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Constitutional Guidance for Lawmakers

Defining Citizens: Congress, Citizenship, and the Meaning of the Fourteenth Amendment

There is a widespread belief that the Citizenship Clause of the Fourteenth Amendment automatically confers citizenship to anybody simply born on U.S. soil, regardless of the legal status of his or her parents. In reality, birthright citizenship is incompatible not only with the text of the Citizenship Clause, but more fundamentally, with the principle of consent—one of the bedrocks of republican government. From a constitutional point of view, the inclusion of the clause "and subject to the jurisdiction thereof" indicates that mere birth is not sufficient to acquire citizenship. Congress, consistent with the highest principles of equal citizenship and consent, would do well to clarify who is "subject to the jurisdiction" of the United States. This essay is adapted from The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"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."
— Amendment XIV, Section 1

Before the adoption of the Fourteenth Amendment in 1868, citizens of the states were automatically considered citizens of the United States. In 1857, the *Dred Scott v. Sanford* decision had held that no black of African descent (even a freed black) could be a citizen of the United States. The Fourteenth Amendment was thus necessary to overturn *Dred Scott* and to settle the question of the citizenship of the newly freed slaves. The Fourteenth Amendment made United States citizenship primary and state citizenship derivative. The primacy of federal citizenship made it impossible for states to prevent former slaves from becoming United States citizens by withholding state citizenship. States could no longer prevent any black from United States citizenship or from state citizenship either.

The Civil Rights Act of 1866 had asserted that "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." The immediate impetus for the Fourteenth Amendment was to constitutionalize and validate the Civil Rights Act because some had questioned whether

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the Thirteenth Amendment was a sufficient basis for its constitutionality. A constitutional amendment would also have the advantage of preventing a later unfriendly Congress from repealing it.

One conspicuous departure from the language of the Civil Rights Act was the elimination of the phrase "Indians not taxed." Senator Jacob Howard of Ohio, the author of the Citizenship Clause, defended the new language against the charge that it would make Indians citizens of the United States. Howard assured skeptics that "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States." Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, supported Howard, contending that "subject to the jurisdiction thereof" meant "not owing allegiance to anybody else…subject to the complete jurisdiction of the United States." Indians, he concluded, were not "subject to the jurisdiction" of the United States because they owed allegiance—even if only partial allegiance—to their tribes. Thus, two requirements were set for United States citizenship: born or naturalized in the United States and subject to its jurisdiction.

By itself, birth within the territorial limits of the United States, as the case of the Indians indicated, did not make one automatically "subject to the jurisdiction" of the United States. And "jurisdiction" did not mean simply subject to the laws of the United States or subject to the jurisdiction of its courts. Rather, "jurisdiction" meant exclusive "allegiance" to the United States. Not all who were subject to the laws owed allegiance to the United States. As Senator Howard remarked, the requirement of "jurisdiction," understood in the sense of "allegiance," "will not, of course, include persons born 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."

Most revealing, however, was Senator Howard's contention that "every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." Almost everyone certainly would have understood "natural law" to refer to the social compact basis of citizenship, the basis for citizenship adumbrated in the Declaration of Independence.

The argument of the Declaration grounded citizenship in consent. The natural law argument of the Declaration was a repudiation of the notion of birthright citizenship that had been the basis of British citizenship (i.e., being a British "subject") ever since it was first articulated in *Calvin's Case* in 1608. Sir William Blackstone, in his *Commentaries on the Laws of England*, had argued that the idea of birthright citizenship was an inheritance from the "foedal system"—it derives from the "mutual trust or confidence subsisting between the lord and vassal." "Natural allegiance," says Blackstone, is "due from all men born within the king's dominion immediately upon their birth. [It] is a debt of gratitude which cannot be forfeited, cancelled, or altered, by any change of time, place or circumstance.… [T]he 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 natural allegiance."

In the *Summary View of the Rights of British America* (1774), Thomas Jefferson argued that it was a natural right possessed by all men to leave the country where "chance and not choice" had placed them. The notion of a natural right to expatriation has no place in the scheme of an indefeasible birthright citizenship. Furthermore, the natural right to revolution is the perfect antithesis of "perpetual allegiance." In 1868, the Reconstruction Congress passed an Expatriation Act. The act provided, in pertinent part, that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Senator Howard was an enthusiastic supporter of the bill, describing the right of expatriation as the necessary counterpart of citizenship based on consent. During debate, commentators frequently described

Blackstone's view of birthright citizenship as an "indefensible feudal doctrine of indefeasible allegiance" that was incompatible with republican government.

In *Elk v. Wilkins* (1884), the Supreme Court decided that a native Indian who had renounced allegiance to his tribe did not become "subject to the jurisdiction" of the United States by virtue of the renunciation. "The alien and dependent condition of the members of the Indian Tribes could not be put off at their own will, without the action or assent of the United States" signified either by treaty or legislation. Neither the "Indian Tribes" nor "individual members of those Tribes," no more than "other foreigners" can "become citizens of their own will."

Beginning in 1870 Congress began extending offers of citizenship to various Indian tribes. Any member of a specified tribe could become an American citizen if he so desired. Congress thus demonstrated that, using its Section 5 powers to enforce the provisions of the Fourteenth Amendment, it could define who was properly within the jurisdiction of the United States.

In 1898, the Supreme Court in *United States v. Wong Kim Ark* declared that the Fourteenth Amendment adopted the common-law definition of birthright citizenship. Chief Justice Melville W. Fuller's dissenting opinion, however, argued that birthright citizenship had been repealed by the principles of the American Revolution and rejected by the framers of the Fourteenth Amendment. Nonetheless, the decision conferred birthright citizenship on a child of legal residents of the United States. Although the language of the majority opinion in *Wong Kim Ark* is certainly broad enough to include the children born in the United States of illegal as well as legal immigrants, there is no case in which the Supreme Court has explicitly held that this is the unambiguous command of the Fourteenth Amendment.

Based on the intent of the framers of the Fourteenth Amendment, some believe that Congress could exercise its Section 5 powers to prevent the children of illegal aliens from automatically becoming citizens of the United States. An effort in 1997 failed in the face of intense political opposition from immigrant rights groups. Apparently, the question remains open to the determination of the political and legal processes.

Edward Erler is Professor of Political Science at California State University, San Bernadino.