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Are We Subjects or Citizens? Birthright Citizenship and the Constitution

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THIS SUMMER, Americans will celebrate the semiquincentennial of the Declaration of Independence—our nation’s 250th birthday. Also this summer, the U.S. Supreme Court will render a decision in the case of *Trump v. Barbara*, a class-action lawsuit challenging President Trump’s executive order ending the practice of birthright citizenship. The two are connected, because *Trump v. Barbara* involves issues fundamental to the meaning of the Declaration and the future of the American experiment in republican government. It is worth the time and effort of every citizen to understand its importance.



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Birthright citizenship—the policy whereby the children of illegal aliens born within the geographical limits of the United States are entitled to American citizenship—is a great magnet for illegal immigration. Many believe that this policy is an explicit command of the Constitution, consistent with the British common law system. But this is simply not true.

The framers of the Constitution were, of course, well-versed in the British common law, having learned its essential principles from William Blackstone’s *Commentaries on the Laws of England*. As such, they knew that the very concept of citizenship was unknown in British common law. Blackstone speaks only of “birthright subjectship” or “birthright allegiance,” never using the terms citizen or citizenship. The idea of birthright *subjectship*, as Blackstone readily admits, is derived from feudal law. It is the relation of master and servant; all who are born within the protection of the king owe perpetual allegiance as a “debt of gratitude.” According to Blackstone, this debt is “intrinsic” and “cannot be forfeited, cancelled, or altered.” Birthright subjectship under the common law is thus the doctrine of “perpetual allegiance.”

America’s Founders rejected this doctrine. The Declaration of Independence, after all, solemnly proclaims that “the good People of these Colonies . . . are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally

dissolved.” According to Blackstone, the common law regards such an act as “high treason.” So the common law—the feudal doctrine of perpetual allegiance—could not possibly serve as the ground of American (i.e., republican) citizenship. Indeed, the idea is too preposterous to entertain!

James Wilson, a signer of the Declaration of Independence and a member of the Constitutional Convention as well as a Supreme Court Justice, captured the essence of the matter when he remarked: “Under the Constitution of the United States there are citizens, but no subjects.” The transformation of subjects into citizens was the work of the Declaration and the Constitution. Both are premised on the idea that citizenship is based on the consent of the governed—not the accident of birth.

WHO IS A CITIZEN?

Citizenship, of course, does not exist by nature. It is created by law, and the identification of citizens has always been considered an essential aspect of sovereignty. After all, the founders of a new nation are not born citizens of the new nation they create. Indeed, this is true of all citizens of a new nation: they are not born into it but rather become citizens by law.

Although the Constitution of 1787 mentioned citizens, it did not define citizenship. It was not until 1868, with the ratification of the Fourteenth Amendment, that a definition of citizenship entered the Constitution. Here is the familiar language: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Thus there are two components to American citizenship: birth or naturalization in the U.S. and being subject to the jurisdiction of the U.S.

We have somehow come today to believe that anyone born within the geographical limits of the U.S. is

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automatically subject to its jurisdiction. But this renders the jurisdiction clause utterly superfluous and without force. If this had been the intention of the framers of the Fourteenth Amendment, they would simply have said that all persons born or naturalized in the U.S. are thereby citizens. Furthermore, the principal supporters of the Fourteenth Amendment were explicit about the meaning of “subject to the jurisdiction”: it meant owing exclusive allegiance to the U.S. and none to any other country.

It is broadly agreed by constitutional scholars that the purpose of the Fourteenth Amendment was to constitutionalize the Civil Rights Act of 1866, which was passed over the veto of then-President Andrew Johnson. A supermajority of both chambers of Congress approved the act, which established the citizenship of newly freed slaves and the protection of their rights and liberties on the exact same basis as white citizens. Many in Congress initially argued that the passage of the Thirteenth Amendment in 1865 granted citizenship and the rights and liberties attached to that status. Others argued that there should be explicit legislation, which resulted in the Civil Rights Act the following year. Still others thought the Civil Rights Act was insufficient because future majorities could repeal it. This concern became the impetus for the Fourteenth Amendment, which constitutionalized the Civil Rights Act.

The citizenship clause was a late addition to the Fourteenth Amendment. The first draft merely stated that citizens were “persons born in the U.S. or naturalized by the laws thereof.” This language was referred to the Joint Committee on Reconstruction, which reported back the language that became the citizenship clause. It is evident that the Joint Committee placed importance on the jurisdiction clause, which meant, at a minimum, that not all persons born in the U.S. were automatically citizens.

Michigan Senator Jacob Howard, who was the manager of the Fourteenth Amendment for the Reconstruction Committee, said the addition of the jurisdiction clause was “simply declaratory of what I regard as the law of the land already,” referring to the Civil Rights Act of 1866. Illinois Senator Lyman Trumbull, chairman of the Senate Judiciary Committee and principal architect of the Thirteenth Amendment and the Civil Rights Act of 1866, joined Howard in agreeing that the “law of the land” meant that “subject to the jurisdiction” connoted “complete jurisdiction”—in other words, not owing allegiance to anyone else.

Under Section 5 of the Fourteenth Amendment, Congress has the power to define “by appropriate legislation” who is subject to the jurisdiction of the U.S. Indeed, during debate over the amendment, Senator Howard, the author of the citizenship clause, attempted to assure skeptical colleagues that the new language was not intended to make citizens of the Indians. Although the Indians were born within the nation’s geographical limits, Howard steadfastly maintained that they were not subject to the nation’s jurisdiction because they owed allegiance to their tribes. Jurisdiction understood as allegiance, Howard pointed out, excluded not only Indians but “persons born in the United States who are foreigners, aliens, [or] who belong to the families of ambassadors or foreign ministers.” Thus “subject to the jurisdiction” does not simply mean, as is commonly thought today, subject to American laws or American courts. It means owing exclusive political allegiance to the U.S.

Consider as well that in 1868, the year the Fourteenth Amendment was ratified, Congress passed the Expatriation Act. This act permitted American citizens to renounce their allegiance and alienate, or abandon, their citizenship. Supported by Senator Howard and

other leading architects of the Fourteenth Amendment, the Expatriation Act characterized the right of expatriation as “a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.” Like the idea of citizenship, this right of expatriation is wholly incompatible with the British common law understanding of perpetual allegiance and subjectship. One member of the House of Representatives at the time expressed the general sense of the Congress when he proclaimed: “The old feudal doctrine stated by Blackstone and adopted as part of the common law of England . . . is not only at war with the theory of our institutions, but is equally at war with every principle of justice and of sound public law.” The common law established what was characterized as an “indefensible doctrine of indefeasible allegiance,” a feudal doctrine wholly at odds with republican government.

In sum, what we today call birthright citizenship is a legacy of feudalism that was decisively rejected as the ground of American citizenship by the Fourteenth Amendment and the Expatriation Act of 1868. It is absurd to believe that the Fourteenth Amendment confers the boon of American citizenship on the children of illegal aliens. Nor does the denial of birthright citizenship visit the sins of the parents on the children, as is often claimed, since the children of illegal aliens born in the U.S. are not being denied anything to which they have a right. A minor’s allegiance should follow that of his or her parents. Furthermore, it is difficult to fathom how those who defy American law can derive benefits for their children by their defiance—or that any sovereign nation would allow such a thing.

WONG KIM ARK

Contrary to claims made by defenders of birthright citizenship, there is no

Supreme Court decision squarely holding that children of illegal aliens are automatically citizens of the U.S. In an 1898 decision, *U.S. v. Wong Kim Ark*, the Court did hold by a vote of six to two that a child of *legal* resident aliens is entitled to birthright citizenship. Even then, the *Wong Kim Ark* decision was based on the mistaken premise that the Fourteenth Amendment adopted the British common law system of birthright subjectship. The majority opinion did not explain how *subjects* were miraculously transformed into *citizens* within the supposedly adopted common law. Supreme Court Justice Horace Gray, writing the majority decision, merely stipulated that “citizen” and “subject” were convertible terms—as if there were no difference between feudal monarchy and republicanism! Indeed, Chief Justice Melville Fuller wrote a powerful dissent arguing that the idea of birthright subjectship had been repealed by the American Revolution and the principles of the Declaration of Independence.

The constitutional grounds for the majority opinion in *Wong Kim Ark* are tendentious, and that decision could easily be overturned by our current Supreme Court this summer. This would, of course, require a proper understanding of the foundations of American citizenship, and whether a majority of the members of our current Court is capable of such is open to conjecture. But in any case, to say that children of *legal* aliens are entitled to citizenship is one thing; after all, their parents are in the country with the permission of the U.S. It is entirely different with *illegal* aliens, who are here without permission. Thus repeal of the current policy of birthright citizenship for the children of illegal aliens would not require a constitutional amendment.

We have seen that the framers of the Fourteenth Amendment agreed that Indians were not “subject to the

jurisdiction” of the U.S. Beginning in 1870, however, Congress began to pass legislation offering citizenship to Indians on a tribe-by-tribe basis. Finally, in 1923, there was a universal offer to all tribes. Any Indian who consented could become an American citizen. This citizenship was based on reciprocal consent: an offer on the part of the U.S. and acceptance on the part of an individual. Thus Congress used its legislative powers under the Fourteenth Amendment to determine who was within the jurisdiction of the U.S. It could make a similar determination today, based on this legislative precedent, that children born in the U.S. to illegal aliens are not subject to American jurisdiction. A constitutional amendment is no more required now than it was in 1923.

DECLINE OF CITIZENSHIP AND OF THE NATION STATE

The same kind of confusion that has led us to accept birthright citizenship for the children of illegal aliens has led us to tolerate dual citizenship. We recall that the framers of the Fourteenth Amendment specified that those who are naturalized must owe *exclusive* allegiance to the U.S. to be included within its jurisdiction. And the citizenship oath taken by new citizens today still requires a pledge of such allegiance. But in practice dual citizenship—and dual allegiance—is allowed. This is a sign of the decline of American citizenship and of America as a nation state.

Elite liberal opinion has for many years considered the sovereign nation state as a historical anachronism in an increasingly globalized world. We are assured that human dignity adheres to the individual and does not require the mediation of the nation state. In this new universe of international norms, demands on the part of the nation state to exclusive allegiance or for assimilation violate “universal personhood.” In such a universe, citizenship will become superfluous or even dangerous.

Those who advocate open borders tend to share this cosmopolitan view of transnational citizenship. Illegal immigrants, they say, are merely seeking to support their families and improve their lives. Borders, according to them, should not stand in the way of “family values”—those universal “values” that refuse to recognize the importance or relevance of mere political boundaries. Somehow, for those who hold these views, political exclusivity and the requirement of exclusive allegiance are opposed to these universal “values” if not to human decency itself.

We must constantly remind ourselves, however, of the historical fact that constitutional democracy has existed only in the nation state, and that the demise of the nation state will almost certainly mean the demise of constitutional democracy. No one believes that the European Union or similar organizations will ever produce constitutional government. Indeed, the EU is well on its way to becoming an administrative tyranny. Nor would the homogeneous world-state—the EU on a global scale—be a constitutional democracy; it would be the administration of “universal personhood” without the inconvenience of having to rely on the consent of the governed.

The doctrine of birthright citizenship and the acceptance of dual citizenship are signs that we in the U.S. are on the verge of reinstating feudalism and replacing citizenship with the master-servant relationship. The continued vitality of the nation state and of constitutional government depends on the continued vitality of citizenship, which carries with it exclusive allegiance to what the Declaration of Independence calls a “separate and equal” nation. Unless we recover an understanding of the foundations of citizenship, we will find ourselves in a world where there are subjects but no citizens. ■