

THE TRUTH ABOUT CITIZENSHIP: An Outline*

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Citizenship belongs not to nations but to human beings. Tribes, peoples, and nations may have members, but only regimes founded in universal principles can properly have citizens. The original British constitution wisely denominated all other political relationships as the relations between subjects and sovereigns—subjects, precisely because the persons comprehended in the description owe a loyalty and belong to their states in a condition of subjection (relations not based on consent) rather than command. The paradox of citizenship properly so called is that it cannot occur universally, is rather realizable only in particular, exclusive instantiations, and nevertheless addresses the end of every human being.

Many of the actors in Eastern Europe in the last very few years have encountered this very paradox, discovering that citizenship is not an intuitive phenomenon. Martin Palous¹ observed that the legal definition of citizenship is far from sufficient because it does not address perhaps the most important aspect of this problem: citizenship cannot be reduced either to a legal formula or to a factual description of its implementation under given historical and political circumstances. The reason, he maintained, is that citizenship has its “subjective dimension” as well. It appears that, in some decisive fashion, the good polity hinges very much on the question of how to bring about the good *politēs*. Interestingly enough, however, at the founding of the United States, the emphasis was reversed, most notably by George Washington, who emphasized the question of the effect of the citizen on the polity over the question of the polity’s effect upon the citizen. The reason for that, I believe, was his conviction that the foundation of a good polity was the preference for justice over patriotism for souls forced to choose. Washington, I think, was correct; it is rather justice that vindicates patriotism than patriotism which produces justice.

Foundations of Citizenship

A reader may justifiably seek some account of the departure from widely held, prior conceptions of citizenship, especially that of ancient Athens (the *politēs*, the citizen as participant in ruling and being ruled in turn), monarchical Britain (essentially that of allegiance to a particular

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monarch legally defined in *Calvin's Case*² and since defended in *R. v. Joyce*³, and, more loosely, certain current views called “communitarian.”

Following upon modern efforts to found political society in individual will, experience proved a mutual *nolo nocere* commitment insufficient. The formal acknowledgment of a continuing right of revolution in the Declaration of Independence derives from this recognition. The contract to avoid force and fraud may be expedient in a limited sphere, but it is not generative. It does not derive a table of obligations with sufficient force to sustain a society and, more particularly, to tie one generation to another. Religion, of course, offers a formula which is strongly generative, universal in its principles,⁴ and also restrains force and fraud. What religion fails to do, however, is to ground public authority sufficiently to replace warfare as a means of constitutional change. The challenge of modern sovereignty, therefore, was to attain the expediency of the *nolo nocere* commitment, the strength of religious foundation, and, at the same time, to regularize constitutional change as an expression of lawful procedure.

In seeking the substantial meaning of citizenship, it is more important initially to identify the agency by which—the efficient cause through which—citizenship comes to be than it is to identify the end of citizenship. The reason for this pre-Kantian scruple is that the question of citizenship derives from considerations of the end of man—the individual, general rather than local concerns—and at a minimum individual will must be positively accounted for or overcome in any theory of citizenship agency which does not repose in the agency of the individual. The will of the community or the goals of the whole can have no pre-creation trumping power. This is the decisive meaning of the Phoenician tale, the noble lie in Plato's *Republic*. Apart from a comprehensive account of individual will, every polity of any sort must cover with a lie or myth a large gap in its story of itself.

An example of this may be located in pre-revolution American society, as colonialists in Massachusetts early detached themselves from the idea of subjection central to English citizenship. The case of Robert Child is, precisely, a lesson in the limitations of pre-modern sovereignty. The 1646 *Remonstrance and Petition of Robert Child, and Others*,⁵ sought redress of injuries they thought they suffered as Englishmen at the hands of the General Court of Massachusetts. The dispute arose over the notion that all the King's subjects (the King-in-Parliament, that is) had the right to exercise citizenship in the colony on grounds harmonious with the exercise of rights in England. The petitioners, however, found that they

² *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (K.B.B 1608) (also known as The Case of the Postnati, or of the Union of the Realm of Scotland with England, 6 Jan. I A.D. 1608), reprinted in 2 *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 559 (T. B. Howell, ed., 1816).

³ *Regina v. Joyce*, [1945] 2 All E. R. 673, *aff'd sub nom. Joyce v. Director of Public Prosecutions*, 1946 App. Cas 347 (appeal taken from Eng.).

⁴ The universality of religious principles is open to discussion. However, with respect to the world's major religions, the characterization is true.

⁵ “Remonstrance and Petition of Robert Childs, and Others” (1646) in *A Collections of Original Papers Relative to the History of the Colony of Massachusetts-Bay* 188 (1769).

cannot, according to our judgments, discern a settled forme of government according to the lawes of England, which may seem strange to our countrymen, yea to the whole world, especially considering we are all English. Neither do we understand and perceive our own laws or liberties, or any body of laws here so established, as that thereby there may be a sure and comfortable enjoyment of our lives, liberties, and estates, according to our due and natural rights, as freeborne subjects of the English nation. . .

. . . Neither can we tell whether the Lord hath blest many in these parts with such eminent political gifts, so as to contrive better laws and customs than the wisest of our nation have with great consideration composed, and by many hundred yeares of experience have found most equal and just; which have procured to the nation much honour and renowne among strangers, and long peace and tranquility amongst themselves.⁶

Quite early, then, the Americans were suspected, if not suspect. They were viewed as setting their judgment against the weight of tradition, even at the risk of endangering the secure and comfortable enjoyment of the natural rights to life, liberty, and estate. Well before the impact of Hobbes, Locke, Montesquieu, in a word, the full impact of European (including Scottish) Enlightenment, and English republicanism, the terms of constitutional debate were set in Massachusetts. However, there was one significant exception, involving the question of ultimate sovereignty: Who shall have the last word? The General Court, in its reply to Robert Child, acknowledged his complaint about the civil incapacitation resulting from the practice of inappropriate religions and also the Court's refusal to support a bishop in the "true church."⁷ They even pointed with pride to their indulgence of the founders of Rhode Island, who were allowed to emigrate there and to undergo the "natural corruption" to which such "liberty and equality" were known to be subject.⁸

In Boston, though, the General Court held fast for breaking its barbarians by "the ordinary means of instruction," as a precondition for the civil and ecclesiastical "peace and prosperity" to which all aspired. This firm stand followed a lengthy review of the petitioners' arguments about the civil constitution, in which the General Court distinguished itself by considering the constitutional question seriously. The review has two parts. In the first, it arrays the petitioners' arguments against themselves. From this, the General Court concludes that their "manifest contradictions" have overthrown their case, in light of which "we might have throwne out their petition, as not worthe of our further trouble . . ."⁹ Yet the General Court continued on to address the grievances brought forth in the Remonstrance.

We will therefore, for the petitioners' more cleare conviction, and further satisfaction to all the world, examine their particular grievances, and other passages which we meete with in their remonstrance, &c. and give such account of our government and admini-

⁶ *Id.* at 190-191.

⁷ "A Declaration of the General Court holden at Boston 4 (9) 1646, concerning a Remonstrance and Petitions exhibited at last Session of this Court by Doctor Child, Thomas Fowle, Samuel Maverick, Thomas Burtin, John Smith, David Yale, and John Dand" (April 9, 1646) in *A Collection of Original Papers Relative to the History of the Colony of Massachusetts-Bay*, at 196 (1769).

⁸ *Id.* at n8.

⁹ *Id.* at 199.

strations both civil and ecclesiastical, as none shall be able (we hope) to contradict the truth thereof.¹⁰

This unprecedented and magnanimous appeal to reason—exceeding even the Declaration of Independence’s faith in a “candid world”—then sets forth the Court’s claim to a “settled government.”

The General Court claimed affinity with the fundamental laws of England (“taking the words of eternal truth and righteousness along with them as that rule by which all kingdoms . . . must render account”),¹¹ but exemption from patterning their “positive lawes” after England’s due to differing necessities. Next it proceeded to set forth in parallel columns, article by article, the fundamental laws of England (collected from Magna Charta and the Common Law) and the “Fundamentals of the Massachusetts” (collected from the “Body of Liberties,” the Charter, and custom). Throughout this production the Court sustain its case that their government closely resembled that of England. Nevertheless, it clearly affirmed an independent authority.

The important exception emerged at that point. The Massachusetts General Court reached in 1646 what Locke was to declare in 1680: the affirmation of legislative supremacy. The first article under the “common law” column reads: “[T]he supreme authorities is [sic] in the high court of parliament.”¹² This anticipation of the Settlement of 1688 would not so necessarily offend Robert Child (for whom the monarch remained head of the church) as the parallel column under the “Fundamentals of Massachusetts:”¹³ “The highest authorities here is [sic] in the General Court, both by our charter, and by our own positive lawes.”¹⁴ In reading this, we are torn two ways. We wish to know if already by 1646 some really did wish to exclude parliamentary authority over internal matters in the colonies. However, finding an indigenous precursor to Locke is significant simply because it shows that the one Lockean difficulty which the Americans had to overcome was the same considered by the General Court, the supremacy of the representative legislature.

The story of the American Revolution begins with the story of the derailing of the English Revolution, which Montesquieu described as

A lovely enough spectacle in the past century, to see the impotent efforts of the English to establish democracy among themselves . . . since the spirit of one faction was repressed only by the spirit of another, the government changed ceaselessly. The astonished people searched for democracy but found it nowhere. Finally, after many movements, shocks, and shake-ups, it even became necessary to settle on the government which they had proscribed.¹⁵

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 202.

¹³ *Id.* at 201.02.

¹⁴ *Id.* at 201-02.

¹⁵ Translated from Montesquieu, *Esprit des Lois*, III, 3 (Masson ed., 1954).

The Restoration was rather the result of the derailing than a derailing of itself. The true derailing takes expression in a 1649 Act of Parliament,¹⁶ which declared Parliament to be the “supreme authority of this nation.”¹⁷ And no one, Roundheads, Levellers, Diggers, or even the Lord Protector, could ever arrive at a suitable formula whereby the people might supplant the Parliament without the utter destruction of order and government. All believed stable government depended on what Madison later called “a will independent of the society,” the pre-modern form of sovereignty and also, incidentally, the institutional foundation of tyranny. Even after the second Revolution in 1688,¹⁸ this fundamental tenet remained the sticking point of British republicanism, ultimately codified as permanent principle by Blackstone on the very eve of the singular American advance beyond this dilemma.¹⁹

There is a connection between legislative supremacy and the General Court’s express determination to man the barrier to vice, which is not apparent in Locke’s version. The form of government depends upon the placing of supreme power, which is the legislative. The people appoint the form of government by establishing the legislature and appointing its members. Society holds the supreme power, not in any form of government, but only in the absence or dissolution of government, and in society under government all powers must derive from and be subordinate to the legislature.²⁰ Locke’s argument in Locke is the basis for Blackstone’s assertion that the British Parliament has permanent and necessary custody of the British constitution.²¹ In

¹⁶ *An Act Declaring England to be a Commonwealth*. May 18, 1649.

¹⁷ *Id.*

¹⁸ This was the second English revolution. The first, the English Civil War, took place from 1648 to 1660.

¹⁹ Stanley N. Katz, Introduction to 1 *William Blackstone, Commentaries on the Laws of England* at iii (phot. reprint 1979) (1765). While it is true that Blackstone specifically affirmed parliamentary supremacy, it may also be said that the purpose of the *Commentaries* is to unfold English law in such a manner as to defeat claims of popular reversion of sovereignty.

²⁰ Locke repeatedly affirmed that “the form of government depending upon the placing of the supreme power, which is the legislative . . .” John Locke, “An Essay Concerning the True Original, Extent, and End of Civil Government” in *Social Contract: Essays by Locke, Hume, and Rousseau* XX, 77. This may, however, seem only a delegation of limited powers, in light of the proviso that men cannot convey to others the power of “their preservation” and “always have a right to preserve what they have not a power to part with.” *Id.* at 87, 88. Locke explains, however, that the residual power of individuals cannot assume any governmental form—that is, it cannot be comprehended *within* the constitution. While, therefore, the power of the community may seem supreme, it is only figuratively so, since the only power the community as such can exercise is to form a constitution. They are not even able, under the constitution, to redress the deprivation of their rights.

Though the people cannot judge so as to have by the constitution of that society any superior power to determine and give effective sentence in the case, yet they have by law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth—viz., to judge whether they have just cause to make their appeal to heaven. *Id.*

This is the light in which one must read the assertion that the “legislative must needs be supreme, and all other powers in any member or parts of the society, derived from and subordinate to it.” *Id.* at 88. According to Locke, the legislative has permanent custody of the constitution, and that is the precise meaning of legislative supremacy (rendering the members of the community rather subjects than citizens).

²¹ Blackstone, *supra* note 20, at 157; see *id.* at 149-57; cf. James Wilson & Thomas McKean, *Commentaries on the Constituting of the United States of America* 38, 62 (1792).

substance that is the same argument the General Court relied upon to persuade Robert Child that it must exercise caution in admitting persons to citizenship in the colony and, most importantly, to membership in the church.

Locke's argument seems to concern itself only with the form of government. In fact, Locke claims that the only joint action the people are capable of is to constitute the society, and society's preservation requires a superintending will independent of it. While he admits the right of revolution (as an unavoidable deduction), he excludes the possibility that every man can be left to liberty of conscience in his civil obligations. Thus, Locke leaves work for the public to assign and order men's civil obligations whether aimed at virtue or no. His reasoning seems to correspond with the General Court's rejection of such liberty. Where the Court found natural corruption and dissension, Locke found the state of war.

To launch modern sovereignty, Americans had to contend at once with a legacy of pride in superior institutions and the unresolved problem of how to entrust to human beings, who were thought to need public formation toward virtue, a conceded right to be governed not just in founding a society but at all times by their own consent. Obviously, virtue's claims to public authority had somehow to be relaxed at the same time as the aim of virtue—self-government—had to be reinforced. It will immediately appear that virtue's claim to rule does not automatically transfer into a title on the part of those civil authorities approved by the church or other interpreters of virtue (hence, the need for the Phoenician tale). Indeed, one may see that dependence on consent is partially generated by genuine skepticism as to the rightful priests of virtue. The highway to government by consent—modern sovereignty—passes by way of the recognition that virtue, to rule at all, must be left to fend for itself (rather than armed with state power). Every other arrangement enslaves or subordinates virtue to some one superstition or another.²²

The foregoing example, coupled with philosophical analysis of its relevance, clarifies modern sovereignty in the sense of removing concern with consent—or individual agency—as mainly a question of efficiency. The first question is how to generate a good polity. Success in doing so only can lend scope to the important but secondary question: What sustains a good polity? If the question of citizenship belongs rather to the first or primary question, rather than to the secondary question, it will follow that reasonings premised on a putative incompatibility between individual agency and community stability do not in fact respond to the requirements of the argument. Before one can require responsibility of citizens, one must invent citizens.

Is Every Human an American?

James Madison successfully navigated an analogous difficulty.²³ He recognized that liberty would breed poisons potentially fatal to popular government. However, he also recognized

Sir William Blackstone will tell you, that in Britain, the [supreme] power is lodged in the British Parliament, that the Parliament may alter the form of government; and that its power is absolute control. The idea of a constitution limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain.

²² See, "Circular to the States" (June 8, 1783) in 26 George Washington, *The Writings of George Washington* 483 (John C. Fitzpatrick, ed., 1938).

²³ *The Federalist* No. 10 (James Madison).

that liberty was a *sine qua non* of the good polity. The argument required a demonstration of methods to mitigate the harmful effects of liberty rather than argument designed to challenge the authority of liberty. The position of modern sovereignty is analagous to the position of liberty according to Madison.²⁴ The universal principle on which it stands is palpable to every human being and is perfected in the design of the United States. It will perhaps serve the purpose of this expose, therefore, if we respond to the question: Why is it that the idea of United States citizenship, without regard to community or national origins, is intuitive to human beings around the world?

The answer, I believe, is that American citizenship is defined strictly in terms of those human characteristics and circumstances that manifestly apply to all human beings. Because those terms, as suggested in the Declaration of Independence, invoke human interests and ambitions as the basis of membership in a good polity, it follows that wherever persons hope for the fulfillments to which their individual interests and ambitions inspire, they will naturally regard themselves as capable of American citizenship. This premise is the *novus ordo seclorum*, a world in which men can imagine “marrying themselves abroad” without conceiving that to do so entails abandoning their dearest attachments. When Aristotle identified intermarriage as the fundamental condition for unity in the polis, he pointed beyond the immediate relationships among individuals to the realms of human imagination. In that realm what counts is the good that one can imagine for oneself. Whatever offers that prospect becomes automatically the standard of decency and fulfillment.

By holding out such a promise the United States and every similarly constituted republic makes a commitment beyond the limits of its own territory. That commitment is to recognize and reward to the extent practicable the aspirations of human beings who find in this promise cause for virtuous exertion. It is that condition of modernity which chiefly distinguishes it from the ancient world. One recalls Juba patterning himself upon the noble Cato.²⁵ It might be thought that Juba wished to be a Roman; in fact, he wished only to be supremely human. What is new is the ability persons now have to draw such inspiration from the idea of citizenship in a free republic. It is a paradox of considerable complexity that what is held out to every human being willy-nilly can still hold forth the prospect of excellence. There are many thoughtful critics who deny such a possibility *a priori*. They do so, in my view, in ignorance of the precise character of modern citizenship, which hinges on affirmation of the people’s capacity for rule despite long-standing doubts on that score.

Is Every American Merely Human?

A system of rule which makes no further distinctions among men than their raw numbers—which is modern democracy—could not fail to expose a people to the influence of folly in their affairs. As Henry Neville said, this was taught by “great artists ancient and modern.”²⁶ The

²⁴ See *id.*

²⁵ See Addison, *Cato*.

²⁶ Henry Neville, “Plato Redivivus, or a Dialogue Concerning Government” (1681), reprinted in *Two English Republican Tracts*, 61, 83 (Caroline Robbins, ed., 1969).

traditions of British-American republicanism²⁷ remained influenced by that teaching from Neville up to the very eve of the American founding. A sea-change in opinion brought Americans to doubt that there was any acceptable alternative to risking dangers of folly in the Commonwealth. The problem was how to build a decent republican life out of ordinary humanity. The labyrinthine trail of pre-Revolutionary opinions is easily traceable to England, Europe, and antiquity precisely because the American problem was the age quintessential political problem. Solutions discussed, far reaching as they were, were always the old solutions. The most characteristic of them, the mixed regime solution, from Plato-Aristotle to Isaac Pennington and beyond, was a firm belief in the necessity for a constitutionally imposed and balancing hierarchy of souls in the Commonwealth. The solution accomplished two purposes. First, it restrained the violence of conflicts between the elite and the masses; second, it prostrated folly to the influence of substance and experienced judgment. It did so, however, only at the cost of keeping the constitution at arms length distance from the people, subjecting them to superior titles to rule—the solution of pre-modern sovereignty.

So long as any mixed regime persisted, representatives of the varying estates (or classes or nations) actually represented not the body politic, but their respective warring “cities,” between or among whom an uneasy truce was enforced in the guise of a civil constitution. The many have always seemed not merely unfit but unable to rule. To say that the many are unable to rule is to emphasize the rule of folly wherever they prevail. Moreover, it suggests that they fail to attain either the good or the objective at which they aim, due to their incapacity. All justifications for their subjection to superior authorities, therefore, derive from the claim that the masses are better served by the institution of unrestrained sovereign powers. However, the degree to which rulers are free of the influence and authority of folly is equivalent to the extent to which they may abuse their powers. The recognition of this problem produces the interest in finding ways to constrain the rulers to the pursuit of the common good.

This scenario formed the context in which the doctrine of *Non tallagio non concedendo* (as well as that of religious toleration) came to express a deep and abiding distrust not just of rulers but of regimes (especially the nation-state) themselves. The very end of politics began to seem impossible to attain. The escape from this paradox (occasioned by long and detailed reflections on political order) produced the move by the American founders which affirmed that it were not sufficient for the people to be thought to rule; they actually had to prevail, through the majority, in governing. Moreover, no authority able to act on its own, apart from dependence on the people, could be expected to adopt liberty as the objective of its government. Therefore, there could be no “will independent of the society.” Such stringent concerns as these led to the radical formulation that no just polity could be formed except on the broadest foundations of human participation and on terms which foreclosed the political primacy of traditional terms of human identification. This conclusion meant following Aristotle’s dictum regarding intermarriage with a vengeance. Mere humanity, raw individuality would constitute the basis for all claims to citizenship.

²⁷ This term is far preferable, as more inclusive than the term Whig, in the attempt to identify the Anglo-American tradition. At a minimum it emphasizes that the Americans were “born republicans” (or at least “christened” so by Pastor Robinson) from the beginning, justifying Tocqueville’s perception.

The Ancien Régime

The broadest claim to citizenship in the ancient city was that of “good birth.” At a minimum, therefore, one had to be born into citizenship and in that sense it was not distinguished from that of the most isolated tribe even today. True, at best, the ancient city offered something more valuable than tribal society. It made membership in the political community a gateway to the human good. Nevertheless, its organization and its moral claim rested decidedly on grounds of nativity.

It must be remembered that there was no formal concept of citizenship in the ancient polis. This ancient citizenship, the *politēs*, would be better translated “participant in the polis.” Not all could participate; in the best case only the well-born could. Still, the *politēs* as a model of participation was a great advance over mere tribal society. Thus, Aristotle’s archeology moved naturally and surely from family to village to polis without a hint of denigration of family or loss of civic culture. The constraint of birth in this progress was inconsistent with modern sovereignty, which needed a broader foundation for membership in the polity, one beyond the participant, indeed, the citizen.

Rome first recognized this necessity, still working on the model of pre-modern sovereignty and having originated in the like grounds of birth that animated other ancient cities. However imperial Rome made the city an abstraction, abandoned finite limits as a determinant of the regime’s reach, and aimed for universality not by taking men in, so to speak, but by nationalizing whole tribes and extending Roman citizenship promiscuously. This was the error for which Montesquieu believed Rome fell. To Rome, everyone was a Roman or not a Roman. Roman law could make anyone from any place a Roman, no matter where that person lived. By force of circumstance, the Roman citizen ceased to be a participant in any but a nominal sense. Nevertheless, one did not thereby become human, invested with a more-than-Roman dignity and thus was little more than a savage dressed in a toga. The hordes never really invaded Rome until after it had debased the lineage on which it depended. It was not truly a universal regime. For when it abandoned its particular foundation, Rome also ceased to be any particular polity.

Rome’s experience created the conditions out of which the nation-state emerged. Europe’s feudalism, which precipitated the nation-state, was, according to the *Federalist Papers*, “a solecism in theory” predicated on “legislation for communities, as contra distinguished from individuals.”²⁸ The “violence in place of law” and the “destructive coercion of the sword” were ultimately stilled only by theories of subjection in the nation-state, and then only for a time.²⁹ Notions of enforced peace and territoriality in the nation-state ran full tilt against individual interests and the human propensity toward displacement. There never was a perfect match of nation-state borders and nationalities, nor could there have been.³⁰ Therefore, the absolute monar-

²⁸ *The Federalist* No. 20, at 185-86 (James Madison) (Benjamin Fletcher Wright, ed., 1974).

²⁹ *Id.* at 186.

³⁰ See Yael Tamir, *Liberal Nationalism* (1993). Tamir recognizes this fact, even as she tries to save the idea of the nation-community as the fundamental basis of civil society.

[O]ur understanding of the need for generalised, impartial principles can only emerge through a commitment to partiality...if the former cannot be attained without experiencing and practicing the latter, then justice cannot become a permanent feature of our moral lives unless we recognise the importance of the morality of community. *Id.*

chy, the original perfected form of the nation-state, proved inadequate to the conceptions of human ends which pressured that state toward its eventual dissolution. Far in the future of absolute monarchies, and also ahead of the modified nation-states which supplanted them, lay the palpable demand for an end to subjection. Consent alone could accommodate the moral claims of human beings.

Novus Ordo Seclorum

Modern sovereignty replaces the nation-state with the state-nation. This is not a mere play on words but rather the introduction of a substantive distinction. Under the terms of modern sovereignty membership in the state is defined by positional rather than by status. Nationality no longer operates to secure the relevant distinctions, which consist primarily in determinations concerning the extent to which rights are guaranteed. The first distinction under modern sovereignty is the distinction of citizenship—membership in the state based on commitments of rights guarantees which are available to human beings qua human beings but obligated only by the effective agency of state membership.³¹ The existence of the state serves to create de facto that class of human beings whose nominal rights are actually enforceable in contrast with those whose rights are exposed to abuse. In those terms, there are never any citizens under totalitarianism—which remained a form of *ancien régime* sovereignty—although nationalities survived more or less intact under totalitarianism.³²

Modern states have, therefore, chosen to adopt national self-determination as their justifying principle, even when their members do not constitute a nation. . . [I]t strengthens the claim that members of the state share something more than coordinating institutions, something that evokes in them feelings of solidarity and fraternity.” *Id.* at 124. While, on the other hand,

[t]he [liberal] state was therefore seen as an embodiment of abstract humanity, representing those universal qualities that unite all human beings. All dividing features were to be removed from the public sphere. Family affiliations, religious alliances, and professional ties were all viewed as private matters inconsequential to political life: The true nature of political agents was their citizenship, equally shared by all. *Id.* at 141.

Although this account cannot be squared with the blunt analysis of James Madison in *Federalist* No. 10, it is true that this over-generalized picture of liberalism describes the nature of the problem, and thus the task Tamir attempts, which is to argue that principles of justice spring from communities rather than nature. Tamir’s account is the best contemporary effort to accomplish this task, though it remains unfulfilled.

³¹ James Wilson provides it thus:

Under civil government, one is entitled not only to those rights which are natural; he is entitled to others which are acquired. He is entitled to the honest administration of the government in general: he is entitled, in particular, to the impartial administration of justice. Those rights may be infringed; the infringements of them are crimes. *The Works of James Wilson* 426 (James DeWitt Andrews, ed., 1896).

This account of membership in civil government—citizenship—transcends questions of identity and culture to make rights paramount. Wilson, of course, was a member of the Constitutional Convention of the United States in 1787 and also on the first Supreme Court under the Constitution.

³² In the aftermath of the Soviet Union, the argument I made fifteen years ago echoes faithfully. The preservation of Soviet power, including the tyranny over their own peoples, depends utterly on their exercise of that will. And that is the same thing as to say that they must frustrate and counteract all other ruling forces, including the political, which would diminish the force of their will (ergo, the Polish problem). Their empire is so constituted that they must either spread their power or die (abstracting from the limit which nature places to their power). Unlike the Romans, who destroyed themselves by [actually] developing a concept of Roman citizenship. I am saying that So-

Modern sovereignty requires the death of nationality or community membership, not as vital memory but as primary and active basis of civic association. Consequently, the idea of the civic culture, which belongs to the nation, plays no role in sustaining the state-nation even though the state-nation still relies on mediating institutions to preserve that social order which stability and progress require. Mediating institutions, however, only grow out of particular soils. That, in turn, gives rise to the appearance that a “civic culture” remains fundamental, although it in fact becomes only instrumental.

The fact that modern sovereignty relies on a principle of exclusivity—and citizenship is such a principle—no less than does the idea of the nation accounts for twentieth century confusion concerning the grounds of membership in the modern polity. The concept of self-determination seems to grow out of principles of modern right, while appearing to apply only to an idea of peoplehood which owes nothing to such principles. Thus, state organizers of the Twentieth Century have attempted to find a natural basis of statehood in the phenomenon of the community rather than in the non-aggregated preferences of rights-bearers.

The Good Polity Is Always Local

We may re-think the problem of exclusivity under modern sovereignty so as to reveal its merely functional and not moral power. Modern sovereignty rests on universal principles rather than local or particular claims. A *Czech Republic* becomes a *Czech Republic* not by virtue of being Czech but by virtue of consciously adopting republican goals. Thus far it is no more Czech than Slovak or American. Founding its statehood on universal principles rather than local claims means that the local claims no longer determine membership. Hence, the republic’s Czechness is an accident, morally speaking, rather than a necessity. This accident occurs for the sufficient reason—the Aristotelian reason—that every essence appears (becomes phenomenal) via agencies whose accidental qualities condition being-in-the-world. Thus, universal principles are made manifest only in particular forms.

Moreover, universal political principles are articulable only in particular circumstances. To found a republic on principles of universal right, one must organize a particular people who will subscribe those rights. Now, one has two grounds of particularity—hence exclusivity—which follow as a natural consequence. One accidental and not determinative, the other essential. The accidental particularity is the character or culture of the people so organized—thus Anglo-Americans in 1776. The essential particularity is the resulting collectivity itself, which becomes “a people” organized to live on universal principles, and is thus distinguished from all other peoples (including those similarly organized) and exclusive of peoples not admitting universal principle as a ground of right.

Finally, the exclusivity itself results in two consequences: one accidental and one essential. The universal regime is particular as to other peoples while nonetheless admitting the potential membership of all other persons (including persons presently members of illiberal re-

viet hegemonism, its spread, is the key to preservation of dubiety about Soviet citizenship and, hence, internal questions about a public good which might serve to coalesce opposition to the regime on the basis of a conception of the needs and ideals of a particular people. In other words, the Soviet regime lasted as long as it did only by means of waging war against the principle idea of modern sovereignty, citizenship.

gimes). On the other hand, while all persons qua persons are eligible members of the universal regime, in fact the requirements to sustain the regime and provide for its preservation impose practical limits on the number of persons admissible to membership.³³

The United States, as late as the early Twentieth Century, offered no formal political asylum. The explanation was simple; no one needed a reason to apply for American citizenship or residence once inside the United States. Immigration was essentially open and unprescribed, which implied that anyone at all could be an American. In such a world citizenship serves no further than to distinguish actual and potential membership in the liberal regime or, morally, good fortune and bad fortune.

Why Citizenship Matters

It must have been such a reflection as this that led Alexander Bickel to the erroneous conclusion that citizenship doesn't really matter:

[E]mphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive and stable institutions. . .³⁴

It has been the failure to become a little “metaphysical” and “symmetrical,” however, which has led scholars and jurists like Bickel and others to create the untenable nether world of American Indians. They both are and are not citizens in the United States and, consequently, suffer immensely from being denied the most elementary protections, while nuanced legal theorists try to carve out a form of citizenship which is at the same time a form of wardship to govern policy toward them. Indeed, despite the universal implications of citizenship on the terms of modern sovereignty, citizenship still matters.

The truth about citizenship is not only that it elevates statehood to displace nationhood, but that it also is the decisive condition for articulating the idea of a common good under modern sovereignty. The idea of modern sovereignty emerges from the discovery of natural rights and the resulting requirement of consent to establish legitimate government—a state as opposed to a nation. Nevertheless, it is not so much natural rights as the practical goal of self-government deduced therefrom which creates the moral conditions of citizenship. The state-nation is defined more by constitutional goals, in contrast to the nation-state in which terms of nationhood or social histories prevail. The chief constitutional goal is that of self-government—a moral reality which is prior to and must shape the political reality as the fundamental condition of political legitimacy.

Thus, even when one is skeptical of the philosophical principles of natural rights, one still must confront the reality of modern sovereignty in the form of self-government as the irreducible human claim. Thus it was last century that the Aristotelian, Gillies, could reject John Locke's

³³ For example, such limits may include restricting the number of persons who can be admitted so as to be consistent with the sound functioning of a regime confronted with resource and relational limitations on its existence.

³⁴ Alexander M. Bickel, “Citizenship in the American Constitution,” 15 *Ariz. L. Rev.* 369, 387 (1973).

social contract but still advance the claims of modern sovereignty. Building on the concept of a “system of civil society” which he attributed to Aristotle, Gillies argued that under many circumstances the good of the community may be promoted by giving to the people at large a role in control in the government.³⁵ His argument joins that of the *Federalist Papers*, maintaining that self-government is not one among the many ends of the modern polity. Rather, it is the end which comprehends all the particular ends that are described in the good polity. This is doubtless what Madison meant when he wrote, “Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.”³⁶

³⁵ John Gillies, Introduction to Edward Walford, *Politics and Economies of Aristotle* xxxviii.

³⁶ *The Federalist* No. 51, at 358 (James Madison) (Benjamin Fletcher Wright, ed., 1974).