Birthright Citizenship and Its Allies

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In 1989, an illegal alien being escorted back to the border gave birth in an Immigration and Naturalization Service van. That child was an American, thanks to our granting citizenship to children born on U.S. soil—a generosity that also extends to children born on any one of 15 islands between the Philippines and Hawaii.

Our promiscuity with citizenship, however "generous" it may seem, effaces the salience of an institution central to the concept of nationhood. That is doubtless what President Trump had in mind when he told reporters from Axios that he intends to sign an executive order that would put a stop to America's birthright citizenship policy.

The United States and Canada are the only two "developed" countries that retain unrestricted birthright citizenship laws. While many Latin American and Caribbean nations also maintain lenient naturalization laws, it is important to understand them in their historical context. Those laws came about not out of a liberal exigency to bestow citizenship onto foreigners, but rather as a mechanism of empire-building designed subdue indigenous populations by growing the number of Europeans in their midst. "The birthright laws in South America have remained due to low immigration numbers," explains John Skrentny, a sociologist at the University of California, San Diego.

In other words, if Scots-Irish Americans began caravanning to Mexico, demanding jobs and welfare, and driving up crime rates, odds are good that Mexico would turn "nativist" and amend its constitution to decrease the liberality of their naturalization laws. Indeed, every other Western country that has experienced mass immigration has amended or repealed their naturalization laws in response.

The British did so beginning in 1962, responding to the mass migration of Indians, Poles, and Ukrainians. Parliament in 1981 passed the British Nationality Act, which made it "necessary for at least one parent of a United Kingdom-born child to be a British citizen, a British Dependent Territories citizen or 'settled' in the United Kingdom or a colony (a permanent resident)."

Similarly, the French responded to mass migration of Muslim North African immigrants by changing the law to require French-born children of immigrants to apply for citizenship before their 18th birthday. The law has since been eased somewhat thanks to liberal policymakers, but the French still restrict citizenship to children of foreign parents who, at the age of 18, have lived in France for five of the previous seven years.

It is progressives in America, however, with their singular obsession with unrestricted birthright citizenship *and* unrestricted immigration who make the Europeans and our neighbors to the north (who actually have prohibitive immigration laws) seem conservative.

Supreme Confusion

Tony Mecia of *The Weekly Standard* claims that the Supreme Court's 1898 decision in *U.S. v. Wong Kim Ark* provides a defense of birthright citizenship for the children of illegal aliens, while the Cato Institute's Alex Nowrasteh asserts there is "little legal debate over the citizenship clause of the Fourteenth Amendment." Not true. Not true at all.

Nowrasteh glosses over part of the amendment that specifies about "subject to the jurisdiction thereof" and takes it to mean that "immigrants, both legal and illegal, are subject to the jurisdiction of the United States government, jurisdiction being a fancy legal word for 'power.' Any other interpretation would mean that the U.S. government didn't have legal power over tourists or illegal immigrants here, a crazy notion."

Is that crazy? The citizenship clause, adopted in 1868, was never meant to extend to those with allegiances to another nation, i.e., non-citizens. It was the *Wong Kim Ark* case that expanded the constitutional mandate at the end of the 19th century to confer citizenship unto the children of legal, permanent residents.

Nowrasteh quotes Republican Senator Jacob Howard, the architect of the citizenship clause, saying that it "will not, of course, include persons in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons." But Nowrasteh leaves out important remarks that would clarify meaning.

Then-Chairman of the Senate Judiciary Committee Lyman Trumbull, who endorsed Senator Howard's reading, said "The provision is, that 'all persons born in the United States and subject to the jurisdiction thereof, are citizens.' That means, 'subject to the complete jurisdiction thereof.'" Jurisdiction, then, is not merely a fancy legal word for "power," like Nowrasteh claims. "What do we mean by subject to the jurisdiction of the United States?" said Trumbull. "Not owing allegiance to anybody else." Senator Howard agreed with Trumbull's reading, stating:

I concur entirely with the honorable Senator from Illinois [Trumbull], in holding that the word "jurisdiction," as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, . . . ; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.

Senator Reverdy Johnson clarified further: "Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power for that, no doubt, is the meaning of the committee who have brought the matter before us, shall be considered as citizens of the United States."

This reading was understood and affirmed in the *Slaughter-House Cases* of 1873, when the Supreme Court said, "The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." During the 2004 *Hamdi v. Rumsfeld* case, the Supreme Court never referred to Yaser Esam Hamdi, a Taliban fighter born in the United States, as a citizen, nor did the Supreme Court declare in that case that anyone born on American soil was automatically a citizen. Hamdi was born on American soil to parents that were subjects of the Kingdom of Saudi Arabia.

Consequently, when Nowrasteh claims that "we need to defend" this nation against a "president who seeks to undermine a great and exceptional American institution," the problem is that the "institution" in question never existed, because the Supreme Court never ruled that children born in America of illegal aliens or temporary visitors are citizens.

Illegal vs. Legal Still Matters

Likewise, Mecia's claim that advocates of birthright citizenship for the children of illegal aliens can "largely point to Ark's story" for rebuttal is incorrect, because the Supreme Court never held that the clause confers citizenship on the children of *illegal* aliens or temporary visitors, and the *Wong* case itself does no such thing. Because *Wong* dealt with a man born to parents who were *lawfully and permanently residing* in the United States at the time of his birth. Still, for the unconvinced, there is one more precedent that puts the proverbial nail in this coffin.

In the 1892 *Nishimura Ekiu v. United States* case, a Japanese woman sued immigration officials for denying her entry to the U.S. on the grounds that she might become a public charge. The man who rejected her claim, and chastised the courts for even entertaining it, was Justice Horace Gray—the author of the *Wong* decision. There are two relevant quotes from *Ekiu* by Justice Gray:

1. "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions. . ."
2. "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government."

Birthright citizenship, as current federal policy stands, was neither the holding of *Wong* or the intent of Justice Gray's decision, thus it cannot and does not operate as binding precedent on the Supreme Court—a point that the *Hamdi* case illustrates. Moreover, the claim that Trump is out to "reverse centuries of American tradition," asserted by the likes of John Yoo and Angelica Alvarez, is bunk. As far as anyone can tell, unrestricted birthright citizenship for all children born on U.S. soil began sometime in the mid-1960s, not "centuries" ago.

An institution that does not exist cannot be undermined, nor can such a farcical practice that is younger than the president himself constitute "centuries of American tradition."

The open-borders cult demands that we tear down our borders and do nothing to guard ourselves against abuses. They will couch their language in hollow cries for "liberty," "opportunity," and "tolerance"—but tolerance least of all for Americans. If the nation that has offered so many people so much is to survive, securing its borders and ending the farce that is birthright citizenship are monumental steps in the right direction.