

SYMPOSIUM

Jus Tempus in the Magna Carta: The Sovereignty of Time in Modern Politics and Citizenship

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In the English constitutional tradition, subjecthood has been primarily derived from two circumstances: place of birth and time of birth. People not born in the right place and at the right time are not considered subjects. What political status they hold varies and depends largely on the political history of the territory in which they reside at the exact time of their birth. A genealogy of early modern British subjecthood reveals that law based on dates and temporal durations—what I will call collectively *jus tempus*—creates sovereign boundaries as powerful as territorial borders or bloodlines. This concept has myriad implications for how citizenship comes to be institutionalized in modern politics. In this article, I briefly outline one route through which *jus tempus* became a constitutive principle within the Anglo-American tradition of citizenship and how this concept works with other principles of membership to create subtle gradations of semi-citizenship beyond the binary of subject and alien. I illustrate two main points about *jus tempus*: first, how specific dates create sovereign boundaries among people and second, how durational time takes on an abstract value in politics that allows certain kinds of attributes, actions, and relationships to be translated into rights-bearing political statuses. I conclude with some remarks about how, once established, the principle of *jus tempus* is applied in a diverse array of political contexts.

THE MAGNA CARTA'S UNCERTAIN BOUNDARIES

Because of its protoconstitutional status, it is reasonable to expect the Magna Carta to both express obligation and constitute a political community, yet, like the first iteration of the U.S. Constitution, the Magna Carta does not define the citizenry in any way that a modern reader might expect. The document contains very little precise language specifying who exactly its subjects are or setting boundaries around a citizenry. The Magna Carta's text makes vague references to place ("realm"), bloodlines ("heirs in perpetuity"), and consent ("freely and out of our good will have given and granted to the archbishops, bishops, abbots, priors, earls, barons and all of our realm these liberties") (Article 1; Turner 2003). But, in contrast with French explanations of *droit d'aubaine* (the right to pass property to one's heirs), which precisely delineated a French citizenry by denying the signature right of citizens to those born on foreign soil, the Magna Carta contains virtually no details about the legal characteristics of freemen or how a jurist or administrator might identify them (Wells 1995; Sahlin 2004).

Constitutive documents generally predicate citizenship on ascriptive, consensual, or substantive grounds (Brubaker 1992; Wheeler 1947). Scholarship on the constitution of citizenries generally identifies two ascribed principles of citizenship: citizenship based on blood lineage (*jus sanguinis*) and citizenship based on place of birth (*jus soli*; Brubaker 1992). *Jus soli* and *jus sanguinis* structure the conferral of citizenship by granting it to people at birth. Equally significant, particularly in the American tradition, is the principle of consent. Through what has been classified as the continental public law tradition of citizenship, ascription is replaced with mutual consent between an individual and a *demos* (Schuck and Smith 1985). A final—and the most dramatic—contrast from the ascription model of *solis/sanguinis* are conceptions of citizenship based on dense notions of the good, usually generated from civic republican traditions. In this view, people must meet substantive standards or exhibit specific qualities to achieve citizenship.

When one searches the text of the Magna Carta for detailed rules regarding who could and could not be considered a subject, virtually none can be found. In order for the rights delineated in the Magna Carta to actually constitute a polity with boundaries, these kinds of specifications needed to be enumerated. The interpretative acts that accomplished this, more than anything in the text of the Magna Carta, enabled sovereignty to be extended to a bounded community of subjects. The Magna Carta's most authoritative interpretations were penned by Sir Edward Coke. Coke translated common law political institutions, laws, and statutes (of which the Magna Carta is the preeminent example) into a system of jurisprudence with constitutional rights and liberties (Hulsebosch 2003). So authoritative are Coke's interpretations that he is sometimes considered an author of the British constitution.¹ The particular nature of his interpretations was such that some have also suggested that his ideas grounded the creation of the British Empire.² It is to Coke, then, that we must turn to understand exactly how the population of English subjects, and eventually citizens, came to be constituted.³

The bulk of Coke's conclusions on constituting the British citizenry can be found in his commentaries on what is known as *Calvin's Case* (1608). *Calvin's Case* involved the question of whether Robert Calvin, a Scottish man born after the union of the Scottish and English crowns under James I, was a subject of the crown and hence could legitimately inherit land. This right of inheritance was a signature right of subjects. At stake was the political status of not just Scots, but also people in other parts of the kingdom, aliens who had been admitted for

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residence or temporary travel to England, and, finally, people residing in territories that had nonstandard political relationships to the crown, yet were in some meaningful way historically tied to English politics. (The latter group included people in territories that had been ceded to other sovereigns, or the reverse.) In short, *Calvin's Case* took up where the Magna Carta's constitutive vagueness left off. It addressed the question of how to differentiate between subjects and foreigners, as well as among the different kinds of aliens who were present within the kingdom.⁴

Coke identifies allegiance as the fundamental trait that distinguishes subjects from aliens and subjecthood from other kinds of political statuses. Coke states that "they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects and no aliens" (*Calvin v. Smith* 1608, 407).⁵ In *Calvin's Case*, Coke took as his main task the production and defense of standards for ascertaining who was in the allegiance of the king. Procedures for addressing nonsubjects (deciding who could be present and enjoy which protections of the king, as well as whether anyone not in the allegiance of the king could somehow be made a subject anyway) would follow therein.

JUS TEMPUS AND THE SOVEREIGNTY OF DATE IN CALVIN'S CASE

Coke invokes the principle of *jus tempus* (as I call it) in order to determine who was in the allegiance of the king. He argues that jurists must scrutinize birthright to ascertain a person's allegiance. Subjects are people born fully and solely in the allegiance of the king's natural body, which ruled both England and Scotland (Meyler 2001; Price 1997, 83–84, 113, 115). In other words, a person's spatial location at the precise moment of his or her birth determines his or her allegiance. Although the Magna Carta makes vague references to birth in the realm, Coke is explicit that the time of birth is at least as important for determining allegiance as the place of birth. He writes, "the time of his birth is of the essence of a subject born; for he cannot be a subject to the king of England, unlesse at the time of his birth he was under the ligeance and obedience of the king" (*Calvin v. Smith* 1608, 399). Merely swearing an oath cannot constitute subjecthood because "ligeance doth not begin by the oath in the leet. . . . Swearing in a leet maketh no denization" (*Calvin v. Smith* 1608, 382). Obedience itself is a birthright, not a decision, choice, or act, and it determines whether one can enjoy the protection of the freedoms spelled out in the Magna Carta, as well as in the rest of the common law tradition.⁶ By stating that allegiance is set at the time of birth, Coke makes the time of a potential subject's birth as important as his or her place of birth.⁷ This principle, *jus tempus*, serves as important a role as place of birth or parentage in determining who can enjoy the freedoms spelled out in the Magna Carta and other parts of the common law tradition.

In order to specify who was actually born into the allegiance of King James, Coke gives a detailed political history of each of the territories potentially containing James' subjects. This included primarily Scotland, Ireland, Normandy, Aquitaine, Calais, Gascony, and Guyan. He traces the history of each territory's political relationship to the crown. Through

these political histories, Coke very carefully details what Magna Carta had left undefined: namely, who could be considered a subject based not only on political principle, but also on historical circumstance. Foremost among the territories whose peoples were of special interest when Coke was writing were the Scottish and the Irish. Coke sifts through the arguments presented to the court and a lengthy history of the subjects in question and concludes that the Irish are not full subjects of James. The Scottish *postnati* (born after the union of the crowns), of which Calvin was one, were indeed subjects. The *antenati* (persons born prior to the union of the crowns) were not.

In drawing a line between the *antenati* and *postnati*, Coke applies the principle of *jus tempus* to the actual population of potential subjects of James I. Calvin was born after James had assumed the throne, joining England and Scotland in political union. By elaborating this principle of *jus tempus*, Coke does not simply show how to draw political boundaries around sovereign territorial boundaries. He demarcates sovereign boundaries in time that are every bit as powerful as those drawn in the soil.

Jus tempus affects the kinds of boundaries that can be drawn within, as well as around, a population or citizenry. Coke's interpretations of the Magna Carta and the English constitutional tradition in *Calvin's Case* illustrate an instance of these internal boundaries. Despite his concern for explaining the bases and applications of membership rules, Coke does not bifurcate the British population into subjects and aliens. Mirroring the allusions to foreigners in the Magna Carta in far more precise terms, Coke describes aliens as either permanent or temporary, friend or enemy, and by birth or circumstance (*Calvin v. Smith* 1608, 397). He also affirms the Magna Carta's implication that aliens can be given safe passage by a grant of the king (*Calvin v. Smith* 1608, 396). Each type of alien status is associated with different privileges, most of which revolve around the crucial questions of landholding and the passage of holdings to heirs. Coke lays out a set of distinctions that is friendly to the idea of foreign persons in the kingdom and even permits friendly foreigners to own some property (Coke points out that they need to house themselves), although he also applies a principle of *jus sanguinis*, forbidding the passage of property from an alien to that person's children (*Calvin v. Smith* 1608, 394). Adding further complexity, the Irish were considered neither subject nor alien, but rather denizens based Coke's reports.⁸ Coke's Magna Carta therefore anticipates a variety of degrees of dominion over people who are not full subjects.⁹

JUS TEMPUS AND DURATIONAL AUTHORITY IN ANGLO-AMERICAN CITIZENSHIP

The constitutional tradition bequeathed by Coke's interpretations of the Magna Carta and refracted through an American lens accords authority to temporal duration as well as specific dates.¹⁰ By this, I mean that precise amounts of time acquire political authority. In combination with other principles of citizenship such as *jus soli*, *jus sanguinis*, and consent, durational *jus tempus* uses these precise amounts of time to translate political experiences and relationships into political

status and rights.¹¹ Barbara Adam provides a clarifying conceptual analogue to this principle when she cites Marx's observation that "time is the decontextualized asituational abstract exchange value that allows work to be translated into money" (Adam 2004, 38). Similarly, as the following shows, durational time takes on an abstract value (although not any that can be measured in exchange value) in politics that allows certain kinds of attributes, actions, and relationships to be translated into rights-bearing political statuses.

The importance of durational authority became apparent early in U.S. constitutional history in the decision of *McIlvaine v. Coxe* (1805), which cited the concept of *antenati* developed in *Calvin's Case*. Like the British version, the U.S. Constitution did not include explicit, detailed definitions or standards for citizenship. These definitions and standards were developed and described piecemeal in the centuries that followed the founding. Just as the union of Scotland and England had posed a political dilemma for the British, so too did the aftermath of the Revolutionary War create questions about citizenship for people in the United States. At issue in *McIlvaine* was the political status of persons who had been loyal to the British crown and wished to be considered U.S. citizens after the signing of the Constitution. In this decision, the court determined that Daniel Coxe, a former loyalist whose relatives sued to have him deemed an alien in order to deprive him of property bequeathed to him, was deemed to have given consent and been consensually admitted to the citizenry. Coxe had sided with the British during the war and held office under the king's authority in British-controlled Philadelphia in 1777, later leaving for England in 1779 (Kettner 1978, 201). Although the plaintiff sought to show that he had expatriated himself, Coxe had been in New Jersey at the moment that the Constitution was established, and he had remained there for some time before departing. Based on his physical presence during this period of time, the judge ruled that he was a citizen. The ruling stated that, while circumstances of birth could no longer govern citizenship alone, his physical presence in the state of New Jersey during the adoption of its constitution and his continued residence in the state as the state explicitly adopted an act stating that all persons abiding in its territory at that time were members owing allegiance to it, did accord him citizenship (*McIlvaine v. Coxe* 1805; Kettner 1978, 200). It was through this principle that loyalists were incorporated into the United States (whose very formation they had resisted), just as the *postnati* were incorporated in England (Kettner 1978, 199–202). *Jus tempus* thus became an equal partner with *jus soli* and, in a departure from the British tradition, with consent as well.

McIlvaine's creation of naturalization procedures to alter a person's citizenship after the moment of birth acknowledged the authority of durational time in politics. Coxe's citizenship was not born in a day, but rather developed over a specific period of time spanning from New Jersey's declaration of sovereignty to the passage of laws under which Coxe could be a member in allegiance to them (*McIlvaine v. Coxe* 1805, 212.) This authority of durational time over citizenship has implications that reach far beyond founding moments. In fact, its importance could already be seen in the deliberations over

the 1790 Naturalization Act. Although this act is rightly famous for its racialized distinctions based in *jus sanguinis*, deliberations over the terms of the act reveal an almost obsessive concern with the exact length of time required to develop or demonstrate the qualities associated with citizenship. To this day, probationary periods accord foreign-born individuals some, but not all, rights of citizenship when they spend legally designated amounts of time in the territory. Additionally, similar to date-based *jus tempus*, durational *jus tempus* inscribes boundaries inside of, as well as around, populations. Even natural-born children must await the arrival of their "age of consent" to exercise the full rights of citizens. And, just as in other exchanges, not everyone's time has equal political value. As Hammar points out, some people's times of residence will earn them future rights and status, while others (notably the undocumented) will not be counted (Hammar 1994, 194). Many people's time is likely to never translate into full membership. Thus, temporally circumscribed visas grant very limited rights to people for temporary asylum, temporary work, and temporary terms of study.

The concept that durations of time have authority in the Anglo-American citizenship tradition is not surprising. The Magna Carta's age itself has been cited as a decisive element of its supremacy. As Pocock states, "If the constitutionalists could show that the laws were as, or older than, kings, they might go on to assert a contractual or elective basis for kingship" (Pocock 1987, 56). It is the longstanding Englishness of the Magna Carta, as well as its sources, that lend each the authority to establish sovereign dominion. In fact, one of Coke's arguments against considering the Irish as full subjects hinged on the fact that the Irish were governed by their own code of law that was itself ancient and historically distinct from the laws governing the English and, post-Union, the Scottish. Coke wrote that the Irish "retain unto this day divers of their ancient customs, separate and diverse from the laws of England." (*Calvin v. Smith* 1608, 398). Somers identifies a significant philosophical underpinning of this point. She states that Locke's justification of a consent principle in his move from pre-political to a contract-based polity is rooted in a "temporal narrative" that describes a causal sequence ending with the establishment of citizenship that is spatially distinct from that which precedes it (Somers 2008, 274–77).

CONCLUSION

Through the interpretations of Edward Coke and subsequent incorporation into U.S. citizenship traditions, the Magna Carta became a vehicle for the introduction of the variable of time into the politics of citizenship. Once the principle of *jus tempus* is identified, a vast array of political implications reveal themselves. As noted earlier, Pocock has observed the authority accorded to documents based on their age, while Rubenfeld has critiqued a perceived over-privileging of political will of people in the present (Rubenfeld 2001, see especially chapter 2). Times and durations structure other facets of political membership as well. States of emergency and exception identify periods in time when people's rights may diminish or change. Political theorists refer to the concepts of transience and permanence to distinguish legitimate

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members of the *demos* from nonmembers (Dahl 1989, 129). *Jus tempus* also inflects legal practices such as respect for precedent, trying persons only one time for any given crime, and protecting people from being tried for acts that were criminalized after they had been committed. People must attain ages of consent, majority, and seniority in order to acquire certain rights. In these cases, age acts as a proxy for capacity and entitlement rather than allegiance. What these examples have in common is that for each instance of *jus tempus*, the sovereign boundaries delineated by time serve to inscribe populations from within. They join governmental and normative principles of politics in ways presaged by Coke's argument about the different allegiances of the *antenati* and the *postnati* in seventeenth-century Britain. ■

NOTES

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1. "Coke's work helped create the Anglo-American idea of a constitution: a national legal environment anterior to the positive law of kings, their courts, and legislatures. In this sense he was a framer of the British constitution" (Pocock 1987, 38). "Coke's 'frame of the ancient common laws of this realm' was a canon of iconic common law institutions (preeminently the jury), core rules (like an heir's right to inherit property), and historic statutes (the most famous being Magna Carta). Like most canons, it was dynamic: some elements dropped off and others were added over time. By the middle of the seventeenth century, this canon was known as the ancient constitution—though Coke never used that term." (Hulsebosch 2003, 444).
2. "Coke's *Institutes* transformed a geographically defined nation into a legally defined one and assured readers of the ability to abandon geographical boundaries without losing legal national identity" (Bilder 2004, 33). Hulsebosch uses the phrase "spatial, temporal, and genetic" in reference to Coke's concept of *ligeance* (Hulsebosch 2003, 445 and n86).
3. Hulsebosch calls Coke the "ablest curator of this constitution" (Hulsebosch 2003, 445 and n86).
4. As I have written elsewhere, these kinds of "semi-citizenships" are integral to the instantiation of the modern state (Cohen 2009).
5. Coke wrote, "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" (*Calvin v. Smith* 1608, 382). Here, Coke's reference to "higher" is a comparison to other political relationships, principally feudal hierarchies of lord and tenant.
6. The case does discuss the fact that possession of a noble title to which a person had been born in Scotland would not entitle him or her to the equivalent in England, although this fact is not central to the argument of this article (*Calvin v. Smith* 1608, 394).
7. A few others have noted this parenthetically (e.g., Price 1997, 117; Bilder 2004, 36).
8. Coke is notoriously vague on the subject of the Irish. Both he and the other main source of commentary on Calvin's Case, Francis Bacon, imply that the Irish are not subjects, and indeed they were not treated as such. However, this matter is the least precise element of Coke's writing on the case.
9. Although it would be a stretch to say that *Calvin's Case* portends empire, Coke's words certainly were not hostile to such a concept.
10. Schuck and Smith write, "Coke's position remained the universally cited starting point for Anglo-American legal analyses of political membership through at least the nineteenth century" (Schuck and Smith 1985, 13). Hulsebosch calls Coke the "ablest curator of this constitution" and uses the phrase "spatial, temporal, and genetic" in reference to Coke's concept of *ligeance* (Hulsebosch 2003, 445 and n86).
11. Many have noted that a variation of *jus soli* similar to that which Coke describes has become integral to U.S. citizenship, as does a consent principle that departs from Coke's ascription-based model and is expressed most directly by the Fourteenth Amendment, although the principle itself became apparent well before the Civil War or Reconstruction (Meyler 2001; Schuck and Smith 1985).

REFERENCES

- Adam, Barbara. 2004. *Time*. Cambridge, UK: Polity.
- Bilder, Mary Sarah. 2004. *The Transatlantic Constitution*. Cambridge, MA: Harvard University Press.
- Brubaker, Rogers. 1992. *Citizenship and Nationhood in France and Germany*. Cambridge: Harvard University Press.
- Calvin v. Smith*. 1608. 77 English Report (K.B. 1608).
- Cohen, Elizabeth. 2009. *Semi-Citizenship in Democratic Politics*. New York: Cambridge University Press.
- Dahl, Robert. 1989. *Democracy and Its Critics*. New Haven, CT: Yale University Press.
- Hammar, Tomas. 1994. "Legal Time of Residence and the Status of Immigrants." In *From Aliens to Citizens: Redefining the Status of Immigrants in Europe*, ed. Rainer Bauböck, 187–98. Vienna: Avebury.
- Hulsebosch, Daniel. 2003. "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence." *Law and History Review* 21 (3): 439–82.
- Kettner, James. 1978. *The Development of American Citizenship, 1608–1870*. Chapel Hill: University of North Carolina Press.
- McIlvaine v. Cox*. 1805. 6 U.S. 280.
- Meyler, Bernadette. 2001. "The Gestation of Birthright Citizenship, 1869–1898: States Rights, the Law of Nations, and Mutual Consent." *Georgetown Immigration Law Journal* 15: 519–62.
- Pocock, J. G. A. 1987. *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*. Cambridge: Cambridge University Press.
- Price, Polly. 1997. "Natural Law and Birthright Citizenship in *Calvin's Case* (1608)." *Yale Journal of Law and Humanities* 73: 73–145.
- Rubinfeld, Jed. 2001. *Freedom and Time*. New Haven and London: Yale University Press.
- Sahlins, Peter. 2004. *Unnaturally French: Foreign Citizens in the Old Regime and After*. Ithaca: Cornell University Press.
- Schuck, Peter H., and Rogers M. Smith. 1985. *Citizenship without Consent: Illegal Aliens in the American Polity*. New Haven and London: Yale University Press.
- Somers, Margaret R. 2008. *Genealogies of Citizenship*. Cambridge and New York: Cambridge University Press.
- Turner, Ralph V. 2003. *Magna Carta through the Ages*. London: Longman.
- Wells, Charlotte. 1995. *Law and Citizenship in Early Modern France*. Baltimore, MD: Johns Hopkins University Press.
- Wheeler, Harvey. 1947. *Calvin's Case and the Empire*, Ph.D. diss., Indiana University.