ESSAY

BIRTHRIGHT CITIZENSHIP AND THE DUNNING SCHOOL OF UNORIGINAL MEANINGS

Evan D. Bernick, Paul Gowder & Anthony Michael Kreis†

This Essay critically surveys the recent debate surrounding birthright citizenship in the United States, particularly in light of arguments presented by legal scholars Randy Barnett, Kurt Lash, and Ilan Wurman. Under the guise of "originalism," Barnett, Lash, and Wurman propose an ahistorical, revisionist interpretation of the Fourteenth Amendment's Citizenship Clause. They suggest that the term "jurisdiction" should be understood as "allegiance," seemingly to give the veneer of legitimacy to the Trump Administration's view that the children of undocumented immigrants may not be American citizens. This Essay argues that their efforts to radically redefine the historical understanding of citizenship are methodologically flawed and undermine core principles of constitutional law. The critique exposes the inaccuracies and inconsistencies in their position and scrutinizes the scholarly merit of new theories of birthright citizenship that are wildly inconsistent with constitutional text, history, precedent, and unbroken tradition. This Essay concludes by examining the professional responsibility of legal scholars to engage in rigorous, fact-based historical analysis rather than politically motivated reinterpretations that threaten to destabilize fundamental constitutional rights.

INTRODUCTION

In 2002, lawyers within former President George W. Bush's Office of Legal Counsel drafted the documents known to history as the "torture memos," which provided a legal justification for the use of abusive interrogation techniques in

† Associate Professor of Law, Northern Illinois University College of Law; Professor of Law, Northwestern University Pritzker School of Law; and Assistant Professor of Law, Georgia State University College of Law. Authors' names are listed in alphabetical order. We thank Maggie Blackhawk, Christine Kexel Chabot, Jack Chin, Stella Burch Elias, Paul Lombardo, Ryan Rowberry, and Melissa Stewart for helpful suggestions. The authors alone are responsible for the content of this Essay and any mistakes therein.

the so-called "war on terror."[1] Thereafter, lawyers and scholars widely criticized those lawyers for the shoddy legal arguments they offered to justify a war crime—explaining that those arguments violated their professional duties to give competent and candid legal advice even to the President of the United States.[2]

Today, the legal profession is again confronted with the specter of some of its prominent members penning meritless, even frivolous, justifications of a President's desire to violate basic human rights.[3] Today, however, the lawyers are in the academy rather than the Department of Justice, the justifications are in the form of editorials and internet posts rather than internal memos, and the proposal is to denationalize American citizens based on the conduct of their parents rather than to torture foreigners based on suspicions of their involvement in terrorism.[4] While the details have changed, the basic professional failings remain the same.

For background, Peter Schuck and Rogers Smith wrote a short book in 1985 entitled "Citizenship Without Consent," which claimed that the Fourteenth Amendment was ambiguous on the question of birthright citizenship for U.S.-born children of undocumented immigrants and argued that Congress should abolish birthright citizenship for children of undocumented immigrants and "temporary visitor aliens."[5] The book's legal argument was not well received.[6] The title of

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1 *See generally* DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 4-35 (2009) (summarizing memos, their flawed legal arguments, and their consequences).

2 *See e.g.* Nancy V. Baker, *The Law: Who Was John Yoo's Client? The Torture Memos and Professional Misconduct*, 40 PRESIDENTIAL STUD. Q. 750 (2010) (arguing that John Yoo should have been professionally disciplined for memos); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005) (arguing that Yoo and Bybee failed to comply with ethical obligations); David D. Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT'L SEC. L. & POL'Y 455 (2010) (arguing for broader accountability for executive branch lawyers who participated in the torture memos).

3 *See* Universal Declaration of Human Rights (1948), art. 15 ("Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.").

4 We use the term "denationalize" to refer to involuntarily stripping a person of citizenship they acquired by birth. This contrasts with "denaturalize," stripping a person of naturalized citizenship. Some scholars use "depatriate" instead. *See* H. Ansgar Kelly, *Dual Nationality, The Myth of Election, and a Kinder, Gentler State Department*, 23 U. MIAMI INTER-AM L. REV. 421, 425-428 (1991-92) (describing terminological variety).

5 PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 5 (1985).

6 *See e.g.* Joseph H. Carens, *Who Belongs? Theoretical and Legal Questions*

Gerald Neuman's review of the book sums up its general reception: "Back to Dred Scott."[7]

There, at least in the academy, the story could have stopped. Twenty-three years after the book's publication, one of its authors acknowledged in print that it had not gained wide acceptance: while various conservative legislators aimed to abolish birthright citizenship for children of undocumented immigrants, no such measures had succeeded, and Smith concluded that "Americans have, through their representatives and their votes for their representatives, consented to reading the Fourteenth Amendment to provide birthright citizenship to children of all aliens born on American soil, whether legally present or not."[8] While we're not convinced that this is quite the right method to interpret the Constitution, it aptly illustrates the plain fact that Schuck and Smith did not convince many people. Indeed, their argument mostly seems to have been taken up by John Eastman—better known thereafter as the architect of the insurrectionist theory according to which Mike Pence could have unilaterally overturned the results of the 2020 presidential election.[9] To be clear, we are confident that Schuck and Smith offered their original argument in good faith. But it was wrong, the field

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about Birthright Citizenship in the United States, 37 UNIV. OF TORONTO L. J. 413, 433 (1987) ("their skillful tailoring can not altogether disguise the sow's ear from which the case has been constructed. Almost every point they raise was anticipated in the debate over *Wong Kim Ark*. Their arguments echo—sometimes in surprising detail—those of the minority in *Wong Kim Ark*, while the majority's counter-arguments are either rejected or neglected.").

7 *See* Gerald L. Neuman, *Back to Dred Scott*, 24 SAN DIEGO L. REV. 485 (1987).

8 Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329, 1334 (2008).

9 *See e.g.* John C. Eastman, *From Feudalism To Consent : Rethinking Birthright Citizenship*, THE HERITAGE FOUND. (Mar. 30, 2006), https://www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship. Garrett Epps notes that Eastman attempted to apply a version of this argument to argue that a U.S. born child of *lawful* immigrant parents was not a citizen in an amicus brief in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) as part of an argument for why he could be held as an enemy combatant without due process. The Court wisely ignored this argument. Garrett Epps, *The Citizenship Clause: A Legislative History*, 60 AM. U. L. REV. 331, 335 (2010). Epps also notes a handful of other scholars who took up Schuck and Smith's invitation, most notably Richard Posner in a brief outburst in concurrence in an immigration case. *Id.* at 336-8 (we do not agree with Professor Epps's characterization of the book as "highly influential" because of those handful of examples). On Eastman as architect of the legal theory of the insurrection, *see* John Eastman, *The Vice President's Electoral Count Powers*, WALL ST. J. (June 22, 2022), https://www.wsj.com/articles/the-vice-president-electoral-count-powers-mike-pence-eastman-jan-6-committee-11655842153 (justifying his advice to Pence).

rightly rejected it, and that should have been the end.

The story did not stop. On the day of his 2025 inauguration, President Donald Trump ordered the executive branch to cease acknowledging the citizenship of children born on U.S. soil to undocumented parents as well as parents on temporary visas, with only prospective effect to children born 30 days or more after the order was issued.[10] Of course, lawsuits were immediately filed and several federal judges have issued preliminary orders enjoining the executive order.[11]

Into the midst of litigation, jump the law professors, and as if by magic, the scholarly consensus dissolved—or at least appeared to do so. It began with a Hoover Institution blog post by Richard Epstein.[12] Shortly thereafter, well-known originalists escalated the sudden academic volte-face to the pages of the New York Times.[13] Others quickly jumped into the fray, sometimes in strikingly odd ways. Kurt Lash, to pick one example, posted an introduction to an article on SSRN—eight pages promising more a month later.[14]

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10 Exec. Order 14610, "Protecting the Meaning and Value of American Citizenship," 90 Fed. Reg. 8449 (Jan. 20, 2025). While the executive order declares that section 2, refusing to issue citizenship documents to covered persons, is prospective only, sections 1 and 3, which, respectively, assert the denationalizing position and direct agencies to act in accordance with the order, do not specify a prospective effect. More worryingly, nothing in the legal theory asserted in section 1 is inconsistent with retroactive effect, so if the legal claims of the denationalizers are to be believed, there is nothing stopping the President (or Congress) from applying it in some later action to people whenever they were born.

11 Order in State of Washington et. al. v. Trump et. al, no. C25-0127-JCC (W.D. Wa., Feb 6, 2025); Memorandum of Decision on Motions for Preliminary Injunction in Doe et. al. v. Trump et. al and State of New Jerey et. al. v. Trump et. al., no. 25-10135-LTS (D. Mass., Feb 13, 2025); Preliminary Injunction in New Hampshire Indonesian Community Support et. al. v. Trump et. al., No. 1:25-cv-38-JL-TSM (D. NH, Feb 10, 2025); Memorandum Opinion in Casa Inc. et al v. Trump et al, No. DLB-25-201 (D. Md., Feb 5, 2025).

12 Richard Epstein, *The Case Against Birthright Citizenship*, Civitas Institute, January 28, 2025, https://www.civitasinstitute.org/research/the-case-against-birthright-citizenship [https://perma.cc/8M52-ERW8].

13 Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES, Feb. 15, 2025 https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html.

14 *See* Evan Bernick, *88 Problems for Kurt Lash*, REASON (March 31, 2025), https://reason.com/volokh/2025/03/31/88-problems-for-kurt-lash/ (describing the sequence of Lash's SSRN posts and criticizing the argument). *See also* Evan Bernick, *Lash's Last Stand*, REASON (April 1, 2025), https://reason.com/volokh/2025/04/01/lashs-last-stand/. Because Lash's draft has gone through revisions even as critiques of it have been published, we elect not to fire on a moving target. We are working from the draft that he posted on March 31, 2025. *See* Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause* (unpublished manuscript)

This Essay focuses primarily on the Barnett/Wurman editorial, which poses a substantial risk of creating the false impression in the minds of the public that there is a serious scholarly debate on the constitutional law of birthright citizenship because of the prominence of its authors, the prominence of the outlet in which it was published, and the claims by its authors to be doing "originalism."[15]

The crux of Barnett and Wurman's argument is that the word "jurisdiction" in the text of the Birthright Citizenship Clause of the Fourteenth Amendment[16] does not actually mean jurisdiction. Instead, it means "allegiance," and encapsulates a common law theory that they call "allegiance-for-protection"—that "individuals give up their personal executive power to enforce their inalienable natural rights and agree instead to obey the laws of civil society—to pledge, if you will, allegiance—in exchange for civil society's protection of those rights."[17] They further extend this idea to suggest that the participants in the citizen side of that deal are those who have entered in "amity" to the United States (not, for example, invaders).[18] Then they argue that undocumented immigrants are not in "amity" in the relevant sense because of their "defiance" of the law upon entry, and therefore (we will say much more about the implicit therefore below) their children are not "under the protection or 'subject to the jurisdiction' of the nation in the relevant sense."[19] The inexorable conclusion of this reasoning—although Barnett and Wurman hedge that conclusion with lawyerly caution—would be to strip the citizenship of, that is to denationalize, the U.S.-born children of at least some undocumented immigrants.

Part I explains why Barnett, Wurman, and Lash have

(on file with authors).

15 For example, the day that Barnett and Wurman's editorial came out, Jeffrey Clark of Fox News published an article trading on the scholarly affiliations and prestige of Barnett and Wurman to claim that someone (perhaps the *Times*, perhaps the two authors, perhaps the law professoriat as a whole, it is unclear) "concedes" the strength of Trump's legal argument. Jeffrey Clark, *NYT Opinion Piece Concedes 'Trump Might Have a Case on Birthright Citizenship'*, FOX NEWS (Feb. 15, 2025), https://www.foxnews.com/media/nyt-opinion-piece-concedes-trump-might-have-case-birthright-citizenship.

16 U.S. Const. amend. XIV, § 1 ("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").

17 *Supra* note 13.

18 *Id.*

19 *Id.* For the sake of completeness, even if Barnett and Wurman were believed, they have not provided a case for the part of the executive order purporting to denationalize not merely the children of undocumented immigrants but also the children of those on temporary visas.

abandoned the project of originalism in their interpretation of the Birthright Citizenship Clause of the Fourteenth Amendment—and have abandoned the criteria for doing originalism in a defensible way. Part II explains why their arguments, and the arguments of other denationalizers, are not only wrong but barely even arguments at all, whether understood as law or as pure political theory. The near-universal rejection of those arguments when Schuck and Smith first tried them on for size thirty years ago was no mistake. The conclusion considers the professional ethics of a law professor intervening in ongoing litigation about fundamental constitutional and human rights with half-baked arguments presented in the op-ed pages of a newspaper.

I
HOW NOT TO DO ORIGINALISM

The leading academic denationalizers claim that their account of the Citizenship Clause is consistent with its "original public meaning"—the meaning originally expressed to the public by the text of the Fourteenth Amendment.[20] They do not make good on these claims.

Only one of us has ever identified as any kind of originalist.[21] But we are all mindful of two longstanding criticisms of originalism. First, originalism invites "law-office history," which progressive originalist Jack Balkin describes as "historical arguments that are opportunistic, anachronistic, and unsophisticated."[22] Second, originalism is exclusionary by

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20 *See* Barnett & Wurman, *supra* note 13 (contending that the Supreme Court should "consider the 14th Amendment's original purpose and the common-law principle of 'jus soli,' or birthright citizenship, which informed the original public meaning of the text." On the nuances of public meaning, *see generally* Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807 (2024); John O. McGinnis & Michael B. Rappaport, *What Is Original Public Meaning?*, 76 ALA. L. REV. 223 (2024).

21 Indeed, one of us (Bernick) coauthored with Barnett for years. He knew Barnett to be a meticulous scholar of the Fourteenth Amendment who was unafraid to follow the evidence of original meaning wherever it led. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018);); Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2018); Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499 (2019); Randy E. Barnett & Evan D. Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 NOTRE DAME L. REV. 679 (2019).

22 Jack M. Balkin, *Lawyers and Historians Argue about the Constitution*, 35 CONST. COMMENT. 345 (2020). The phrase was coined in Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. L. REV. 119, 122, 122 n.13 ("By 'law-

prioritizing the voices of elite white men in constitutional interpretation.

It is difficult to imagine how Ilan Wurman, Randy Barnett, and Kurt Lash could have done more to confirm these critiques if they set out deliberately to do so.

A. Law Office History Run Riot

The law-office critique is easily summarized. Lawyers and judges use history, but they are not historians. The methodological rigor that historians bring to their scholarship is impossible to replicate under the conditions of ongoing litigation. The pressures of time, the incentives to depict the position of one's adversary in the worst possible light, the limited evidence before the court, and the need for a clear rule of law invite motivated reasoning and fudging along multiple dimensions.

1. *Wurman and Barnett*

Wurman and Barnett commenced Citizenship Clause research during ongoing litigation. The evidence of original public meaning which they have presented is gossamer-thin; their depiction of competing positions suggests unfamiliarity with the literature; and they play fast and loose with crucial concepts.

Consider the concept of "allegiance" that is pivotal to the account of citizenship in their op-ed. They describe a "social compact" whereby "individuals give up their personal executive power to enforce their inalienable natural rights and agree instead to obey the laws of civil society."[23] This allegiance to the law is offered as a "pledge."[24] Those who do not agree to follow the laws of the United States are not, in the language of the Citizenship Clause, "subject to the jurisdiction" of the United States.[25] And people who have entered the country unlawfully are not subject to the jurisdiction of the United States, because one "cannot give allegiance and promise to be bound by the laws through an act of defiance of those laws."[26]

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office' history, I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.")

23 Barnett & Wurman, *supra* note 13.

24 *Id.* We have chosen to focus on the op-ed because it is the first major statement that Wurman and Barnett have made and the only one that the public is likely to read.

25 *Id.*

26 *Id.*

Consensual accounts of allegiance aren't new. Similar ideas were presented by counsel for the United States[27] in *Wong Kim Ark* and accepted by Chief Justice Melville Fuller in dissent.[28] More recent efforts by Peter Schuck and Rogers Smith,[29] Flight-93-election guy Michael Anton,[30] and insurrection architect John Eastman[31] have been subjected to devastating criticisms.[32] Perhaps the most damning demerit of consensual accounts it is that they struggle to explain how the Citizenship Clause can perform the most basic function that everyone agrees that it must perform: the nullification of *Dred Scott v. Sandford*. Indeed, it gives us a theory of citizenship that resembles that which led the *Dred Scott* majority to conclude that Black people could never become citizens of the United States.[33]

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27 *See* CAROL NACKENOFF & JULIE NOVKOV, AMERICAN BY BIRTH: WONG KIM ARK AND THE BATTLE FOR CITIZENSHIP 105 (2021) (describing how counsel for the United States "acknowledged that birthright citizenship was more or less presumed, but they characterized this as a False 'feudal and monarchical practice'").

28 *See id.* at 117-18 (describing how Chief Justice Melville Fuller in dissent "viewed the attribution of citizenship through natal location as a feudal practice" and that his "theory of allegiance rested significantly more in the idea of citizenship by choice").

29 *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

30 *See* Michael Anton, *Citizenship Shouldn't Be a Birthright*, WASH. POST (July 18, 2018), https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b_story.html. The linked article now comes with an editorial note detailing how Anton misrepresented his primary sources. Briefly, Michigan Senator Jacob Howard, who introduced what would become the Citizenship Clause, explained that the Clause would not guarantee birthright citizenship to "persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). Anton added "or" before "who," thus conveying the impression of a list of exclusions that included all foreigners, aliens, and children of ambassadors or foreign ministers.

31 *See* John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. POL. POL'Y 167 (2007) (Eastman misrepresented the same primary sources in the same way as Anton). *See* John C. Eastman, *We Can Apply the 14th Amendment While Also Reforming Birthright Citizenship*, NAT'L REV. (August 14, 2015) ("As Senator Howard explained, the Citizenship Clause excludes 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.").

32 *See, e.g.,* Gerald L. Neumann, *Back to Dred Scott?,* 24 SAN DIEGO L. REV. 485 (1987); James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367 (2006); Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331 (2010); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020).

33 *Supra* note 5, at 72 ("By making Dred Scott's citizenship turn upon the putative will and intention of the Framers to exclude all blacks from the American political community, Taney seemed to embrace the consensual conception of

Enslaved people were kidnapped and forced into the United States; their consent was neither sought nor given. Federal and state governments subjected them to their lawmaking and executive power without asking for permission. Even after Congress banned the international slave trade in 1808,[34] the enforcement regime established by Congress delegated the fate of unlawfully introduced captives to local state and territorial governments.[35] Nullifying *Dred Scott* thus required a theory of citizenship that did not depend upon any initial consent on the part of enslaved people to obey U.S. law.

When pressed by Ilya Somin[36] on this point, Wurman responded:

> A thoughtful critique. We think, though, there's an obvious difference w.r.t. the formerly enslaved who were brought against their will and of whom the nation demanded allegiance. It owed them protection as a result and therefore brought them into the social compact as a result.[37]

Presented in the op-ed as a consensual agreement to obey the law, allegiance is transformed into a nonconsensual duty to obey the law. Wurman toggles between two different senses of allegiance, corresponding to two concepts of citizenship that were in circulation during the antebellum period. The duty-based account can be traced through hundreds of years of common law and was embraced by abolitionists and, later, Republicans.[38] The consent-based account was embraced by a handful of antebellum courts, mostly in enslaving states, and by the majority in *Dred Scott*.[39]

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citizenship").

34 *See* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 UC DAVIS L. REV. 2215, 2226 (2020) (contending that "the laws regulating and then banning the African slave trade and the entry of free blacks were tools of selective immigration policy just like modern immigration legislation").

35 *See* Andrew J. Walker et al., *Impunity for Acts of Peremptory Enslavement: James Madison, the U.S. Congress, and the Saint Domingue Refugee*s, 79 WM. & MARY Q. 425, 447 (2022) (detailing how "the federal government not only undid its own much-vaunted ban passed less than two years earlier but also facilitated acts of enslavement of free persons on its own shores").

36 *See* Ilya Somin, *Birthright Citizenship—A Response to Barnett and Wurman*, REASON (Feb. 15, 2025), https://reason.com/volokh/2025/02/15/birthright-citizenship-a-response-to-barnett-and-wurman/[https://perma.cc/8PPH-3PXD].

37 *See* Ilan Wurman (@Ilan_Wurman), X (Feb. 15, 2025, 5:25 PM), https://x.com/ilan_wurman/status/1890890327143092473?s=46 [https://perma.cc/TE8F-J9KQ].

38 *See generally* MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); Ramsey, *supra* note **Error! Bookmark not defined.**, at 472.

39 Mark Shawhan, *"By Virtue of Being Born Here": Birthright Citizenship and*

Wurman and Barnett might well respond that one can only do so much in an op-ed and that it is difficult to hash out complicated historical questions on social media. But nobody forced them to do things this way. Barnett has discouraged judges from taking account of the work of scholars who, during ongoing litigation, posted journal-length articles with hundreds of footnotes on SSRN without adequate scholarly vetting:

> [E]veryone needs to bear in mind that this is a self-described "rough draft" which is not to be cited or quoted. Therefore, despite its coincidental timing, neither should it be given any weight in the Supreme Court's deliberations in *McDonald* until it has been carefully vetted by other scholars who are familiar with all the evidence of original meaning.[40]

We cannot improve upon this admonition.

2. *Lash*

Kurt Lash can't claim space constraints as an excuse. The 80-plus-page draft that he initially posted was advertised as "completed"[41] and contains hundreds of footnotes. But Lash's draft pays little attention to existing literature, and his pivotal arguments are supported by little evidence, even after several updates. More than the Wurman/Barnett op-ed, Lash's gives the impression of shoehorning to achieve a desired outcome.

Lash should have surveyed evidence and arguments in support of the conventional wisdom before adducing and advancing his own. However, his citation is selective, and his engagement with the scholarship that he cites is cursory. He cites Michael Ramsey's authoritative 2020 account of the original meaning of the Citizenship Clause.[42] Lash only cited a concession made by Ramsey that helps his own effort to minimize the importance of an extremely inconvenient case.[43]

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the Civil Rights Act of 1866, 15 HARV. LATINO L. REV. 201, 206–207 (2012).

40 *See* Randy. E. Barnett, *Hamburger's "Rough Draft" on Privileges or Immunities*, THE VOLOKH CONSPIRACY (Feb. 27, 2010), https://volokh.com/2010/02/27/hamburgers-rough-draft-on-privileges-or-immunities/ [https://perma.cc/QPQ7-TWBQ].

41 *See* Kurt Lash (@kurtlash1), X (March 22, 2025, 9:33 AM), https://x.com/kurtlash1/status/1903439901422723343 [https://perma.cc/BD64-4HAG].

42 Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020)).

43 *See* Lash, *supra* note 14, at *18 n. 74 (citing Ramsey for the proposition that "despite the holding in Lynch [v. Clarke], it seems fair to say that the issue of temporary visitors remained somewhat unsettled in the mid-nineteenth century").

He cites Mark Shawhan's 10-page student comment suggesting a possible requirement that the parent of a birthright citizen be domiciled in the United States.[44] But he ignores Shawhan's full-length article advancing an original-public-meaning case for expansive birthright citizenship.[45]

Lash thanks and cites John Eastman, the disgraced architect of a scheme to overturn the 2020 election. He doesn't discuss Bethany Berger's work on Indian law and the Citizenship Clause.[46] The omission is glaring, because Lash devotes dozens of pages to Indian law and relies upon an analogy between Tribal citizens and undocumented migrants. Why does a saboteur of the constitutional order merit respect, but an expert in the field that Lash is trying to write himself into doesn't?

Substantively, Lash relies upon antebellum sources that tell against him. Take James Kent's *Commentaries on American Law*, which Lash traces through several editions leading up to the ratification of the Fourteenth Amendment. The 1848 edition states that citizenship attends birth "within the . . . allegiance of the United States" and describes this as "the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent."[47] Lash recognizes that the "political condition or allegiance" bit is a problem for him, so he brushes it off as a (1) flawed summary of a decision that (2) was "not representative of a consensus understanding" of citizenship circa 1868.[48]

Lash offers no persuasive reason that the 1848 summary of *Lynch v. Clarke*[49]—the only antebellum decision to

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44 *See* Lash *supra* note 14; *id.* at *5 n. 8 (citing Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L. J. 1351 (2010)).

45 *See generally* Shawhan, *supra* note 39.

46 *See, e.g.,* Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v.* Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016); Bethany R. Berger, *Separate, Sovereign, and Subjugated: Native Citizenship and the 1790 Trade and Intercourse Act*, 65 WM. & MARY L. REV. 1117 (2024); Bethany R. Berger, "The Anomaly of Citizenship for Indigenous Rights" *in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM (Shareen Hertel & Kathryn Libal eds., 2011).

47 JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 38 (William Kent ed., 6th ed. 1848).

48 *See* Lash, *supra* note 14, at *18.

49 1 Sand. Ch. 583 (N.Y. Ch. 1844).

adjudicate the citizenship of children of temporarily visiting foreign nationals[50]—is flawed. Even if the summary were flawed, this would not affect its probative value as a matter of original public meaning absent evidence (which Lash does not adduce) that people recognized the flaws. And Lash does not demonstrate that *Lynch* was unrepresentative. It was cited by James Buchanan's Attorney General Jeremiah Black[51] and Abraham Lincoln's Attorney General Edward Bates (twice);[52] by New York's highest court five years before the ratification of the Fourteenth Amendment;[53] and by circuit-riding Supreme Court Justice Noah Swayne, the first Republican appointee to the Supreme Court, in the 1867 case of *U.S. v. Rhodes*—the first federal opinion interpreting the Civil Rights Act of 1866.[54] Leading Fourteenth Amendment Framer William Lawrence cited the "political condition or allegiance" language on the floor of Congress during the framing of the Civil Rights Act of 1866.[55] And the 1866 CRA contains a guarantee of birthright citizenship that Lash takes to be substantially identical to that of the Citizenship Clause.[56]

Now, the shoehorning. More than Wurman and Barnett, Lash tries to distance himself from those who demand reciprocal consent on the part of enslaved people and the polity to the presence and membership of Black people within it.[57] But his account of allegiance as loyalty suffers from other limitations.

Lash contends that allegiance "refers to one's loyalty to, or fidelity towards, a sovereign, in return for which the sovereign provides protection" and that parental allegiance determines citizenship status.[58] How is it that people forced into the United States and subjugated by the laws of enslaving states can be determined to be loyal to the United States? Lash's solution to this apparent problem is an extraordinarily strong presumption in favor of loyalty: "[n]othing about that context

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50 *See* Shawhan, *supra* note 39, at 205 n. 17.

51 *See* 9 Op. Att'y Gen. 373, 374 (1859).

52 *See* Edward Bates, "Citizenship of Children Born in the United States of Alien Parents, Sept. 1, 1862" *in* 10 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL 328-29 (1868); *id.* at 329-30 (Sept. 2, 1862).

53 *See* Munro v. Merchant, 28 N.Y. 9, 24 (1863).

54 *See* U.S. v. Rhodes, 27 F. Cas. 785, 789 (No. 16,151) (C.C.D. Ky. 1866).

55 CONG. GLOBE, 39TH CONG., 1st Sess. 1832 (1866) (statement of Rep. William Lawrence) (quoting KENT, supra note 47, at 38) (describing *Lynch* as a "great cause" that "conclusively show[ed]" that "all 'children born here are citizens without any regard to the political condition or allegiance of their parents'").

56 Lash, *supra* note 14, at *44.

57 *Id.*

58 *Id.* at *12.

suggests, much less involves proof of, refused or counter allegiance."[59]

We disagree. The countless souls who tried to flee slavery refused allegiance to the United States, in Lash's sense. Still more counterintuitive is Lash's claim that Confederate parents did not do enough to "rebut the presumed natural allegiance of a child born in the United States" by rebelling against it.[60] If any parents manifested their disloyalty towards the United States, it would be Confederate parents. And yet the citizenship of the children of enslaved people and rebels was not seriously disputed.[61] So: Why complicate things with loyalty? On the conventional account, these children are subject to the unmediated sovereign power of the United States—day in, day out, through its lawmaking, enforcement, and adjudicatory institutions—so they are subject to the jurisdiction of the United States.

B. Public? Meaning?

The exclusionary critique of originalism has procedural and substantive components. Even public meaning originalists tend in practice to prioritize elite white male voices—*they* are the relevant public. Black and Native people appear in footnotes to constitutional histories when they are, in fact, prime movers, as well as the most directly impacted by constitutional design and decision-making.[62]

Originalist neglect of nonelite, non-white publics is a descriptive problem because public meaning originalism is avowedly committed to capturing what the Constitution meant to actual people, and yet originalists ignore multitudes of them.[63] It's a normative problem because ignoring people who

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59 *Id.* at *87.

60 *Id.* at *80.

61 *See* Steven Calabresi, *President Trump's Executive Order on Birthright Citizenship is Unconstitutional*, REASON (Feb. 18, 2015), https://reason.com/volokh/2025/02/18/president-trumps-executive-order-on-birthright-citizenship-is-unconstitutional/ [https://perma.cc/B9X5-DJZE] (sharing an article by Samarth Desai showing that Republicans debated the allegiance of Confederate rebels but the amendment's supporters never "broached the possibility of denying birthright citizenship to *children* who had been born to Confederate rebels during the war").

62 *See generally* James W. Fox, *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675 (2015); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517 (2011); Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243 (2023); Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law,* 132 YALE L.J. 2205, 2219 (2023).

63 *See* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 409, 413 (2018).

exerted transformative influence on the Constitution's content despite their marginalization effectively perpetuates that marginalization.[64]

1. Wurman and Barnett

Originalists—including Barnett—have acknowledged the exclusionary critique, whether directly or indirectly, by centering the Black-led abolitionist movement and detailing its influence on the Republican Party's constitutional vision.[65] So it is surprising that there is no abolitionist history in Wurman and Barnett's op-ed.[66] And it is shocking that there is no "public." No newspapers, no pamphlets, no engagement with the voluminous, illuminating, widely publicized debates in the Thirty-Ninth Congress about the Civil Rights Act of 1866 or the

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64 *See* Annaleigh E. Curtis, *Why Originalism Needs Critical Theory: Democracy, Language, and Social Power*, 38 HARV. J. L. & GENDER 437, 451-59 (2015).

No single scholar has done more to focus attention on how Native peoples have built and institutionalized constitutional power to make and shape the laws that govern them than Maggie Blackhawk. Her work documents how Native peoples have wrought express affirmations of Tribal sovereignty into constitutional text and filled out under determinate text in sovereignty-affirming ways. *See* Blackhawk, *supra* note 61; Maggie Blackhawk, *Federal Indian Law as a Paradigm within Public Law*, 132 HARV. L. REV. 1787 (2019). Blackhawk's monumental Harvard Law Review Foreword synthesizes and builds upon pathbreaking research which shows how Native power has transformed a constitutional order to which Native peoples never consented. Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023). All the work that Blackhawk and other Native scholars have done to integrate Indian law into conversations about constitutional law and constitutionalism that have taken place without Native voices is effectively ignored by Wurman and Barnett, even when it is directly relevant. *See id.* at 89 (describing Native advocacy for forms of citizenship that preserved dual nationalism as well as tribal sovereignty); Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v.* Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1197-98 (2016) (describing how the 1787 Constitution's "exclusion [of Tribal citizens] from citizenship reflected the autonomy of tribal nations" and how during the framing of the Fourteenth Amendment "[t]he insistence that Indians in tribal relations should not involuntarily become citizens came exclusively from Republicans, and was championed most fervently by the stalwarts of early Reconstruction egalitarianism").

65 *See, e.g.*, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. Legal Analysis 165 (2011); Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 HOFSTRA L. REV. 1 (2022).

66 They might have consulted JONES, *supra* note 38, which details the importance of birthright citizenship to abolitionists and documents their struggle to constitutionally entrench it. Consent played no significant role in their accounts of the origin of allegiance. *See, e.g.*, WILLIAM YATES, RIGHTS OF COLORED MEN TO SUFFRAGE, CITIZENSHIP, AND TRIAL BY JURY 37 (1838) ("All writers agree . . . that while the residence of the citizen continues in the State of his birth, allegiance demands obedience from the citizen, and protection from the government. . . . He is not a citizen to obey, and an alien to demand protection.").

Fourteenth Amendment.[67]

Of course, these omissions produced a Citizenship Clause that doesn't even clearly nullify *Dred Scott*—the one "publicly known" purpose of the Clause that the authors identify.[68] *Of course* they lead the authors to offer in support of their position only one antebellum primary source that is even arguably relevant to original meaning. That source is an 1862 opinion by Lincoln AG Bates on the citizenship of free Black sailors. And *of course* they misread it.

Bates determined that Black Americans were "citizens of the United States, and therefore competent to command American vessels," notwithstanding *Dred Scott*.[69] He considered and rejected a previous opinion by former Attorney General William Wirt, which contended that free Black residents of Virginia were not U.S. citizens.[70] As Garrett Epps has underscored, Wirt's opinion rested on the premise that "the allegiance which the free man of color owes to the State of Virginia, is no evidence of citizenship; for he owes it not in consequence of any oath of allegiance."[71] In short, no consent, no allegiance. Bates not only rejected Wirt's conclusion but also his reasoning:

> I did verily believe that the oath of allegiance was not the cause but the sequence of citizenship, given only as a solemn guarantee for the performance of duties already incurred. But, if it be true that the oath of allegiance must either create or precede citizenship, then it follows, of necessity, that there can be no natural born citizen, as the Constitution affirms, because the child must be born before it can take the oath.[72]

Wurman and Barnett look impressed by Bates's statement that "every person born in the country is, at the moment of birth, prima facie a citizen."[73] Bates emphasizes that those who would overcome the presumption of birthright citizenship must shoulder the "burden of proving some great disfranchisement strong enough to override the 'natural-born' right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race

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67 *See generally* BARNETT & BERNICK, *supra* note 21.

68 Barnett & Wurman, *supra* note 13.

69 Citizenship, 10 OP. ATT'Y GEN. 382, 397 (1862).

70 *Id.* at 400 (1862) (discussing Rights of Free Virginia Negroes, 1 OP. ATT'Y GEN. 506, 509 (1821)).

71 Rights of Free Virginia Negroes, 1 OP. ATT'Y GEN. 506 (1821).

72 Citizenship, 10 OP. ATT'Y. GEN. 382 (1862).

73 *See* Barnett & Wurman, *supra* note 13.

or color, or any other accidental circumstance."[74] Bates identifies only one kind of exception to the general rule of birthright citizenship: "[T]he small and admitted class of the natural born composed of the children of foreign ministers and the like."[75] This cannot underwrite the denial of birthright citizenship to countless children who are not similarly situated to the children of foreign ministers.[76]

Finally, *of course* Wurman and Barnett—neither of whom has previously written anything about Indian law—wrongly believe that the Citizenship Clause's treatment of the citizens of Native nations somehow redefined the entire Clause. They neglect the distinctive constitutional status of Native nations, indicated by explicit references to "Indians" throughout our Founding documents[77] and reaffirmed in Section Two of the Fourteenth Amendment.[78] And they do not address the abolitionist-Indigenous solidarity that contextualizes the exception of Indians from birthright citizenship.[79]

The same abolitionist movement that converged around birthright citizenship for the sake of Black freedom came to support the sovereignty of Native nations as a means of securing Native freedom.[80] Having beheld the brutality of the forced removal of citizens of the Cherokee Nation from their ancestral homelands by federal troops under the command of President Andrew Jackson, many antislavery activists abandoned their support for the colonization of Black Americans.[81] Republicans, too, swore by the Supreme Court's decision in Chief Justice Marshall's 1832 opinion for the Court in *Worcester v. Georgia*, which affirmed that Tribes were

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74 Citizenship, *supra* note 69, at 394.

75 *Id.* at 397.

76 Contemporaneous newspaper coverage, including the abolitionist press, focused on its inclusionary breadth. *See, e.g.,* "The Dred Scott Decision Pronounced Void," THE NEW YORK TIMES (December 16, 1862), p. 5 ("His conclusion is that all free persons, without distinction of race or color, if native born, are citizens."); DOUGLASS' MONTHLY (Feb. 1, 1863), p. 10 (recounting a meeting at Metropolitan Hall in Chicago, during which Douglass declared that "according to Attorney General Bates's opinion, every negro is a citizen").

77 *See* Blackhawk, *supra* note 64, at 10.

78 Berger, *supra* notes 64 & 46, at 1199. *Compare* U.S. Const. art. I, § 2, cl. 3 (excluding "Indians not taxed" from state population counts for congressional representation purposes), *with* U.S. Const. amend. XIV, § 2 (same).

79 *See* Blackhawk, *supra* note 64, at 89.

80 *See* Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875 (2003); Gerard N. Magliocca 80, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2007); Berger, *supra* note 64, at 1198.

81 *See id.* at 515-6.

sovereign nations.[82] Republicans crafted the Fourteenth Amendment to reaffirm that constitutional command.[83]

There was no wholesale redefinition or anomalous exception to resolve. Indeed, one of the most methodically galling moments in the op-ed occurs when Wurman and Barnett *acknowledge* the existence of a well-defined set of historically rooted exceptions—and then immediately consider adding others![84] As they put it, "It is widely agreed that 'subject to the jurisdiction' excluded the children of diplomats, Native Americans subject and with allegiance to tribal authority . . . The crucial question is, why?"[85]

The first crucial question to ask from an originalist perspective is whether the set of exceptions was originally meant to be open or closed. If closed, any addition would be a departure from original meaning. And yet Wurman and Barnett don't ask—they assume that the set is open. Even if this assumption were correct, Wurman and Barnett do not adequately specify the criteria for inclusion.

To see the problem, consider abortion rights. The Framers of the Fourteenth Amendment didn't say anything about abortion. However, the rights that they discussed were valued because of their connection to republican citizenship, grounded in natural rights and civic equality.[86] Abortion rights promote natural rights to bodily integrity, and they promote civic equality by preventing the subordination of women. Therefore, the Fourteenth Amendment protects abortion rights. We expect that Wurman and Barnett would reject this as a form of living constitutionalism.[87] But they reason their

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82 *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 423-4 (1993); Oklahoma v. Castro- Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting).

83 *See* Magliocca, *supra* note 8083, at 520-1; Bethany Berger, *Separate, Sovereign, and Subjugated: Native Citizenship and the 1790 Trade and Intercourse Act*, 65 WM. & MARY L. REV. 1117, 1130-1 (2024); Berger, *supra* note 64; Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 568 (2000). In 1870 the Senate Judiciary Committee declared that "an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void" unless it is "consistent with their character as separate political communities or states." S. REP. NO. 41-268, at 9-10 (1870). *See also* Anna O. Law, *The Civil War and Reconstruction Amendments' Effects on Citizenship and Migration*, 3 J. AM. CON. HIST. 111, 137 (2025) (noting how the postwar amendments also presented new challenges for native peoples).

84 *See* Barnett & Wurman, *supra* note 13.

85 *Id.*

86 *See* BARNETT & BERNICK, *supra* note 21, at 223.

87 *See* Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405,

way to denationalization in similar ways.

2. Lash

Lash's exclusionary problems are still more striking than Wurman and Barnett's, both because of the greater space he was afforded to develop his arguments and his presumptuousness in wading into territory well beyond his expertise.

Lash cites one "abolitionist" source—a 1859 annual report by the American Anti-Slavery Society.[88] The report contains a summary of an opinion given by the Supreme Court of Maine in response to a legislative inquiry about the right of Black people to vote, which states that "citizenship, as the term is used in the Constitution of the United States, is the inevitable consequence of birth and allegiance."[89] All this language does is suggest a distinction between birth and allegiance, which the conventional view of allegiance does not deny. And the fact that this is Lash's only abolitionist source is inexcusable, given the pronounced tension between his contrarian account of allegiance and highly relevant abolitionist history.

Recall that Lash ties the citizenship of children to the allegiance of parents and ultimately contends that the presumption of parental allegiance can be rebutted by illegal border-crossing. Amanda Frost documented the abolitionist struggle for "birthright freedom," which entailed that all children born within the borders of free states were automatically free, even if their parents could be removed and returned to slavery.[90] Birthright freedom was established through legislation and litigation, not only in northern states and in territories governed by the Northwest Ordinance, but in a few courts in enslaving states.[91] Frost argues that Republicans framed the Citizenship Clause "against a backdrop of antebellum legal rules in which birth within borders granted new status and rights of membership."[92] Lash

414-15 (2007) (criticizing Jack Balkin for "identifying the principles underlying the Fourteenth Amendment as a whole" and then applying the principle of "equal citizenship" "directly to the problem of women's rights in general and abortion rights in particular" without regard for the text. Barnett worries that Balkin defined the relevant rule at too high a level of generality, too quickly. We have a similar concern about Wurman and Barnett's approach to the Citizenship Clause).

88 Annual Report of the Anti-Slavery Society 136 (1859).

89 *Id.*

90 *See* Amanda Frost, *Dred Scott's Daughter: Gradual Emancipation, Freedom Suits, and the Citizenship Clause*, 35 YALE J.L. & HUMAN. 812, 814 (2024).

91 *Id.*

92 *Id.* at 844.

seems unaware of this.

Lash also appears to be unaware of abolitionist support for Tribal sovereignty, discussed above.[93] Like Wurman and Barnett, Lash has not written anything substantial about Indian law. But that did not stop him from posting a draft, dozens of pages of which are devoted to Indian law, and which relies upon an analogy between Tribal citizens and undocumented migrants for its core argument—all without apparently talking to a single Indian law scholar.

The exclusion of American Indians from birthright citizenship is no great mystery. Republicans maintained that Tribal citizens on Tribal land did not ordinarily experience U.S. power over their internal affairs.[94] As for "wild Indians" (so legislators called them) who were not citizens of any Tribe with whom the U.S. treated, they were still further beyond U.S. sovereign power and were similarly excluded.[95]

Lash, however, fixates on an analogy between Tribal citizens whom he claims (citing no authority on point) could be returned to lands reserved to them by treaty if they crossed agreed-upon boundaries. With respect to these "unaligned Indians" (Lash's neologism) and unlawful entrants, the common problem is that the would-be entrant has "intentionally refuse[d] to formally present themselves to sovereign authorities."[96]

This analogy fails. Despite Lash's cherry-picking quotes from Senator Lyman Trumbull to support his article, nothing that Trumbull or any other credible source says about U.S. power over Tribal citizens resembles what undocumented people and their children experience. Denying the children of undocumented people citizenship subjects them to unmediated lawmaking, enforcement, and adjudicatory authority of the United States. Denying citizenship to Native children in 1868 had no such effect, as Trumbull made plain in his description of the jurisdictional situation in Indian country:

Can you sue a Navajoe [sic] Indian in court? Are they in

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93 *See sources cited supra* notes 77-82.

94 *See, e.g.,* CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (1866) (statement of Sen. Trumbull) (during the framing of the Civil Rights Act of 1866, claiming that Tribal citizens "will not be embraced by this provision [guaranteeing birthright citizenship because we have always treated the Indian tribes as nations," dealt with "by treaty, and not by law")

95 *See, e.g.* CONG. GLOBE, 39TH CONG., 1ST SESS. 572 (1866) (statement of Sen. Trumbull) (referring to Indians "not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction").

96 Lash; *supra* note 88.

> any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction . . . If we want to control the Navajoes, [sic] or any other Indians . . . Do we pass a law to control them? Are they subject to our jurisdiction in that sense?[97]

This was avoidable. Careful engagement with existing literature should have cautioned Wurman, Barnett, and Lash against cavalierly challenging the conventional wisdom about the Citizenship Clause. Nevertheless, they persisted.

The crucial question is, why?

II
HOW NOT TO DO POLITICAL THEORY OR POLICY

Let's now move beyond originalism. Barnett and Wurman's argument, like the Schuck and Smith work which it closely resembles, is more political theory than law. It rests less on the actual history of what the Republicans thought they were doing when writing the repudiation of *Dred Scott* into our law or the consistent interpretation given that text by the courts or even the plain meaning of the word "jurisdiction" than on a normative story about how citizenship ought to be organized. That story represents undocumented immigrants as disconnected from or even hostile to the laws of the United States and attributes that hostility to their children.

As political theory, the basic premise of Barnett and Wurman's version of the "allegiance" case for denationalization is that birthright citizenship represents a kind of bargain: adherence to the state and its laws in exchange for membership and protection.[98] Unlawful entry breaks this bargain. Thus, Barnett and Wurman, drawing on Wong Kim Ark[99] and some language from Edward Coke's opinion in *Calvin's Case*,[100] suggest that an unlawful entrant does not enter in "amity" with the United States, and hence cannot take up that relationship.

But even as political theory, that argument fails utterly. As theory, it rests on circular arguments about consent and anti-republican notions of blood-guilt. In application, it would generate a morass of inconsistencies and ambiguities that

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97 *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2893 (1866) (statement of Sen. Trumbull).

98 *See* Barnett & Wurman, *supra* note 13.

99 U.S. v. Wong Kim Ark, 169 U.S. 649 (1898).

100 *See* Calvin v. Smith, 77 Eng. Rep. 377 (K.B. 1608).

could be resolved only with arbitrary distinctions among groups of immigrant parents. And it betrays its proponents' lack of curiosity about immigrants, their families, and even immigration law itself.

A. The Incoherence of "Amity"

The "amity" theory cannot explain why unlawful entry in particular matters, or why this particular kind of unlawful entry, or even what unlawful entry really means. And the whole idea mischaracterizes immigrants as hostile in ways that are both dehumanizing and utterly removed from reality.

First, why is the legal character of the entry the only thing that matters? Consider the following hypothetical: a criminal enters the United States with a wholly valid visa (perhaps even one entitling them to long-term residence), and no criminal history, but with the intent to commit a serious crime. Perhaps they're an aspiring drug smuggler or assassin. They leave the airport and immediately commit a felony, then, two weeks later, give birth. On Barnett and Wurman's theory of allegiance, would they have entered in amity with the United States notwithstanding their intention to commit crimes?

Second, how far does the idea of unlawful entry go? What if, for example, a person enters the U.S. with a valid visa, but with a banana in their bag which they fail to declare at customs?[101] What about a person who drives across the U.S./Mexico border in a car with a bumper that fails to meet Department of Transportation standards?[102] Does it matter whether the entrant is aware of the banana or the poor condition of the bumper? It might, if the theory of "amity" depends on whether the character of the unlawful entry is such that the immigrant would be removable, as is indirectly suggested by Barnett and Wurman's reference to summary removal proceedings.[103] But we are not told, because no effort

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101 *See generally* 19 U.S.C. § 1497 (punishing failure to declare items at border), 19 C.F.R. § 148.11 (requiring declaration of items at border).

102 *See generally* 49 U.S.C. § 32502 (authorizing Secretary of Transportation to promulgate bumper standards for importation of vehicles). The Department of Transportation has used this statute to prohibit vehicles with broken headlight covers. 49 CFR § 581.5(c)(1). The reader is invited to join us in contemplating with horror a fix-it ticket issued by the local police shortly after a parent's crossing the border with a valid visa being introduced as evidence for their child's lack of citizenship in a decades-later deportation proceeding.

103 *See, e.g.*, Notash v. Gonzales, 427 F.3d 693 (9th Cir. 2005) (considering whether conviction of failure to declare at customs rendered alien removable as guilty of crime of moral turpitude; holding that crime would only be of moral turpitude if alien was convicted of particular section predicated on intent to defraud).

has been made to think through what the theory of "amity" amounts to. Observe that if they want to say that entering with intent to commit murder is inconsistent with "amity," it makes it more difficult to distinguish the case of the banana smuggler or bumper smuggler from the case of the border hopper, at least if these trivial kinds of smuggling were done willfully.[104] Our point is that from the internal perspective of immigration law, it is intuitive to distinguish between entering without authorization and committing some other unlawful act on entry—and indeed it does.[105] But if one is offering a theory according to which "defiance" of the law when entering the U.S. means one is out of "amity" with the country, one is obligated to account for why some acts of lawbreaking count as unfriendly and some don't.

More importantly, even within the class of entrants without permission, when is an unlawful entry really unlawful? Consider a person who crosses the border without papers to apply for asylum and immediately makes that application. U.S. law permits a person to apply for asylum regardless of the manner of their entry or their immigration status.[106] This is an obligation for the U.S. under Article 31 of the Refugee Convention, which bars signatories from penalizing legitimate refugees who enter without authorization and promptly seek refuge.[107] So did an asylum-seeker who crossed without papers enter "unlawfully" within the sense of the theory according to which unlawful entry is inconsistent with "allegiance" or "amity," or not? The predicate of unlawful entry embeds a critical ambiguity in such cases.

Nor is an asylum seeker the only case where "unlawful" entry is more complicated than a handful of constitutional law professors who apparently have never bothered to study any immigration law might realize. Victims of human trafficking who cooperate with law enforcement in prosecuting their traffickers are eligible to apply for a "T visa," and ultimately may be eligible for an adjustment of status to permanent

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104 *See id.*

105 *See* 8 U.S.C § 1325 (defining offense of "improper entry by alien").

106 8 U.S.C. § 1158.; *See* East Bay Sanctuary Covenant v. Biden, 993 F.3d 640 (9th Cir. 2021) (invalidating rulemaking purporting to deny right to claim asylum to those who enter other than at ports of entry); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.DC 2019) (same).

107 Convention Relating to the Status of Refugees (1951), Article 31(1). While the United States did not sign the Convention, it did sign the Protocol Relating to the Status of Refugees (1967), which incorporates Articles 2-34 of the Convention by reference.

residency.[108] So consider the case of someone who was thus trafficked, crossing the border involuntarily but without papers.[109] Amity or no amity? Does it depend on whether they have applied for a T visa? Whether they have received one? The point should be clear: the simple binary of "unlawful/not unlawful" fails to remotely capture the complexity of immigration status.[110]

Moreover, Barnett and Wurman equivocate between two categories of undocumented immigrants: those who enter unlawfully versus those who enter lawfully but drop out of legal status later.[111] A large number of undocumented immigrants originally entered on valid temporary visas, but overstayed the terms of those visas.[112] An overstayer has not entered unlawfully, and hence Barnett and Wurman's basic logic about the inability to establish the relationship of amity with the United States doesn't apply.[113] Barnett & Wurman (as well as all other advocates of denationalization on similar theories) thus face a dilemma: either they must concede that only *some* undocumented immigrants (those who crossed the border without papers) fall within their argument, or they must come up with some way to explain why a person can enter the country in "amity" with the United States and then drop out of "amity" when their visa expires.

To see the absurdity of the latter horn of the dilemma, observe that there's a natural variation in the length of human pregnancies around the mean of 9 months.[114] Now consider a

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108 8 U.S.C. § 1101(a)(15)(T)(i); 8 C.F.R. § 214.202; 8 C.F.R. § 245.23.

109 This is directly analogous to the Fourteenth Amendment's undisputed grant of citizenship to formerly enslaved people who had been unlawfully imported. *See* supra text accompanying n. 33-38.

110 Another example is a person brought across the border by an abusive partner, who may be eligible for cancellation of removal and adjustment of status under the Violence Against Women Act. *See* 8 U.S.C. § 1229b(b)(2).

111 The op-ed contains a subheading entitled "Have Unlawful Entrants Given Allegiance?" followed immediately by a reference to the broader category of "people who are present in the United States illegally" followed by a reference to the compound category of "a citizen of another country who violated the laws of this country to gain entry and unlawfully remain here," overlooking a common occurrence of persons unlawfully remaining after lawful entrance.

112 Robert Warren, *US Undocumented Population Continued To Fall From 2016 To 2017 And Visa Overstays Significantly Exceeded Illegal Crossings For The Seventh Consecutive Year*, 7 J. ON MIGRATION & HUMAN SEC. 19 (2019).

113 In their words: "They gave no obedience or allegiance to the country when they entered — one cannot give allegiance and promise to be bound by the laws through an act of defiance of those laws." Barnett & Wurman, *supra* n. 13.

114 A.M. Jukic et al., *Length of Human Pregnancy and Contributors to its Natural Variation*, 28 HUMAN REPRODUCTION 2848, 2849 (2013) ("Only 4% of women deliver at 280 days and only 70% deliver within 10 days of their estimated due date").

simple hypothetical: a married heterosexual couple enters the country on April 1, 2025, on visas that expire a year later. The wife becomes pregnant on July 1. She might give birth on March 31, 2026. Or she might give birth on April 2. But we ought not to take seriously any argument that supposes that this random variation in when the mother happens to give birth changes whether the child is "born within the allegiance" of the United States.[115]

Our point is about scholarly responsibility. A scholar who purports to offer an argument about the legal consequences of being born to parents with certain immigration statuses is under an obligation to educate themselves on the nature of the immigration statuses in question, and whether those statuses correspond to the terms of their argument or not. All the chaotic implications we have just described arise primarily from the fact that the denationalizers fail to understand—or even have any interest in—immigration law. It seems to never have occurred to them that an undocumented immigrant might be anything other than a person who has snuck across the border in the dead of night.

Even as concerns a person who sneaks across the border, there is a basic conflict between the implicit vision of an undocumented immigrant that the denationalizers share and reality. To the denationalizers, the border-crosser's acts render them irrevocably hostile to the sovereignty of the United States. Thus, while Barnett and Wurman are careful to say that an undocumented immigrant is not the same as an invader, neither are "in amity." They present the case of the undocumented immigrant immediately after that of the invader, with the unavoidable implication that the immigrant's

115 Those who would reply "and yes, that's why Trump's executive order also denationalizes those born to parents on temporary visas," should observe that the hypothetical could be changed to have the parents have green cards which get validly revoked on April 1 without changing its absurd consequences. This possibility is particularly salient now that the Secretary of State has claimed the authority to revoke the green cards of pro-Palestinian activists because of political activity. *See* Kaia Hubbard, *Secretary of State Marco Rubio says "we're going to keep doing it" after arrest of Columbia activist*, CBS News (March 17, 2025), [https://perma.cc/NCT7-5PQ3] (describing Rubio's statements and actions with respect to Mahmoud Khalil's green card). As it so happens, Mr. Khalil's wife is pregnant with the couple's first child. Patrick Smith, Wife of Mahmoud Khalil, Palestinian activist facing deportation, says she was 'naive' not to expect his arrest, NBC NEWS (March 13, 2025), https://www.nbcnews.com/news/us-news/wife-mahmoud-khalil-palestinian-activist-facing-deportation-says-was-n-rcna196186 [https://perma.cc/W56B-RV64]. It so happens that she is a U.S. citizen. *Id.* But what if she were an undocumented immigrant or on a temporary visa? Would the child lose their citizenship because the Secretary of State decided to punish a student activist?

"act of defiance" to the country's laws is in some way analogous to the kind of hostility to the sovereignty of the nation displayed by an invader. Some, such as Fifth Circuit Judge James Ho, have gone further and openly flirted with the idea that the President can outright declare undocumented immigrants to be invaders.[116]

This vision of the undocumented immigrant (whether border-crosser or visa overstayer) is unsupported by any actual evidence. The evidence, derived from legal sociologist's Emily Ryo's daring methodology of asking people about their motivations, is that undocumented immigrants generally respect and value American law, understand themselves as having an obligation to obey it, and understand their own choice to break the immigration laws as rooted in necessity rather than disregard.[117] Ryo's undocumented immigrant research subjects acknowledge the right of the U.S. to regulate its own border and understand themselves as law-abiding by contrasting their relationship to U.S. law to those who migrated for criminal purposes, such as smugglers.[118] They emphasize their desire to work for mutual benefit to themselves and to the American economy and political community, rather than to harm others.[119]

More directly stated: the whole point of immigration, whether with or without papers, and whether at a port of entry

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116 Josh Blackman, *An Interview with Judge James C. Ho,* VOLOKH CONSPIRACY(Nov. 11, 2024), https://reason.com/volokh/2024/11/11/an-interview-with-judge-james-c-ho/ [https://perma.cc/584J-HBWH]. Ironically, Judge Ho had earlier written one of the most cogent explanations of why the Fourteenth Amendment guarantees citizenship to the children of undocumented immigrants. James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367 (2006). Ho acknowledged at the end of that article, *id.* at 378, that the opposite position invoked the sinister ideology of *Dred Scott* ("Stay tuned: *Dred Scott II* could be coming soon to a federal court near you"). Does Judge Ho believe that creating a new *Dred Scott* would be acceptable if the President merely unilaterally declares an invasion first (in a situation where nary a foreign soldier is to be found)?

Incidentally, Judge Ho's Green Bag article cleanly dispatches the recurrent reference seen among denationalizers to the exception to birthright citizenship for members of Native American nations. As Ho quotes Senator Trumbull in explaining, "it would be a violation of our treaty obligations . . . to extend our laws over those Indian tribes with whom we have made treaties saying we will not do it." *id.* at 371.

117 Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 628 & 651 (2015).

118 *Id.* at 647-8.

119 *Id.* at 653-4; *See also* Ming H. Chen, *Leveraging Social Science Expertise in Immigration Policy,* 112 NW. U. L. REV. ONLINE 281, 291-3 (2018) (describing disjuncture between social scientific evidence about the motivations of immigrants and stereotypes held by policymakers).

or through the desert, is to join the American community, out of preference for its laws and the way of life it offers as opposed to the alternative of one's home country. This point is particularly salient with respect to refugees, who deliberately seek the shield of the sovereignty of the country to which they flee. But this is even true with respect to those who immigrate for economic purposes, when they seek economic opportunities generated in part by the American legal system.[120] Rather than representing some kind of denial of or hostility to the laws and sovereignty of the United States, such immigration, even if undocumented, is an affirmation of it. The notion that undocumented immigrants enter the United States in hostility rather than friendship ("amity") rests in its entirety on a conception of immigrant motivations rooted in vicious, dehumanizing stereotypes.

B. The Fiction of Consent to Citizenship, or: Who's the Real Feudalist?

Many of the earlier defenses of denationalization, including Eastman, Schuck, and Smith, describe their arguments as representing a modern conception of citizenship that challenges the feudal tradition.[121] Wurman, on X, has bought into this idea.[122]

This binary originates with Schuck and Smith, who contrast a feudal principle of citizenship with mutual "consent." In Eastman's version, the reader is asked to infer from the idea that a person's parents entered without authorization that their presence was without the consent of the American people, and hence that the American people could not have consented to the citizenship of their children.[123]

While it is largely beyond the scope of this Essay (which is primarily addressed to the contemporary arguments, none of which clearly rely heavily on the consent theory in quite the

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120 *See generally* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. OF ECON. LITERATURE 285 (2008) (arguing that countries with common law heritages perform better economically); Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. OF POL. SCI. 205 (2008) (reviewing literature on the relationship between the rule of law and economic growth).

121 Schuck & Smith, *supra* note 28 at 2-3; Eastman, *supra* note 9.

122 Ilan Wurman, X, https://x.com/ilan_wurman/status/1890829547542552954 [https://perma.cc/5QCD-JT6Z] ("Some of the initial reaction from other con law profs is odd. It's curious how some embrace not only original meaning (which is great, though they normally wouldn't), but also a particularly feudalistic conception of subjectship that is not compelled.").

123 *See, e.g.*, Eastman, *supra* note 9 at 7.

same way as the likes of Eastman as derived from Schuck and Smith), a few words are in order about the "consent" gloss to the allegiance or amity argument to reveal flaws shared by the entire class of theories.

The consent variation of the argument trades on a bunch of ambiguities and equivocations in the notion of consent. Observe first that it equivocates from consent to something about the parents to consent to something about the child. Second, it equivocates from consent to a person's presence to consent to (another person's) citizenship. Neither of those two jumps in the object of consent has any obvious justification. Third, it prompts the question: Who consented to the citizenship of children born to American citizens? If the answer to that question is "the American People, through section 1 of the Fourteenth Amendment," the underlying argument is revealed to be circular, as the entire point in dispute is whether the American people have *also* consented to the citizenship of the children of undocumented immigrants via that same provision.[124]

Schuck and Smith try to bridge the gap between those different conceptions of what is consented to and by whom by imagining that, under laws that compromise *jus soli* with elements of *jus sanguinis*, we could understand existing citizens as consenting to accept citizenship for themselves only on the condition that their own children also be treated as citizens by everyone else.[125] Space does not permit a full discussion of this theory, but we can make a few small points. Observe first that this "consent" is necessarily hypothetical even given their proposal that a person be formally permitted to denationalize themselves on adulthood, since the failure to self-expatriate tells us nothing about the rest of the bargain (i.e., whether or not there is a meeting of the minds about citizenship for their children being a condition of the "deal").[126]

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124 This kind of circularity applies at a more general level to all of the arguments that purport to attribute a parent's lack of "allegiance" or "amity" to their child. Typically, we ask who owes allegiance to a country by asking who its citizens are. It is, after all, because the parents are foreigners in the first instance that Barnett and Wurman can claim that they don't offer allegiance to the United States when they enter without papers. (Obviously, a U.S. citizen who, for example, crossed the border after their passport expired wouldn't thereby render themselves out of allegiance.) By assuming that this lack of allegiance passes to their children, the denationalizers implicitly assume the very question in dispute, to wit, that the children didn't acquire allegiance to the United States in virtue of being born on the territory.

125 Schuck and Smith, *supra* note 28 at 116-8.

126 Their proposal appears to directly replicate a theory of hypothetical consent that they attribute to Jean-Jacques Burlamaqui earlier in the book. *See*

Second, note that citizenship shifts roles here: for citizen parents, citizenship is represented as a kind of burden, undertaken for the benefit of the state, which they can refuse—and hence for which they receive consideration in the form of the guarantee of citizenship to their children, now understood as a benefit.

We fail to see how the Schuck and Smith theory or its relatives resemble anyone's actual self-understanding of citizenship or consent. Among the many questions it raises are: What would motivate the childless or the sterile to accept American citizenship (The fertile octogenarian's surprise cameo in nationality law?)? What would motivate the community at large to offer this deal to keep within the political community citizens who are, inter alia, murders, rapists, kidnappers, and terrorists, all of whom Schuck and Smith represent as graciously agreeing to continue to be citizens in exchange for the guarantee of membership for their children?[127]

C. Against Blood-Guilt

More to the present point, birthright citizenship is not inherently feudal just because Coke and similar lawyers and political theorists echoed a feudal standpoint.[128] We submit that the historical origins of a form of citizenship do not determine whether it is feudal or republican in any meaningful sense. More important is whether the form of citizenship in question is consistent with the most important distinguishing features of those ways of organizing the state. The denationalizers fare extremely poorly by this criterion, as they propose to replicate a notorious feature of feudalism: visiting the sins of the parents on their children.[129]

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id. at 42-45.

127 Strikingly, a few pages after they articulate this theory, they assert that "any argument from tacit consent should be viewed with suspicion," *id*. at 130, and suggest that we ought to reject "a consent defined by hypothesis and tautology" *id*. at 131. Quite so.

128 This appears to be the reason Schuck and Smith imagine that *jus soli* citizenship has something to do with feudalism. *See id*. at 9-10 (describing the feudal origins of what they call "the principle of ascription"), 44-45 (describing contrasting enlightenment-era theory of consent-based rather than ascriptive citizenship involving the attribution to children of a hypothetical agreement between their parents and the state).

129 For example, Blackstone explains the principle of corruption of blood and escheat for treason and felony as one in which "the feudal covenant and mutual bond of fealty are held to be broken," not only disabling the felon from passing property to his heirs but also stripping the heirs of any right to acquire property "in all cases where they are obliged to derive their title through [the felon] from any remoter ancestor." II Commentaries, 252-4 (1893 edition, Book 2, ch. 15).

Because of a single violation of law by a parent, the denationalizers would strip the child of citizenship, and potentially (depending on whether the parents' countr(ies) of origin recognize citizenship by descent) render that child stateless. This anti-republican idea is inconsistent with numerous other provisions of the Constitution, including the prohibitions on titles of nobility and corruption of blood, which recognize that status in a republic is a property of individuals, not families.[130] The Supreme Court expressed that fundamental principle, striking down legal discrimination not only against the children of undocumented parents,[131] but also against nonmarital ("illegitimate") children.[132] There was, to be sure, one circumstance where the American founders permitted degraded legal status to be heritable, but we hope that it is not one that today's denationalizers would embrace.[133]

The denationalizers frequently fail to even notice that they're visiting the sins of the parents on the children. For example, Richard Epstein begins his version of the denationalization case by observing that "it is hard to think of any good reason why legal and illegal conduct should be treated identically."[134] He then expresses surprise that citizenship law, unlike the law against murder, fails to distinguish between legal and illegal behavior. Ultimately, he invokes the common law maxim "ex turpi causa non oritur actio" to support the notion that a person ought not to acquire a legal claim from their illegal behavior. But no attention whatsoever is paid to the fact that the illegal behavior (such as it is) is the parent's, and the legal claim he would rule out is of the child.[135] All we get from Epstein is the bald assertion that

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130 U.S. Const. art. I, §9, cl. 8; art. III, §3, cI. 2. Accord Christopher L. Eisgruber, *Birthright Citizenship And The Constitution*, 72 N.Y.U. L. REV. 54 (1997), 76; Cristina M. Rodriguez, *The Citizenship Clause, Original Meaning, And The Egalitarian Unity Of The Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363 (2009), 1367. For a survey of the constitutional principle against blood guilt, see Max Stier, *Corruption Of Blood And Equal Protection: Why The Sins Of The Parents Should Not Matter*, 44 STANFORD L. REV. 727 (1992).

131 Plyler v. Doe , 457 U.S. 202, 220 (1982).

132 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

133 *See* PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 37 (2021), (describing antebellum legal principle according to which the children of an enslaved woman were themselves enslaved).

134 Epstein, *supra* note 12.

135 *Cf.* Schuck and Smith, *supra* note 19 at 97, who assert that "[i]llegal aliens, in Harlan's terms, are less needful of birthright citizenship than even the plaintiff in Elk. They almost always possess another nationality, owe allegiance to a foreign power, and are therefore members of a political community, whether or not they choose to return and take up that membership." Note how they use features of the foreign-born, foreign citizen *parent* to mischaracterize the needs

the maxim "covers the case where any person uses his or her illegal act to advance the position of his child," without any deliberation about, for example, whether the child had any say in the matter (obviously not), or even whether the parent actually had any such intent. Again, see an implicit appeal to the dehumanizing vision of the undocumented immigrant as a kind of scammer, bent on tricking the body politic and stealing from it, as opposed to the factual reality of the immigrant who values their relationship with the United States and its laws.[136]

Now return to Barnett and Wurman. We now have the tools to unpack the true meaning of their claim that the child of undocumented immigrants is not "born under the protection" of the United States. On the theory they explicate, this promise of protection is the reciprocal side (an ersatz sort of consideration) of the citizen's promise of allegiance. This is why they can cite the undocumented immigrant's susceptibility to summary removal as support for the proposition that they're out of the allegiance of the United States: it suggests that our legal system more generally treats an undocumented immigrant as a person to whom only minimal obligations are owed. But what of the child? Who is to protect them, especially if the country of their parents does not recognize citizenship by descent? In yet another question-begging maneuver, Barnett and Wurman assume that the United States owes the child no protection, even though that assumption is predicated on the very question in dispute, viz., whether the child is a citizen.

The feudal principle of denationalization has a contagion problem. While the current executive order purports to only affect children born after its announcement,[137] the underlying argument is not so limited. On the logic of the denationalizers, it's merely a matter of policy convenience that the order did not purport to strip citizenship of the children of those who entered the U.S. without documentation no matter when they arrived, even decades ago. At best, maybe they could be rescued by some kind of estoppel argument—but it is hardly wise to rely on the equitable powers of the courts to preserve basic

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and characteristics of the U.S.-born *child*. How do Schuck and Smith know whether some other country will accept the child, born abroad, of their citizens? (Later, they simply assert that this question is irrelevant to citizenship. *Id.* at 100-1). Indeed, their own proposal for the United States later leaves it up to Congress whether or not to treat those born abroad to U.S. parents as citizens or not. *Id.* at 126.

136 *See* Ryo, *supra* note 117.

137 Exec. Order 14610, *supra* note 10.

republican principles like the stability of citizenship.[138]

Moreover, the argument could conceivably span generations: if, say, a person three generations ago entered the United States unlawfully, then their children would not be citizens and—in the absence of some other basis for conferring upon them a right to be here, would themselves be present in violation of law and (we guess) outside the "amity" of the U.S. That, in turn, would denationalize their own children, and so on, and so on.[139] Making matters worse, some people may not know that they are undocumented. For example, international adoptees can turn out to be undocumented under current law because the parents who adopted them made mistakes in their paperwork—and then, if the denationalizers are to be believed, the children of those adoptees suddenly lose their citizenship too.[140]

The denationalizing argument proves far too much. At the limit, it would subject every American to a kind of title search, digging through a century and a half of immigration records and state vital statistics records to ensure that their bloodline had never been tainted by an ancestor's unlawful border-crossing (and God help them if an ancestor had a gap in their birth record).[141]

D. Denationalization is Irreconcilable with the Rule of Law

When you bring together all of these uncertainties and ambiguities, all the question marks surrounding the seemingly simple proposition, "no citizenship for children of unlawful immigrants"—ambiguities in whose migration counts as unlawful, and on what grounds, ambiguities in the retroactive application of the principle and in how many generations back it can look—the picture that comes into view is inconsistent with the rule of law.

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138 Moreover, the application of estoppel doctrines against the government has long been disfavored. *See* Leonard C. Brahin, *A Jacksonian Theory of Estoppel in IP Litigation Against the United States*, 82 WASH. AND LEE L. REV. ONLINE 89, 101-107 (2024) (summarizing the Supreme Court's resistance to permitting estoppel against the United States).

139 "Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me" Exodus 20:5 (King James Version).

140 *See generally* DeLeith Duke Gossett, *The Deportation of America's Adoptees*, 58 CT. REV. 34 (2022) (describing surprise undocumented status of international adoptees).

141 *See generally* Betsy L. Fisher, *Citizenship, Federalism, and Delayed Birth Registration in the United States,* 57 AKRON L. REV. 49 (2025) (describing gaps in system of birth registration, implications for citizenship claims).

A key goal of the rule of law is to establish stable entitlements so that people may make choices free from having their plans disrupted by the power of others,[142] and so that they may stand in relations of equality with the powerful, secure in the knowledge that they can't have the violence of the state turned against them absent their violation of some law.[143]

Against that core ideal of legality imagine a world in which the U.S.-born child of an immigrant can live as a law-abiding citizen for twenty years, and then one day come into conflict with their neighbor, who just happens to be an ICE officer, only to find themselves potentially subject to denationalization and deportation because of some irregularity in the immigration paperwork of their parents that occurred before they were even conceived.[144] To build such potentialities into the conjunction of our immigration and nationality law would truly make it, as Stella Burch Elias has written, "a tool of terror."[145]

Rather than recoil from this, the denationalizers embrace

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142 *See generally* Steve Wall, *Planning, Freedom, and the Rule of Law*, *in* THE OXFORD HANDBOOK OF FREEDOM 283, 290–91 (David Schmidtz & Carmen E. Pavel eds., 2016) (giving account importance of importance of rule of law to freedom).

143 See generally Paul Gowder, THE RULE OF LAW IN THE REAL WORLD 20–22 (2016) (discussing vertical relationships of terror that result from failure of rule of law).

144 Rebecca Futo Kennedy paints a vivid picture of how badly such a system can go through the example of Classical Athens, which was plagued with endless litigation over citizenship in which attacks on a person's ancestry were used as a weapon in, for example, property disputes. Rebecca Futo Kennedy, *Strategies of Disenfranchisement: "Citizen" Women, Minor Heirs and the Precarity of Status in Attic Oratory*, *in* VOICELESS, INVISIBLE, AND COUNTLESS IN ANCIENT GREECE 265 (Samuel D. Gartland & David W. Tandy eds., 2024).

145 Stella Burch Elias, *Law As A Tool Of Terror*, 107 IOWA L. REV. 1 (2021). This terror is particularly salient at a time when the United States claims the power to deport people directly into foreign prisons without due process. *See* Alanna Durkin Richer & Regina Garcia Cano, *A Timeline Of The Legal Wrangling And Deportation Flights After Trump Invoked The Alien Enemies Act*, ASSOCIATED PRESS (March 19, 2025), https://apnews.com/article/trump-deportation-courts-aclu-venezuelan-gang-timeline-43e1deafd66fc1ed4e934ad108ead529 (describing deportations into El Salvador prison). At least one court has ruled, at the preliminary injunction stage, that one such deportation was unlawful because it was carried out without legal process. Order Granting Preliminary Injunction in Garcia v. Noem, no. 8:25-cv-00951-PX (D. Md., April 4, 2025) (https://storage.courtlistener.com/recap/gov.uscourts.mdd.578815/gov.uscourts.mdd.578815.21.0_1.pdf). One consequence of undermining birthright citizenship as denationalizers propose would be to radically increase the evidentiary burden on persons to prove their citizenship and thereby their legal presence. A birth certificate alone would not be enough if a citizen must also prove the immigration status of their parents. If the mere say-so of ICE officers can justify deportations, these evidentiary burdens could easily become insurmountable even for people whose parents were citizens or green card holders.

it.[146] In the absence of genuine fidelity to the inclusive aspirations of the Fourteenth Amendment, the only thing standing in the way of this world of citizenship law as terror is the uncharacteristic forbearance of Donald Trump in making the operative part of his executive order prospective only. Nothing—except the Fourteenth Amendment and the integrity of those who would interpret it—keeps him from declaring that children of undocumented parents are subject to deportation no matter when they were born. Thus, the basic guarantees of membership in a republic under law are degraded beyond recognition.

CONCLUSION: HOW NOT TO DO ETHICAL LAW PROFESSORING

The birthright citizenship saga reveals a more profound question about the role of legal scholarship when political controversies arise and the professional obligations that accompany law professors wading into public debate. It also should be an appropriate moment to pause and consider how we train and prepare legal academics for scholarly work.

That a question about the academic mission, morality, and politics arises in the context of a historical claim about Reconstruction is unsurprising. The Civil War Amendments were core to a great constitutional reformation in the wake of the Civil War and the extended period of social unrest and political violence that preceded it. The history of Reconstruction is indisputably central to constitutional law scholarship.[147] Moreover, while many aspects of the

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146 While the current crop of denationalizers are not anti-dual citizenship, we think it's necessary to dispatch that position now. According to an early argument of John Eastman's, the sort of allegiance suitable for birthright citizenship also precludes the would-be citizen having allegiance to anyone else. *See, e.g.*, John C. Eastman, *Born in the U.S.A.?. - Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH L. REV. 955, 960 (2008) (claiming that 14th Amendment only grants birthright citizenship to those not owing allegiance to any other country). This would denationalize dual citizens as well, regardless of their parentage or place of birth. But this is the perennial refuge of a wide variety of racists and other bigots. These include most prominently the antisemites who have long accused Jews of divided loyalties, *see e.g.*, Tom W. Smith & Benjamin Schapiro, *Antisemitism in Contemporary America*, in AMERICAN JEWISH YEAR BOOK 2018, 113, 143 (Arnold Dashefsky & Ira M. Sheskin eds., 2019); *see generally* Hagen Troschke, Disloyalty/Jewish Loyalty, in DECODING ANTISEMITISM 115 (Matthias J. Becker et al. eds., 2024)—it seems to be no coincidence that the most prominent Supreme Court case recognizing dual citizenship centered on an attempt to denaturalize an American for voting in an Israeli election. *Afroyim v. Rusk*, 387 U.S. 253 (1967). The same slur has been levied against Catholics, allegedly more loyal to the Pope than to their country, *see e.g.*, Gerald P. Fogarty, *Reflections on Contemporary Anti-Catholicism*, 21 U.S. CATHOLIC HISTORIAN 37, 40 (2003). The time for such ideas has long passed.

147 *See, e.g.*, ANTHONY MICHAEL KREIS, ROT AND REVIVAL: THE HISTORY OF

Constitution implicate race and national identity questions, these questions are central to understanding the Fourteenth Amendment. As is the case with the history of Reconstruction, broadly speaking, interpretations of the Civil War Amendments' history are liable to be influenced by contemporaneous debates on the meaning of equal citizenship and the racial politics of the moment.

This is one of the great lessons of the Dunning School, named after the late nineteenth and early twentieth-century historian William Archibald Dunning.[148] Dunning, along with the founder of the modern American political science discipline, John W. Burgess, trained multiple historians at Columbia University on questions involving the history of Reconstruction.[149] Dunning and his students were notorious for writing narratives and interpretations of Reconstruction that blamed Reconstruction's failures on the quality of Black leadership and attributed the expansion of Black political power more to northern vindictiveness than to a moral right that emanated from the Union victory.[150] Indeed, many of Dunning's students were attracted to Dunning as a mentor because of his seemingly sympathetic views toward the South.[151] Dunning's students believed their work was neutral truth-telling, standing in contrast to other academics they accused of viewing Reconstruction as a straightforward story of the North's victory.[152] Far from neutral, this cadre of racist historians actively contributed to the mythology of the Lost Cause.[153]

Dunning and his students were viewed as conducting high-level professional history that was widely acclaimed at its

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CONSTITUTIONAL LAW IN AMERICAN POLITICAL DEVELOPMENT 56–70 (2024) (excavating the history of Reconstruction South Carolina and the effect labor politics on constitutional development).

148 Eric Foner, *Foreword to* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION, at ix (2013).

149 *Id.*

150 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at xviii (2002) (explaining how Dunning School affiliates propagated a view that "childlike blacks . . . were unprepared for freedom and incapable of properly exercising the political rights Northerners had thrust upon them").

151 John David Smith, *Introduction to* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 1 (2013) (describing Dunning and his students as trying to wrestle the historical narrative away from "unobjective" northern bias and toward Southern storytellers).

152 *Id.*

153 *See* DAVID W. BLIGHT, RACE AND REUNION, 295 (2001) (describing the close relationship between Lost Cause mythology and professional historians in the Dunning School period).

time.[154] In some respects, this group of historians significantly impacted all future historical work concerning this period because they collected evidence and documented an extraordinary number of facts about the events that unfolded in the postwar American South.[155] Some Dunning School historians' work remains the only attempts at full-blown, state-level projects on Reconstruction and the political development of the South.[156] However, their own biases, political motives, and the nativist ethos that hovered over the United States during the early 1900s clouded the work. They failed to look for evidence that would not further their narratives, used outlandish stereotypes in their characterizations, and artificially constrained their methods so their work would comport with their sympathies.[157] As Mark Wahlgreen Summers explained:

> The simple fact was that Dunning students in varying degrees knew what they wanted to find and, unlike some scholars, did not change their minds as they tackled the primary materials. How could they, when they used no black sources, read Republican newspapers as editorials and Democratic ones as fact, dismissed sworn testimony by freed people and Unionists as claptrap, and gulped down most of the allegations by their enemies as gospel?[158]

Scholars often find inspiration from current events that spark ideas about new topics for intellectual inquiry. However,

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154 James S. Humphreys, *William Archibald Dunning: Flawed Colossus of American Letters, in* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 77, 98–99 (2013).

155 Smith, *supra* note 121, at 4 ("Though historians remember the Dunningites for their racist descriptions of Reconstruction, they accomplished much more than that, setting forth basic facts mobilized by later scholars and investigating aspects of Reconstruction ignored by previous polemicists and historians.").

156 *Id.* at 21.

157 William Watson Davis, for example, was a pioneer in using oral history to study Reconstruction Florida but only interviewed white Floridians and was obvious in his sentimentality for the Confederate cause. *See* WILLIAM WATSON DAVIS, CIVIL WAR AND RECONSTRUCTION IN FLORIDA (1913). In comparison, W.E.B. Du Bois, carefully documented the Reconstruction South and offered a perspective that supplied nuance. *See*, e.g., W.E.B. DuBois, *Reconstruction and its Benefits*, 15 AM. HIST. REV. 781, 791 (1910) ("Undoubtedly there were many ridiculous things connected with Reconstruction governments . . . [that] were extravagant and funny, and yet somehow, to one who sees beneath all that is bizarre, the real human tragedy of the upward striving of down-trodden men, the groping for light among people born in darkness, there is less tendency to laugh and gibe than among shallower minds and easier consciences. All that is funny is not bad.").

158 Mark Wahlgreen Summers, *Reviewed Work*: The Dunning School: Historians, Race, and the Meaning of Reconstruction, 81 J. SOUTHERN HIST. 225, 226 (2015).

academics should be mindful of the Dunning School's harsh lessons and avoid the trap of fly-by-night histories. Law professors have a professional responsibility to sift through all evidence in the search for truth. Excellent scholarship takes more than a singular scholar because academics rely on others to challenge and improve work to ensure it holds up. This obligation means that professors workshop ideas and present ongoing projects to peers for comment and critique so that errors are addressed and perspectives that might not have been contemplated are considered. In this way, even if a scholar has a non-consensus view of legal history, they can explain why the criticisms fail to persuade them or present the counterevidence and justify the weight they decide to give it. Simply put, this takes time. Furthermore, it should not be fought in the cramped opinion columns of high-circulating newspapers in the first place, either.

The obligation is on legal scholars to show evidence and take in earnest the work that others have done first. From there, academics can demonstrate, with methodological precision, why others' prior understandings are wrong or point to critical, newly unearthed evidence. Retrofitting theories to evidence and the slipshod presentation of data is the hallmark of law office history. The failure to squarely inspect well-established work is unscholarly and renders newer work acutely susceptible to the influences of political headwinds because it is not engaging with facts but focused on a naked narrative. Good scholars doing empirical work, especially those with historically oriented endeavors, must occasionally step back from their creations and consider how the world around them might shade their analysis. And they must take similar steps for source criticism–why are certain influential persons in history motivated to say and do what they say and do? That kind of work is much more challenging to do than stripping quotes from documents without broader context and careful study.[159] Academics who take the time to marinate in the ideas of others, reexamine evidence, search for new evidence, and then work on their craft in conversation with others–not in the haste and heat of political debate, or in competition to weigh in on fresh litigation–is the proper way to delve into fundamental questions about who we are as a people

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159 *See, e.g.*, Sara M. Butler, *Context Matters: Understanding Why Medieval Legislators Chose to Regulate Women's Pregnant Bodies*, L. & HIST. REV. 1 (2024) (warning against the inapt use of medieval common law history in the abortion context because non-experts fail to appreciate the broader legal architecture in which the premodern rules were set).

and origins of the law's enduring values.

Good legal scholarship may bring scholars to diverging conclusions about legal history. In that vein, the academy should not aspire to a universally held view of any subject for the sake of settlement. But, to splash wild, new theories into the pages of the popular press with inadequate engagement between other scholars, shoddy cherry-picked quotes, and tapping into ambition instead of expert authority is inconsistent with doing steady, fair-minded, and nuanced work of quality. A natural inquiry anyone might cry out for an answer to is: why this; why now? In contrast to a comprehensive approach to historical work, muddling through the annals and giving half-baked thoughts along the way is unscholarly in any context. Presenting bits of evidence from third parties to large audiences as validating a prior historical position without independent verification is methodologically bankrupt and a disservice to the public.[160] But even more so now, when the stakes are so high because the rights of individuals hang in the balance, the morality of academic ambition should not be cast aside as irrelevant.[161]

The Dunning School, once again, is instructive as a warning for legal scholars today and for all time. The

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160 For example, NYU Law Professor Samuel Estreicher, a labor and employment law scholar, and student Rudra Reddy in a letter to the *Wall Street Journal* editor claimed to have evidence that State Department passport issuance practices in the 1880s rejected birthright citizenship. Samuel Estreicher & Rudra Reddy, *Revisiting the Scope of Birthright Citizenship*, WALL ST. J., Mar. 27, 2025, https://www.wsj.com/opinion/revisiting-the-scope-of-birthright-citizenship-trump-illegal-alien-01f4ef2c. Professor Wurman posted the letter online, adding, "Wow. From yesterday's WSJ. This is not exactly how I would analyze the issue but it shows the academic consensus on birthright citizenship is more fragile than many believe." Ilan Wurman, X, https://x.com/ilan_wurman/status/1905647115675517010 [https://perma.cc/ED9C-5GHY]. Other academics, including Kurt Lash, reposted Wurman's characterization. Professor Jonathon Booth promptly looked at the source materials and discovered that the facts did not square with the claim Professor Estreicher—someone who has never written about nineteenth century American history—claimed. Jonathon Booth, BLUESKY, https://bsky.app/profile/jboothhistory.bsky.social/post/3llhdaerijc2n [https://perma.cc/RC6J-EWR6]. This is no way to search for truth.

161 David Schraub responded to the sudden emergence of anti-birthright citizenship pieces that law professors should take stock of the environment they are writing, arguing that "playful and provocative takes" might require special professional considerations "in an *unhealthy* legal climate, where norms are routinely shattered and long-standing legal limits are crumbling at alarming speed." David Schraub, *Laying Aside One's Toys*, THE DEBATE LINK (Apr. 1, 2025), https://dsadevil.blogspot.com/2025/04/laying-aside-ones-toys.html [https://perma.cc/85KC-GDRP]. Importantly, too, while adherence to historical research methods is always the hallmark of good scholarship, *transparent adherence* to standard process is crucial when work is done concerning ongoing, politically charged controversies.

enterprising students at the Columbia History Department fueled a one-sided narrative of Reconstruction that was used to justify Jim Crow and gave the veneer of credibility to cultural phenomena like D.W. Griffith's *Birth of a Nation* or Margaret Mitchell's *Gone with the Wind*.[162] It influenced the Supreme Court.[163] One-dimensional publications were not just a matter of wasting time on frivolous debate. Instead, the literature contributed to public disinformation and the intellectual defense of enclaves of authoritarianism in the South.[164] So too with birthright citizenship today, hyper-vigilance against knee-jerk claims that risk tainting public perception is a virtue. Self-reflection is an essential part of the process, and the morality of the enterprise, its motivations, and the consequences of its fallout are valuable questions worth proffering, as well. Advancing arguments that would strip children of citizenship they would otherwise be entitled to under the Constitution's text, despite the overwhelming body of historical evidence, judicial precedent, and unbroken tradition, is not a trivial project.

Wurman and Barnett's cavalier treatment of a sacred constitutional right, that of birthright citizenship, should be beneath the legal academy's aspirations. However, where it leaves the historian wanting for serious methodology and intellectual rigor as a matter of academic discipline, it also misses history's more significant lessons. In this country, we safeguard birthright citizenship and the presumption of loyalty that comes with it. This was lost on America in wartime not so long ago, as Justice Robert Jackson reminded the nation in his dissent in *Korematsu v. United States.* Jackson wrote for all time to stress that Fred Korematsu, forcibly removed from his community and imprisoned because of his Japanese

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162 TRAVIS M. FOSTER, GENRE AND WHITE SUPREMACY IN THE POSTEMANCIPATION UNITED STATES 38 (2019) (describing *The Birth of a Nation* and *Gone with the Wind* as "Dunning School national fantasies").

163 Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1594 (2012) ("When it did cite works of history, the Court [before the Warren years] relied on the Dunning School . . . ."); James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 445 (2014) ("Until the 1960s, the judicial view of Reconstruction mirrored that of the Dunning School . . . ."). *See also* Nikolas Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022) (exploring how the Dunning School influenced the Supreme Court's development of separation of powers jurisprudence in the 1920s).

164 *See* Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 183 (2013) ("The Dunning School's story of Reconstruction dominated American textbooks and popular understandings for the first half of the twentieth century, where it undoubtedly helped justify Jim Crow.").

ancestry alone, was "born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence."[165] In the hue and cry of the moment, Jackson sounded the alarm against policies that legalized the corruption of blood, arguing that "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable."[166] Rushed historical work serves nobody well. Advancing a sloppy position that children could be punished with statelessness, for whatever the sins of their parents, is contrary to our constitutional tradition. Playing games with the law of citizenship disturbingly betrays one of the most solemn lessons we teach our students never to forget when they learn about *Dred Scott* and *Korematsu*: safeguarding the place of citizenship is a sacred obligation in our constitutional order.[167]

165 Korematsu v. United States, 323 U.S. 214, 242–43 (1944) (Jackson, J., dissenting), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018).

166 *Id.* at 243.

167 *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386–87 (2011) (identifying Dred Scott, Plessy, Lochner, and Korematsu as "important for us to teach, to cite, and to discuss . . . ostensibly as examples of how not to adjudicate constitutional cases.").