# Birthright Citizenship – Just and Justified

> *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.*

So says section 1 of the 14th Amendment to the U.S. Constitution. With the impeccable timing we're accustomed to, Donald Trump says he will sign an executive order to nullify this constitutional provision by denying citizenship to persons born in the United States and subject to the jurisdiction thereof *if their parents were in the country without the permission of the government.* (My remark about his timing refers to the fact that his latest move in his campaign to demonize the Other in order to Make America Great comes on the heels of the homicidal evil at the Tree of Life synagogue in Pittsburgh last Saturday. The dominant tone of the Trump presidency is hatred.)

Obviously, two issues are involved in birthright citizenship. The first is whether Trump can abolish it by executive order rather than having to ask the Congress to pass a bill for him to sign. More fundamental, however, is whether Congress can do this by anything less than a constitutional amendment that would nullify section 1 of the post-Civil War 14th Amendment.

At this point no one should be surprised that Trump — who along with other Republicans routinely scorned Barack Obama's use of the executive order — thinks he can do this. He sees himself as the Sun King who may do whatever happens to catch his fancy. In Trump World, his impulses are the supreme law of the land. Whatever Trump wants Trumps gets — at least his very, very large brain tells him so.

But let's be serious and turn to the more interesting question. Does the Constitution require that "all persons born in the United States, and subject to the jurisdiction thereof" be recognized as citizens? The burden of proof would seem to be on those who say no.

What is their case? It seems to come down to one thing: the drafter of the section, Sen. Jacob Howard, said, "This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."

Okay, he said it. So what? It changes nothing. In fact, it affirms what we pro-birthright citizenship folks say. No one thinks that the U.S.-born children of foreign ambassadors can

claim citizenship; they are not under the jurisdiction of the U.S. government. Howard used the word "alien" merely as a synonym for U.S.-born "foreigners … who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States." Howard said nothing about immigrants, either legal or illegal. (There were no illegal immigrants in those days.) The Howard quote is a nothingburger.

But even if he had listed illegal immigrants, he did not put such language in the section, and so it was not approved by members of Congress or ratified by the state legislators. Whether one uses the standard of original intent or contemporary common understanding, why should Howard's words have any force whatever? It's not as though "all persons" was an arcane technical phrase or term of art.

Lysander Spooner told us why Howard's statements are of no import in his extraordinary book *The Unconstitutionality of Slavery* (1860). I commend this book to the constitutionalists of all parties. Spooner, like me, was no fan of the Constitution, but he showed in his book that those who *do* revere it ought to see that they may have embraced a position — namely, that slavery was constitutional — that *by logic* they ought to have rejected if they were to be true to their devotion in the Constitution. Spooner had slavery in mind. I contend that section 1 of the 14th Amendment is subject to the same sort of arguments Spooner made about the allegedly pro-slavery provisions.

Spooner exhaustively demonstrated, among other things, that the infamous "three-fifths" clause, which said that only "three fifths of all other persons" were to be counted for purposes of taxation and congressional representation, did not indicate a constitutional sanction of slavery. (Other provisions were also used to make the specious argument, but Spooner dispatched them as well.)

Working from a background of natural law, natural justice, and self-ownership, Spooner noted that the Constitution purported to, quoting the preamble, embody the ratifiers' intention to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." (He would not have had to believe the preamble to hold the constitutionalists to these stated objectives.) Thus, Spooner argued, the Constitution's several provisions must be read in the light of those objectives *unless* the language "be irresistibly explicit."

Note that Spooner was *not* saying the Constitution could not possibly contain anti-freedom provisions. It could and it does. Rather, he was saying that where the language permits a pro-freedom interpretation, *that is how it must be read because of the Constitution's own purported objectives*. Anti-freedom provisions must be *irresistibly explicit*. Ties go to the libertarian because "we cannot unnecessarily place upon the constitution a meaning directly destructive of the government it was [purportedly] designed to establish." (For

more on Spooner and the Constitution, see Roderick T. Long's "Spooner Defended" and "Inside and Outside of Spooner's Natural Law Jurisprudence.")

Now let's turn to Spooner's specific argument about the three-fifth clause because it is almost exactly on point in the matter of birthright citizenship. The three-fifths clause contrasts "free persons" and "all other persons." The pro-slave constitutionalists said this proved that the latter phrase had to be read to mean slaves, thus sanctioning slavery. But Spooner makes mincemeat of this argument.

"The English law had for centuries used the word 'free' as describing persons possessing citizenship, or some other franchise or peculiar privilege—as distinguished from aliens, and persons not possessed of such franchise or privilege," Spooner wrote. "This law, and this use of the word 'free,' as has already been shown, (Ch. 6,) had been adopted in this country from its first settlement." In other words, *that* was the common meaning of the term, and nothing in the Constitution set out a different one. Thus as a correlative to "free," "all other persons" should have been taken to mean resident noncitizens, so-called aliens rather than slaves. Again, the Constitution's stated purposes forbade anyone from imposing a different, anti-freedom, anti-natural-justice meaning no matter what the drafter had in mind. They could have written "slaves," but they didn't. (Spooner earlier in his book showed that slavery violated the colonial charters, state constitutions, and Articles of Confederation regardless of law had been passed.)

Spooner also had much to say about the pro-slave argument that went outside the Constitution to define "free persons" as correlative to "slaves":

> *If we are obliged (as the slave argument claims we are) to go out of the constitution of the United States to find the class whom it describes as "all other persons" than "the free," we shall, for aught I see, be equally obliged to go out of it to find those whom it describes as the "free"—for "the free," and "all other persons" than "the free," must be presumed to be found described somewhere in the same instrument. If, then, we are obliged to go out of the constitution to find the persons described in it as "the free" and "all other persons," we are obliged to go out of it to ascertain who are the persons on whom it declares that the representation of the government shall be based, and on whom, of course, the government is founded. And thus we should have the absurdity of a constitution that purports to authorize a government, yet leaves us to go in search of the people*

> *who are to be represented in it. Besides, if we are obliged to go out of the constitution, to find the persons on whom the government rests, and those persons are arbitrarily prescribed by some other instrument, independent of the constitution, this contradiction would follow, viz., that the United States government would be a subordinate government—a mere appendage to something else—a tail to some other kite—or rather a tail to a large number of kites at once—instead of being, as it declares itself to be, the supreme government—its constitution and laws being the supreme law of the land. [Emphasis added.]*

Spooner adds, "It certainly cannot be admitted that we must go out of the United States constitution to find the classes whom it describes as 'the free,' and 'all other persons' than 'the free,' until it be shown that the constitution has told us where to go to find them." The Constitution is deafeningly silent on the matter.

I submit that the same applies to the argument of those who say the 14th Amendment does not require birthright citizenship. As Spooner wrote, the argument "sets out with nothing but assumptions, that are gratuitous, absurd, improbable, irrelevant, contrary to all previous usage, contrary to natural right, and therefore inadmissible…. Yet these perversions of the constitution are made…, not merely in defiance of those legal rules of interpretation, which apply to all instruments of the kind, but also in defiance of the express language of the preamble, which declares that the object of the instrument is to 'establish justice' and 'secure liberty'—which declaration alone would furnish an imperative rule of interpretation, independently of all other rules."

A plain reading of the amendment, reinforced by Spooner and what Edward S. Corwin called the "'higher law' background of American constitutional law," shows that birthright citizenship is not only just but justified.