

Debating Immigration

Edited by

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Carved from the Inside Out

Immigration and America's Public Philosophy on Citizenship

Elizabeth F. Cohen

During the second session of the 109th Congress, bitter debate broke out about how many guestworker immigrants we should admit within our borders and under what conditions they may remain here. Should they receive permission to stay permanently? That immigration should be the topic of raging debate is unsurprising. What is surprising is that it is taking place only now, two and a half immigrationladen centuries after the founding of our nation. Immigration has shaped us as a country in manifold ways, and yet it can hardly be said that at any point in the United States' history we – as a nationstate, as a republic, or as a people – have shaped immigration. Why is it that subjects as basic as the status of children born on American soil to undocumented immigrants or the fairness of guestworker programs have received sustained national attention only recently?

Despite its lengthy history as an immigrantreceiving nation, the United States has as yet failed to produce a wellarticulated public philosophy of immigration. Many European nations, most of which have been the recipients of largescale immigration for less than half a century, seem as well or even better equipped than the United States to answer these questions through a coherent public philosophy of immigration.¹ This leaves 21stcentury Americans in the position of trying to extract a reasoned set of policies to govern the border from a relatively shallow well of precedent and philosophy. If we are to come to conclusions regarding how much and what sort of immigration we ought to tolerate, it seems sensible to first ask ourselves why it is that the United States, of all nations, has not yet answered these questions. In this chapter, I will suggest that fundamental principles of American public law have contributed to an understanding of

citizenship driven by concerns of difference, particularly racial difference, ascribed among nativeborn citizens. This internal differentiation² domestically produces foreignness that renders ostensible citizens (including, but not limited to, African Americans) foreign despite their native birth. The priority placed on managing racial distinctions through citizenship law has precluded a reconciliation of our relationship to immigrants, whose outsider or foreigner status cannot be reduced to or equated with that of the marginal nativeborn groups who have continually been deprived of full citizenship within the American polity.

If immigrants have not always been the most foreign people in our midst, then it makes sense that immigration has not been either central to or well attended to by existing definitions of citizenship. We have no public philosophy of immigration because our understanding of citizenship is focused inward, on differences that exist within the nativeborn population. In the first half of the chapter, I will describe the contours of the problem: how immigration has been understood in the context of citizenship, and how the dilemmas created by an absence of a public philosophy of immigration manifest themselves. In the second half, I will offer an explanation for these circumstances that looks to the commonlaw tradition we inherited from England, in particular the jurisprudence based on *Calvin's Case*. I will argue that this jurisprudence meshed effectively with our own commitment to racial and other internal classifications in order to produce an understanding of citizenship that was not attentive to questions of immigration.

CONTEMPORARY POLITICAL THEORIES OF IMMIGRATION AND CITIZENSHIP

Most nationstates publicly declare whether they consider themselves to be "countries of immigration." Patrick Weil notes that as countries begin to perceive themselves as countries of immigration, they tend to invoke rhetoric and policies that are geared toward absorbing and assimilating immigrants.³ Thus not only can we expect to generate public philosophies of immigration, but there ought to be a direct relationship between a country's philosophy, or general approach to immigration, the mechanics of the immigration policy itself, and the treatment of the foreignborn, particularly but not exclusively through the alienage law that governs immigrants once they have arrived. In the United States, there is public consensus that we are a nation of immigration, and we have declared as much to the world. However, this has not put an end to disagreement

about who ought to be able to immigrate, the rights they ought to enjoy, and the circumstances under which they should or should not be granted citizenship. In other words, while many among us view an abstract notion of immigration as integral to our politics, there still exists widespread ambivalence toward the foreigners who actually appear at our doorstep at any given point in time.

In his recent and controversial book *Who Are We?*, Samuel Huntington makes the case that America's settlers never intended to create a nation that would be defined and continually redefined by an ever-changing cast (or caste) of immigrants. This thesis flies in the face of a voluminous and wellgrounded literature that regards open immigration as central to American identity.⁴ For many, the quintessential national tale is the American Dream, which speaks more directly to immigrants than perhaps any other social group. While for Huntington immigration has been a process through which new members became Americanized, others view immigration itself as the defining American experience and attribute. It comes as no surprise, then, that we find ourselves so divided over the subject of our borders. We have never been entirely certain whether we were subjects of a state dedicated to accommodating the varying needs of successive generations of new members or sovereigns of an empire whose conquests are found within rather than outside of our borders.

Many would protest the claim that we lack a wellarticulated approach to immigration, arguing that in fact American history has engendered an intense debate over the meaning of citizenship that is both public and selfconscious. Settlers arrived on our shores with the express purpose of founding a community in which they could enjoy freedoms they had not experienced in their homelands. The transition from colonial settlement to nationstate instigated a set of very public and deliberate debates over the content and right to membership in the newly formed republic. These debates have replayed themselves repeatedly as Americans have come to terms with internal conflicts over the meaning of citizenship. It could therefore hardly be said that we have no public philosophy of citizenship even though this philosophy has evolved significantly since it was first conceived.

Yet, what this implies for the politics of immigration remains unclear. Many historians of American political thought who study the nature and lineage of American philosophies of citizenship examine immigration through the lens of an overarching theory of American citizenship. Rogers Smith's *Civic Ideals* details the development of multiple traditions of liberalism, republicanism, and ascriptive exclusion through an analysis

of public law from the colonial period through the end of the 19th century. Smith's is the most recent in a history of venerable tomes that includes Louis Hartz's⁵ defense of liberalism as the defining American ideology and Gunnar Myrdal's⁶ civic republican rejoinder. Each of these texts has presumed that we can infer a great deal regarding attitudes toward immigration based on approaches to citizenship.

However, a philosophy of citizenship need not make central, or even answer, important questions regarding immigration. Indeed, normative political philosophers have long noted that the theories of membership upon which practices of citizenship are founded tend to function very well when applied to bounded communities but fail the tests posed by immigration. Of the ancient theorists, only the Stoics envisioned cosmopolitanism, and even they did so in a limited fashion. Plato and Aristotle both set very narrow limits on the inclusion of foreigners, offering them at best the very form of secondclass citizenship that Aristotle himself held. Modern liberal theory invites further conundrums of inclusion by espousing principles of universal worth while simultaneously recognizing that selfgovernance can occur only within wellbounded communities. Contemporary theorists, most famously John Rawls, have only replicated this internal contradiction of liberalism. Rawls qualified the entirety of *A Theory of Justice* with a statement that it only applies to nationstates. If the abstract world of normative theory cannot manage to produce theories of citizenship that accommodate immigration, then the much messier reality of public philosophy and the policies it informs can only be expected to engender further complications and contradictions.

A few scholars of citizenship explicitly acknowledge the challenges of trying to reconcile philosophies of citizenship and immigration. In her examination of the peculiar philosophies that have forged American citizenship, Judith Shklar makes an important distinction between her goal of elucidating the role of race in American citizenship and what she views as the important, but different, task of characterizing American approaches to immigration. Shklar writes, "The history of immigration and naturalization policies is not, however, my subject. It has its own ups and downs, but is not the same as the exclusion of nativeborn Americans from citizenship. The two histories have their parallels, since both involve inclusion and exclusion, but there is a vast difference between discriminatory immigration laws and the enslavement of a people."⁷ In contrast, Smith, whose subject and spirit of inquiry is much the same as Shklar's, treats the application of the ascriptive principles, which he and Shklar indict for their effect on nativeborn racial minorities, to immigration laws as an extension

of the same processes. He moves nearly seamlessly between discussions of the laws governing the citizenship of nativeborn racial minorities and women and laws governing immigration and the rights of the foreignborn.

As Shklar indicates, this is not an illogical move because the two sets of rules are, in her words, parallel. But it might not be entirely warranted, for as parallel, or at least distinct, processes, the forging of a philosophy of citizenship is not necessarily coextensive with that of a philosophy of immigration. Not only are the two conceptually distinct, but for a variety of reasons Americans did not produce a philosophy of immigration alongside their philosophy of citizenship. The ascriptive principles guiding the exclusion of some from full citizenship prove an uneasy fit with the realities of immigrant populations and, further, the role of immigrants in, and their relationship to, American society is also different from that of nativeborn minorities. One can observe moments in which awkward attempts were made to fuse racial ideologies with nativism, such as the cry that the Irish would never be white, yet the experience of being an immigrant and a nativeborn minority in America are – and always have been – vastly different. Indeed, evidence drawn from American political thought, public law, and policy indicates that even today we have not yet fully articulated our understanding of the challenges of immigration, let alone our responses to them. A full examination of this phenomenon would consume more space than this chapter permits. However, a few illustrations will indicate the degree to which immigration has managed to shape American identity without being subjected to the sort of systematic philosophical scrutiny accorded to other elements of citizenship.⁸

OBSERVING AMERICAN INATTENTION TO IMMIGRATION

Indications that immigration has not received systematic thought in the context of an otherwise wellarticulated and selfconscious understanding of citizenship abound. Perhaps the most telling institutional evidence of American ambivalence toward immigration and border concerns is the fact that immigration has only relatively recently come to be governed nationally. For most of American history, immigration was regulated by the states. Aristide Zolberg notes that the Passenger Act (1819) indicates early interest on the part of the national government in limiting immigration, but a federal apparatus for regulating immigration only began to emerge in a very nascent form following antiChinese immigration measures passed in the 1870s.⁹ A full federal bureaucracy only came to pass in 1929, as a means of implementing the 1924 National Origins Quota

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Act. The reasons for this are well rehearsed: the strong commitment to federalism evinced by many of the founders informed, and was influenced by, conflicts of interest arising from differing positions on the status of slaves and free black Americans. Internal migration therefore gave Americans as much cause for concern, and probably more, than the entry of hundreds of thousands of European nationals.

One could make the claim that a laissezfaire attitude toward immigration constitutes the American approach to border control. Leaving aside the question of whether an unarticulated laissezfaire policy can constitute a public philosophy, the fact remains that not all matters related to immigration can be resolved passively. In particular, refuge demands proactive policies and laws. The right of refuge requires that states formulate policies and programs in order to identify and protect eligible candidates for protection. There is much to suggest that refuge is an important element of American identity – from our founding as a refuge for religious minorities to the oftreferenced inscription on the Statue of Liberty. And yet institutional mechanisms that define and implement such protections have only come to exist in this country recently and in an entirely ad hoc fashion. In fact, until the cold war, the United States eschewed explicitly formulating a policy of refuge. While we encouraged the world to give us their tired, poor, huddled masses yearning to breathe free, we were not particularly interested in ferreting out anyone who might have been huddling voiceless in the dark recesses of poverty or political oppression. Only under the threat of appearing hypocritical, and with the incentive of weakening our cold war enemies, did the federal government institute a policy of refuge, and the terms of that policy limited the right to those fleeing communism.¹⁰

In addition to a relatively passive institutional approach to immigration, American politics has also rarely been shaped by conflict over immigration. While it is the case that the foreignborn have periodically been the subject of intense public scrutiny, this focus has rarely reached the levels experienced by many European countries. Furthermore, much of the conflict has centered on matters to do with alienage – the rights of the foreignborn who are already here and not the question of immigration and/or expatriation. Perhaps the closest we have come to party politics in which immigration played a dominant role was the brief period in the 1850s when the KnowNothings held sway. However, the spell cast by their nativist rhetoric was broken by internal divisions over racial politics and, to date, while political parties have engaged immigrants as potential citizens and threats alike, none has predicated its existence on

either defending or halting immigration.¹¹ This stands in sharp contrast to our European peer states that, upon discovering that they had become states of immigration in the post-World War II period, promptly generated political parties whose main reason for existence was connected to immigration. There is no American Kurt Waldheim, and there has never been an American Front National.¹²

Finally, as a matter of policy, it is simply the case that Americans did not seek to control or restrict access to their borders until relatively recently. Immigration was viewed as a necessity for much of American history – perhaps a necessary evil to some, but nonetheless inevitable. Restrictions for reasons of security, health, poverty, and criminality have existed, but the plain fact is that statistically these have prevented only an insignificant number of people from entering the country.¹³ This pattern remained the case until the National Origins Quota Act was enforced in 1929, and following the 1965 Immigration and Nationality Act there has been a slow drift back toward increased immigration and lax border enforcement. "Illegal" immigration has tacitly been encouraged not simply through lax border enforcement but also by laws that facilitate the continued presence of undocumented individuals and their families. The paradigmatic example is the extension of *jus soli* to the children of the undocumented that accords citizenship to those born on U.S. soil regardless of the legal status of their parents. However, accommodations for the undocumented abound, ranging from the provision of education to their children to the licensing of undocumented drivers. Similar inconsistencies abound in the laws that govern the entry of legal immigrants. Family reunification and work changed places several times in the ranked list of immigration priorities institutionalized in 1965. If this indicates nothing else, it ought to make clear the fact that we do not know what we want our borders or the keepers of our gates to accomplish.

If it is an institutional, legal, and political fact that Americans lack a public philosophy of immigration, it remains to be explained why this is so. No doubt the reasons are manifold. Immigration is an issue that cuts across otherwise wellorganized material and social interest groups.¹⁴ Yet the moments at which immigration has been restricted and opened do not indicate that the material interests of any given class or set of classes are being systematically pursued via border control.¹⁵ One might also suggest that the federal nature of the republic has prevented the development of a coherent philosophy of immigration. However, the demands of federalism alone cannot explain the failure of Americans to produce a public philosophy of immigration. The period following the nationalization of

immigration has been the most schizophrenic to date. Furthermore, a country such as Germany has traditionally devolved many of the powers of immigration to the *Länder* and yet has maintained a consistent, if objectionable, philosophy of immigration in which the rights of refuge and return are honored, while traditional immigration is discouraged.

CITIZENSHIP VERSUS IMMIGRATION

Having established the counterintuitive fact of American inattention to immigration, I will draw upon the jurisprudential traditions that shaped American approaches to foreignness in order to offer an explanation of how a country so profoundly shaped by immigration has in turn considered immigration in such an unsystematic manner. But, before turning to the circumstances that led to the divergence of these two questions in the United States, a word about the general principles with which we can differentiate theories of citizenship from those of immigration is in order. Citizenship encompasses a broad and dense set of norms, policies, and laws that together govern what it means to be a member of a polity. This meaning includes rights, benefits, and expectations: the conditions of and for membership. Place of birth and/or nationality – the traits that distinguish immigrants from nonimmigrants – need not hold either a singular or a central place among these conditions. One tends to assume that because nationstates are in some senses reliant on sovereign borders for their existence, they must necessarily prioritize bordercrossing issues in their definition of membership. Yet there is no reason that race or social class might not play a more central role in a philosophy of citizenship. That one is white or male or respectably employed in fact turns out to be crucial to many definitions of citizenship. One can be foreign without holding the passport of another nation and, at the same time, a nonnative Canadian may not be perceived as, treated as, or even feel particularly foreign.

Americans have developed a philosophy of citizenship that, while keenly sensitive to notions of foreignness, does not fully resolve issues of immigration. We understand the degree to which the nationstate has the power to determine who enjoys the status of citizen, and we are extraordinarily selfconscious of the benefits conferred by our citizenship. But none of this dictates any particular response to entreaties from beyond our borders. One could examine this paradox through a number of lenses. Particularly illuminating is the distinction between immigration and alienage law discussed by Linda Bosniak in Chapter 6 of this volume. This

distinction refers to the degree to which we have historically regulated the immigrants in our midst, as opposed to the act of immigration itself. While there was little in the way of a nationalized immigration policy, there have long been in place significant legal precedents that facilitated the control of aliens once admitted.¹⁶ Alienage law, as opposed to immigration constraints, was very well developed early on in our history. From the founding onward, the rights of aliens were subjects of public debate.¹⁷ While we did not seek to restrict immigration, as a nation we did recognize the need to control the foreigners in our midst. Alienage law, as opposed to immigration restriction, was prioritized both by the Framers, who sought to prevent those without citizenship from holding office, and by successive generations of American leaders. Even as we ignored our borders, we have always remained quite concerned with the foreigners among us.

The prioritization of debate regarding the rights of foreigners over discussion of immigration restrictions reinforces the idea that Americans have chosen to focus attention on citizenship rather than immigration. The primary concern of alienage law is the degree to which nonnationals may enjoy the rights of citizenship. To be sure, the threat of deportation looms large as an implication of alienage law; however, mass deportation has not played a particularly important role in the history of immigrants in the United States. More common has been a pattern of benign neglect of both legal and "illegal" immigration coupled with extensive use of alienage law as a tool to constrain the freedoms enjoyed by foreigners.

CALVIN'S CASE, THE ORIGINS OF THE AMERICAN CONCEPTION OF CITIZENSHIP, AND PREOCCUPATION WITH INTERNALLY GENERATED FOREIGNNESS

That foreignness can matter so much to Americans and yet not generate a better articulated and more measured approach to border control would ostensibly seem to be unlikely, if not entirely irreconcilable. However, an examination of the origins of the American approach to citizenship yields a rationale for this very striking set of circumstances. American approaches to citizenship have long reflected a preoccupation with forms of discrimination that focus on race more than nationality. Perhaps the moment at which our skepticism about immigration was at its peak was the period surrounding the passage of the 1924 National Origins Quota Act, when we were concerned less with nationality and more with race. The bill itself was designed to encourage immigration from countries seen

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as racially and culturally in harmony with "Americanness" and simultaneously block further immigration of racially undesirable people. It was a law driven by sociobiology rather than sovereignty.

There are a number of routes to understanding why it is that race and other forms of internal differentiation have generated a philosophy of citizenship that lacks a focus on borders. I will now focus on the formative effects of the citizenship law bequeathed to the United States by the commonlaw tradition of Great Britain and in particular the influence of *Calvin's Case*. Nearly all scholarship on the origins of American citizenship acknowledges the singular importance of *Calvin's Case* in shaping the legal and philosophical principles upon which American citizenship was founded. *Calvin's Case* resolved the political status of people who had been born in Scotland after the ascent of a Scot, King James, to the British throne. The ruling accorded them subjecthood based on the principle of *jus soli* – their birth in territory considered to be a part of the British dominion. In so doing, it created two categories of people: *antennati* (persons born before the joining of the two kingdoms) and *postnati* (persons born afterward). The decision rendered the latter citizens and led to the development of naturalization rules and procedures for the former. Thus, commonlaw rules of citizenship were instantiated without any particular reference or relation to immigration across sovereign borders. In *Calvin's Case*, it was borders rather than people doing the migrating.

Insofar as it addressed the historically specific question of the citizenship of Scots who were newly incorporated into the political domain of England as a result of the ascent of King James to the throne, the case appears an odd one to have served such a significant role in shaping American jurisprudence. We were not a kingdom with an empire; we were a former colony that would continue to rely upon immigration to compose our population. *Calvin's Case*, with its emphasis on *jus soli*, could not help us with that. Given the lack of an American corollary to the status of the Scots in the British Empire, it is not entirely obvious why *Calvin's Case* became so important to American citizenship. Furthermore, the principle of *jus soli*, which *Calvin's Case* established, contradicts liberal consent, republican linkages of membership with civic virtue, or a contractbased notion of citizenship, which together embody the central philosophical influence on American citizenship doctrine.¹⁸ Ascribing citizenship to persons based on *jus soli* (a rule based on place of birth) is almost entirely arbitrary. It deprives both the community and the individual of the opportunity to come to reasoned conclusions about membership.

It is tempting to leap to the conclusion that because the United States depended on mass immigration, *Calvin's Case* was crucial in establishing the means through which immigrants could become citizens because it gave the sovereign the right to naturalize noncitizens. Yet this reflects neither the spirit of *Calvin's Case* nor the use to which it was put for much of American history. Although *Calvin's Case* defended the king's right to naturalize subjects, it did not address itself directly to questions of immigration across sovereign national borders. Rather, it provided the means through which an expanding empire and its newly acquired members could understand their membership in relation to one another and to a shared sovereign. In the decision, Sir Edward Coke addresses himself to foreignness, citizenship, and problems of alienage. He does not take up the subject of transnational immigration. *Calvin's Case* not only established an ascriptive rule of *jus soli* but also generated a legal process of naturalization as a means through which citizenship could be granted to those not born with it. Scots born before the ascent of James had to be naturalized because the land upon which they were born had not been British territory at the time of their birth. Americans recognized that in order to remain sovereign they, too, would have to engage in ascription, if only because as a newly formed nation it was imperative that some justification exist for assigning citizenship to the people of the land, particularly loyalists to the British throne whose status might otherwise be indeterminate and threatening to the newborn union.¹⁹

Calvin's Case therefore trained an admittedly willing American eye to look inward in order to shape the borders of the nation. The decision applied the norms of an empire intent on colonizing territories and absorbing their populations into a single nationstate. It would therefore be an imperial understanding of citizenship, and not immigration, that would serve as the primary tool through which Americans would sculpt their populace. Thus, as the title of this chapter suggests, Americans have carved themselves from the inside out. This caused Europeans to remark, as Samuel Huntington notes, that we created a "consciousness among people" well before we ever formed what they would have legitimately called a state.²⁰

The need to enfranchise the population following the establishment of the union was not the only distinctly American dilemma that *Calvin's Case* resolved. It also provided a means for addressing the presence of persons who may be desirable residents but not citizens. The ruling eschewed the ascription of citizenship to all Scotsmen. Rather, the ruling applied to two sets of persons: the *antenati* and the *postnati* – or those born before and

after James's accession, respectively. The decision only granted automatic citizenship to those born after his accession. Most of the *postnati* were ultimately granted naturalization, but it was not ascribed to them. It is also the case that the persons to whom citizenship was ascribed by the new rule still had to be otherwise eligible for citizenship. *Calvin's Case* did not grant the Irish full subjecthood – they remained merely denizens. Thus, to call the precedent that *Calvin's Case* establishes an ascriptive form of pure *jus soli* is to mischaracterize it. In fact, it only selectively ascribed citizenship to segments of the population. The Irish in particular were left in the netherworld between full and noncitizenship.

There are therefore multiple legal statuses that denote “domestic foreignness” – birthright foreignness that is not produced by movement across sovereign national borders. This is supported by the conclusion affirmed in the subsequent case indicating that the rights of nonnative Scotsmen, who could be naturalized, were more extensive than those of nonnative Irishmen, whose status as a conquered people accorded them a weaker set of entitlements. Coke's reasoning in *Calvin's Case* allowed that “the conclusion that naturalization rested upon a legal fiction made it possible to distinguish among the various classes of subjects. Native Englishmen, *postnati* Scotsmen, and naturalborn Irishmen were natural subjects.”²¹

The analytical benefit of framing *Calvin's Case* thusly is that it reminds us that complicated questions of citizenship must be answered before a rule of *jus soli* can be invoked. In not automatically granting citizenship to *antenati*, *Calvin's Case* legitimized the existence of populations who would hold citizenship despite their birth in a territory now subject to *jus soli*. It therefore raises the very likely possibility that *jus soli* leaves unanswered a range of ascriptive and substantive questions of citizenship. Understanding *Calvin's Case* thusly helps explain how Chief Justice Roger Brooke Taney, in writing the *Dred Scott* decision, was able to eschew the principle of *jus soli* that the case evinces. *Jus soli* would have accorded citizenship to free blacks. But the status of the Irish following *Calvin's Case* was similar to that of free blacks in the United States. Because no rule had changed, it was conceivable that the principle that excluded free blacks was still in effect in much the same way that some Irish continued to be excluded even after Coke's decision in *Calvin's Case* was issued. To bring us back to the initial premise of this chapter, *Calvin's Case* created an understanding of citizenship that accorded birthright citizenship based on *jus soli* to some, but not all, persons born in the territory.

Underlying the case is the presumption that rules affecting the contours of a citizenry can change and, when they do, complex negotiations will be necessary to determine to whom and how the rules ought to be applied. King James's ascent to the throne changed the rules under which subjecthood would be awarded. A rule had changed – in this case one involving borders, and one that affected a people's relationship to citizenship. This particular rule change affected this group in a way that made many of them eligible for citizenship. However, rule changes can take many forms, and one could easily imagine rule changes that would strip people of their right to citizenship. A border could contract rather than expand, ceding the citizenship of a set of people. Furthermore, rule changes that affect citizenship need not confine themselves to questions of sovereign borders. In the 20th century, rule changes granted citizenship to American women and (temporarily) deprived Japanese Americans of theirs. In this view, therefore, the rule of *jus soli* is secondary to the larger implication of *Calvin's Case*, namely that a range of circumstances can change and, in so doing, alter the contours of the population considered eligible for citizenship. Furthermore, when changes occur, the state will require and create procedures such as naturalization in order to regularize and govern the statuses they create.

The final outcome of *Calvin's Case* was the creation of procedures to transform people into citizens when rule changes entitle them to membership. *Antenati* had to be dealt with once the decision was rendered. The idea of naturalizing noncitizens predates *Calvin's Case* but had no legal precedent until Coke forced the issue by creating a large group of persons who needed to be naturalized. In adopting the entire jurisprudence that grew out of *Calvin's Case*, the United States therefore adopted not only *jus soli* but also a legitimization for multiple forms of citizenship and procedures for transforming noncitizens into citizens.

If we revisit the original question this chapter posed – why it is that we have such a wellarticulated public understanding of citizenship that fails to answer basic questions about borders – we can now see that the jurisprudence out of which American citizenship was established was one that did not take up questions of immigration. *Calvin's Case* adopts ascriptive *jus soli* in a confined manner that does not apply universally. It actually legitimizes the simultaneous enfranchisement of immigrants and disenfranchisement of native and African Americans. Even as it dictated that a rule of *jus soli* be applied to *postnati* Scots, *Calvin's Case* simultaneously indicated that others be excluded.²² It therefore framed questions of citizenship for the British and Americans who looked to it in ways

that paid more attention to idiosyncratic and internally generated racial distinctions than to immigration. This functioned well within the unique context of the British Empire and fed into a longstanding American tradition of legalized racial citizenship hierarchies. But much as the British have had to execute a speedy gymnastic routine to address the influx of émigrés from former colonies following the dissolution of its empire, Americans, too, now find themselves forced to answer questions about immigration from within a tradition of citizenship that has more to say about how to distinguish between people of different races and nationalities than it does the question of how to make immigration law.

CONCLUSION

For much of American history, our failure to develop a coherent philosophy of immigration was relatively unproblematic – in fact it may have served to allow vastly different visions of our nation to coexist. However, during the 20th century, this lacuna led to serious repercussions, leaving us now in the position of trying to forge a consensus on the basis of a set of apparently conflicting premises. Theorists of American political thought must reconcile the contradictions of massive, racially defined restrictions on immigration during the first half of the 20th century with equally extreme liberalizations during the second half. Do we wish to remain a nation that shapes itself from within, or are we in a moment of transition to a politics in which immigration controls will define the contours of future generations? Choosing the latter route will demand that the American people answer, not Samuel Huntington's query of "Who Are We?" but the more difficult question, "Who do we want to be?" If the thesis of this chapter is correct, then we are in for more work than Huntington acknowledges, for the reply he offers us tells us who we have been. Who we ought to be and how we ought to achieve this remain as yet unanswered questions.