REVIEWS


Willi Paul Adams†

This detailed and solid account of what legislators, judges, and jurists said about the law of citizenship in the United States before 1870 reaches a sad termination with the acknowledgment of failure: failure of reason in the face of power. “Ultimately,” James Kettner concludes, “the questions of community, power, and sovereignty so integrally bound up with the concept [of citizenship] would be decided not by the rule of law, but by the verdict of armed force.”1 In the 1857 opinion of Dred Scott v. Sandford,2 the Supreme Court finally took its stand against the claims of the black inhabitants of the United States, both slave and free, in the struggle to secure their rights. It was then obvious that even the judicial branch of the federal government would be unable to provide a nationally acceptable solution to the bitter sectional conflict.

The guardian of the Constitution failed to reconcile the clash of values in the political culture of which it was a part. The Court merely referred to the same apologetic concept of “constituent member” used by the author of the Virginia Bill of Rights three generations before when he faced the inconsistency of slavery among a free people: in 1775, George Mason explained that only “those constituent members from whom authority originated” had to be consulted “for their approbation or dissent”; he took them to stand for “the body of the people.”3 And so in 1857, Chief Justice Taney, speaking for a majority of the Court, announced that a black man, born in the United States, could not claim the rights and privileges secured to citizens by the Constitution.4 Although such a person


2 60 U.S. (19 How.) 393 (1857).


4 60 U.S. (19 How.) at 404-05.
might well be a citizen of one of the individual states, the Chief Justice declared, he could not be a citizen of the United States, as that term is used in the Constitution, because the framers of that document would not have considered him "a constituent member of this sovereignty."5

Kettner amply demonstrates that the law of citizenship throughout American history reflected the pervasive social values of American society, a society of various nationalities, several races, and many cultures. The author, trained as a historian of ideas (he acknowledges Bernard Bailyn as his "chief intellectual creditor"6), reconstructs the patterns of thought to which judges and legislators appealed when they were faced with questions concerning subjectship, citizenship, or nationality. The major contribution of the book is thus its comprehensive chronological explication of legal doctrine, based on firsthand knowledge of the extensive source material: state and federal case reports and statutes, as well as the existing legal and historical literature. The book does not advance a controversial thesis. Herbert Baxter Adams and Frederick Jackson Turner would have been delighted to find their view of American history so convincingly corroborated. In the field of legal history, too, Kettner shows that English institutions, ideas, and habits were gradually transformed into a genuinely American product by confrontation with the New World environment.

Subjectship, citizenship, and nationality, in the modern senses of those terms, developed, of course, only upon the emergence of the modern territorially defined state. With the establishment of the modern state, place of birth and residence replaced the feudal concepts of personal and "natural" allegiance between a ruler and those under his protection as the determinants of political affiliation. The first fully developed theory of English subjectship in modern times was presented by Sir Edward Coke in 1608 as part of his opinion in Calvin's Case.7 When James VI of Scotland became James I of England, the question arose whether his Scottish subjects were also to be considered naturalized English subjects. Coke insisted that the allegiance and obedience a person owed to the sovereign in whose territory he happened to be born was "natural" and "perpetual."8 This allegiance, furthermore, was to the person of the

---

5 Id. at 404, quoted in Kettner at 326.
6 Kettner at xi.
8 Kettner at 28.
monarch, not to the crown as a legal construct. Hence only Scotsmen born after James's succession to the crown of England were natural-born subjects of the king of England. Coke recognized Parliament's right to declare an alien a natural-born subject (hence the term "naturalization"). The king had the power only to declare an alien a denizen, a title which enabled one to own, but not to bequeath, the land one held, and which provided no political rights. This case and others that are part of the English background of American citizenship are clearly presented by Kettner in the prologue and in chapter 1.

The revolutions of the seventeenth century, Kettner found, had little effect on the law of citizenship, naturalization, and treason, although Whig contract thinking was logically incompatible with the hierarchical society and supposedly natural order that underlay Coke's notion of a perpetual allegiance (chapters 2 and 3). Courts continued to apply the maxim "once an Englishman, always an Englishman," or in the words of a striking judicial pronouncement of 1747, "It is not within the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince." Blackstone's Commentaries also adhered to this view. Kettner persuasively suggests that the logical integrity of the English law of allegiance decreased in the face of Whig political theory in the course of the eighteenth century. To the historian of ideas, the judges' stubborn adherence to precedents from another epoch of political belief represents an instance of intellectual incongruity that threatens his faith in logical connections between political and social beliefs and realities.

Given the English judges' and legislators' inability or unwillingness to adjust to the basic tenets of the Glorious Revolution at home, it is not surprising to find them slow to recognize and meet the special needs of an expanding empire and maturing colonies. While English migrants to the colonies and their descendants remained subjects of the king of England, non-English settlers in the colonies

---

9 Id. at 21.
10 Id. at 22.
11 Id. at 27.
12 Id.
13 Id. at 34.
14 Id. at 51 (quoting Macdonald's Case, Foster 59, 60, 168 Eng. Rep. 30, 30 (K.B. 1747)).
15 KETTNER at 55 (quoting 1 W. BLACKSTONE, COMMENTARIES *369 ("For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his allegiance to the former")).
16 See KETTNER at 59-60.
faced a confusing and frequently changing variety of means to establish allegiance (chapters 4 and 5). One possibility was the costly and difficult procedure of naturalization by private act of Parliament. An easier way, that sufficed for many merchants who merely wanted to secure trading rights, was denization by royal letters patent. A general naturalization act, which greatly simplified the procedure in the colonies by allowing courts to administer the oath of allegiance, was in force only briefly from 1709 to 1712. Although the Act’s exclusion of Catholics, Jews, and other non-Christians from naturalization conformed to prevailing Tory views, the Tories nevertheless strongly opposed the act and abolished it as soon as they won a majority in Parliament. Only in 1740 did Parliament finally enact a statute providing a workable naturalization procedure. The act empowered colonial courts to administer the oath of allegiance to an alien after a residence of seven years; it had an unusual set of restrictions, excluding Catholics but not Quakers and Jews.

In 1773, Parliament strictly set off naturalization in the colonies from naturalization in the mother country by declaring that the new subjects did not qualify to inherit land or hold public office in Great Britain and Ireland. In 1773, colonial legislatures were also forbidden to continue imitating Parliament by passing naturalization bills. Kettner does not explain why Parliament acted only in 1773, although colonial assemblies had been naturalizing immigrants ever since the need to do so had arisen with the first settlements in Virginia. The assemblies’ “Quest for Power” might also have usefully been discussed in this connection.

Kettner’s findings in both chapters 4 and 5 support the general assumption that liberal naturalization and property laws, together with a relative openness to groups of various religious persuasions, were important factors in making a colony attractive for immi-

---

17 Id. at 66-67.
18 See id. at 68.
19 Id. at 70-72 (citing An Act for naturalizing Foreign Protestants, 1709, 7 Anne, c. 5).
20 Id. at 74 (citing An Act for naturalizing Foreign Protestants, and others therein mentioned, as are settled, or shall settle, in any of his Majesty’s Colonies in America, 1740, 13 Geo. 2, c. 7).
21 Id. at 74.
22 Id. at 77 (citing Act of 1773, 13 Geo. 3, c. 25).
23 Kettner at 105 (“[A]n order of council fixed the new policy, requiring that colonial governors be instructed not to assent to any more naturalization acts.”).
grants. If both chapters had been integrated, some duplication and cross-references would have been avoided.

Political rights were not yet an integral part of the concept of subjectship in the colonies. For example, Jewish immigrants were naturalized by New York's assembly, but in 1737 they were denied the right to vote. Laws of South Carolina and Maryland disqualified naturalized subjects from running for public office. From Kettner's findings it seems that aliens usually wanted to swear allegiance to the king of England not so much because they wanted to become responsible citizens but rather because they wanted to be responsible parents: property of aliens escheated to the king and had to be regranted, for a fee.

After the Seven Years War the struggle over colonial self-rule concerned the rights of natural-born subjects, not those of immigrants. Kettner's analysis of the imperial crisis (chapter 6) supports Bailyn's view of the American founders as reluctant ideologues who merely provided after-the-fact justifications for changes that had in reality already taken place. Kettner makes it clear that colonial lawyers and legislators were no great theoreticians and were only forced by the circumstances of life in the colonies to rethink and finally reject English solutions. From this point of view, it was the British side that was inflexible, whereas the Americans were the practical realists who recognized that the empire was not a nation-state. They were aware that they had outgrown the status of a "discovered" colony whose inhabitants, although guaranteed "the retention of English rights," were nevertheless ruled by a Parliament in which they were not represented. Although the colonists did not publicly question allegiance to the king until January 1776, they contended that the colonial assemblies were the only legislatures authorized to regulate interior problems such as taxation. Even allegiance to the person of George III, they argued, was conditional upon the protection he provided. A king could break the compact with his subjects and thereby lose their allegiance, as James II had done in 1688.

---

28 KETTNER at 116.
27 Id.
26 Id. at 123 (citing Act of Nov. 4, 1704, no. 228, 2 S.C. Stat. 251); id. at 124.
29 KETTNER at 118-19.
31 KETTNER at 155.
32 See id. at 166.
33 Id. at 144.
was thus discarded; but his theory of several "dominions," such as Scotland, Ireland, England, and Virginia, each with its own parliament and each united by allegiance to one king, remained useful to the defenders of colonial rights.\textsuperscript{34}

After independence, the contractual theory of allegiance appeared in a new light when applied to the opponents of that independence (chapter 7). How were those inhabitants of the new states who decided not to change their allegiance from the monarch to the republican regime to be treated? When did a Loyalist become a traitor? The Continental Congress answered these questions with the territorial principle in its most basic form: "all persons residing within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony."\textsuperscript{35} Regardless of his choice of allegiance, every inhabitant could be accused of treason. There were in fact hundreds of indictments for treason, Kettner reports, but executions for treason were "fairly rare."\textsuperscript{36} (A comparative glance at the French Revolution might have been particularly enlightening in this context, but throughout the book we are not once allowed to stray from the path of American history.) American courts recognized free choice of allegiance, a "right of election" of citizenship in a revolutionary situation, only after the War of Independence had been won.\textsuperscript{37} During the second American civil war, the Confederacy brushed that piece of logic aside in allowing its states to revert to the pure and simple territorial principle.\textsuperscript{38}

The state and federal constitutions and the first laws concerning naturalization and citizenship did not completely specify the meaning of American citizenship (chapter 8). It remained unclear what "privileges" and what "immunities" article IV of the Constitution guaranteed.\textsuperscript{39} The new Constitution gave Congress the power only to regulate the naturalization of immigrants,\textsuperscript{40} but left the legislatures and courts of the states free to decide under what conditions the new (as well as the old) citizens would be given the right to vote.\textsuperscript{41} The American founders practiced not only the art of compromise but also that of procrastination. No matter how essential

\textsuperscript{31} Id. at 163-66.
\textsuperscript{32} Id. at 179 (citing 5 JOURNALS OF THE CONTINENTAL CONGRESS 476-76 (1776)).
\textsuperscript{33} KETTNER at 182.
\textsuperscript{34} See id. at 193-96.
\textsuperscript{35} Id. at 337-38.
\textsuperscript{36} Id. at 231.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
the question of citizenship might have been in political theory, a fundamental lack of consensus caused them to leave it for later generations to settle.

The increasingly bitter sectional struggle did not bypass the judges who decided cases involving an interpretation of the privileges and immunities clause and the explosive issue of state citizenship in relation to federal citizenship (chapter 9). The environment praised by historians as the creative force producing an American identity in the seventeenth and eighteenth centuries became a liability, a source of deplorable inconsistencies and contradictions, in the nineteenth century.

Between 1820 and 1860, American judges increasingly faced questions concerning the special status of Indians and free and enslaved blacks. (Chapter 10 concerns the legal status of "Indians, Slaves, and Free Negroes"; Kettner chose not to deal with another citizenship issue beginning to gain momentum in this period, the movement for women's suffrage.) Today the nineteenth-century justifications for the dispossession and displacement of the American Indians through manipulation of such legal concepts as "citizenship," "allegiance," "foreign states," and "domestic dependent nations" seem an exercise in legal fiction. Kettner provides the lawyer's view, treating the development of judicial attitudes toward the legal status of American Indians from the seventeenth century to 1870 in thirteen dense pages. He includes the same kind of brief, yet instructive, survey of the legal status of blacks dating back to the introduction of slavery as a legal category in the middle of the seventeenth century. The very existence of free blacks presented southern judges and legislators with a dilemma: since free blacks born in the United States were neither slaves, aliens, nor Indians, by elimination they would have to be citizens unless the entire concept of citizenship were reinterpreted. Yet granting them the status of citizens would raise "complex questions about manumission that could easily challenge the idea that black slaves were property." Lawyers attempted to evade the dilemma by denying that the status of citizenship per se implied political and social rights; yet the notion that citizenship and allegiance necessarily provided the protection of those rights had been one of the ideologi-

---

42 Id. at 296.
43 Id. at 298-300.
44 Id. at 300-33.
45 Id. at 312.
46 See id. at 316.
cal foundations of the colonists' claim to self-government.\footnote{See text and note at note 33 supra.}

The question mark in the Epilogue’s subtitle “Resolution?” reminds us that even the Civil War did not bring about a conclusive and legally unequivocal answer to the unresolved issues of American citizenship. The Civil Rights Act of 1866\footnote{Ch. 31, § 1, 14 Stat. 27.} provided the first “clear statutory definition of citizenship.”\footnote{KETTNER at 341 (citing Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27).} It based citizenship simply on birth within the territory of the United States (with the exception of Indians on reservations), and it enumerated several guaranteed rights such as the right to make contracts, give evidence in court, own property, and enjoy “full and equal benefit of all laws . . ., as is enjoyed by white citizens.”\footnote{Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, quoted in KETTNER at 341-42.} These principles were written into the Constitution before the war mood had passed, against the will of President Johnson and without the assent of the southern states.\footnote{KETTNER at 342.}

Even the fourteenth and fifteenth amendments, however, did not guarantee every citizen the right to vote; “race, color or previous condition of servitude” were merely disallowed as criteria for denying suffrage; the state legislatures were left free to apply any other restrictive qualifications such as sex, literacy, and property.\footnote{Id. at 345.} With The Slaughter-House Cases\footnote{122 U.S. 636 (1873).} of 1873, the Supreme Court initiated a series of restrictive interpretations of the fourteenth amendment.

Kettner discusses the international aspects of American citizenship in the nineteenth century only briefly, in connection with two issues: the British insistence on “perpetual allegiance,” which supposedly justified the impressment of naturalized Americans born in Britain,\footnote{KETTNER at 269.} and the citizenship questions arising out of the acquisition of new territories, such as Louisiana, Texas, California, and New Mexico, for which collective naturalization by treaty could provide an answer.\footnote{Id. at 252-53 & 253 n.15.} The Bancroft treaties of 1868\footnote{15 Stat. 615, 2 Malloy 1298 (1868).} with the North German Union and other German states, which acknowledged the rights of naturalized as well as native-born American citizens abroad,\footnote{See Hecker & Krakau, Die völkerrechtlichen Verträge der Vereinigten Staaten von Amerika über Fragen der Staatsangehörigkeit einschliesslich Einbürgerung und Wehrpflicht, 4 VERFASSUNG UND RECHT IN ÜBERSEE, 69, 72-73 (1971).} would have formed an appropriate ending for the discus-
sion of the development of naturalization in the period covered by this study; unfortunately, they are not mentioned.

The price one pays for the advantages of a survey that sweeps three centuries is, of course, lack of detail—detail, for instance, concerning the personal political interests of judges, such as those of Justice McLean in the Dred Scott case. On the whole, however, Kettner admirably succeeds in presenting cases and statutes in their political context; no reader will put down this volume still believing in a pure science of the law. The impact of this rich study, which was deservedly awarded the Jamestown Prize of the Institute of Early American History and Culture, would certainly have been strengthened by the addition of cross-national comparisons. The qualifications for various types of membership in various political units, and the rights and duties associated with such membership, have been discussed by European lawyers at least since Caracalla, in 212 A.D., declared all free inhabitants of his empire to be cives romani. Comparative glances at other nations the legal traditions of which also began in England, that now also stress the jus soli, and that also accommodate ethnically diverse populations, such as Canada, Australia, New Zealand, and South Africa, might have been particularly useful.

See Corwin, The Dred Scott Decision, in the Light of Contemporary Legal Doctrines, 17 Am. Hist. Rev. 52, 53 (1911) ("Justice McLean, a candidate for the Republican presidential nomination, had determined to make political capital of the controversy").