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Rethinking Birthright Citizenship
in the Wake of 9/11**

By John C. Eastman



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I. Introduction

At 4:05 p.m. on the afternoon of September 26, 1980—day 327 of the Iranian hostage crisis—Nadiyah Hussen Hamdi, born Nadia Hussen Fattah in Taif, Saudi Arabia, gave birth to a son, Yaser Esam Hamdi, at the Women’s Hospital in Baton Rouge, Louisiana. I mention the Iranian hostage crisis because Yaser Hamdi might just as easily have been the son of parents of Iran, then in a hostile stand-off with the United States, as of Saudi Arabia. The boy’s father, Esam Fouad Hamdi, a native of Mecca, Saudi Arabia and still a Saudi citizen, was residing at the time in Baton Rouge on a temporary visa to work as a chemical engineer on a project for Exxon.² While the boy was still a toddler, the Hamdi family returned to its native Saudi Arabia, and for the next twenty years Yaser Esam Hamdi would not set foot again on American soil.³

Yaser Hamdi’s path after coming of age would instead take him to the hills of Afghanistan, to take up with the Taliban (and perhaps the al Qaeda terrorist organization it harbored) in its war against the forces of the Northern Alliance and, ultimately, against

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² Certificate of Live Birth, Birth No. 117-1980-058-00393, on file in the Vital Records Registry of the State of Louisiana and available on-line at <http://news.findlaw.com/cnn/docs/terrorism/hamdi92680birthc.pdf> (last visited March 20, 2003); Frances Stead Sellers, *A Citizen on Paper Has No Weight*, Wash. Post B1 (Jan. 19, 2003).

³ Sellers, *supra* n. 2, at B1.

the armed forces of the United States as well.⁴ In late 2001, during a battle near Konduz, Afghanistan between Northern Alliance forces and the Taliban unit in which Hamdi was serving and while armed with a Kalishnikov AK-47 military assault rifle, Hamdi surrendered to the Northern Alliance forces and was taken by them to a military prison in Mazar-e-Sharif, Afghanistan.⁵ From there Hamdi was transferred to Sheberghan, Afghanistan, where he was interrogated by a U.S. interrogation team, determined to be an enemy combatant, and eventually transferred to U.S. control, first in Kandahar, Afghanistan and then at the U.S. Naval Base in Guantanamo Bay, Cuba.⁶

Unlike his fellow enemy combatants being detained in Guantanamo Bay, Hamdi had a get-out-of-Cuba-free card. When U.S. officials learned that Hamdi had been born in Louisiana, they transferred Hamdi (free of charge!) to the Naval Brig in Norfolk, Virginia,⁷ from where Hamdi, under the auspices of his father acting as his next-friend, has waged a legal battle seeking access to attorneys and a writ of habeas corpus compelling his release. This, because under the generally-accepted interpretation of the Fourteenth Amendment's citizenship clause, Hamdi's birth to Saudi parents who were temporarily visiting one of the United States at the time of his birth made him a U.S. citizen, entitled to the full panoply of rights that the U.S. Constitution guarantees to U.S. citizens.

⁴ The armed forces of the United States had been ordered to Afghanistan by President Bush, acting pursuant to his powers as Commander in Chief, U.S. Const. Art. II, and an explicit Congressional Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), against the "nations, organizations, or persons [the President] determines planned, authorized, committed or aided the terrorist attacks [against the United States on September 11, 2001] or harbored such organizations or persons."

⁵ Brief of the United States, *Hamdi v. Rumsfeld*, at 3, 6.

⁶ *Id.* at 6-7.

⁷ *Id.*

In this paper I argue that the received wisdom regarding the Citizenship Clause is incorrect, as a matter of text, historical practice, and political theory. As an original matter, mere birth on U.S. soil was alone not sufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., *not* owing allegiance to another sovereign) was the constitutional mandate, a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization. While Congress remains free to offer citizenship to persons who have no constitutional entitlement to citizenship, it has not done so. Mere birth to foreign nationals who happen to be visiting the United States at the time, as with the case of Hamdi the Taliban, should not result in citizenship. Because court rulings to the contrary have rested on a flawed understanding of the Citizenship Clause, those rulings should be revisited. Moreover, the statutory grant of citizenship conferred by Congress, which precisely tracks the language of the Fourteenth Amendment, should itself be re-interpreted in accord with the original understanding of the Citizenship Clause. In the wake of 9/11, now would be a good time to do so.

II. The Citizenship Clause of the Fourteenth Amendment

To counteract the Supreme Court's decision in *Dred Scott v. Sanford*⁸ denying citizenship not just to Dred Scott, a slave, but to all African-Americans, whether slave or free, the Congress proposed and the states ratified the Citizenship Clause of the Fourteenth Amendment, which specifies: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

⁸ 60 U.S. 393 (1857).

State wherein they reside.”⁹ It is today routinely believed that, under the Clause, mere birth on U.S. soil is sufficient to confer U.S. citizenship. Legal commentator Michael Dorf, for example, noted last summer: “Yaser Esam Hamdi was born in Louisiana. Under Section One of the Fourteenth Amendment, he is *therefore* a citizen of the United States, even though he spent most of his life outside this country.”¹⁰ What Dorf’s formulation omits, of course, is the other component of the Citizenship Clause. One must also be “subject to the jurisdiction” of the United States in order constitutionally to be entitled to citizenship.

To the modern ear, Dorf’s formulation nevertheless appears perfectly sensible. Any person entering the territory of the United States—even for a short visit; even illegally—is considered to have subjected himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Indeed, former Attorney General William Barr has even contended that one who has never entered the territory of the United States subjects himself to its jurisdiction and laws by taking actions that have an effect in the United States.¹¹ Surely one who is actually born in the United States is therefore “subject to the jurisdiction” of the United States, and entitled to full citizenship as a result.

⁹ U.S. Const. Amend. XIV, § 1.

¹⁰ Michael C. Dorf, *Who Decides Whether Yaser Hamdi, Or Any Other Citizen, Is An Enemy Combatant?* FindLaw (Aug. 21, 2002) (emphasis added).

¹¹ See, e.g., The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 3 (1989) (statement of William Barr, U.S. Assistant Attorney General); William J. Tuttle, *The Return of Timberlane? The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 Vanderbilt J. Transnat’l L. 319, 348 (Jan. 2003) (noting that in April 1992 then-Attorney General William Barr revised Department of Justice antitrust enforcement guidelines to permit lawsuits against foreign corporations who acted exclusively outside the United States if their operations were detrimental to U.S. exporters); see also *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

However strong this interpretation is as a matter of contemporary common sense, is simply does not comport with either the text or the history surrounding adoption of the Citizenship Clause, nor with the political theory underlying the Clause. Textually, such an interpretation would render the entire “subject to the jurisdiction” clause redundant—anyone who is “born” in the United States is, under this interpretation, necessarily “subject to the jurisdiction” of the United States—and it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results.¹²

Historically, the language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section 1 of the Fourteenth Amendment) was derived so as to provide a more certain constitutional foundation for the 1866 Act, strongly suggests that Congress did *not* intend to provide for such a broad and absolute birthright citizenship. The 1866 Act provides: “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.”¹³ As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child’s parents remained a citizen or subject of the parents’ home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.

Of course, the jurisdiction clause of the Fourteenth Amendment is somewhat different from the jurisdiction clause of the 1866 Act. The positively-phrased “subject to

¹² See, e.g., Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case. W. Res. L. Rev. 179 ?? (1989); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562 (1995) (“this Court will avoid a reading which renders some words altogether redundant”).

¹³ Chapter 31, 14 Stat. 27 (April 9, 1866).

the jurisdiction” of the United States might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act, one more in line with the contemporary understanding accepted unquestioningly by Dorf that birth on U.S. soil is alone sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading. When pressed about whether Indians living on reservations would be covered by the clause since they were “most clearly subject to our jurisdiction, both civil and military,” for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that “subject to the jurisdiction” of the United States meant subject to its “complete” jurisdiction; “[n]ot owing allegiance to anybody else.” And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean “a full and complete jurisdiction,” “the same jurisdiction in extent and quality as applies to every citizen of the United States now” (i.e., under the 1866 Act). That meant that the children of Indians who still “belong[ed] to a tribal relation” and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin to explicitly exclude “Indians not taxed,” as the 1866 Act had done, was rejected as redundant.¹⁴

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by the Supreme Court—by both the majority and the dissenting justices—in *The*

¹⁴ Congressional Globe, 39th Cong., 1st Sess., 2892-97 (May 30, 1866). For a more thorough discussion of the debate, see Peter H. Schuck and Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity 72-89 (Yale Univ. Press 1985).

Slaughter-House Cases. The majority correctly noted that the “main purpose” of the Clause “was to establish the citizenship of the negro,” and that “[t]he 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.”¹⁵ Justice Steven Field, joined by Chief Justice Chase and Justices Swayne and Bradley in dissent from the principal holding of the case, likewise acknowledged that the Clause was designed to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were as a result citizens both of the United States and the state in which they resided, provided they were not at the time subjects of any foreign power.¹⁶

Although the statement by the majority in *Slaughter-House* was *dicta*, the position regarding the “subject to the jurisdiction” language advanced there was subsequently adopted by the Supreme Court in the 1884 case addressing a claim of Indian citizenship, *Elk v. Wilkins*.¹⁷ The Supreme Court in that case rejected the claim by an Indian who had been born on a reservation and subsequently moved to non-reservation U.S. territory, renouncing his former tribal allegiance. The Court held that the claimant was not “subject to the jurisdiction” of the United States at birth, which required that he be “not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.”¹⁸ John Elk did not meet the jurisdictional test because, as a member of an

¹⁵ 83 U.S. (16 Wall.) 36, 73 (1872).

¹⁶ *Id.* at 92-93.

¹⁷ 112 U.S. 94 (1884).

¹⁸ *Id.* at 102.

Indian tribe at his birth, he “owed immediate allegiance to” his tribe and not to the United States. Although “Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states,” “they were alien nations, distinct political communities,” according to the Court.¹⁹ Drawing explicitly on the language of the 1866 Civil Rights Act, the Court continued:

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more “born in the United States and subject to the jurisdiction thereof,” within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.²⁰

Indeed, if anything, Indians, as members of tribes that were themselves dependent to the United States (and hence themselves subject to its jurisdiction), had a stronger claim to citizenship under the Fourteenth Amendment merely by virtue of their birth within the territorial jurisdiction of the United States than did children of foreign nationals. But the Court in *Elk* rejected that claim, and in the process necessarily rejected the claim that the phrase, “subject to the jurisdiction” of the United States, meant merely territorial jurisdiction as opposed to complete, political jurisdiction.

Such was the interpretation of the Citizenship Clause initially given by the Supreme Court. As Thomas Cooley noted in his treatise, *The General Principles of Constitutional Law in America*, “subject to the jurisdiction” of the United States “meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other

¹⁹ *Id.* at 99.

²⁰ *Id.* at 102.

government.” But the clear (and as I contend, correct) holding of *Elk v. Wilkins*, and the equally correct *dicta* from *Slaughter-House*, was rejected in 1898, thirty years after the adoption of the Fourteenth Amendment, in the case of *United States v. Won Kim Ark*,²¹ decided by the same court, with nearly the same line-up, that had given its sanction to the ignominious separate-but-equal doctrine less than two years earlier in *Plessy v. Ferguson*.²²

In *Won Kim Ark*, the Supreme Court held that “a child born in the United States, of parents of Chinese descent, who at the time of his birth were subjects of the emperor of China, but have a permanent domicile and residence in the United States,” was, merely by virtue of his birth in the United States, a citizen of the United States as a result of the Citizenship Clause of the Fourteenth Amendment. Justice Horace Gray, writing for the Court, correctly noted that the language to the contrary in *The Slaughter-House Cases* was merely *dicta* and therefore not binding precedent.²³ He found the *Slaughter-House* *dicta* unpersuasive because of a subsequent decision, in which the author of the majority opinion in *Slaughter-House* had concurred, holding that foreign consuls (unlike ambassadors) were “subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside.”²⁴ Justice Gray appears not to have appreciated the distinction between partial, territorial jurisdiction, which subjects all present within the territory of a sovereign to the jurisdiction of its laws, and complete, political jurisdiction, which requires as well allegiance to the sovereign.

²¹ 169 U.S. 649 (1898).

²² 163 U.S. 537 (1896).

²³ 169 U.S. at 678.

²⁴ *Id.* at 679 (citing, e.g., 1 Kent, Comm. 44; *In re Baiz*, 135 U.S. 403, 424 (1890)).

More troubling than his rejection of the persuasive dicta from *Slaughter-House* was the fact that Justice Gray also repudiated the actual holding in *Elk v. Wilkins*, which he himself had authored. After quoting extensively from the opinion, including the portion, reprinted above, noting that the children of Indians owing allegiance to an Indian tribe were no more “subject to the jurisdiction” of the United States within the meaning of the Fourteenth Amendment than were the children of ambassadors and other public ministers of foreign nations born in the United States, Justice Gray simply held, without any analysis, that *Elk* “concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.”²⁵

By limiting the “subject to the jurisdiction” clause to the children of diplomats, who neither owed allegiance to the United States nor were (at least at the ambassadorial level) subject to its laws merely by virtue of their residence in the United States as the result of long-established international law fiction of extraterritoriality by which the sovereignty of a diplomat is said to follow him wherever he goes, Justice Gray simply failed to appreciate what he seemed to have understood in *Elk*, namely, that there is a difference between territorial jurisdiction and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified.

Justice Gray’s failure even to address, much less appreciate, the distinction between territorial jurisdiction and complete, political jurisdiction was taken to task by Justice Fuller, joined by Justice Harlan, in dissent. Drawing on an impressive array of

²⁵ *Id.* at 681-82.

legal scholars, from Vattel to Blackstone, Justice Fuller correctly noted that there was a distinction between two sorts of allegiance—“the one, natural and perpetual; the other, local and temporary.” The Citizenship Clause of the Fourteenth Amendment referred only to the former, he contended. He contended that the absolute birthright citizenship urged by Justice Gray was really a lingering vestige of a feudalism that the Americans had rejected, implicitly at the time of the Revolution, and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment.

Quite apart from the fact that Justice Fuller’s dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray’s broad interpretation led him to make some astoundingly incorrect assertions. He claimed, for example, that “a stranger born, for so long as he continues within the dominions of a foreign government, owes obedience to the laws of that government, *and may be punished for treason.*”²⁶ And he necessarily had to recognize dual citizenship as a necessary implication of his position,²⁷ despite the fact that, ever since the Naturalization Act of 1795, “applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects.”²⁸ That requirement still exists though, as noted yesterday, it no longer seems to be taken seriously.

Finally, Justice Gray’s position is simply at odds with the notion of consent that underlay the sovereign’s power over naturalization, as described yesterday by Tom West.

²⁶ *Id.* at 693.

²⁷ *Id.* at 691.

²⁸ *Id.* at 711 (Fuller, J., dissenting) (citing Act of Jan. 29, 1795, 1 Stat. 414, c. 20)

What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children merely by giving birth on American soil, whether or not their arrival on America's shores was legal or illegal, temporary or permanent.

Justice Gray held the children of two classes of foreigners were not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment. First, as noted above, were the children of ambassadors and other foreign diplomats who, as the result of the fiction of extraterritoriality, were not even considered subject to the territorial jurisdiction of the United States. Second were the children of invading armies born on U.S. soil while it was occupied by the foreign army. But apart from that, all children of foreign nationals who managed to be born on U.S. soil were, in his formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens and who as a result had not yet renounced their allegiance to their prior sovereign would become citizens by birth on U.S. soil. This was true even if, as was the case in *Wong Kim Ark* itself, the parents were, by treaty, unable ever to become citizens.

Children of parents residing only temporarily in the United States on a work or student visa, such as Yaser Hamdi's parents, would also become U.S. citizens. Children of parents who had overstayed their temporary visa would also become U.S. citizens, even though born of parents who were now here illegally. And, perhaps most troubling from the "consent" rationale, children of parents who never were in the United States legally would also become citizens as the direct result of the illegal action by their parents. Finally, to return to my opening reference to the Iranian hostage crisis, this would be true even if the parents were nationals of a regime at war with the United States

and even if the parents were here to commit acts of sabotage against the United States, at least as long as the sabotage did not actually involve occupying a portion of the territory of the United States. The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to the former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in our territory illegally, is simply too absurd to be a credible interpretation of the Citizenship Clause.

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals. But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone born in the United States, and subject to its jurisdiction, is a citizen. With the absurdity of Hamdi’s claim of citizenship so vividly before us, it is time for the courts, and for the political branches as well, to revisit Justice Gray’s erroneous interpretation of that language, restoring to the constitutional mandate what its drafters actually intended, that only a complete jurisdiction, of the kind that comes with it a total and exclusive allegiance, is sufficient to qualify for the grant of citizenship to which the people of the United States actually consented.