*, though, the King's prerogative was an issue of concern to Coke and some members of the English Parliament. We know from other sources that Coke clearly supported a constitutional limit to the King's prerogative, although he accepted James's basic theory of government.<sup>253</sup> This larger story is a complicated topic, with an even more complicated historiography. In 1604 Parliament refused James's request to change his title from King of England to King of Great Britain<sup>254</sup> and rejected James's goal of a union of laws and institutions of the two kingdoms. Parliament thereby expressed its fear that union of the two kingdoms was part of a larger plan to destroy English law and subjugate the English Par-

249. 2 STATE TRIALS, *supra* note 11, at 691.

250. *Calvin v. Smith*, 77 Eng. Rep. 377, 394 (K.B. 1608) (emphasis added).

251. See 7 WORKS OF FRANCIS BACON, *supra* note 37, at 643-46.

252. 77 Eng. Rep. at 393.

253. See Berman, *supra* note 94, at 1673-78. See generally CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1956); STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMON LAW," 1621-1628 (1982).

254. Had the new style "king of Great Britain" taken effect by statute, some judges contended that the result would be "an utter extinction of all the laws not in force." See JACOBAN UNION, *supra* note 129, at xxii. That argument reflected the view of many in Parliament that the change in title by itself would abrogate both Scottish and English law and create a union between the two kingdoms. *Id.* at xxi, xxxii.



liament.<sup>255</sup> Coke was surely aware of this ambivalence as he wrote his opinion in *Calvin's Case*.

Coke's limiting principle in *Calvin's Case* appears to have been the reciprocal nature of the relationship placed on subject and sovereign. In return for the subject's loyalty, the sovereign owed "protection and government due by the law of nature."<sup>256</sup> Although Coke did not elaborate what the law of nature might require of the King concerning protection and government of his subjects, an avenue of restraint upon royal prerogative was clearly present. Coke could have chosen the theory of the King's two bodies as argued in *Calvin's Case* as a principle limiting royal prerogative. That he instead insisted that the King had a political body only for a few specific purposes,<sup>257</sup> and chose to place the King under the law of nature (a position that ultimately lead to Coke's dismissal as chief justice in 1616), perhaps reveals the continuing hazard of adopting any stance suggesting treason. Despite this fundamental difference between Bacon's proposals and Coke's resolution of *Calvin's Case*, both reached outside of English precedent in order to affirm Robert Calvin's claim that he was a natural subject of the King of England.

In England, the immediate effect of *Calvin's Case* was minimal. The decision meant that an entire generation would pass before the effects would be felt. In 1603 few *postnati* were old enough to pose any immediate threat of wholesale incursions into English patronage. Parliamentary compilations for the period immediately following *Calvin's Case* record occasional acts of denization of Scottish *antenati*, but the numbers are not overwhelming.<sup>258</sup> *Calvin's Case* itself appears to have generated little comment in England. If general acceptance is the "age-old sanction of law,"<sup>259</sup> then the relative lack of criticism in the two decades after 1608 attests to its strength. A speech in Parliament by Sir Robert Phelps, in 1628, is apparently one of the

255. A summary of the background of the Anglo-Scottish union is provided in Liam Seamus O'Melinn, Note, *The American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 COLUM. L. REV. 104, 116-20 (1995).

256. See *Calvin v. Smith*, 77 Eng. Rep. 377, 394 (K.B. 1608).

257. See *id.* at 391.

258. See, e.g., 11 CALENDAR OF STATE PAPERS AND MANUSCRIPTS, RELATING TO ENGLISH AFFAIRS 451 (Horatio F. Brown ed., 1905); CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF JAMES I, 1603-1610, at 68, 81, 83, 220, 398, 401, 415, 430, 532 (Mary Anne Everett Green ed., London, Longman, Brown 1857); CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF JAMES I, 1611-1618, at 84, 110, 179, 194, 210, 250, 271, 292, 293, 407, 449, 451, 551, 557, 593 (Mary Anne Everett Green ed., London, Longman, Brown 1858); 2 COMMONS DEBATES, *supra* note 110, at 528, 533, 535; 3 COMMONS DEBATES, *supra* note 110, at 6, 11, 349, 350; 5 COMMONS DEBATES, *supra* note 110, at 204, 214, 281, 288, 290, 291, 298, 300, 303, 308; 6 COMMONS DEBATES, *supra* note 110, at 70, 74, 180.

259. See John M. Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 348 (1918).

few recorded instances of public criticism of the decision. Phelps considered *Calvin's Case* to be the first of several court decisions "all exceeding one another in prejudice."<sup>260</sup> Of *Calvin's Case*, he said, "I do not complain of it but only mention it"<sup>261</sup> in a diatribe against "foreign dangers" and James's perceived increasing propensity to "scoff at Parliaments, at laws, at all."<sup>262</sup>

## V. CONTINENTAL LEGAL THOUGHT AND THE *JUS FEUDALE*

### A. *The Acquisition of Citizenship at Birth in France and the Italian Cities*

Was there any possibility for the judges of England in 1608 to draw directly from continental examples in their consideration of the status of the *postnati*? At the time of *Calvin's Case*, there were perhaps as many as one hundred civil lawyers in England who had studied the *jus gentium*, or the law of nations, at Oxford, Cambridge, or abroad. These professionals were a source of contemporary knowledge of international law and practice.<sup>263</sup> Because of their knowledge and experience with questions of international law, civilians were often used in diplomatic service and as advisors to the Privy Council on treaties and other issues concerning international relations.<sup>264</sup> They were, in fact, consulted on the status of James's Scottish subjects in England in the Commons debates preceding *Calvin's Case*. The evidence suggests that some participants in the political debates in England over the status of James's Scottish subjects were both interested in, and at least vaguely informed about, naturalization practices in the "civil law" as well as in other kingdoms and territories.<sup>265</sup> A brief consideration of some naturalization practices on the continent is therefore instructive to consider the extent to which English jurists in 1608 could borrow from other legal systems.<sup>266</sup>

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260. See 2 COMMONS DEBATES, *supra* note 110, at 63.

261. See *id.*

262. See *id.* at 61.

263. See LEVACK, *supra* note 35, at 16-24.

264. See *id.* at 26-27.

265. See 2 STATE TRIALS, *supra* note 11, at 565.

266. For European naturalization practices generally, see J.M. BARBALET, *CITIZENSHIP* (1988); BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650* (1982); CHARLOTTE C. WELLS, *LAW AND CITIZENSHIP IN EARLY MODERN FRANCE* (1995); William M. Bowsky, *Medieval Citizenship: The Individual and the State in the Commune of Siena, 1287-1355*, 4 *STUD. IN MEDIEVAL AND RENAISSANCE HIST.* 195 (1967); Joseph Canning, *A Fourteenth-Century Contribution to the Theory of Citizenship: Political Man and the Problem of Created Citizenship in the Thought of Baldus de Ubaldis*, in *AUTHORITY AND POWER: STUDIES IN MEDIEVAL LAW AND GOVERNMENT PRESENTED TO WALTER ULLMANN ON HIS SEVENTIETH BIRTHDAY 197* (Brian Tierney ed., 1980); Jeffrey Merrick, *Conscience and*

France and England are usually considered the best examples of the emerging nation-state in the late middle ages and hence the earliest examples for judicial determinations relating to national status. In 1600, citizenship had little meaning as a term designating national status or origin for most European residents outside of France and England. The term "citizen" was significant, if at all, only in the cities. In rural areas, the feudal relationship with a local lord probably was the most significant legal and social status.

While the discontinuities between what we might term "naturalization" practices in France and England in the early modern period are striking, in some respects the legal developments during this period parallel each other. The themes of discontinuity are: (1) The scholastic sources from the Commentators, used by some French jurists to describe acts and court decisions concerning naturalization,<sup>267</sup> seem never to have been a part of English legal discourse on the acquisition of the status of natural-born subject; (2) French jurists (and the earlier Commentators) sometimes used the word "citizen" interchangeably with the word "subject" in legal discourse, with some expression that the relationship was contractual,<sup>268</sup> an idea not as evident in English legal thought; and (3) French jurists (following the Commentators and the practice in the Italian cities) placed more emphasis on the *jus sanguinis* as a theory underlying all rules of naturalization.<sup>269</sup> On the other hand, the themes of continuity include: (1) As in England, the function of legal rules concerning naturalization were formed through questions of inheritance and land-holding; (2) an emerging concept of the *jus soli* in France contemporary with *Calvin's Case* broadened the scholastic emphasis on the *jus sanguinis*,<sup>270</sup> and (3) at least in the writings of Jean Bodin, a parallel idea that allegiance was a natural, irrevocable duty by native-born persons, creating a vertical bond between prince and subject individually rather than a horizontal bond between citizens as a whole.<sup>271</sup>

French and Italian jurists in the fifteenth century frequently considered questions of status acquired at birth according to a model of citizenship developed by the Commentators. The city-states of Italy in the twelfth and thirteenth centuries gave rise to jurists who had

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*Citizenship in Eighteenth-Century France*, 20 EIGHTEENTH CENTURY STUD. 48 (1987); Peter Riesenber, *Citizenship and Equality in Late Medieval Italy*, 15 STUDIA GRATIANA 424 (1972).

267. See WELLS, *supra* note 266, at 49.

268. See *id.* at 88, 92, 100; RIESENBERG, *supra* note 79, at 208-09.

269. See WELLS, *supra* note 266, at 36-37, *passim*.

270. See *id.* at 36.

271. See *id.* at 58-60; see also *infra* text accompanying notes 330-33.

only recently rediscovered the Roman law texts compiled under Justinian, which they systematized into the *Corpus Juris Civilis*. The Commentators, who followed later, devoted themselves to the *Corpus Juris* to apply that body of learning to then-contemporary legal issues within the city-state. Bartolus<sup>272</sup> was among the first to consider the Roman law of acquisition of citizenship, the *civilitas civitatis*. Persons became citizens either by birth or by statutory process. Under the formulation articulated by Bartolus, and apparently followed in the Italian cities of the thirteenth and fourteenth centuries, a citizen by birth—a *civis ab origine*—was one who had been born within the territory of the state *and* to at least one parent who was already a citizen of the state.<sup>273</sup> French jurists and courts in the sixteenth century seem to apply opinions and ideas from the *Corpus Juris Civilis* of the Commentators, especially rules establishing citizenship according to the *jus sanguinis*, to a much greater extent than can be discerned from the arguments in the English Parliament and in *Calvin's Case*. French jurists, in fact, made far greater efforts to link French practices with ancient Greece and Rome than with earlier practice in France or even contemporary Italian practices.<sup>274</sup>

The continuities and discontinuities with English legal practices aside, legal developments in France do not seem to have provided any direct precedent or examples to resolve *Calvin's Case*. In the decades prior to *Calvin's Case*, French courts had no occasion to consider wholesale naturalization of a separate kingdom, as in the case of the *postnati* in England. Instead, incorporation of separate kingdoms had occurred by conquest such as after the Italian wars, or by royal act or legislation.<sup>275</sup> Interestingly, because of political alliances during the sixteenth century, Scots enjoyed many privileges in France, though they appear never to have been considered as a group to be the equivalent of natural-born French subjects.<sup>276</sup>

France, though often viewed to have employed a rule of the *jus soli* in the period contemporary with *Calvin's Case*,<sup>277</sup> in reality employed a combination of both the *jus soli* and the *jus sanguinis*

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272. Bartolus de Saxoferrato, a 14th-century Italian Commentator on the Digest, is widely viewed as the first scholar of the Civil Law to write systematically on international law. See BARTOLUS ON THE CONFLICT OF LAWS 9-11, 14-15 (Joseph H. Beale trans., 1979).

273. See WELLS, *supra* note 266, at 5.

274. See *id.* at 42, 49.

275. See *id.* at 32.

276. See *id.* at 49.

277. See, e.g., H.J. Randall, *Nationality and Naturalization: A Study in the Relativity of Law*, 40 LAW Q. REV. 18, 25 (1924) ("Most striking in this connection is the development of the law of France, because its basis was deliberately changed from the *jus soli* to the *jus sanguinis* by the Code Napoleon.").

similar to Italian definitions of natural citizenship.<sup>278</sup> Prior to the sixteenth century, the children of foreign parents were unable to inherit land in France even if they had been born within the kingdom of France.<sup>279</sup> A growing tendency to emphasize the *jus soli* can be discerned in the sixteenth century, but French jurists simultaneously developed the view that citizenship depended, to some degree, upon intent of the individual to reside in France, and they also linked citizenship with membership in the corporation that embodied the state.<sup>280</sup>

### *B. Excommunication and Religious Oaths of Allegiance*

Yet another group of legal scholars at work in Europe around the time of *Calvin's Case* possessed a developed law of hierarchical, governing relationship—the Canonists. The extent of their contribution to rules determining the acquisition of citizenship status has not been considered in the detail that it deserves. Ecclesiastical courts in England as well as France dealt with issues related to domicile and status in its family law jurisdiction (including disposition of property), the status of aliens, excommunicants,<sup>281</sup> sectarians, and others. Thus, a thorough study of ecclesiastical courts and the laws they applied could well produce evidence of a contribution by canon lawyers to the development of legal theories determining national status. Excommunication, in fact, provides a strikingly close analogy to the law of subjects and aliens developed in the early modern period. Excommunication in the middle ages, in England and on the continent, did not entail banishment or physical exclusion from a territory, but rather was a type of public ostracism within the community, separating an individual from some benefits of community membership to encourage repentance and return to the spiritual fold.<sup>282</sup> The line between political and spiritual community often blurred. Canon law in the medieval period, for example, called for the suspension of feudal ties owing to an excommunicant during the period of excommunication.<sup>283</sup> Furthermore, excommunicants could not sue in civil litigation or accuse in criminal trials, excommunicants' rights as defendants were curtailed, and excommunicants could not enforce

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278. See WELLS, *supra* note 266, at 34.

279. See *id.*

280. See *id.* at 49.

281. See Richard Helmholz, *Excommunication in Twelfth-Century England*, 11 J.L. & RELIGION 235 (1995).

282. See generally DONALD LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND* (1968); ELISABETH VODOLA, *EXCOMMUNICATION IN THE MIDDLE AGES* (1986).

283. See VODOLA, *supra* note 282, at 67.

contracts. Secular courts were held by canon law to enforce the withdrawal from the community.<sup>284</sup> English royal courts frequently recognized the legal disabilities of excommunicants from the twelfth through the fifteenth centuries.<sup>285</sup> In these respects, excommunicants and aliens suffered similar legal disabilities in the royal courts of England, at least until the period of the Reformation.

As late as 1797, legal authority in England apparently still supported the rule that one who had been excommunicated by spiritual authority suffered legal disabilities equivalent to those of aliens: “[B]y the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him so long as he shall remain excommunicate.”<sup>286</sup> Furthermore, neither excommunication nor alien status was necessarily permanent. Excommunicants and aliens shared in common the need for formal admittance into the political community. To restore civil rights to an excommunicant or an alien, some formal adjudication was required, either by Church authorities in the case of excommunication, or by Parliament or the crown in the case of aliens.

After the Reformation, oaths of allegiance were increasingly used as religious tests, and these oaths probably replaced excommunication as the primary form of political control of religious beliefs. It is therefore instructive to consider, however briefly, the relationship of law, religion, and citizenship through the oaths of allegiance required of adult subjects throughout the early modern period in England.<sup>287</sup> In 1605, James promulgated a new oath of allegiance acknowledging James as “lawful and rightful King” and promising to defend him in case of attack.<sup>288</sup> Critically, the oath also contained the following: “I do from my heart abhor, detest, and adjure, as impious and heretical, this damnable doctrine and position, that princes which be excommunicated or deposed by the Pope may be deposed or murdered by their subjects or any other whatsoever.”<sup>289</sup> Clearly directed at Catholics, the oath demanded that James’s subjects deny the Pope’s

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284. *See id.* at 70-71.

285. *See id.* at 180 (“In the [English] royal courts the exception of excommunication was endorsed by jurists and faithfully upheld by judges and advocates. . . . Forty cases . . . document its use from 1196 to 1411.”).

286. *See* 2 RICHARD BURN, ECCLESIASTICAL LAW 259 (London, A. Strahan, 6th ed. 1797). Burn cited Coke for the proposition generally that “[t]he Temporal Law and the Ecclesiastical Law are so coupled together, that the one cannot subsist without the other.” *Id.* at title page.

287. In 1559, for example, Elizabeth required an oath of allegiance of her Catholic subjects. The Elizabethan oath acknowledged the Queen as supreme governor and denied the authority of any outside person or state in matters “ecclesiastical or spiritual within this realm.” *See* WORKS OF JAMES I, *supra* note 31, at lii.

288. *See id.* at lii-liii.

289. *See id.*

authority in secular matters. The oath was required of all non-noble persons eighteen years of age and older after 1610.<sup>290</sup>

How did James view the relationship, if any, between the oath of allegiance taken as an adult, and the natural allegiance owing at birth? In the 1607 tract *An Apologie for the Oath of Allegiance*, James gave the following explanation:

[A] forme of Oath was framed to be taken by my Subjects, whereby they should make a clear profession of their resolution, faithfully to persist in their obedience unto me, according to their natural allegiance; To the end that I might hereby make a separation, not only between all my good Subjects in general, and unfaithful Traitors, that intended to withdraw themselves from my obedience: but specially to make a separation between so many of my Subjects, who although they were otherwise Popishly affected, yet retained in their hearts the print of their natural duty to their sovereign: and those who . . . could not contain themselves within the bounds of their natural allegiance, but thought diversity of religion a safe pretext for all kinds of treasons and rebellions against their sovereign.<sup>291</sup>

“Natural allegiance,” of course, corresponds with the allegiance owing at birth in *Calvin’s Case*. All subjects owed allegiance to the crown from birth. There is no obvious inconsistency in requiring a separate oath of allegiance as an adult, because oaths of allegiance gave content and definition to the general allegiance owing at birth. Oaths could serve several purposes: (1) as confirmation of loyalty, similar to practices in some Christian faiths in which infant baptism is followed by confirmation upon reaching adulthood; (2) to ferret out religious dissent; or (3) to identify treason or treasonous beliefs. In the late sixteenth and early seventeenth centuries, in particular, there is clearly a religious test motivating oaths of allegiance to the English monarch. The substance of the oath, according to James (disingenuously), was that the oath was “merely civil.”<sup>292</sup>

Catholics were expressly forbidden to take this oath by Paul V in September 1606, pronouncements that provoked James’s *Apologie*.<sup>293</sup> The result, according to James, was that the Pope’s admonition meant that Catholics “must now renounce and forswear their profession of obedience already sworn, and so must as it were at the third instance, foreswear [sic] their former two Oaths, first closely sworn, *by their birth in their natural Allegiance*; and next,

290. *See id.*

291. Quoted in *id.* at 71-72.

292. *Id.* at 86.

293. JAMES HENDERSON BURNS, *THE TRUE LAW OF KINGSHIP* 267 (1996).

clearly confirmed by this Oath, which doeth nothing but express the same.”<sup>294</sup>

All of this suggests that we are only beginning to explore the intersection between law and religion in the development of concepts of citizenship. Coke, in fact, adopted Protestant teachings on the status of Jews (derived from thirteenth-century canon law doctrines on infidels) as part of natural law in *Calvin's Case*.<sup>295</sup> The early canonists developed a tradition of rights discourse,<sup>296</sup> and its relationship to the development of Western concepts of citizenship only recently has begun to be explored.<sup>297</sup>

Although it is difficult to conclude that English lawyers in the early seventeenth century could look to any specific continental legal practice for a resolution of the problem of the *postnati*, *Calvin's Case* was not the first consideration of that issue in writing of the time. Two other legal thinkers, whose works were readily accessible to Bacon and Coke, had earlier arrived at very similar conclusions concerning the questions raised by *Calvin's Case*. One, Sir Thomas Craig (1538-1608), a Scottish lawyer, wrote about the problem of the *postnati* while serving on James's commission of union. Another, Jean Bodin (1529-1596), the French civil lawyer and political thinker, in his 1576 work *Les Six Livres de la Republique* (first translated into English in an edition published in 1606),<sup>298</sup> proposed that the mutual obligations between subject and King inherent in sovereignty brought about a commonality of citizenship between communities with differing laws.

### C. Thomas Craig on the Feudal Law

In 1605, Craig addressed the question of naturalization of James's Scottish subjects in his *De Unione Regnorum Britanniae*.<sup>299</sup> Craig's purpose in writing the *De Unione* was to advocate a “perfect” union—a “single powerful monarchy” to avoid “the catastrophes of

294. See *id.* at 81-82 (emphasis added).

295. Coke wrote, for example, that “a perpetual enemy . . . cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui inimici*, perpetual enemies. . . .” *Calvin v. Smith*, 77 Eng. Rep. 377, 397 (K.B. 1608). Coke thus stated the law in England to be that infidels were a special category of aliens and could never become subjects of a Christian King. Coke also noted the differing effect of the conquest of a kingdom of an infidel and the conquest of a kingdom of a Christian King with respect to the continued validity of local laws in the conquered kingdom. See *id.* at 397-98.

296. See Charles J. Reid Jr., *Thirteenth-Century Canon Law and Rights: The Word Ius and Its Range of Subjective Meanings*, 30 *STUDIA CANONICA* 295 (1996).

297. See RIESENBERG, *supra* note 79, at 203-52.

298. See BODIN, *supra* note 10.

299. See CRAIG, *DE UNIONE* 60, *supra* note 9.



the past [that] have so vexed the island."<sup>300</sup> An essential component of this perfect union was the "sharing of offices, dignities, and rights" between the King's Scottish and English subjects. Craig concurred with English opponents of a "perfect" union that this sharing would not extend to those deemed "aliens" by English law. Thus, the issue of naturalization of James's Scottish subjects received considerable attention in Craig's *De Unione*.<sup>301</sup>

The core of Craig's arguments on the question of status at birth came from his conception of the international character of the *jus feudale*.<sup>302</sup> The *jus feudale*, or "feudal law," was taught as part of the *jus commune* in the universities of Europe from the eleventh to sixteenth centuries. Feudal law was a body of secular law governing primarily the system of rights and obligations associated with lord-vassal relationships, landholding and tenure. It had begun as manorial custom, but came to be viewed as a system of customary law with many commonalities in its practices throughout Europe.<sup>303</sup> Craig contended that English common law was Norman and feudal in origin. Similarly, the law of Scotland was essentially feudal, and Craig urged that James's governmental authority was based upon the personal, reciprocal dependence of all the King's subjects.<sup>304</sup> This issue of union had earlier prompted Craig to write his *Jus Feudale* in 1603.<sup>305</sup> In that work, Craig challenged the received view of the origins of the common law in England. Craig traced English legal practices to a medieval feudal code already in place in Scotland.<sup>306</sup>

Craig's determination that all Scots were natural subjects in England (and vice versa, for English subjects in Scotland)<sup>307</sup> came

300. *Id.* at 227.

301. For example, Craig titled an entire chapter, "Whether a sharing of office, dignities, and rights be needful in the projected Union." *See id.* at 329-53. Various writers of the literature on union also addressed this question, but Craig's work was by far the most extensive. Numerous political tracts concerning the status of Scots in England show that the issue was widely debated in the period from the ascension of James to the English throne to the time of *Calvin's Case*. John Russell thought all Scots should be naturalized by royal prerogative. John Russell, *A Treatise of the Happy and Blessed Union*, in *JACOBEAN UNION*, *supra* note 129, at 75, 127. John Doddridge simply endorsed the position taken by the Commissioners in 1604—mutual naturalization of the *postnati* on the basis of allegiance at birth to the same sovereign. Doddridge, *supra* note 153, at 147. Sir Henry Spelman likewise thought the union of the crowns in 1603 naturalized the *postnati*. Henry Spelman, *Of the Union*, in *JACOBEAN UNION*, *supra* note 129, at 160, 172.

302. On the *jus feudale* generally, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 295-315 (1983).

303. *See generally* Berman & Reid, *supra* note 147, at 5.

304. *See* POCOCK, *supra* note 96, at 84-87.

305. *See* 1 & 2 THOMAS CRAIG, *THE JUS FEUDALE* (James Clyde trans., 1934) [hereinafter CRAIG, *JUS FEUDALE*]; ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 56 (1981).

306. *See* *JACOBEAN UNION*, *supra* note 129, at xxxvii.

307. CRAIG, *DE UNIONE*, *supra* note 9, at 271, 276, 311-12, 339.

from two related propositions: (1) that the common feudal origin of the laws of England and Scotland resulted in substantial similarities between the two legal systems; and (2) that because Englishmen and Scots were common subjects of James, "vassals of the same prince,"<sup>308</sup> there should be no disparate treatment of Scots under the laws of England.

Craig defined aliens under the *jus feudale* as persons born out of the jurisdiction of the "liege prince," although a child born in another sovereign's territory was not an alien "so long as the parents are [regarded] as having died in loyalty to the king."<sup>309</sup> In many countries aliens were denied the right of succession because such persons "cannot be the liege man of two superiors."<sup>310</sup> Thus, for Craig, feudal principles of allegiance clearly determined the issue:

If we look at the subject in the light of feudal law, the fact that a man cannot be the vassal of more than one liege lord strongly supports our case; for if men are the vassals of the superior in whose territory their possessions lie, they must share the privileges of their co-vassals, a legal right which is obvious. . . . For the English and ourselves are now the subjects of the same King and superior. As therefore the legal grounds are clear which forbid a foreigner to possess property in another prince's realm, namely, lest it should be employed to the hurt of its own superior, so also it is patent, that when the eventualities which called for the rule are no longer able to arise, the rule itself must cease to be operative.<sup>311</sup>

Accordingly, any English statutes purporting to exclude Scots from offices or succession because of alien status were no longer operative:

If any one supposes that any statute exists depriving Scotsmen of the power to enjoy the same rights and privileges as the English, let him indicate the statute and the Parliament by which it was passed. And even if such a statute could be found, it can no longer be proceeded on, as the lawyers say, seeing that we then were enemies and now are fellow subjects of the same king. What is permitted to one subject cannot be denied to the other, and we Scotsmen demand nothing more than that we should be treated as fellow subjects.<sup>312</sup>

Thus, in the absence of a statute enacted specifically to establish the legal status of the *postnati*, Craig thought that the law of England

308. *Id.* at 468.

309. CRAIG, *JUS FEUDALE*, *supra* note 305, at 774.

310. *Id.* at 771-74.

311. CRAIG, *DE UNIONE*, *supra* note 9, at 339-40.

312. *Id.* at 335-36.

would consider them natural subjects, just as the *jus feudale* would conclude. The source of the rule in the *jus feudale* applied equally in England and Scotland, according to Craig, because of the common origins of both legal systems.

Coke, on the other hand, saw only a continuous and insular legal practice of English common law with no parallel in Europe. In the generation immediately following Coke, John Selden, an English legal thinker of the mid-seventeenth century, would recognize that the Norman Conquest brought substantial changes to English law, including the introduction of feudal law.<sup>313</sup> His views echoed Craig's earlier writings in the *Jus Feudale*. A century later, Blackstone would describe the feudal origins of the "allegiance" due from a subject:

With us in England, it becoming a settled principle of tenure that all lands in the kingdom are holden of the King as sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the King alone. By an easy analogy the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial.<sup>314</sup>

One remarkable aspect of the feudal origins of the allegiance due from a subject is that, despite the commonality of feudal law across Europe, England would derive from this allegiance a judicial rule of the *jus soli* by historical accident.

#### *D. Jean Bodin on Mutual Citizenship*

Another source of political and legal writing about citizenship was the French civil lawyer and political thinker Jean Bodin. Undoubtedly Coke was familiar with Bodin; Bodin's political works were well-known in early seventeenth-century England. One historian claimed that in 1600 no other political writer was cited in England "more often or more favorably" than Bodin.<sup>315</sup> Another historian cited a dozen treatises from the Elizabethan and Stuart periods making use of Bodin's formulation of the idea of sovereignty.<sup>316</sup> James himself, in *The Trew Law of Free Monarchies*, written in 1598,<sup>317</sup> derived many of his ideas from Bodin, stressing the obligation of a monarch

313. See Berman, *supra* note 94, at 1696. See also POCOCK, *supra* note 96.

314. 1 WILLIAM BLACKSTONE, COMMENTARIES \*367.

315. Kenneth McRae, in BODIN *supra* note 10, at A-63 (citation omitted).

316. George Mosse, *The Influence of Jean Bodin's Republique on English Political Thought*, 5 *MEDIAEVIA ET HUMANISTICA* 73 (1948).

317. See WORKS OF JAMES I, *supra* note 31, at 53.

otherwise absolute in his power to rule by law.<sup>318</sup> Bodin's *Republique* became known in England soon after the first French edition was published in 1576.<sup>319</sup> Richard Knolles began the translation for the first English edition in 1603, in the immediate aftermath of James's accession to the English throne, and several years after Bodin's death.<sup>320</sup>

Though Bodin used the Latin *civis* for citizen, a term not used in English legal discourse at the time of *Calvin's Case*, Bodin often used the term interchangeably with "subject" in the *Republique*. In fact, the distinctions between Bodin's "citizen" and the English "subject" were few. Bodin clearly meant for the term "citizen" to represent a feudal relationship between sovereign and subject, according to his definition for the status of "a Citizen, which is no other in proper terms than a free subject holding of the soveraigntie of another man."<sup>321</sup> A group of citizens holding of one sovereign constituted a "great kingdom," which "is no other thing than a great Commonwealth, under the government of one chief sovereign."<sup>322</sup> Further, "[i]t is then the acknowledgment and obedience of the free subject towards his sovereign prince, and the tuition, justice, and defense of the prince towards the subject, which maketh the citizen."<sup>323</sup> The status of citizen, then, had feudal overtones, representing a mutual obligation between a superior and an inferior, a liege lord and a subject.

In chapters six and seven of the first book of the *Republique*, Bodin described the attributes and obligations of citizenship. Similar to the practice in England, citizens were either "natural" or "naturalized." The natural citizen was the "free subject who is a native of the commonwealth, in that both, or one or other of his parents, was born there. . . . The naturalized citizen is one who makes a voluntary submission to the sovereign authority of another, and is accepted as his subject."<sup>324</sup> The natural citizen, or subject, was born into submission:

318. See Berman, *supra* note 94, at 1667-73.

319. See WORKS OF JAMES I, *supra* note 31, at A-62. See generally GEORGE MOSSE, STRUGGLE FOR SOVEREIGNTY IN ENGLAND (1950).

320. See Kenneth McRae, in BODIN, *supra* note 10, at A58-59.

321. *Id.* at 47.

322. *Id.* at 10.

323. *Id.* at 64.

324. *Id.* at 49. This translation is from the 1955 M.J. Tooley edition. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 19-20 (M.J. Tooley trans. 1955) [hereinafter BODIN, Tooley Edition]. Bodin, in fact, criticized Aristotle's definition of citizenship, based in a notion of the "popular state," preferring instead a definition of citizen as one who "enjoys the rights and privileges of a city." *Id.* at 53. English legal discourse on the acquisition of status at the time of *Calvin's Case*, by contrast, is concerned less with "rights and privileges" than it is with the effect of that status on the ability to hold and inherit property.

Privileges make not a citizen, but the mutual obligation of the sovereign to the subject, to whom, for the faith and obedience he receives, owes justice, counsel, aid, and protection, which is not due strangers. . . . [T]he true citizen either is born [into submission] or else submits himself to the rule and sovereign power of another man.<sup>325</sup>

Unlike Craig's *De Unione*, Bodin's *Republique* did not offer a general rule for determining who was a natural-born subject. The only mention of acquisition of citizenship by birth suggests that a rule Bodin thought similar to that of the Romans should be followed: One became a "natural citizen" if born to at least one parent who was a citizen, irrespective of place of birth.<sup>326</sup> Otherwise, one must become "naturalized" by some form of municipal law or act of a sovereign if one were born within the sovereign's territory but of alien parents. This is Bodin's characterization of the rule of the "ancients." Bodin, in fact, appears to reject the rule of the *jus soli*: "For the place maketh not the child of a stranger (man or woman) to be a citizen: and he that was born in Africk of two Roman citizens is no less a citizen, than if he had been born in Rome."<sup>327</sup>

On the other hand, Bodin would recognize a rule of the *jus soli* for a child born in another country of a French parent, if the parent had "expressly renounced the place of his birth".<sup>328</sup>

As whether a Spaniard born and brought up in Spain, and yet the son of a French man (which French man had always dwelt in Spain, and expressly renounced the place of his birth) being come into France there to make his perpetual residence, ought to enjoy the privileges of a citizen, without letters of his naturalizing? Nevertheless I am of opinion that he is a stranger, for the reasons before alleged, and that he ought not to enjoy the privilege of a citizen, saving unto the prince to reform it if it shall so seem good unto him.<sup>329</sup>

Although Bodin's discussion of the acquisition of citizenship by birth was not a primary concern of his *Republique*, Bodin's writings concerning the nature of sovereignty nonetheless resolved the problem of mutual citizenship within a "commonwealth" of diverse laws. Because Bodin defined citizenship as subjection to a sovereign, maintaining that sovereignty by its very existence had a claim to the

325. RIESENBERG, *supra* note 79, at 223 (translating Bodin). See also BODIN, *supra* note 10, at 57, 64-65.

326. See BODIN, *supra* note 10, at 49.

327. *Id.*

328. *Id.* at 63.

329. *Id.*

subject's obedience,<sup>330</sup> Bodin's definition did not require any man-made law of allegiance. Therefore, various groups of subjects with peculiar laws or local customs were related through subjection to a common sovereign:

Wherefore of many citizens, be they naturals, or naturalized, or else slaves enfranchised (which are the three means that the law giveth to become a citizen by) is made a Commonwealth, when they are governed by the puissant sovereignty [the single sovereign power] of one or many rulers: albeit that they differ among themselves in laws, language, customs, religions, and diversity of nations.<sup>331</sup>

For Bodin, the reciprocal obligation of citizen (or subject) and sovereign was grounded in the "laws of God and nature."<sup>332</sup> The problem and resolution in *Calvin's Case* was similar, but without the explicit recognition that, for the *postnati* at least, the two kingdoms of England and Scotland had to some degree become the "commonwealth" Bodin described, while retaining a "diversity of laws, language, customs, [and] religion."<sup>333</sup>

Interestingly, Richard Knolles's preface to the English translation, completed in 1606, provides some insight into Knolles's interest in Bodin:

But to find out a good and reasonable means, whereby such multitudes of people, so far differing in quality, estate, and condition, and so hardly to be governed, might yet into one body politic be in such sort united, as that every one of them should in their degree, together with the common good (as members of one and the self-same natural body) . . . [is] so hard and difficult a matter[.] Yet of this so few have written[.] These six books of Jean Bodin . . . orderly and exactly prosecute all forms and fashions of commonwealths, with the good and evil . . . and many other matters and questions most necessary to be known for the maintenance and preservation of them.<sup>334</sup>

From Knolles's preface, though he did not mention explicitly the issue of the status of Scots in England, one can conclude two things: First, that the regal union of the two kingdoms engendered new political questions concerning the status of subjects of the two kingdoms; and

330. See *id.* at 84-85, 88-89, 92.

331. *Id.* at 49. The parenthetical inserted above is a translation from the 1955 M.J. Tooley edition. See BODIN, Tooley Edition, *supra* note 324, at 19-20.

332. BODIN, *supra* note 10, at 92.

333. *Id.* at 49.

334. Richard Knolles, *Introduction to BODIN*, *supra* note 10, at iv-v.

second, that these political questions may have prompted his translation.

Thus, in 1608, the litigants and judges considering *Calvin's Case* were not working in a vacuum of political and legal thought on the problem of the *postnati*. The municipal law practiced in France, as well as the writings of the commentators of the *Corpus juris civilis*, pointed to the conclusion that naturalization of subjects born outside of a territory must be by charter or by statute. Even English precedent arguably pointed to this conclusion, at least for the *antenati*. On the other hand, the unique contribution of Craig and Bodin was that they also concluded that mutual naturalization could occur apart from charter or statute because of natural law and the obligations of allegiance owed by all of a monarch's subjects. Under the feudal law, allegiance was a prerequisite for holding land in the King's territory.

### *E. A Synthesis*

James's union plans sparked a wide-ranging search for a legal solution to the question of which persons were entitled to the rights and entitlements of English law. Civil lawyers contributed to the substantial literature on the union of the laws of the two kingdoms, and the Commissioners of Union included civilians as well as common lawyers. The opposition faction in the Commons looked to civilians for examples of how other legal systems resolved the question of kingdoms united by descent. One civilian, John Bennet, perhaps inadvertently made a substantial contribution to the strength of the defendants' challenge in *Calvin's Case*. Bennet's maxim was incorporated into the theory of the King's two bodies, making this theory a viable challenge because it now fit the *ad fidem Regis* formulation of the statute *De Natis* and *Cobledike's Case*. Contemporaries claimed that there was no example from civil law to further the resolution of *Calvin's Case*, but the introduction of the maxim *cum duo jura* into the debate about the nature of the King's sovereignty was a powerful concept, and the maxim was accepted with little discussion concerning its source in civil law.

Coke and Bacon turned to higher law to defeat the challenge from the Commons. Bacon maintained that the King's body politic had no place in the resolution of the lawsuit. Coke, on the other hand, did not completely repudiate the defendants' claim that the King's body politic was relevant to the question of who was a subject and who was an alien. The political writings of Craig and Bodin show that other legal thinkers outside of England had previously offered solutions similar to Coke's resolution of the case. The most striking similarity is that, in the absence of a statute enacted specifically to establish the

legal status of the *postnati*, Bacon, Coke, and Craig arrived at the same rule: Place of birth in a territory within the King's dominion made one a natural-born subject in all of the King's lands.

For Craig, the issue was to be determined according to the *jus feudale*—Craig arrived at this rule without reference to the English precedent discussed in *Calvin's Case*.<sup>335</sup> Bacon and Coke, on the other hand, found the basis for determining natural-born status not in a general *jus feudale* predating or underlying English common law but as a matter of natural law. Nonetheless, the results were the same. Contemporaries viewed the *jus feudale* as part of the "civil" law.<sup>336</sup> If Bacon derived any of his arguments concerning the legal status of the *postnati* from Craig's writings, he certainly had an incentive to replace Craig's source of the rule in the "*jus feudale*" with the "law of nature" because of Coke's general resistance to "foreign laws [and] alien precedents."<sup>337</sup> Moreover, Bacon had directly experienced the hostility of common lawyers to his calls for a union of the laws of Scotland and England, a hostility based largely upon the general perception that Scotland had a civil-law system.<sup>338</sup>

Nonetheless, a feudal conception of "ligeance" was at the heart of Bacon's (and later, Coke's) arguments concerning how it was that allegiance to the same sovereign brought about mutual naturalization in Scotland and England. Coke looked to English statutes referring to the monarch as "natural liege lord" for evidence that one's allegiance was due by the law of nature.<sup>339</sup> Craig looked to the mutuality of loyalty and protection resulting from the oath of fealty, as well as to the feudal assumption that one could not give homage to more than one lord, to determine that allegiance to the King as "liege sovereign" was the same in Scotland as in England.<sup>340</sup>

Furthermore, some aspects of Coke's reasoning in *Calvin's Case* appear similar to Bodin's theories of sovereignty contained in the *Republique*. Bodin, even though he most likely would have rejected a rule of the *jus soli*, would probably have reached the same result as Coke: Because the law of nature required a subject's allegiance, and

335. See CRAIG, DE UNIONE, *supra* note 9, at 339.

336. See, e.g., THOMAS RIDLEY, A VIEW OF THE CIVIL AND ECCLESIASTICAL LAW 68 (Oxford, H. Hall for Richard Davis 1607) (classifying *jus feudale* as fourth "tome" of civil law). The situation in which Ridley published his book is described in Daniel Coquillette, *Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676*, 61 B.U. L. REV. 315, 336-40 (1981).

337. See *Calvin v. Smith*, 77 Eng. Rep. 377, 381 (K.B. 1608).

338. See LEVACK, FORMATION, *supra* note 28, at 85-89.

339. 77 Eng. Rep. at 382-83.

340. See CRAIG, DE UNIONE, *supra* note 9, at 335-36, 339-40; CRAIG, JUS FEUDALE, *supra* note 305, at 774.



the law of nature was the same in Scotland and in England, differences in the municipal laws of the two countries were irrelevant to determine citizenship. In particular, Bodin's discussion of the "liege fealty and homage" aspect of sovereignty<sup>341</sup> looks like Coke's natural law—one did not look to customary law for the source of this obligation. For both Bodin and Coke, something beyond the reach of customary or municipal law determined who was a subject. Bodin reached this result even though he defined the "principal point of sovereign majesty, and absolute power, to consist principally in giving laws unto the subjects in general, without their consent."<sup>342</sup> Coke would vehemently disagree with this statement if this meant the King alone had such absolute power.

The second area in which Bodin's *Republique* resonates with Coke's resolution of *Calvin's Case* is Bodin's emphasis on a mutuality of obligation between sovereign and subject. Bodin proposed that divine and natural law imposed certain concrete limitations on sovereigns, much like Coke's formulation of the mutual obligations of allegiance constraining the royal prerogative. For Bodin, because sovereigns were the source of all positive law, sovereignty was not subject to human limitations. Nonetheless, sovereigns were subject to God and the law of nature, though there was no jurisdiction on earth in which to prosecute a sovereign's violation of divine or natural law, because the King was also head of the church in his domain.<sup>343</sup>

Coke, too, emphasized the reciprocal obligations between sovereign and subject, but the sovereign's obligations were vague, undefined, and seemingly fairly limited: "But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects."<sup>344</sup> Although Coke would not agree that James was the exclusive source of law for England, in *Calvin's Case*, Coke did rely on the mutual obligations due by the law of nature as a limiting principle, at least in theory, on the King's exercise of sovereignty. In fact, the notion that the King by the law of nature owed certain duties to his subjects marks a point of divergence between Bacon's position and Coke's resolution of the case. Nonetheless, both Coke and Bodin articulate unified notions of sovereignty that extend beyond feudal relations.<sup>345</sup>

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341. See BODIN, *supra* note 10, at 175.

342. *Id.* at 98.

343. *Id.* at 84-113, 153-74.

344. *Calvin v. Smith*, 77 Eng. Rep. 377, 382 (K.B. 1608).

345. Compare BODIN, *supra* note 10, at 114-15, with Coke's statements in *Calvin's Case*, 77 Eng. Rep. at 388-89, 391.

## VI. EPILOGUE: THE ORIGINS OF U.S. BIRTHRIGHT CITIZENSHIP

We in the United States often take the rule of the *jus soli*, incorporated into our Fourteenth Amendment, for granted. Is that because we have known little of its origin? The most remarkable aspect of *Calvin's Case* is how a politically charged legal question perplexed many of the most important English lawyers of the early seventeenth century. The English justices encountered a hurdle in resolving Robert Calvin's status in line with past precedent. This hurdle was the result of unsettled ideas of sovereignty—a challenge that grew from the larger, unique political situation. Would nineteenth-century jurists in the United States have adopted the rule of *Calvin's Case* but for the historical accident of the union of the Scottish and English crowns in 1603? Coke's doctrine tying allegiance to the natural body of the King was archaic even by the end of the eighteenth century and should never have had even theoretical significance in the former colonies. When one considers *Calvin's Case* in the detail it deserves, it is plain that the importance placed upon territory of birth was not logically, politically, or historically inevitable.

The larger debate of immigration reform has kindled the interest of scholars in the development of territorial birthright citizenship during the early history of the United States.<sup>346</sup> A rule of birthright citizenship to determine legal status has been part of American law for a long time. Until the late nineteenth century in the United States, however, the common law—not a statute or a constitutional provision—was the source of the rule of territorial birthright citizenship. In 1830, the U.S. Supreme Court stated the rule in the following manner: "*Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.*"<sup>347</sup>

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346. The seminal work on the subject to date is JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870* (1978). More recently, contributions have come from T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990); Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667 (1996); Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469 (1993); William Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988); Robert J. Shulman, Comment, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American-Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669 (1995).

347. *Inglis v. Trustees of the Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 164 (1830) (emphasis added). The case considered whether a citizen might expatriate himself without sanction of the

Equating the ancient English term “subjects” with “citizens,” the Court stated unambiguously that, as a matter of common law, acquisition of birthright status by children of aliens was dependent solely upon the circumstance of birth within the territorial boundaries of a government.<sup>348</sup>

For nineteenth-century courts in the United States, *Calvin’s Case* more than any other source of law had settled the rule.<sup>349</sup> *Calvin’s Case* was well known in the early history of the United States because of its inclusion in the standard treatises of the day—*Coke’s Reports*, Blackstone’s *Commentaries*,<sup>350</sup> and later, in the *Commentaries* of James Kent.<sup>351</sup> In 1827, Chancellor Kent stated: “The distinctions [in *Calvin’s Case*], in reference to our revolution, have been frequently the subject of judicial discussion since the establishment of our independence.”<sup>352</sup> The United States Supreme Court considered *Calvin’s Case* on five occasions prior to 1868,<sup>353</sup> but state court uses of *Calvin’s Case* constituted the primary transformation of *Calvin’s Case* from a rule to determine the status of subjects who owed allegiance to a king, to one about citizenship in the American republic.<sup>354</sup>

As a pronouncement of the common law, the determination of U.S. citizenship by birth paralleled and was, indeed, derived directly from

state, in a question of land ownership by a child born in New York prior to 1783 of Irish parents. One author has noted that the case “manifestly had settled nothing, and the great question as to the right of expatriation was unresolved.” Charles Gordon, *The Citizen and the State: The Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 321-22 (1965).

348. See 28 U.S. at 156.

349. See *id.* at 164; U.S. v. Wong Kim Ark, 169 U.S. 649, 656 (1898). See generally KETTNER, *supra* note 29, at 65-105.

350. 1 WILLIAM BLACKSTONE, COMMENTARIES, \*354-63.

351. 2 KENT, *supra* note 49, at 49-52.

352. *Id.* at 49.

353. *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830); *The Venus*, 12 U.S. (14 Cranch) 253 (1814); *Dawson’s Lessee v. Godfrey*, 8 U.S. (8 Cranch) 321 (1808); *Lambert’s Lessee v. Paine*, 7 U.S. 97 (1805); *M’Ilvaine v. Coxe’s Lessee*, 6 U.S. (5 Cranch) 280 (1805). Lower federal courts also referenced *Calvin’s Case*. See, e.g., *United States v. Rhodes*, 27 F. Cas. 785 (C.C. Ky. 1866) (No. 16,151); *Case of Williams*, 29 F. Cas. 1330 (C.C. Conn. 1799) (No. 17,708).

354. See, e.g., *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 20, 24-26 (1838) (“The term ‘citizen,’ as understood in our law, is precisely analogous to the term ‘subject’ in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from the man to the collective body of the people; and he who before was a ‘subject of the king’ is now ‘a citizen of the state.’”); *Gardner v. Ward* (1805), reprinted in *Kilham v. Ward*, 2 Mass. (1 Tyng) 236, 244-45 n.(a) (1806) (“[A] man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term ‘citizenship’.”) (citation omitted).

the treatment of subjects and aliens in the common law of England. At its starting point, citizenship in the United States in 1790 was defined by state common law.<sup>355</sup> Although the first federal statute on naturalization was passed in 1790,<sup>356</sup> it merely supplemented existing state common-law definitions of citizenship. In fact, there was no federal definition of citizenship by birth in the United States until 1868, when for the first time a constitutional definition of citizenship through the Fourteenth Amendment imposed uniformity throughout the states.<sup>357</sup> Even then, the common-law rule articulated in *Calvin's Case* became the basis for the view that the intention of the first section of the Fourteenth Amendment must have been to constitutionalize birthright citizenship.<sup>358</sup> In 1928, a comment in the *Harvard Law Review* stated the present-day rule of birthright citizenship in the United States: "[I]t seems safe to say that the same rule would be applied to children born to aliens temporarily within the country, no matter how short their stay."<sup>359</sup>

The constitutional development of the law of citizenship in the United States has been considered with some frequency, including the

355. The Commonwealth of Virginia, for example, naturalized and enfranchised aliens until the 1840s. In 1844, Congress debated whether the Commonwealth of Virginia could naturalize aliens to create U.S. citizenship for purposes of voting in elections to the U.S. Congress. A "large majority" of the House committee were of the following opinion:

[A]s the power of the Federal Government "to enact uniform laws upon the subject of naturalization" is, when exercised, exclusive, the statutes of Virginia prescribing an oath of fidelity of the Commonwealth, and declaring the mode in which persons shall become citizens of Virginia, are merely void; and that such persons, although treated by the laws of Virginia as citizens, cannot exercise the right of suffrage for members of the House of Representatives . . . .

H.R. REP. NO. 28-520, at 3 (1844).

356. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 104 (repealed 1795). U.S. CONST. art. I, § 8, cl. 4 provides that Congress shall have power "[t]o establish an uniform Rule of Naturalization." Most scholars agree that the power granted to Congress by this section was limited to defining under what circumstances birth outside of the territorial United States would result in the rights of a natural-born citizen. See FREDERICK VAN DYNE, A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES 6 (1907) (noting that naturalization of foreigners was power expressly reserved to federal government); Note, *Constitutional Limitations on the Power of Congress to Confer Citizenship by Naturalization*, 50 IOWA L. REV. 1093, 1094 (1965) (noting that art. I, § 8 arose out of concern for lack of uniformity between state laws regarding who was alien and who was naturalized citizen).

357. Citizenship acquired by birth in the United States is granted not by Congress but by the 14th Amendment. See *Bell v. Maryland*, 378 U.S. 226, 249 (1964) ("The Fourteenth Amendment . . . makes every person who is born here a citizen.") (Douglas, J., concurring); see also Michael T. Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1044 (1976) ("Congressional power over citizenship is limited by the naturalization clause and the first sentence of the fourteenth amendment."); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility*, 97 YALE L.J. 881, 892 n.65 (1988) ("Citizenship acquired by birth in the United States is granted by the 14th Amendment itself, not by Congress.").

358. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *In re Look Tin Sing*, 21 F. 905 (9th Cir. 1884).

359. Comment, *Citizenship by Birth*, 41 HARV. L. REV. 643, 644 (1928).

*Dred Scott* decision and its aftermath.<sup>360</sup> What is less well known are the origins of the earlier, unique form of citizenship by birth developed in the common law. The few historians who have pursued these origins have rightly emphasized the precedential value of Coke's report of *Calvin's Case* in the American colonies,<sup>361</sup> as well as its place in constitutional development during the Stuart period in England.<sup>362</sup> The foundations of *Calvin's Case*, however, have not previously received adequate attention. Scholars have not looked much behind the reports of *Calvin's Case* to consider the sources of the rule announced by the judges in 1608. This Article may begin to fill this gap.

Courts in the early United States adopted tenets of *Calvin's Case* for quite complex reasons, but primarily the appeal of the rule of the *jus soli* articulated in *Calvin's Case* was two-fold. The most important factor in the transfer of the doctrine of territorial birthright citizenship from the Old World to the new was that the early Republic did not create a federal definition of citizenship, leaving the determination of citizenship to individual states. The federal constitution distinguished between citizens and "natural-born" citizens,<sup>363</sup> but it did not specify criteria for determining the difference between them.<sup>364</sup> And while both states and the federal government enacted legislation for naturalization in the immediate aftermath of the revolution,<sup>365</sup> there was no immediate necessity for a rule determining citizenship at birth. As a result, only gradually did courts face the question of whether persons born within the territorial United States *after* the revolution were automatically to be considered citizens.

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360. See, e.g., *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857); KETTNER, *supra* note 29, at 307-33; Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

361. See, e.g., KETTNER, *supra* note 29, at 65-105; Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1175-76 (1976); Robert J. Steinfield, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 347-48 (1989).

362. See, e.g., DONALD W. HANSON, *FROM KINGDOM TO COMMONWEALTH: THE DEVELOPMENT OF CIVIC CONSCIOUSNESS IN ENGLISH POLITICAL THOUGHT* 313-15 (1970).

363. Compare U.S. CONST., art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States."), with art. II, § 1, cl. 4 ("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 the President.").

364. There exists a large literature on this issue, some of it cited previously in this Article. In 1898, the U.S. Supreme Court validated the long-held view that the common-law principles familiar to the Framers were to determine this issue, in *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) ("The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that.").

365. See generally FRANK GEORGE FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES* (1969); Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 VA. L. REV. 493, 506-07 (1996).

Chancellor Kent wrote under the comprehensive title of “aliens” and “natives”:

Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are, in theory, born within the allegiance of the foreign power they represent.

. . . .  
. . . And if, at common law, all human beings born within the ligeance of the king, and under the King’s obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States in all cases in which there is no express constitutional or statute declaration to the contrary.<sup>366</sup>

Coke’s report of *Calvin’s Case* emphatically placed acquisition of birthright status in the realm of the law of nature. For all the ambivalence in legal thought in the early United States concerning the role of natural law, for a time at least, *Calvin’s Case* settled the issue into a rule of common law.

Second, an equally important explanation for the status accorded *Calvin’s Case* in the new Republic is that jurists saw parallels between the question of who was to be a citizen in the new American Republic and the questions raised by the status of the Scottish *postnati*. After 1776, legal thinkers needed a working definition of who was to be included in the citizenry of the former colonies. Likewise, because *Calvin’s Case* turned on a distinction based on the union of the crowns in 1603, the Scottish *postnati* had many similarities to post-Revolutionary inhabitants of the new United States.<sup>367</sup>

The subsequent uses of *Calvin’s Case* in the United States remind us that in legal history it is often difficult to understand the power of an idea unleashed in an era with which we are largely unfamiliar without some appreciation for the later importance of the story. The importance of *Calvin’s Case* in the early history of the United States is accounted for in part by the fact that it permitted courts to resolve questions of citizenship status in the absence of any statutory or constitutional authority on the subject. In 1830, the U.S. Supreme Court announced that no rule was “better settled” in the common law than the rule of acquisition of citizenship by birth. Yet just twenty-

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366. 2 KENT, *supra* note 81, at 39, 42 n.258.

367. From Kent, we know that “[t]he distinctions between the *antenati* and the *postnati*, in reference to our revolution, have been frequently the subject of judicial discussion since the establishment of our independence.” *Id.* at 49.

seven years later, in the famous case of the freed slave Dred Scott,<sup>368</sup> the Supreme Court would disregard the settled common-law rule in favor of a rule for federal citizenship which derived from pedigree and ancestry. For black inhabitants, at least, *Dred Scott* invoked a rule more akin to the *jus sanguinis*, while the rule of territorial birthright citizenship appears to have been a settled rule for white inhabitants.

A lasting contribution of *Calvin's Case* was to equate the legal status of "subject" with a specially privileged class of persons, those entitled to hold land in England, but at the same time to award that status solely by the criteria of birth within a territory. The subsequent importance of *Calvin's Case* in the early history of the United States is therefore ironic in its deviation from this essentially egalitarian origin. American citizenship throughout the nineteenth century, a matter of state law from its inception, was concerned with and divided into various levels of political participation. While white women could be and probably were considered citizens in most states, they had few political and legal rights. Slaves, Native Americans, and even free people of color were entirely excluded during most of the nineteenth century.<sup>369</sup> The existence of a rule of the *jus soli* alongside these divisions in the various states diverged radically from its origin to determine only the duties and benefits of allegiance, not the political rights that would accompany it.

Of this later story, we credit the contradiction of slavery. *Calvin's Case* was decided in an essentially monolithic racial context. Thomas Craig wrote in 1605:

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368. In *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the U.S. Supreme Court held that black inhabitants of the United States were not "citizens" within the meaning of the federal constitution, despite whatever classification a state may choose to give them, and despite Justice Curtis's declaration: "Undoubtedly, . . . it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship." *Id.* at 578 (Curtis, J., dissenting). In *Dred Scott*, the Court deviated from the received and "settled" rule of birthright citizenship based upon territory, the legacy of *Calvin's Case*, in favor of a rule in which national citizenship derived from pedigree and ancestry. The race question marked the only substantial divergence from the rule of territorial birth announced in *Calvin's Case* in U.S. history.

369. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), Justice Johnson, in dissent, appeared to recognize that *Calvin's Case* also determined the citizen or alien status of Indians, but that, too, was an issue of state law: "And if not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the nation. . . . The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes." *Id.* at 66, 68 (Johnson, J., dissenting). Justice Johnson noted that Chancellor Kent had reached the same result in *Jackson v. Goodel*, 20 Johns. 187, 193 (N.Y. 1822) ("In my view they have never been regarded as citizens, or members of our body politic. They have always been, and still are, considered by our laws as dependent tribes, governed by their own usages and chiefs; but placed under our protection, and subject to our coercion so far as the public safety required it, and no farther."). *Cherokee Nation*, 30 U.S. at 66 (citing *Jackson*).

As to persons, slavery, and even the name of it, has ceased throughout all Christian states, and at the present day no master has power of life and death over his servant, the King being the sole disposer of the life and limb of his subjects. . . . Of slavery there is no trace among us therefore. Our neighbors, however, still retain certain survivals of slavery in the plantations, in those whom they call natives. . . . With that exception there are no slaves in any nation.<sup>370</sup>

The absence of slavery within the British isles meant that Coke in *Calvin's Case* had no need to distinguish between classes of subjects—all persons born within the King's territories were subjects by virtue of the circumstances of their birth.

The surprising point, then, is that the rule of the *jus soli* established by *Calvin's Case* was adopted and continued in the early history of the United States, at a time when, politically, no one intended to accord equal citizenship rights solely on the basis of birth within the territory. The racial mix of the American territories created a disjuncture between national status and citizenship rights, finally constitutionalized through the Fourteenth Amendment as one step to solve the problem of citizenship created by *Dred Scott*.<sup>371</sup> Bodin, in *Republique*, was emphatic that citizenship was a status only for free subjects.<sup>372</sup> Coke, in developing the rule of the *jus soli* in *Calvin's Case*, had no occasion to discuss the distinctions, if any, between the King's subjects who were "free" and those who were not. And although the topic cannot be explored fully here, in the United States, I would argue, the two-century history of the rule of the *jus soli*, at common law and later in the Fourteenth Amendment, is further evidence that there were, in fact, two American Revolutions.<sup>373</sup> The second Revolution, the American Civil War, ushered in a constitutionalized federal rule of birthright citizenship.

Finally, *Calvin's Case* and its aftermath illustrate the tenacity of a legal doctrine accorded "natural law" status in the late medieval period, long after the political and social situation prompting its

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370. CRAIG, DE UNIONE, *supra* note 9, at 306-07.

371. Native Americans, however, were not extended territorial birthright citizenship until this century, in the Citizenship Act of 1924. See 8 U.S.C. § 1401(a)(2) (1994). This act made them natural-born citizens of the United States irrespective of their desire in the matter. Native Americans were excluded from the reach of section one of the 14th Amendment on the theory that they were a separate sovereignty, a dependent sovereign nation within the territorial United States. See Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 854 (1990).

372. See BODIN, *supra* note 10, at 48.

373. On one aspect of the shift in federalism brought about by the Civil War, see Price, *supra* note 365, at 523, 527.



formulation changed. *Calvin's Case*, born of natural law in a feudal system, was the bridge for adoption of the *jus soli* in the United States. Courts in the early United States firmly grasped *Calvin's Case* and used it precisely to define the relationship of allegiance owing by birth. Perhaps because jurists in the early history of the United States misunderstood the inherent limitations of its context, Chancellor Kent could say of *Calvin's Case*: "I do not perceive why this doctrine does not apply to these United States in all cases in which there is no express constitutional or statute declaration to the contrary."<sup>374</sup> Scholars who address the question of how the *jus soli* came to be a common-law rule in the early United States, I predict, will ultimately conclude that the explanation lies somewhere in the fact that *Calvin's Case* imbued birthright citizenship with the status of natural law.

If legal history is to be thought of instrumentally, it is best used to inform, but not to direct, present action. What this history has told us is that policy justifications used today to support the rule of birthright citizenship are far different from those of its origin, but they are, perhaps, no less explicitly goal-oriented. In 1608, the rule of obedience and allegiance required of a subject at birth was a self-serving policy for a monarchy at a time when few other compulsions existed. The cost of a rule determining that all persons born within the King's territories were subjects at birth was low because few benefits were tied to that allegiance. Today, by contrast, most nations, including particularly the United States, have radically expanded the benefits tied to the status of citizen. Current legislation restricting rights and benefits of illegal aliens is driven by a changed sense of the balance between what an individual owes to the state and what the state owes to the individual. Great Britain, the nation that gave birth to *Calvin's Case*, has now abandoned that rule, but only after nearly four centuries of following it. The remaining question is whether, as a legal practice and as a political idea, the U.S. rule of birthright citizenship will survive without the divine sanction it once enjoyed as a product of natural law.

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374. 2 KENT, *supra* note 81, at 42, n.258.

