

Roberts Gets the 14th Amendment Wrong

In the 1860s, citizenship was not only extended but defined more narrowly than the chief justice acknowledges.

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At right: Chief Justice John Roberts speaks in DC

In *Trump v. Barbara*, Chief Justice [John Roberts](#) screams from the rafters that the framers of the 14th Amendment affirmed “citizenship, then as now, was the right to have rights—freely to participate in our community.” That’s contrary to history. The framers made sure that the newly freed black citizens didn’t get the vote, because if that benefit had been included, the amendment wouldn’t have passed.



It took the 15th Amendment, ratified more than 1½ years later, to enfranchise black Americans. And that still didn’t extend the franchise to all adult citizens. In *Minor v. Happersett* (1874), the Supreme Court unanimously held that although women were citizens, the 14th Amendment didn’t confer on them the right to vote. The justices applied the then-standard definition of citizenship as an exchange of protection by the sovereign for loyalty of the citizens. It took the 19th Amendment to enfranchise women as a matter of constitutional right. In the meantime, voting was left exclusively to the states. The Civil Rights Act of 1866 covered only the private rights to contract, testify and make wills. No political rights were involved.

The chief justice wholly failed to explain how his flawed originalist methodology supported birthright citizenship for the children of illegal aliens or temporary visitors. His blunder is captured in the false proposition that birthright citizenship “crossed the Atlantic with the colonists—and was adopted with little fanfare after the Revolution” as an outgrowth of the common law of England.

Not so. English law had adopted a form of birthright citizenship—but, as Blackstone noted, not as a common-law matter but because naturalization “cannot be performed but by an act of parliament.” The English statutory framework was explicitly rejected in the U.S. Alexander Hamilton noted in Federalist No. 32 that the constitutional requirement of a “uniform” naturalization law conferred exclusive jurisdiction on the federal government, to the exclusion of the states.

The chief justice never cites that clause or the Naturalization Acts of 1790 and 1795, which limited naturalization to “free white persons” who had resided in the U.S. for two years (later raised to five), were of good character, and had explicitly renounced their loyalty to all other sovereigns and determined the status of minor children solely by the status of their parents. That provision excluded all people of African descent until reversed by the 1870 Naturalization Act, which didn’t apply to people of Asian descent until after 1900. Chief Justice Roberts then cites a group of irrelevant state-law cases, none of which deal with birthright citizenship, but addressed such issues as the ability to inherit under state law, to hold state office, or to vote in state elections.

A key to the constitutional structure was the distinction between “subject to the jurisdiction thereof” in the 14th Amendment’s Citizenship Clause and “within the jurisdiction” in the Equal Protection Clause. The latter isn’t limited to citizens, as the Privileges or Immunities Clause is, but applies to all persons.

That rests on Blackstone’s explicit distinction between “local” and “natural” allegiance. The former requires all persons to respect the criminal and civil law while in a foreign nation but ceases to bind them on their departure. Local allegiance never confers any opportunity to obtain citizenship, which natural allegiance does. The chief justice incorrectly collapses the two into one by writing that “the Citizenship Clause uses jurisdiction in its ordinary sense—referring to the power of the United States to govern those within its territory.” The Equal Protection Clause had nothing to do with citizenship. How could the 14th Amendment confer automatic birthright citizenship when the 1870 statute set out more-rigorous conditions to apply for naturalization?

Against this background, *U.S. v. Wong Kim Ark* (1898) wrongly held that birthright citizenship attached to a man born in the U.S. whose Chinese parents were legally resident in the U.S. In so holding, Justice Horace Gray committed three major blunders. First, the Naturalization Acts then didn’t make Asians eligible for citizenship until after 1900. Second, Wong Kim Ark traveled on a Chinese passport and thus hadn’t renounced his former sovereign. Third, an elaborate set of treaties with China prevented any Chinese national from applying for U.S. citizenship.

All these arguments are found in my friend-of-the-court brief, written with Benjamin Flowers; in my extensive comments on the oral argument; and in my recent book, “The Myth of Birthright Citizenship.” The chief justice found it all too comfortable to ignore every objection.

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