

# CITIZENSHIP AND THE LAW OF TIME IN THE UNITED STATES

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## INTRODUCTION

Who is entitled to become a United States citizen? In an age of mass migration, unease over the question of citizenship attribution has led to fierce debate about naturalization rules. On every occasion in recent history that Congress has held hearings about whether to create a pathway to citizenship for its undocumented population, many in the United States have actively lobbied against offering even a liminal status for long-term resident non-citizens. Such disagreement reveals deep normative ambivalence about immigration. As a nation, we have never entirely agreed on who deserves to be a citizen.

In this Article I will use the constitutional and legislative history of citizenship and naturalization rules in the United States to make an argument that we have a long and well-defined history of according American citizenship to people based, in large part, on a temporal rule of citizenship. This rule identifies moments and durations of time that, along with other traits, qualify people for citizenship. The Article describes the history of temporal rules of citizenship and, in so doing, illustrates why these principles of citizenship are ideally suited for making determinations of citizenship under conditions of normative disagreement that are complicated by administrative challenges. In particular, the Article will point to the way in which time can represent a wide array of the norms that even vastly divergent ideologies associate with citizenship. Time can simultaneously represent assimilation, civic knowledge, social connection, loyalty, and many more citizenly traits and experiences. Because time is associated with an unusually wide array of citizenship norms, temporally based

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rules of citizenship forge compromises between conflicting founding ideologies. Of most relevance to the subject of this Article is the fact that temporal rules circumvent quandaries such as disagreement over who deserves to be a citizen. This potential for bridging normative divides makes temporal rules of citizenship unusually powerful governing instruments. At the same time, temporal rules also ensure the smooth functioning of a large-scale state committed to basic liberal egalitarian norms. Unlike money or property or even work, time is equally available to all people. It proceeds at the same rate regardless of one's ascribed characteristics, social class, or any other subjective traits. Using measures of time as a means of assigning citizenship rights circumvents the pitfalls inherent in most qualitative, subjective, and often inequalitarian measures of fitness for citizenship.

### I. ELIGIBILITY FOR CITIZENSHIP

Citizenship rules in all nation-states generally fall into two types. The first, *jus soli*, assigns citizenship based on physical presence, usually at the time of birth.<sup>1</sup> The second, *jus sanguinis*, assigns citizenship based on blood lineage, asking one to prove a relative is or was a citizen.<sup>2</sup> These principles use either physical presence or blood lineage to represent traits such as allegiance, fidelity, and connection to the polity or its people. In some cases the rules will be applied in conjunction. For example, citizenship is assigned to people born in United States territory<sup>3</sup> and to children born abroad to American parents.<sup>4</sup>

A third rule is quietly in operation alongside, and sometimes in cooperation with, these two rules. It is a temporal rule of citizenship that associates fitness for membership with specific amounts of time. I call this *jus temporis*. *Jus temporis* is a temporal principle of citizenship that allows states to use dates and measurements of calendrical or durational time to confer part of or the entire citizenship bundle upon individuals and groups. Different types of temporal measurement apply in different circumstances. These temporal measures are not the only variables for determining someone's readiness for citizenship but they are critical. *Jus temporis*

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1. BLACK'S LAW DICTIONARY 942 (9th ed. 2009).

2. *Id.* at 941.

3. 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 . . .").

4. Immigration and Nationality Act, 8 U.S.C.A. § 1401 (West 2013).

produces the probationary periods of time that every nation-state demands aspiring citizens wait prior to naturalizing. It can also be observed in more local contexts, such as the requirement that legal permanent residents reside in the United States for a minimum of five years prior to applying for discretionary state benefits, such as Temporary Aid for Needy Families.<sup>5</sup> A rule of *jus temporis* is even at the heart of rules creating an age of consent, in which the full rights of citizenship are bestowed on persons after they have reached a predetermined age. In each of these three examples, *jus temporis*, in the form of a temporal threshold or a duration of time, serves to represent the development of qualities, relationships, and skills that are associated with citizenship.

Much like *jus soli* and *jus sanguinis* use land and blood to represent the deeper and intangible kinds of qualities that a society deems central to citizenliness, temporal rules of citizenship use time in an analogic fashion. In other words, time has come to be used to represent core values and norms associated with citizenship.<sup>6</sup> This is especially true because the social meanings of time are quite elastic, offering a wide range of possible values that can be represented using time. Time therefore comes to have special agency in the negotiation of compromises among different citizenship norms. As this article will show, time's elasticity allows it to represent a full array of the core norms that even vastly divergent ideologies associate with citizenship.

## II. TIME AND SOVEREIGNTY

There are several overarching reasons that time figures so prominently in naturalization rules. The first has to do with the establishment of sovereignty. Although sovereignty over a territory and its inhabitants is generally associated with the rule of law and geographical markers, sovereignty is also established at a specific time.

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5. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 402, 8 U.S.C.A. § 1612 (West 2013).

6. As George Lakoff and Mark Johnson describe, societies around the world exhibit a common reliance on the value of time for the purpose of creating the building block metaphors that are essential to any system of communication. George Lakoff & Mark Johnson, *Conceptual Metaphor in Everyday Language*, 77 J. PHIL. 453, 456–57 (1980).

In the Anglo-American tradition, the precedent for the establishment of citizenship, and consequently naturalization, is *Calvin v. Smith*,<sup>7</sup> otherwise known as *Calvin's Case*. *Calvin's Case* also establishes the practice of using a date to distinguish between subjects of the King and outsiders.<sup>8</sup> In 1608, Edward Coke recorded the decision in *Calvin's Case* stating that persons born in Scotland after the ascent of James I to the throne in 1603 (*postnati*) were to be considered subjects in his allegiance, while those born prior to his ascent (*antenati*) were not. The explicit outcome of this decision was to make the date of James's ascent a political boundary between subjects and those of the various lesser political statuses that existed at the time. The 1603 boundary was as stark as any line on a map or border in the earth. Although it could be crossed—naturalization could bring the *antenati* into the political body—even people who were “naturalized” had different political statuses than those born into it.<sup>9</sup>

The authoritative use of time to make a legal distinction between *antenati* and *postnati* is hardly unique to the early modern or the Anglo-American context. Nor is it only deployed in states that use place of birth to assign citizenship. The establishment of sovereign borders following the breakup of the Soviet Union into its constituent republics offers a striking recent instance of the use of specific dates to carve out citizenries, in many cases in concert with both *jus soli* and *jus sanguinis*.<sup>10</sup> In those cases, dates were specifically deployed not

7. (1608) 77 Eng. Rep. 377 (K.B.); 7 Co. Rep. 1a.

8. In the literature on citizenship the choice of a date at which all persons present in a territory are offered citizenship is frequently referred to as the “zero option.” I am avoiding use of this term because I believe it is misleading. In most cases where the term “zero option” is used, exceptions (temporal, racial, and otherwise) exist that ensure that segments of the population do not actually receive citizenship on the same terms as others. For further discussion of the “zero option,” see Rainer Obliger, *Ius Sanguinis*, in 1 IMMIGRATION AND ASYLUM: FROM 1900 TO THE PRESENT 342, 342–46 (Matthew J. Gibney & Randall Hansen eds., 2005). I am indebted to Kathrine Barnes for drawing my attention to the phrase “zero option” citizenship rules.

9. See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 37–42 (1978) (discussing *Craw v. Ramsey*, (1670) 124 Eng. Rep. 1072, 1075 (C.P.), which distinguished between natural-born and naturalized Irishmen in recognizing priority in inheritance of an English earl's estate).

10. These are instances of a larger category of citizenship attribution issues associated with “restoration” or “restitution.” See Piotr Korcelli, *Current Issues Related to Citizenship and Immigration: The Case of Poland*, in FROM ALIENS TO CITIZENS: REDEFINING THE STATUS OF IMMIGRANTS IN EUROPE 121, 199 (Rainer Bauböck ed., 1994); Andre Liebich, *Introduction: Altmuehländer or the Vicissitudes of Citizenship in the New EU States*, in CITIZENSHIP POLICIES IN THE NEW EUROPE 21, 21–37 (Rainer Bauböck et al. eds., expanded and updated ed. 2009).

only to mark the assertion of each individual republic's sovereignty, but also to identify the boundaries of their citizenries.<sup>11</sup> Latvia, Estonia, and Lithuania famously excluded from citizenship large numbers of people who had been born in their territories during the Soviet era and who were present during separation, but whose parents and grandparents had not been present prior to the moment at which the Soviet occupation began.<sup>12</sup> In these cases the use of precise dates is essential to identifying the sovereign boundaries of each state, as well as the boundaries that demarcate citizens (*postnati*) from non-citizens (*antenati*). Citizenship laws in Bulgaria and Romania as well as the seven former Yugoslav republics followed similar patterns, establishing rules that singled out residence during specific time periods. For example, in Macedonia citizenship was accorded to an individual

if on 6 April 1945 he or she had municipal membership on the territory of the People's Republic of Macedonia; if before 30 June 1948 he or she made a statement in the presence of the town or regional council where he or she resided that he or she wished to be a citizen of PR Macedonia; or, if on 28 August 1945 he or she was a resident outside the territory of the FPR Yugoslavia but before 6 April 1941 his or her last municipal membership was somewhere on the territory of the People's Republic of Macedonia.<sup>13</sup>

Very similar provisions can be found in almost all of the citizenship laws instituted following the breakup of the Soviet Union.

Although this article focuses on the Anglo-American context, it is worth noting that rules of *jus temporis* were also invoked in the dismantling of the British Empire. Date-based *jus temporis* was applied in the transition of Hong Kong from British rule.<sup>14</sup> Similarly, despite its association with strong rules of *jus sanguinis*, Germany's

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11. See Jeff Chinn & Lise A. Truex, *The Question of Citizenship in the Baltics*, 7 J. DEMOCRACY 133, 133–34 (1996) (observing that these states defined citizenship following independence in 1991 in terms of citizenship at the time of Soviet annexation in 1940).

12. See *id.* at 134–36 (describing the stringent post-independence naturalization requirements these states, especially Latvia and Estonia, imposed on residents who had immigrated during the Soviet era).

13. Ljubica Spaskovska, *Macedonia's Nationals, Minorities and Refugees in the Post-Communist Labyrinths of Citizenship* 5–6 (University of Edinburgh School of Law, Working Paper No. 2010/05, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1914398](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914398).

14. JAMES M. CARROLL, *A CONCISE HISTORY OF HONG KONG* 239–51 (1987) (discussing “[b]ecoming Hong Kongese”).

Basic Law (the German constitution) extends citizenship to persons present or related to those present as of December 31, 1937, as well as to anyone expelled between January 30, 1933 and May 8, 1945, as long as those persons were also present after May 8, 1945.<sup>15</sup> Temporal boundaries are not just the product of moments of establishment and dissolution, they are also implicated in rules that states adopt after establishment. For example, persons born in the Panama Canal Zone after 1904 have long been considered American citizens.<sup>16</sup> Similarly, the Jones Act granted United States citizenship to Puerto Ricans in 1917.<sup>17</sup>

Time holds singular political potential for the exercise of sovereignty. It is common to all political subjects, and yet it necessarily has a distinctive meaning within every society. Accordingly, time is both universal and particular. It can appear neutrally scientific and impartial while simultaneously attaching to a group's deepest normative traditions. Benedict Anderson has famously pointed out that shared temporal context, facilitated by the regularization of clock time, was crucial to the development of the modern nation-state.<sup>18</sup> More recently, Thomas M. Allen illustrated this process at work in eighteenth-century America, writing that America made "time the medium for an effusive nationalism."<sup>19</sup> It comes as no surprise then that time is so important to sovereignty and subjectivity. Time can apply to almost any kind of action or relationship. Time is also understood, if differently so, by all people. And despite its universal qualities, time also takes on a distinct meaning in any society. Few

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15. GRUNGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 116 (Ger.).

16. Immigration and Nationality Act of 1952, tit. 3, ch. 1, § 303, 66 Stat. 163, 236 (codified as amended at 8 U.S.C. § 1403 (2006)) ("Any person born in the Canal Zone on or after February 26, 2014 . . . whose father or mother or both at the time of birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.").

17. Jones-Shafroth Act of 1917, ch. 145, § 5, 39 Stat. 951, 953 (codified at 48 U.S.C. § 733 (2006)).

18. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTION ON THE ORIGIN AND SPREAD OF NATIONALISM 194–95* (1983). Anderson discusses the imposition of the Napoleonic calendar as representative of the movement to synchronize the shared experience of an entire people. He argues that this was critical to the development of nationhood among disparately situated people in newly forming political bodies. *Id. passim*.

19. THOMAS M. ALLEN, *A REPUBLIC IN TIME 23* (2008). Writing about the effect of the French Revolution on European identity, Peter Fritzsche proposes a dualist thesis about European identity in which shared context and differentiation are produced by the "specific temporal identity not unlike the feeling of generation, and separated or decoupled . . . from their forebears two or three generations earlier." PETER FRITZSCHE, *STRANDED IN THE PRESENT: MODERN TIME AND THE MELANCHOLY OF HISTORY 53* (2004).

other things have the potential to be applied to politics in such specific and general ways.

### III. TIME AND CITIZENSHIP NORMS

Although time is crucial to establishing sovereignty, it is also a useful tool for connecting political norms and citizenship practices, as demonstrated by the development of United States citizenship laws. American jurists did not adopt the *Calvin's Case* rule of *jus soli* wholesale. What transformed this precedent in the United States context were notions of consent that Coke rejected, but which were integral to the separation of the colonies from Great Britain.<sup>20</sup> Coke had established allegiance as perpetual: it began at birth and could not be abjured. By contrast, Lockean consent was not ascribed; it was only conceivable once a child reached maturity (the age of consent) and it could be foresworn.<sup>21</sup> Putting this Lockean ideal into practice, the founders, legislators, and jurists in the United States constructed a consensual government in which citizenship could be subscribed within the space of a reasonable period of time. This marriage of consent and *jus soli* was made possible because United States citizenship revised the temporal reasoning found in *Calvin's Case*. In so doing, they ensured that full members of the United States polity would be consenting citizens of the republic rather than loyal subjects of the king.

The insertion of consent into common law citizenship norms in the United States—which required and employed a different understanding of time—began in 1804 with a series of court decisions establishing a set of understandings about who was an American citizen. The Supreme Court's earliest words on the subject of the American *antenati* came in the case *M'Ilvaine v. Coxe's Lessee* (*McIlvaine*).<sup>22</sup> Leading up to this confrontation had been a series of

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20. Peter H. Schuck and Rogers M. Smith illustrate in careful detail how consent came to dominate American conceptions of citizenship. *E.g.*, PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 42–43, 49 (1985); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 81–82 (1997). However, even the nation's most purely consensual rules of citizenship attribution required physical presence and therefore some element of *jus soli* is omnipresent.

21. See KETTNER, *supra* note 9, at 54–55; SCHUCK & SMITH, *supra* note 20, at 23–25; SMITH, *supra* note 20, at 78–80. On expatriation, see Gerhard Casper, Lecture at the University of Chicago Law School: Forswearing Allegiance (May 1, 2008).

22. (*McIlvaine I*) 6 U.S. (2 Cranch) 280 (1805). The case was reargued in 1808. *McIlvaine v. Coxe's Lessee* (*McIlvaine II*), 8 U.S. (4 Cranch) 209 (1808). “*McIlvaine*” will be used to refer to both *McIlvaine I* and *McIlvaine II*.

squabbles between the British and Americans about the exact date on which United States sovereignty, and hence citizenship, was established (1783, upon the conclusion of the Treaty of Paris, as the British contended, or 1776, as the Americans contended).<sup>23</sup> As was true of many of the early citizenship cases, *McIlvaine* involved a question of whether an *antenatus* could inherit land.<sup>24</sup> Perhaps marking a hangover from the pre-democratic membership defined in *Calvin's Case*, property ownership, particularly rights associated with inheritance of property, was a proxy for citizenship rights far more than was the right to vote.<sup>25</sup> In *McIlvaine*, Daniel Coxe's allegiance and eligibility for citizenship were brought into doubt by virtue of the fact that he had been a loyalist during the Revolutionary War.<sup>26</sup> The arguments on each side were complex, pointing to where Coxe resided at specific intervals marked by the declaration of war in 1776, the signing of Jay's Treaty in 1794, and interim legislative acts in New Jersey that explicitly enumerated the acts that would henceforth be considered treasonous.<sup>27</sup> Rather than using a single date, as *Calvin's*

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23. KETTNER, *supra* note 9, at 186–87. The difference of opinion between the British and the Americans is directly noted in *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 187–88 (1830) (Story, J., concurring). It may be useful at this point to recall that the period under examination roughly corresponds to the period during which French authorities were playing all manner of games with time, including the imposition of an entirely alien calendar for which time began with the French Revolution.

24. *McIlvaine I*, 6 U.S. at 210.

25. KETTNER, *supra* note 9, at 117–18. On the relative openness of the franchise, see generally RONALD HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* (2006); Ronald Hayduk, *Noncitizen Voting Rights: Extending the Franchise in the United States*, 92 NAT'L CIVIC REV. 52, 57–62 (2003); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993); Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 CITIZENSHIP STUD. 607, 608 (2009).

26. *McIlvaine I*, 6 U.S. at 334.

27. The Court noted:

The inquiry which the jury is directed to make, by the act of the 18th of April, 1778, in order to lay a foundation for the confiscation of the personal estates of these fugitives is, whether the person had, between the 4th of October, 1776, and the 5th of June, 1777, joined the armies of the king of Great Britain, or otherwise offended against the form of his allegiance to the state. The 7th section of this law is peculiarly important, because it provides not only for past cases, which had occurred since the 5th of June, 1777, but for all future cases, and in all of them, the inquiry is to be whether the offender has joined the armies of the king, or otherwise offended against the form of his allegiance to the state. During all this time, the real estates of these persons remained vested in them; and when by the law of the 11th of December, 1778, the legislature thought proper to act upon this part of their property, it was declared to be forfeited for their offences, not escheatable on the ground of alienage. This last act is particularly entitled to attention, as it contains a legislative declaration of the point of time, when the right of election to adhere to the old allegiance ceased, and the duties of allegiance to the new government commenced.

*Case* had, American jurists began to rely on *durations* of time to establish citizenship. Ultimately the Court declared Coxe to be a citizen by virtue of the fact that he had tacitly given consent through residence in New Jersey at the time of its founding (the adoption of the state constitution) all the way to the point at which New Jersey passed laws defining its citizenship requirements. The Court held:

Daniel Coxe lost his right of election to abandon the American cause, and to adhere to his allegiance to the King of Great Britain; because he remained in the state of New-Jersey; not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to, the new government.<sup>28</sup>

In the language of *McIlvaine*, Coxe's citizenship existed because he lost his right to elect not to be a citizen, or to adhere to his allegiance to the King, by residing in New Jersey during this period of time.<sup>29</sup> A period of time—rather than the single moment of time identified in *Calvin's Case*—became a proxy for reasoned consent. Thus, the Court identified three interwoven principles of American citizenship: consent (“right of election”); *jus soli* (“remained in the state of New-Jersey”); and *jus temporis* (“not only after she had declared herself a sovereign state, but after she had passed laws”).<sup>30</sup>

The mutually constitutive relationship between time, place, and consent is fleshed out in even more useful detail in the decision written by Justice Thompson in *Inglis v. Trustees of Sailor's Snug Harbor*,<sup>31</sup> as well as Justice Story's frequently cited concurrence. *Inglis* involved an even lengthier hashing out of both the moment at which United States sovereignty commenced and the appropriate timeframe in which consent, or election, could take place. In the decision, Justice Thompson stated:

The rule as to the point of time at which the American *antenati* ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries.

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*McIlvaine II*, 8 U.S. at 213.

28. *Id.* at 212.

29. See KETTNER, *supra* note 9, at 194 (discussing the corollary point that, prior to states passing treason laws, individuals were not prosecuted for treason even though Congress had defined the crime, implying “that individuals were generally allowed to choose sides before that time” (citing BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON* 72 (1964))).

30. *McIlvaine II*, 8 U.S. at 212. *Jus sanguinis* is an implicit part of the decision as well, because if Daniel Coxe had not been Anglo-Saxon, his standing likely would have been denied on the basis of his racial origins.

31. 28 U.S. (3 Pet.) 99 (1830).

The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the [D]eclaration of [I]ndependence.<sup>32</sup>

On the subject of durational time and consent Thompson noted that “[t]o say that the election must have been made before, or immediately at the [D]eclaration of [I]ndependence, would render the right nugatory.”<sup>33</sup> In this way he gave voice to a belief repeated throughout *antenati* cases, asserting that a government that imposed itself at a specific date was arbitrary and non-consensual while one to which citizens could subscribe within the space of a reasonable period of time was consensual.

Justice Story’s concurrence reaffirmed this relationship between durational time and consent by stating that consent requires reason and reason occurs in durations of time.<sup>34</sup> Story also acknowledged that the precedent of *McIlvaine* contradicted his precise conclusion with respect to when allegiance could commence. Story claimed the British occupation of New York that began on September 15, 1776 effectively muddled any allegiances claimed to begin on July 4, 1776.<sup>35</sup> He therefore strenuously argued that 1783 be regarded as the cutoff date for the period of election.<sup>36</sup> Still, Story emphasized that the nature of the American Revolution made it crucial that individuals be allowed an appropriate duration of time in which to choose their allegiance. He wrote:

The general doctrine asserted in the American courts, has been, that natives who were not here at the [D]eclaration of [I]ndependence, but were then, and for a long while afterwards remained, under British protection, if they returned before the treaty of peace, and were here at that period, were to be deemed citizens. If they adhered to the British crown up to the time of the treaty, they were deemed aliens . . . .<sup>37</sup>

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32. *Id.* at 121.

33. *Id.*

34. *See id.* at 159–60 (Story, J., concurring) (noting that following the American Revolution people were “entitled to make their own choice, either to remain subjects of the British crown, or to become members of the United States” and that this choice was “to be made within a reasonable time”).

35. *Id.* at 164–65 (Story, J., concurring) (“If he was born after the 15th of September 1776, and his parents did not elect to become members of the state of New York, but adhered to their native allegiance at the time of his birth, then he was born a British subject.”).

36. *Id.* at 170–71 (Story, J., concurring) (“[T]he treaty of peace of 1783 released all persons from any other allegiance than that of the party to whom they adhered, and under whose allegiance they were then, de facto, found.”).

37. *Id.* at 161 (Story, J., concurring).

Beyond his assertions about specific moments, Story also drew a connection between time and reasoned consent.

This choice was necessarily to be made within a reasonable time. In some cases that time was pointed out by express acts of the legislature; and the fact of *abiding* within the state after it assumed independence, or after some other specific period, was declared to be an election to become a citizen.<sup>38</sup>

What Story's words tell readers is that consent requires reason, and reason is measured in durations of time.

Even during the war years we can find decisions that illustrate a conception of "volitional allegiance" that embraced the idea of a temporal duration in which people could elect their own citizenship.<sup>39</sup> For example, Chief Justice McKean wrote that, following a civil war,

the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government, who have not freely assented to it. What is a reasonable time for departure, may, perhaps be properly left to the determination of a court and jury.<sup>40</sup>

Similarly, North Carolina passed a law in November 1777 allowing citizens a period of election lasting until October 1778.<sup>41</sup> Writing for the Supreme Court of North Carolina, Justice Johnston upheld the law in *Stringer v. Phillips*,<sup>42</sup> stating that "[t]he Assembly meant to retain and actually reserved the power of restoring to such *the rights which to them once belonged*, if within the limited time they would apply for that purpose."<sup>43</sup> Delaware followed suit by stretching its waiting period for full rights of office-holding to five years.<sup>44</sup>

38. *Id.* at 160 (Story, J., concurring).

39. The term "volitional allegiance" is from KETTNER, *supra* note 9, at 173–209.

40. *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 58 (1781).

41. Act of 1777, ch. 17, § 2, *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 124 (Walter Clark ed., 1886) (ordering the confiscation of property of all persons that were absent from North Carolina on July 4, 1776 or who had left since that time and were still absent unless at the next General Assembly, to be held on October 1, 1778, "such Person[s] shall . . . appear, and be by the said Assembly admitted to the Privilege of a Citizen of th[e] State").

42. 3 N.C. (Cam. & Nor.) 158 (1802).

43. *Id.* at 159.

44. Act of June 11, 1788, ch. 174, § 1, *reprinted in* 2 LAWS OF THE STATE OF DELAWARE 922 (1797) ("[N]o person who shall become . . . a subject of this state, by virtue of this act, shall be appointed to any civil office, or eligible as President, Member of the Privy Council or General Assembly, unless such person . . . resided within this state five years previous to such election or appointment . . .").

Perhaps the most illustrative, Georgia's citizenship act affirmed what the judicial decisions cited in the preceding paragraphs asserted.<sup>45</sup> Following the war, Georgia moved from a xenophobic system that had singled out Scottish immigrants for exclusion, to rules that required an oath, affirmation of character, and a twelve-month waiting period.<sup>46</sup> Minors who left the country for three or more years for their education would, upon their return, be considered aliens for the purposes of civil, military, and legislative or executive office for the exact length of their absence.<sup>47</sup> By instituting such a policy, Georgia effectively created a temporal algorithm that both expressed and "solved" the problem of Americanization by taking into account a person's age, length of absence, and period of re-immersion in American society, economy, and politics.<sup>48</sup>

To sum up: In *Calvin's Case*, the moment of birth represented the commencement of a lifelong obligation (allegiance) to the sovereign for his protection.<sup>49</sup> *McIlvaine, Inglis*, and their counterparts in state courts further developed the temporal logic of *Calvin's Case* in two important respects. First, as is commonly acknowledged, they predicated citizenship not just on allegiance, but also on consent, expressed as "right of election."<sup>50</sup> Coke's conception of *jus soli* seemed arbitrary to the colonists, who replaced the model of conquest with a "right of election" in determining the citizenship of the *antenati*.<sup>51</sup> To do so required the second innovation. In the course of making decisions with respect to the *antenati*, the Court became increasingly strident about the fact that electing citizenship required a period of time during which reason could occur and culminate in consent. The time was demarcated by two dates rather than a single moment in

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45. See generally Act of Feb. 7, 1785, ch. 28, reprinted in 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 375–78 (Allen D. Candler ed., 1911) ("Whereas the many advantages and peculiar blessings which this State enjoys, may induce foreigners to apply for a participation thereof, and whereas it is the intention of the Legislature to confer those benefits on all such as may apply and do merit the same.").

46. *Id.* at 376.

47. *Id.* at 378.

48. The judges writing these decisions had a plethora of far more explicit and concrete means for affirming consent, some of which also bore the authority of having been drawn from the common law tradition. Oaths of allegiance, for example, were far more direct, concrete, and active expressions of consent for a population that had been divided against itself. See generally JEAN BODIN, ON SOVEREIGNTY (Julian H. Franklin ed. & trans., 1992).

49. Elizabeth F. Cohen, *Jus Tempus in the Magna Carta: The Sovereignty of Time in Modern Politics and Citizenship*, 43 PS: POL. SCI. POL. 463, 463–66 (2010).

50. *McIlvaine II*, 8 U.S. (2 Cranch) 209, 212 (1808).

51. KETTNER, *supra* note 9, at 193.

time (as would be the case in a royal accession such as James's in 1603). Over and over again, judges writing decisions about the *antenati* explicitly called for "reasonable" periods of time in which persons could elect to become citizens.<sup>52</sup> These durations were, in fact, times of actual critical political reasoning during which people had information (such as newly adopted constitutions and social and political context) available in order for them to make enlightened decisions about their consent.<sup>53</sup> It was durational time that allowed the American form of *jus soli* to avoid the arbitrary quality of Coke's perpetual allegiance.<sup>54</sup> In fact, the decision to assign durational time a political value stood in direct opposition to Blackstone's related writing on the subject, which expressly stated that natural allegiance was due from the moment of birth because infants were incapable of protecting themselves and natural allegiance "[could not] be forfeited, cancelled, or altered by any change of time, place, or circumstance."<sup>55</sup> This contrast between Coke's *jus soli* and the early American focus on consent was noted in *McIlvaine*, among other cases.<sup>56</sup> As formulated by American judges, consent to citizenship occurs within a reasonable duration of time and within a specific territory. Because of this,

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52. *E.g.*, *Respublica v. Chapman*, 1 U.S. 53, 58 (1781) ("[A]ll of the writers agree, that the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government who have not freely assented to it.").

53. Here the word "enlightened" is a deliberate reference to the phrase "enlightened understanding" that Robert Dahl uses to describe one of his key prerequisites for democratic decision-making. *See generally* ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

54. Note that the idea of constituting consent through time and place upon the creation of a polity is directly analogous to Locke's formulation of consensual citizenship in an existing polity, which also invokes durational time. Locke singles out the duration of time in which a child born into a polity matures, and acquires the capacity to give consent. Thus birthright citizenship is somewhat of a misnomer, because children do not receive most rights of citizenship until they reach the age of consent. This is true of *jus soli* as well as *jus sanguinis*, as evidenced by Schuck and Smith's discussion of Burlemaqui's belief that *jus sanguinis* allowed children a "provisional political membership at birth" and that they could elect full citizenship upon reaching maturity. SCHUCK & SMITH, *supra* note 20, at 44–46. Indeed, time is critical to conferring legitimacy on the kind of "tacit consent" that Locke discusses and that is integral to social contractarian democracy. A. John Simmon, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 279 (1976). Although tacit consent is a silent consent, that does not necessarily imply that tacit consent is entirely passive. Justice Story went so far in his *Inglis* concurrence as to claim that durational time and residence together formed an "overt act or consent . . . to their [citizens'] right of election." *Inglis v. Tr. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 159 (1830) (Story, J., concurring) (emphasis added). For a recent discussion of whether *jus soli* is consensual, see generally Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175 (2010). On Locke's discussion of the political status of children, see generally IAN SHAPIRO, *DEMOCRACY'S PLACE* (1996).

55. SCHUCK & SMITH, *supra* note 20, at 43.

56. *E.g.*, *McIlvaine II*, 8 U.S. at 211–13.

*McIlvaine* allowed the full incorporation of *antenati* who were ineligible for full subjecthood under the *jus soli* rules laid out in *Calvin's Case*.

What occurs over time is more than an extended mutual “I do” to citizenship. As the text of these decisions indicates, time permitted would-be citizens to engage in acts of political reason that must occur prior to consent.<sup>57</sup> The consensus that emerged from these decisions was that, in living in the time of election and the sovereign territory of the new country, *antenati* created what I would term a “lived consent,” which was neither truly active nor completely tacit in exchange for their citizenship. Just as one’s birthplace or blood represents civic membership or volkish connection, among other things, time too comes to represent intangible qualities and acts of great significance to citizenship. The development of citizenly qualities and the performance of citizenly acts demands more of aspiring citizens above the passive acceptance implied by tacit consent and yet is not so demanding as to be inherently exclusionary.

At this point, two points about *jus temporis* have been fleshed out: First, the use of measured time to establish sovereign boundaries has been illustrated in *Calvin's Case* as well as in the United States precedents that cited Coke’s commentaries. In *Calvin's Case* we see the invocation of a single date in order to establish a sovereign boundary around a citizenry (or proto-citizenry, as the individuals in question were subjects and not citizens). Second, the use of measured time to represent an intangible political act, in this case reason, has also been illustrated.

Reason is not the only crucial act, trait, or value that time can represent. Other processes and traits that were relevant to citizenship are linked to these temporal durations. James Kettner’s read on the Court’s consistent use of time to demarcate the act of electing citizenship is that “[i]t took time to dissipate the bitterness felt toward

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57. As David Noble points out, the “state of nature” anthropology that Europeans had developed by the time of the Enlightenment treated the nation as natural and rational and everything outside its boundaries as unnatural and irrational. However, some outsiders were deemed capable of reason, hence a period of time in which to engage in political reason was a non-metaphorical breach in an otherwise seamless border that guarded the nation from the threat posed by the irrational. Thus, persons reared in aristocratic societies could engage their capacities during probationary durations of time and become American citizens. Persons who were incapable of reasoning were not given this opportunity; even as these people occupied the same land as the American nation and were governed by its laws, they were excluded from temporal opportunities for inclusion. DAVID W. NOBLE, *DEATH OF A NATION: AMERICAN CULTURE AND THE END OF EXCEPTIONALISM* xxvii (2002).

natives or longtime residents who took up arms against their neighbors or who otherwise aided the enemy.”<sup>58</sup> If we look beyond these court cases to political debates about citizenship and naturalization, more substantive statements about the purpose of *jus temporis* reveal two further points: First, time held a diverse but limited array of normative meanings in the minds of founders and early American legislators; second, these legislators established a process through which durations of time that represented these norms could be exchanged, in this case for political status.

Not only was American-style democratic citizenship virtually unprecedented, so too were its levels of immigration. As even a casual observer of American history knows, the ability to attract newcomers was essential to the survival of the young nation. In turn, survival was also dependent on finding a means with which to politically transform these newcomers into citizens in ways that were harmonious with the nation’s political underpinnings.

Prior to the American Revolution, in 1740 Parliament had created a naturalization procedure for aliens who settled in America that required applicants to have resided in the colonies for at least seven years, without being absent more than two consecutive months.<sup>59</sup> Most colonies had procedures for naturalization that were adopted and adapted by the states. Directly following the American Revolution, individual states incorporated naturalization procedures into their constitutions. Pennsylvania and Vermont identified character, an oath of allegiance, and a specified period of residence as prerequisites for naturalization.<sup>60</sup> North Carolina required an oath of allegiance and one year of residency.<sup>61</sup> New York required only that the person be a state resident, take an oath of allegiance, and renounce any other

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58. KETTNER, *supra* note 9, at 203.

59. British Naturalization Act of 1740, 13 Geo. II, c. 7 (Eng.) (providing that after June 1, 1740, “all persons born out of the legience of His Majesty, His Heirs, or Successors, who have . . . or shall inhabit or reside for . . . seven years or more in any of His Majesty’s colonies in America . . . shall be deemed, adjudged, and taken to be His Majesty’s natural-born subjects of this Kingdom”).

60. PA. CONSTITUTION of 1776, § 42 (requiring “good character,” an “oath or affirmation of allegiance,” and “one year’s residence” for naturalization, but requiring a two-year period of residence to be eligible for election as a representative of the state); VT. CONSTITUTION of 1777, ch. 2, § 38 (same).

61. N.C. CONSTITUTION of 1776, § 40 (requiring foreigners to take an oath of allegiance and reside in the state for at least one year to “be deemed a free citizen”).

allegiances.<sup>62</sup> Other states passed acts describing naturalization procedures as well.<sup>63</sup>

The bulk of early debates over political incorporation occurred at one of two points: during the Constitutional Convention of 1787 when the matter of prerequisites for national office-holding was discussed, and a few short years later when naturalization for newcomers was debated.<sup>64</sup> At the Constitutional Convention, discussion was devoted to two significant questions related to the citizenship of newcomers. First, delegates argued about how many years of residence *after* naturalization new citizens should be required to wait before becoming eligible to hold office in either the House or the Senate.<sup>65</sup> Some thought no waiting period would be just while others went so far as to advocate for a seven-year bar for the House and a fourteen-year bar for the Senate.<sup>66</sup> Second, the delegates took up the larger issue of whether the federal government would have a monopoly on the power to grant naturalization. Lack of uniformity in this regard was of concern to the founders, who believed that consequential forms of confusion would arise if the states continued to impose divergent rules about something as fundamental as citizenship.<sup>67</sup> The United States would need its own procedures for handling immigration once a sovereign state had been established. This ensured that citizenship and naturalization were among the earliest and most fiercely contested subjects taken up by delegates in 1787, and again when the newly formed legislature took up and passed the aptly

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62. N.Y. CONSTITUTION of 1777, § 42 (requiring a person to settle in the state, take an oath of allegiance, and “abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate, and State in all matters” to be eligible for naturalization).

63. It is worth observing that, unlike the court decisions discussed earlier, legislative naturalization acts linked durational residence more to the franchise of voting than to the right to own and bequeath property to one’s heirs. In several cases (arising in Pennsylvania, Vermont, Maryland, and Virginia) the probationary period was explicitly designated for voting and office-holding rights; all other rights of citizenship were accorded based on oaths of allegiance. KETTNER, *supra* note 9, at 214–15.

64. *See generally* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio Univ. Press 1966). The debates from June 15, August 9, and August 13, 1787 are of particular relevance. *See id.* at 118–21, 414–25, 437–50.

65. KETTNER, *supra* note 9, at 224–27 (analyzing the debates).

66. *Id.*

67. In 1782, James Madison wrote to Edmund Randolph that he was worried about “the intrusion of obnoxious aliens through other States” and that he believed a “uniform rule of naturalization ought certainly to be recommended to the States.” Letter from James Madison to Edmund Randolph (Aug. 27, 1782), *available at* <http://etext.virginia.edu/etcbin/toccer-new2?id=DeIVol19.xml&images=images/modeng&data=/texts/English/modeng/parsed&tag=public&part=68&division=div1>.

named Uniform Rule of Naturalization in 1790.<sup>68</sup> There was serious disagreement about whether creating a uniform rule for naturalization would trample state rights or ensure egalitarian treatment for new immigrants.<sup>69</sup>

Bearing out the larger point made earlier, durational time immediately came to the fore as the primary means of effecting uniformity in citizenship while also taking into account the concerns of skeptics who sought to reserve this power for the states. William Patterson introduced the idea of bringing “harmony” to the patchwork of state naturalization rules on June 15, 1787.<sup>70</sup> However, the periods of time recommended by different key players varied substantially. The committee reports recommended a three-year waiting period before allowing a naturalized foreign-born person into the House of Representatives and a four-year period for the Senate.<sup>71</sup> Madison’s record of the deliberations shows intense disagreement over whether the waiting periods were so long as to “give a tincture of illiberality to the Constitution” and “discourage the most desirable class of people from emigrating.”<sup>72</sup> George Mason demanded a seven-year period for the House in order to prevent “foreigners and adventurers” from making American law and to ensure adequate civic knowledge for all lawmakers.<sup>73</sup> Mason even worried about foreign conspiracies to purchase influence in the United States.<sup>74</sup> Gouverneur Morris and Charles Pinckney advocated a fourteen-year wait for the Senate.<sup>75</sup>

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68. See Naturalization Act of 1790, ch. 3, 1 Stat. 103.

69. See KETTNER, *supra* note 9, at 239–40 (summarizing the arguments on both sides).

70. MADISON, *supra* note 64, at 128.

71. Rutledge delivered the committee report on August 6, 1787. Article IV, Section 2 stated that members of the House of Representatives “shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the state in which he shall be chosen.” *Id.* at 386. Article V, Section 3 stated:

Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be, at the time of his election, a resident of the state for which he shall be chosen.

*Id.* at 387.

72. *Id.* at 419.

73. KATE MASON ROWLAND, *THE LIFE OF GEORGE MASON 1725-1792* 149 (1892).

74. *Id.*

75. MADISON, *supra* note 64, at 418.

In Morris's appeal for "reason" on the subject, he analogized between making offices available to recently naturalized foreigners and reports that some tribes of Indians had offered their daughters and wives to strangers as signs of hospitality.<sup>76</sup> Furthermore, he believed the loyalty of foreigners would always be to their first governments.<sup>77</sup> Nativists such as Elbridge Gerry and Pierce Butler ultimately sought to exclude the foreign-born from holding public office entirely.<sup>78</sup> Butler believed that not only were foreigners likely still "attached" to their native governments, but simply unable to abandon their very different notions of government.<sup>79</sup> Oliver Ellsworth disputed this, arguing that it would discourage the very sorts of immigrants that the country ought to recruit for admission.<sup>80</sup> Franklin and Madison concurred.<sup>81</sup> James Wilson wryly pointed out that he, as a foreign-born person, would be prevented by such a rule from serving in a body that he had taken part in crafting.<sup>82</sup> Wilson also demonstrated that foreigners had made valuable contributions during the Revolution.<sup>83</sup>

The final result of the negotiation was a nine-year waiting period for the Senate and a seven-year waiting period for the House.<sup>84</sup> Candidates for the office of President were initially only required to have been a resident for twenty-one years;<sup>85</sup> this was later amended to require that they be natural-born citizens.<sup>86</sup> Although it represents too serious a digression to explore further at this juncture, it should not pass unnoticed that questions of the political status of naturalized persons were hardly the only matters to which the delegates applied answers drawing upon temporal algorithms. The very matter of the timing of elections in the upper and lower houses, as well as term limits, evince the same core belief: Durations of time (*e.g.*, term lengths) could be inserted into equations along with other variables (for example the number of delegates and the respective powers of

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76. *Id.* at 421.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 418.

81. *Id.* at 419–20.

82. *Id.* at 420.

83. *Id.*

84. U.S. CONST. art. I, §§ 2–3.

85. *Presidential Eligibility*, CONSTITUTION SOCIETY, [http://constitution.org/abus/pres\\_elig.htm](http://constitution.org/abus/pres_elig.htm) (last updated July 1, 2013).

86. U.S. CONST. art. II, § 1.

the two houses) to produce virtuous, effective, democratic governance.

These debates continued within the federal legislature. One of the first acts of the new Congress was to pass a bill that detailed how the federal government's power to naturalize new citizens could be exercised.<sup>87</sup> Just as their judicial counterparts engaged in the task of determining how specific moments in time would divide citizens from non-citizens, legislators argued over what durational time meant and how it could be used incrementally both to include and exclude newcomers. To read the debates over the Uniform Rule of Naturalization is to come face to face with an almost obsessive concern with the meaning of specific durations of time for citizenship.<sup>88</sup> The legislature worried equally about the dangers of admitting people into political enfranchisement immediately upon arrival and, alternatively, in a progressive but piecemeal fashion after passing temporal thresholds. All of the worries and aspirations of the representatives—their concern about foreign influence and purchase of offices, of creating inequalities among the population, of what people with foreign attachments might accomplish, of becoming an illiberal society—were expressed by arguing for different durational residence requirements for newcomers. The sheer volume and range of discussion about the meaning of time, the fairness of temporal rules, and the effect time has on the division of citizenship into semi-citizenships is surprising, perhaps in part because contemporary academic attention has focused on the relative importance of *jus sanguinis*, *jus soli*, and consent to early immigration laws. Just as birthplace, blood lineage, and consent each represent intangible qualities necessary for citizenship, the legislators quoted above thought that time could measure abstract traits.

A significant point of contention attached to the terms of the Uniform Rule of Naturalization centered on whether an oath of allegiance would suffice to qualify someone for naturalization or whether a probationary residence time period was necessary. A

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87. See Naturalization Act of 1790, ch. 3, 1 Stat. 103.

88. Most scholars of citizenship who have studied the Rule of Uniform Naturalization attend to its presumption of *jus sanguinis*, pointing out that racialized restrictions were so ingrained that the discussion of the Act did not include deliberation over whether non-whites could naturalize. See ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 153 (1997); Barbara Welke, *Law, Personhood, and Citizenship in the Long Nineteenth Century: The Borders of Belonging*, in *The CAMBRIDGE HISTORY OF LAW IN AMERICA* 345, 346–48 (Michael Grossberg & Christopher Tomlins eds., 2008).

consensus quickly emerged that some sort of probationary period was in fact important to demand of would-be citizens.<sup>89</sup> Once one stops to consider that other means of measuring the traits of good citizens exist (such as loyalty oaths, tests, and property ownership, each of which had appeared in many of the individual colonies' rules about incorporation),<sup>90</sup> it is striking to observe that the legislative debates over the Uniform Rule of Naturalization and the related rules that followed its passage focus almost exclusively on how many years immigrants ought to wait before they could naturalize. The consensus on making newcomers wait for citizenship is all the more notable in a context where new citizens were so actively sought and needed.<sup>91</sup>

Parsing these debates makes evident the degree to which linking intangible values such as loyalty and civic incorporation to durational time, measureable in precise increments by clocks and calendars, facilitated the development of an algorithmic formula for the extension of rights to foreign-born persons. The concept of a probationary duration was not an American innovation. It can be traced back to Roman laws pertaining to the status of newly (and less newly) conquered people.<sup>92</sup> However, the English common law precedents to which Americans turned for guidance in creating their own citizenship rules did not allow for the full naturalization of newcomers.<sup>93</sup> American legislators advocating probationary periods prior to naturalization referred to the Roman practice of requiring probationary periods to ratify the practice, but their justifications for the probationary period make reference to the qualities and values of American citizenship rather than the authority of any predecessor.

The congressmen debating the Uniform Rule of Naturalization referred to a diverse yet limited set of values that they believed time represented. Like Coke and the American judges who would later

89. 1 ANNALS OF CONG. 1146–58 (Joseph Gales ed., 1790).

90. See KETTNER, *supra* note 9, at 179–80 (discussing the naturalization rules adopted by several colonies).

91. Kettner points out that early America witnessed a “chronic labor shortage” that could be remedied only by actively enticing new arrivals. *Id.* at 107.

92. See A. N. SHERWIN-WHITE, *THE ROMAN CITIZENSHIP* 61 (2d ed. 1973) (describing the process of Roman conquest and incorporation as one that required “a probationary period during which these peoples were brought under the influence of Romano-Latin discipline and culture”); see also RANDALL S. HOWARTH, *THE ORIGINS OF ROMAN CITIZENSHIP* 4–5 (2006) (detailing the founders’ consultation of Roman sources during the drafting of the Constitution).

93. See KETTNER, *supra* note 9, at 37–42 (noting that naturalization implied significant differences between naturalized and natural born subjects, which was made explicit in *Ramsey*, where it was determined that Irish *antenati* who had been naturalized were still aliens in England).

draw on his ideas, some legislators identified probationary time periods prior to naturalization as a means of measuring “fidelity and allegiance.”<sup>94</sup> But allegiance, which treats the loyalty of citizens as a debt incurred from the protection of a sovereign, is only one value that the participants in the debate associated with probationary periods. Thomas Hartley, for example, noted that “an actual residence of such a length of time as would give a man an opportunity of esteeming the Government from knowing its intrinsic value, was essentially necessary to assure us of a man’s becoming a good citizen.”<sup>95</sup>

Other advocates of a probationary time period, including James Madison, connected the amount of time an immigrant is in residence with understanding the value of citizenship itself, rather than just understanding the government and laws.<sup>96</sup> Similarly (though with a different emphasis), Representative Theodore Sedgwick of Massachusetts also connected a probationary time period with shedding “prejudices of education, acquired under monarchical and aristocratical governments [that] may deprive [potential citizens] of that zest for pure republicanism which is necessary in order to taste its beneficence” and, taking this one step further, with forms of civic knowledge that will make them good citizens.<sup>97</sup> Representative James Jackson of Georgia wanted “to see the title of citizen of America as highly venerated and respected as was that of old Rome.”<sup>98</sup> Jackson stated: “I am clearly of the opinion, that rather than have the common class of vagrants, paupers, and other outcasts of Europe, that we had better be as we are, and trust to the natural increase of our population for inhabitants.”<sup>99</sup> He went on to insist that a period of residence was a conduit for obtaining testimonials to the character of persons seeking citizenship.<sup>100</sup> He thought we must test the propriety and decency of every potential citizen.<sup>101</sup>

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94. 1 ANNALS OF CONG. 1147.

95. *Id.* at 1147–48.

96. *See id.* at 1150 (quoting Madison saying, with regard to naturalization, “it is to increase the wealth and strength of our community; and those who acquire the rights of citizenship without adding to the strength or wealth of the community are not the people we are in want of”).

97. *Id.* at 1156.

98. *Id.* at 1152.

99. *Id.*

100. *Id.* at 1153.

101. *Id.*

Besides the *length* of the probationary period, other subsidiary temporal issues were raised. For example, a debate ensued over the importance of *continuity* in time: Could probationary periods that were interrupted disqualify someone from meeting the standard for citizenship?<sup>102</sup> White went so far as to argue for denationalizing citizens who left and stayed abroad for a specified length of time.<sup>103</sup>

Even as many supported the idea of a probationary period, a number of influential congressmen also recognized that it would be both constitutionally and morally problematic to legislate the creation of semi-citizenships according only partial rights to some persons. James Madison, William Smith, and Elias Boudinot were particularly outspoken on this topic.<sup>104</sup> Madison voiced concerns that merged the normative with procedural questions, asking whether a probationary period that sliced up citizenship into semi-citizenships would be unconstitutional, or at a minimum antithetical to the egalitarian foundations of the Constitution.<sup>105</sup> Representative William Loughton Smith of South Carolina asserted that a progressive rule of naturalization (according some rights upon arrival and various others after specified lengths of residence) went against the charge to create one rule of uniform naturalization.<sup>106</sup> Even Jackson, who deeply distrusted extending American citizenship too widely, referred to Blackstone's commentaries to make the point that citizenship cannot be conferred progressively or piecemeal (except the right to hold office).<sup>107</sup> Additionally, Page argued that European nations that required longer time restrictions did so because they were more bigoted and prejudiced against foreigners/neighbors.<sup>108</sup> This likely contributed to the fact that the Uniform Rule of Naturalization Act required only a two-year period of residence prior to naturalization.<sup>109</sup>

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102. See FRANK GEORGE FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES* 42 (Arno Press, Inc. 1969) (1906) ("Uninterrupted time remains significant to the naturalization process. Legal permanent residents of the United States may not leave the country for extended periods of time while seeking to naturalize.").

103. 1 ANNALS OF CONG. 1149.

104. In fact, the Constitution itself had created semi-citizenships on all sorts of bases, including temporally defined restrictions on the election of the foreign-born to Congress described above. See U.S. CONST. art. I, §§ 2-3.

105. See 1 ANNALS OF CONG. 1149-50.

106. *Id.* The issue of creating different forms of citizenship, some with lesser and greater rights was a sensitive one for many who regarded separation from Great Britain as an act of defiance against the lesser status of the colonists in the empire. See *id.*

107. See *id.* at 1158.

108. *Id.*

109. See Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (requiring candidates to

The probationary period of the Act in effect allowed people not born with American citizenship to exchange two years of their time for the status of citizen. The crafters of the bill were aware that they were instantiating such a process. Hartley actually makes a direct reference to the fact that time has a political exchange value, excoriating states in which men could become citizens immediately upon arrival for making citizenship too “cheap.”<sup>110</sup> And the appeal of temporal algorithms equating time-in-residence with qualifications-for-citizenship was so great that in the Naturalization Act of 1795, only five years after the passage of the Uniform Rule of Naturalization, advocates of a longer probationary time period succeeded in replacing the two-year threshold with a five-year term.<sup>111</sup> Furthermore, foreign-born persons were ordered to declare their intent to naturalize three years prior to their admission,<sup>112</sup> thus marking another important temporal boundary for prospective citizens. It is interesting to note that the parties who supported the new restrictions held otherwise politically divergent opinions and had very different reasons for supporting the change.<sup>113</sup> In fact, increasing the probationary period was one of the few issues agreed upon by the representatives discussing the Naturalization Law.<sup>114</sup> By the time alienage (as opposed to naturalization)<sup>115</sup> legislation came onto the agenda in the form of the Alien and Sedition Acts of 1798, the threshold had been raised to fourteen years.<sup>116</sup> Thus later discussions of amending the durational waiting period for citizenship were now complicated by the existence of the Naturalization Act of 1795 and its

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reside in the United States for two years to be eligible for naturalization).

110. See 1 ANNALS OF CONG. 1148.

111. Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414 (requiring candidates to reside in the United States for five years to be eligible for naturalization).

112. *Id.*

113. KETTNER, *supra* note 9, at 240. Kettner claims that Jeffersonians were generally interested in excluding “merchants and aristocrats” while Federalists at the time were more concerned by threats to political stability. *Id.*

114. See *id.* (“[B]oth Federalists and Jeffersonian Republicans could agree on the desirability of tightening the government’s naturalization policy.”). This supports the thesis that relying on durational time as a means to represent values in politics brokers compromises of the sort required by liberal democracies, under whose auspices equal justice must be meted to very differently situated persons.

115. Alienage law differentiates laws governing the treatment and rights of non-citizens living in the United States and is distinct from both immigration law and naturalization law. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 222 (2006).

116. Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, 566.

temporal declaration requirement of three years.<sup>117</sup>

To summarize, the new Acts had to address: (1) aliens in the United States prior to the adoption of the Constitution who were not naturalized by a state law prior to the Uniform Rule of Naturalization; (2) all aliens who might have been naturalized by the Uniform Rule of Naturalization; and (3) those who had declared their intent to become citizens by the Naturalization Act of 1795.<sup>118</sup>

In short, the Alien and Sedition Acts of 1798 created three different sets of *antenati*<sup>119</sup> based on the two preceding probationary time periods and the declaration time period. In order to institute a new fourteen-year probationary period, Congress had to do something about the potential citizens to whom earlier laws applied. Although this was resolved relatively easily by grandfathering the earlier arrivals under the earlier laws, it points to the very fragmenting of citizenship that people like Smith had worried about.<sup>120</sup> Not only was citizenship being accorded piecemeal over a period of time, but people who were otherwise similarly situated aside from having arrived on different dates were being treated very differently. The deliberations over the bill reveal that the men discussing it were keenly aware of the fine line they walked as they sought to exclude from the *demos* titled nobles and other persons with strong aristocratic attachments, while advocating a temporal hierarchy of immigrant statuses in the United States.<sup>121</sup>

Debate over a probationary period continued through 1802, when the duration was revised back to five years upon the urging of Hamilton, among others. Hamilton wrote:

Some reasonable term ought to be allowed for aliens to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government; and to admit the probability at least of feeling a real interest in our affairs. A residence of at least 5 years ought to be required. If the rights of

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117. Naturalization Act of 1795 § 1.

118. FRANKLIN, *supra note* 102, at 84.

119. Technically they were “arrived prior” rather than “born prior.”

120. See *supra* text accompanying note 106.

121. FRANKLIN, *supra note* 102, at 84–87. A non-trivial postscript to the passage of the Alien Act of 1798 is the fact that it also specifies that the power to restrain or remove alien enemy males applied to persons fourteen years or older. Act Respecting Alien Enemies, ch. 66, § 1, 1 Stat. 577, 577 (1798). This fourteen-year duration marked a final temporal boundary to the population, on one side of which lay children without political standing, and on the other adults who did possess standing. Although ages of majority and ages of license are significant instances of *jus temporis*, they cannot adequately be addressed in this Article without a lengthy digression.

naturalization may be communicated by parts . . . those peculiar to the conducting of business and the acquisition of property, might be at once conferred, upon receiving proof . . . of the intention of the candidates to become citizens.<sup>122</sup>

Once again, we find reason joined with the idea of consent and egalitarian processes of political incorporation into citizenship.

#### IV. CITIZENLY TRAITS, EXPERIENCES, RELATIONSHIPS, AND NORMS EXPRESSED IN DURATIONAL TIME

To defend the probationary period they sought, advocates of the various positions identified above were forced to articulate a precisely defined range of meanings that time could hold. Judicial language linked durational time to consent, political reason, and the dissipation of bitterness following the Revolutionary War. In my reading of the naturalization debates, the congressmen involved in crafting the bills variously suggested that time be used to represent the following traits: allegiance; fidelity; valuation of the United States government; civic knowledge; the degree to which prior allegiances had been shed; and an intent to settle in the United States permanently.

Why were judges and legislators so confident that traits such as loyalty, civic virtue, or familiarity could be represented using durations of time? Recall that at the outset of this article, it was pointed out that all principles of citizenship both carry some direct meaning and hold much larger symbolic significance.<sup>123</sup> Insofar as they represent otherwise intangible personal qualities, rules of citizenship are always translating abstract traits into concrete terms. This is as true of *jus temporis* as it is of any other principles used to draw lines between citizens and non-citizens. And yet, like each of the other three principles—*jus soli*, *jus sanguinis*, and consent—*jus temporis* exists as a political principle because it can accomplish something that the other three cannot.

Of the qualities that were identified in the debates, experience, knowledge/familiarity, and the shedding of prejudice seem intuitively likely to develop over time. However, each can also develop as a product of specific efforts and actions that are identified using means other than durations of time. Experiences can be isolated events, for

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122. ALEXANDER HAMILTON, 6 THE WORKS OF ALEXANDER HAMILTON 776–77 (Henry Cabot Lodge ed., 1885).

123. See *supra* pp. 53–54.

example military valor, marriage, and labor.<sup>124</sup> Each of these events can be described in primarily qualitative terms. Yet, those qualitative terms are inadequate for the purposes of both administrative efficiency and normative compromise.

Time's abstract quality is of special relevance to liberal agencies that seek to forge compromises between thickly situated democratic norms and the impartial universalist aspirations of those liberal norms.<sup>125</sup> It allows people who are morally equal according to liberal theory to become politically equal (or politically "more equal") in the eyes of a particular democratic polity. In theory, time is equally available to people of all social classes, races, etc., as long as they are considered moral equals. Historian Lynn Hunt describes the modern time schema as a dimension that is "*universal, homogenous, and 'deep'* in the sense of stretching back very, very far in time."<sup>126</sup> This allows time special agency in the negotiation of compromises among different citizenship norms. Time can come to represent a full array of the core norms that even vastly divergent ideologies associate with citizenship.

#### CONCLUSION

I set out in this Article to demonstrate that a temporal rule of citizenship is uniquely capable of brokering compromises among disparate and sometimes even contradictory notions of citizenship. I began by demonstrating that a rule of time is integral to the establishment of sovereignty. Because time and sovereignty are imbricated, the constitution of a sovereign *demos* is also likely to invoke temporal rules, particularly with respect to naturalization laws. United States constitutional jurisprudence about the establishment of citizenship shows a heavy reliance on time to represent reasoned consent. Our legislative debates about naturalization reveal less consensus about the qualities that new citizens ought to demonstrate and yet settle on a rule very similar to that of the Supreme Court: Newly arrived citizens must wait a probationary period of time before becoming eligible to naturalize.

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124. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 200–27 (2002) (discussing marriage and citizenship). See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1995) (discussing military service and citizenship).

125. See ELIZABETH COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 95–149 (2009).

126. LYNN HUNT, *MEASURING TIME, MAKING HISTORY* 39 (2008).

Once we recognize the importance of temporal rules to citizenship they become apparent in myriad forms. The age of consent, which confers citizenship on adults, is a temporal rule. Prison sentences that deny criminals rights for specific durations of time are also temporal rules. Time is both an administratively convenient and normatively freighted way to represent our most deeply held—and sometimes fiercely contested—beliefs about citizenship. Without question, temporal rules will also continue to play a key part in settling thorny citizenship questions that remain on the political horizon. Time figured prominently in the 1986 immigration “amnesty.” Similarly, temporal rules have already played a central role in the 2013 congressional immigration proposals and hearings.<sup>127</sup> And given the unique role of temporal rules in establishing sovereignty and maintaining political accord, we can fully expect that temporal rules will be a part of any future changes to naturalization and citizenship laws that emerge beyond our current political horizon.

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127. See, e.g., Press Release, Office of the Press Secretary, Fixing our Broken Immigration System so Everyone Plays by the Rules (Jan. 29, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules>; Charles Schumer et al., *Bipartisan Framework for Comprehensive Immigration Reform*, C-SPAN, <http://www.c-span.org/uploadedFiles/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf>. The waiting period for regularization and citizenship has become central to the compromises being brokered between the Democrats and Republicans trying to sponsor bipartisan immigration reform. One of the initial planks of the Senate plan as well as the proposal issued by the White House involved sending undocumented immigrants to the “back of the line” to wait for citizenship. After much public discussion of the fact that there is no single line for Green Cards, President Obama amended his initial, more punitive stance to include a limit of an eight-year wait for regularization.