



# who is america?

GOP nativists have taken aim at a fundamental principle defining the American republic: birthright citizenship. Their legal rationale has an unlikely source: a liberal professor who totally opposes their aims. And that's just where things start to get interesting with Constitutional law scholar Rogers Smith.

**By Trey Popp**

*“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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

—US Constitution, Article XIV, Section 1

**In** July 2018, hot on the heels of a 14-month stint as a senior official in President Donald Trump W’68’s National Security Council, Michael Anton authored an arresting op-ed in the *Washington Post*.

Prior to joining the administration, Anton was probably best known as the author of “The Flight 93 Election,” a treatise he wrote under the pen name Publius Decius Mus. Addressed to conservative intellectuals, it posited that failure to defeat Hillary Clinton was tantamount to airline passengers not charging the cockpit of the Al Qaeda-hijacked flight. The essay lauded Trump as the first presidential candidate since Pat Buchanan to campaign against Washington’s “bipartisan junta” on the three “fundamental issues of our time”: opposing free trade, US war-making,

and—most importantly—immigration, which Anton characterized as “the ceaseless importation of Third World foreigners with no tradition of, taste for, or experience in liberty” who pollute American life with “poverty, crime, and alien cultures.”

Anton’s preoccupation with immigration had been evident in his first post-White House *Washington Post* op-ed, titled “Why do we need more people in this country anyway?” (His answers: to ensure oligarchs an “endless influx of cheap labor” and swell the Democratic Party’s voting base—both of which he judged contrary to the national interest.) But it was his second op-ed that sparked a furor, for it targeted the most fundamental principle governing who “We the People of the United States” are: birthright citizenship.

Since the ratification of the Fourteenth Amendment in 1868, US law has automatically conferred citizenship on every person born on American soil. Birthright citizenship had already been customary but had previously been denied to free blacks and slaves. By codifying it in race-neutral terms within the Constitution itself, the Fourteenth Amendment's framers aimed to establish a society without an underclass of people denied the American promise.

In a nation with a long history of exclusion—states had denied suffrage and other political rights to Catholics, Quakers, Jews, and unpropertied white men, and continued to exclude women from civic participation—the Fourteenth Amendment was a high-water mark of the Reconstruction-era Republican Party's drive for inclusiveness. For many it exemplified Lincoln's view of the purpose of the American republic: "augmenting the happiness and value of life to all people, of all colors, everywhere."

But at points during the past 150 years, some have lamented it as overly inclusive. Most recently, voices within the modern Republican Party have decried the US's approach to birthright citizenship for what they consider a critical defect: the fact that it grants citizenship to the newborn children of noncitizens. This is true. Although children of diplomats or enemy soldiers do not qualify, babies born to green-card holders, temporary legal residents, tourists, and others become citizens by dint of a US birth certificate. The class that most agitates many Republicans is unauthorized immigrants.

In proposing that newborns to such parents be excluded from birthright citizenship, Anton wasn't saying anything that party leaders like US Senators Lindsey Graham and Rand Paul hadn't said before. Trump himself had attacked birthright citizenship as a candidate, calling it "the biggest magnet for illegal immigration."

Anton's provocation was to declare that the Fourteenth Amendment had

in fact been misinterpreted for the last 150 years—and that Trump had the authority to issue an executive order specifying that "the children of non-citizens are not citizens."

The ensuing dustup followed a predictable template. Liberal pundits tarred Anton and his fellow travelers as xenophobes and racists. Others—including a fair number of conservatives—cited constitutional scholars to catalogue the ways Anton had misread the law. Consternation flared about whether a wrecking ball was being readied to demolish a central pillar of Lincoln's legacy. After all, Trump had expressed the same unorthodox view of the Fourteenth Amendment in 2015, claiming that "some of the great legal scholars" agreed with him.

In fact, American legal scholars overwhelmingly disagree. Support for the conventional view of birthright citizenship runs from liberal Fourteenth Amendment authority Garrett Epps to originalist James Ho, a Trump-appointed federal circuit judge. But Trump's alma mater happens to house a remarkable exception.

Rogers Smith, the Christopher H. Browne Distinguished Professor of Political Science, is about as far as you can get from Michael Anton or Donald Trump. The self-described "left liberal" has spent his entire professional life preoccupied by the ways race, ethnicity, and gender have been used to privilege some Americans at the expense of others. He has long advocated higher levels of legal immigration. He has argued that the US has incurred special obligations to Mexican nationals including favored "access to American residency and citizenship" as well as "leniency toward undocumented Mexican immigrants."

Smith also pioneered the revisionist view of the Fourteenth Amendment's citizenship clause now being deployed by nativists who stand in stark opposition to so many values he holds dear. This is the story of how that came to be, and why it matters. Moments when the far ends of the political spectrum converge can

clarify the challenges facing a society, and sometimes point to fresh solutions. Moments when they simultaneously converge and clash can be even more revealing. As the United States wrestles anew with the question *Who belongs?*, and citizens confront competing visions of the nation's purpose, there's a lot riding on how we secure the ties that bind us together as a common people.

### Portrait of a Teenaged Politico

Rogers Smith was born in 1953 in legally segregated Spartanburg, South Carolina. His family moved the following year to Springfield, Illinois, where his father started a wholesale drug distribution business. It was a typical Eisenhower-era childhood: Sunday School, cowboys and Indians, and brother-vs.-brother battles with World War II toy soldiers. By the time he was in second grade, Smith saw himself as a budding patriot of a familiar "white Anglo-Saxon Protestant" variety: "I knew that, like Lincoln and my parents, I was a Republican, and I watched and thought Nixon won the first debate" of the 1960 presidential campaign.

Smith may or may not have been the only seven-year-old in town with a hot take on the nation's first-ever televised presidential debate. But there can't have been many who fell for politics as hard as he did. After proclaiming himself a Goldwater Republican in 1964—a connection reinforced by an aunt who chaired the senator's campaign in South Carolina—Smith dove headfirst into party politics. Interest morphed into action when his older brother discovered a "faltering and moribund" local teenage Republican club whose bylaws permitted new members to vote upon paying a \$1 membership fee. The Smith boys rounded up a dozen friends with a dozen dollars, turned up at the club's leadership election, and presto: at 13, Rogers became his brother's vice president.

In short order he climbed the ranks to become president of the statewide organization and gained a reputation as an underage field commander in election-

day turnout efforts. He went all in. While his three brothers worked summers for their dad, Rogers took patronage jobs instead. “I like to boast a little bit,” he chuckles, “that by the time I was 16, I had worked in all three branches of the Illinois state government.”

He was a page in the state senate, a clerk in the secretary of state’s office, and a clerk for the state Supreme Court. The experience was part intellectual intoxication, part political culture shock.

“Five Illinois governors during my lifetime have been indicted and convicted,” he reflects, adding that two more probably should have been. The state capitol was a feeding ground for corruption and

At the same time, Smith found inspiration in figures like Lieutenant Governor Paul Simon and Assemblyman Alan Dixon, who combined a glad-handing touch with integrity and intellectual seriousness. “These were guys with whom you could have an intelligent conversation about the ideals of politics, who did read and who did care,” Smith recalls. And it was people like these—both of whom eventually became US Senators—that really influenced policy.

Another brand of evil made an impression too deep to shake.

“Because I was this up-and-coming teenage Republican leader, I would get invited to the formal leadership confer-

The experiences reinforced a lesson he’d taken from his political work as a teen: “People involved in immediate decision-making are very dependent on the universe of ideas around them. They reach for ideas thinking they’re going to be useful for them.”

In other words, original thought is rare in politicians. As John Maynard Keynes quipped: “Practical men who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.”

So Smith set out to become such a scribbler.

## “I was thrown into shockingly deep morasses of all kinds of evil.”

graft. “My parents were very straight people. I was thrown into shockingly deep morasses of all kinds of evil.”

There was the “impoverished drunk” the Daley machine had installed in the state senate—where older pages were charged with keeping the coffee mugs filled with whiskey—who begged Smith for \$15 to get back to Chicago at day’s end. There were the so-called “monkey girls”: women from country towns who hung onto their jobs in the state capitol “by their tails”—like a fellow page’s mother who frequented the majority leader’s chambers as his mistress. There was Illinois Secretary of State Paul Powell, “drunk out of his mind” at 10 in the morning while signing Smith’s petition for the 18-year-old vote (which the GOP opposed). When Powell died a few years later, a search of his room at Springfield’s St. Nick Hotel revealed \$750,000 in cash stashed behind old whiskey cases.

ences,” Smith recalls, where “the older guys, in their 20s, would hold late-night sessions where you got the real stuff. They would teach you dirty tricks you could play on opponents. And they would get drunk—we would get drunk—and then they would start singing obscene songs.” Like racist ditties set to the tune of “Jingle Bells.”

“And that’s when I began to freak out,” he remembers. There was a “far-right racist element” in the Republican Party that was increasingly impossible to ignore, especially as the Nixon-era GOP “turned away from Lincoln’s cause of civil rights.”

Disillusionment sent him running from the party—but not from politics. As an undergrad at Michigan State University’s James Madison College, and then as a graduate student at Harvard, he worked for legislative and regulatory commissions in Michigan and Illinois.

### Liberalism, Republicanism, and America’s Dark Underbelly

The young idealist entered the Ivory Tower—as a professor at Yale—during an idealistic academic debate. On one side were historians who located the US’s fundamental political character in the liberal vision of John Locke, who conceived of government as the product of a social contract designed to protect individuals’ rights to life, liberty, and property. On the other were scholars who argued that America’s founders had been guided more by civic republicanism, which envisioned citizens not simply as rights-bearers engaged in private pursuits of happiness, but as members of a communitarian enterprise that demanded forms of civic service to achieve civic virtues. The rise of “originalist” jurisprudence, which attempts to interpret the Constitution according to the perceived intent of its framers, gave such questions some practical significance.

As a way of contributing to this debate, Smith set out to explore empirically how citizenship had been characterized in federal statutes, legislative debates, and court decisions—surveying some 2,500 cases stretching from colonial times to the early 20th century. A clearer idea of how Americans had officially defined citizenship over time might serve as a

good starting point for contemporary arguments about whether the country was tilting too far toward either the Lockean liberal or communitarian extreme.

But Smith was soon “overwhelmed” by the quantity of statutes, speeches, and decisions that didn’t really belong in either category. “Rather than stressing protection of individual rights for all in liberal fashion, or participation in common civic institutions in republican fashion,” he wrote in *Civic Ideals: Conflicting Visions of Citizenship in US History*, a finalist for the 1998 Pulitzer Prize in history, “American law had long been shot through with forms of second-class citizenship, denying personal liberties and opportunities for political participation to most of the adult population on the basis of race, ethnicity, gender, and even religion.” [Emphasis added.]

The Constitution’s failure to define citizenship was emblematic of this pattern. Tensions over how to classify free blacks, and whether citizenship should be determined by states or the national government, had discouraged the framers from including a clear-cut definition. The result was not only a divide between those with and without citizenship status, but wide disparities in rights and responsibilities among citizens themselves.

Well into the 20th century, for example, a male citizen who married a foreigner conferred automatic citizenship upon her, whereas a female citizen who did so was involuntarily stripped of citizenship, even if she remained in the United States. Citizenship wouldn’t have afforded her all the privileges and immunities it afforded men anyway. Never mind voting rights: American married women lacked the right to enter into contracts, file lawsuits, and control property for much of the 19th century, and couldn’t obtain independent financial credit until the 1970s. Depending on the time and state, meanwhile, men’s access to citizenship’s rights and responsibilities varied according to their race, creed, wealth, or place of birth.

These inequalitarian arrangements arose

from “some very different ideological systems,” Smith concluded, but they had an important commonality: “Against liberal and democratic republican views describing citizenship as a human creation that ought to rest on the consent of all involved,” they assigned (or withheld) political rights on the basis of inalterable characteristics like race, gender, and the religion into which people were born.

### Citizenship and Consent

Smith saw consent as the *sine qua non* of a political community’s legitimacy. Like Locke, he believed no one should be coerced into citizenship against their wishes. Especially not in the US, whose Declaration of Independence explicitly repudiated perpetual allegiance and asserted that governments derive “their just powers from the consent of the governed.” And like republican theorists, Smith thought the addition of new members also required the existing community’s consent.

A strong conception of mutual consent is intuitively appealing but not necessarily benign. The tension between popular self-governance and basic human rights was vividly illustrated by the Supreme Court’s 1857 *Dred Scott* decision. Free blacks, Chief Justice Roger Taney reasoned, could not be citizens because the states party to the Constitution had never consented to their membership.

The Fourteenth Amendment’s citizenship clause was specifically drafted to overturn *Dred Scott*, making citizenship a national rather than state determination and guaranteeing it to native-born and naturalized African Americans: “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.”

The debate about birthright citizenship centers on what, precisely, that middle clause means.

In 1985, Smith coauthored a book with his Yale colleague Peter Schuck advancing an answer. *Citizenship Without Consent* was an unusual blend of antiquar-

ian intellectual history and public-policy brief. The policy question was whether the Fourteenth Amendment mandated birthright citizenship for the children of unauthorized immigrants. It was impossible to know exactly what the amendment’s framers and ratifiers thought, for the simple reason that there was no such category as “unauthorized immigrant” in 1868. Congress did not begin regulating immigration until 1875.

But the legislative record was unambiguous on another count: while its abolitionist framers aimed to extend birthright citizenship to African Americans, they were determined to withhold it from both foreign diplomats and Native Americans who remained members of officially recognized tribes. Since tribal members were not fully subject to US legislative or judicial power—enjoying, for instance, broad immunities from court trials—the jurisdiction clause emerged as a way to exclude them. (The degree to which Native Americans desired or spurned citizenship is an open question, but insistence on tribal sovereignty has been an enduring feature of many tribes’ relationships with the United States.)

Would the framers have considered unauthorized immigrants—who also originate from separate political entities and whose presence on US soil is not invited—as analogous to Indian tribal members?

Again, a definitive answer is elusive. During the legislative debate, Senator Edgar Cowan of Pennsylvania warned his colleagues that the amendment’s language threatened to confer birthright citizenship upon Chinese, Mongols, and Gypsies—which he regarded as undesirable races. Senator John Conness of California answered that this was in fact the amendment’s express intent—“that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States.” Yet a racially defined group simply disliked by some or many Americans is legally different, Smith observes, from one whose presence contravenes American law.

Seeking a deeper understanding of the jurisdiction clause, Schuck and Smith turned to the 18th-century Swiss legal theorists Emer de Vattel and Jean-Jacques Burlamaqui, who had influenced the Constitution's framers. They had recognized that birthright citizenship presented a theoretical problem: it was a common-law tradition rooted in a doctrine of perpetual and irrevocable allegiance to a sovereign. That was incompatible with democracy's insistence that government be based on consent. Their innovation was to justify the practice instead on the grounds that "parents should be understood to demand the offer of citizenship to their children as a condition of their own consent to membership," as Smith puts it.

Viewing the jurisdiction clause through the prism of Vattel and Burlamaqui, Schuck and Smith concluded that it made the birthright citizenship guarantee conditional on the presence of mutual consent. They felt the amendment's framers would have viewed unauthorized immigrants in the same light as Native American tribes. At a minimum, that interpretation seemed as supportable as a contrary one.

And "when the Constitution itself does not answer important questions with clarity," as they put it in a 2018 follow-up paper, "decision-making should usually be left to the people's elected representatives in Congress, so long as they do not violate fundamental rights. This properly leaves Congress with the authority to decide the question of birthright citizenship for these children."

### An Academic's Agony

One of the ironies of *Citizenship Without Consent* is that its authors advocated higher levels of immigration. Both went on to argue that the children of undocumented immigrants deserved access to citizenship. Schuck proposed "retroactive-to-birth citizenship for the US-born children of illegal-immigrant parents who demonstrate a substantial attachment" to the country by residing here



for some minimum period and completing a certain level of schooling (which would ensure a baseline level of English proficiency and civic knowledge). Smith, who joined Penn's faculty in 2001, has consistently favored retaining the birthright citizenship rule as it has always been applied. (For one thing, birthright citizenship almost certainly pales next to labor opportunities as the "biggest magnet" for illegal immigration. For another, making what has heretofore been a simple universal rule conditional on parents' citizenship status would require an expansive bureaucratic apparatus whose documentary demands would make childbirth even more arduous for citizens than it already is.) But both have steadfastly insisted that Congress be the arbiter—and, in the book, expressed confidence that "after the issues are fully explored, contemporary Americans will decide generously." In 1924, they noted, Congress had granted citizenship to Native Americans by statute.

The book soon went the way of many academic volumes: out of print. Then it experienced an unwelcome revival.

In 1993 US Rep. Elton Gallegly, a California Republican, cited it while introducing a bill and a proposed Constitutional amendment to restrict birthright citizenship to the children of mothers (but not fathers) with citizen or legal-resident status. The proposals failed but kicked off a trend. Similar bills have been introduced in every Congressional term since. They formed a plank of the 1996 Republican Party platform, though one publicly rejected by presidential candidate Bob Dole. In 2003, the influential conservative jurist Richard Posner used a concurring opinion to call for rolling back the birthright citizenship guarantee, pointedly citing Schuck and Smith to suggest that it wouldn't take a Constitutional amendment to do so. Current Vice President Mike Pence introduced Senate legislation restricting birthright citizenship in 2009, and six years later Donald

Trump became the first major party presidential candidate to endorse it.

Smith has long been more comfortable with his critics than his citers. “The argument was used more persistently and prominently by nativist political forces than I ever anticipated,” he says. “And that has been a shadow over my work in life.” His subsequent writing about the issue brims with generous references to scholarly counterarguments. “Garrett Epps is indeed the best of our critics,” he emailed me when I approached him about this article, adding, “Others are good too!”

“I would prefer to read the Citizenship Clause” as some of them do, he wrote in 2008. “Yet I cannot escape [my own] conclusion.”

## “The rhetorical triumph of the ideal of democracy is being accompanied by the practical eclipse of democratic practices.”

I had thought too little about the legal framework of birthright citizenship to have an opinion about it at the outset. Reading both Smith and his critics sparked more questions than convictions, but on balance I found his critics more compelling. Does “subject to the jurisdiction thereof” really require such a roundabout historical reading? Couldn’t it simply mean “subject to the nation’s legal authority”—as is the case for any non-diplomat? Unauthorized immigrants can be arrested, imprisoned, and tried in US courts. Undocumented males are even required to register with the Selective Service System for potential military conscription—the ultimate assertion of a government’s jurisdictional authority.

The most relevant Supreme Court ruling, *United States v. Wong Kim Ark* (1898), centered on a child born in the US to parents who were Chinese subjects.

The parents were legal residents—but, under the 1882 Chinese Exclusion Act, had been prohibited from attaining citizenship. The majority ruled that the Fourteenth Amendment guaranteed the child citizenship and that Congress could not alter that guarantee. It interpreted “subject to the jurisdiction” as a geographical condition joined with a requirement to answer to US law (diplomats being exempt from the latter). It did not find Emer de Vattel’s consensual gloss on birthright citizenship germane—though the dissenting opinion did.

Smith contends that since *Wong Kim Ark* involved parents who were legally present in the United States, it has limited relevance to the question of unau-

thorized immigrants. But Congress had expressly excluded Wong Kim Ark’s parents from the US political community—and the Court nevertheless ruled that their child was automatically a part of it. The Fourteenth Amendment’s framers clearly were not “adopting revolutionary new principles of citizenship by consent,” argues legal scholar Gerald Neuman. “Taney had done that in the *Dred Scott* decision ... [and the] framers sought to overturn Taney’s innovation.”

Smith is no Taney acolyte. Why, I wondered, was he so obsessed with consent? And why did he emphasize Congress as the superior vehicle for expressing it, when the Constitution’s amendments offer an arguably even deeper expression of a political community’s will?

The answers to those questions cast Smith’s position in, by turns, a more compelling and provocative light.

### Toward a New American Story

Smith started his academic career with a Lockean “individualistic liberal” bent. He gradually came to see himself more as “an Abraham Lincoln, civil rights, small-r republican.” (He notes that many of Lincoln’s policies—which included expansion of the federal government’s role in the economy, progressive income taxation, publicly supported universities, and other initiatives aimed at reducing wealth inequality—typify today’s left end of the political spectrum.) But in America those traditions have never truly been in sharp opposition.

“Everybody was for individual rights, and everybody was for republican self-governance, and everybody was for civic virtue,” he says. In varying combinations, those principles have helped bring about the signal democratic reforms to American life. But each victory has been difficult and susceptible to reversal—in large part due to the other ways Americans have historically tried to order their society. “Almost everybody was for white supremacy, Christian hegemony, patriarchy, et cetera,” Smith inescapably concluded from his exhaustive survey of citizenship laws.

In other words, Americans (like other peoples) have never been content seeing themselves as merely part of a Lockean “arms-length alliance” exercising inalienable rights to which every human being on earth is entitled. They have insisted their nationality has a more particular meaning than can be supplied by universalistic liberal ideals. And too often, Americans have turned to racial, gender, or religious hierarchies in search of it. (And not just in the distant past. A 2016 survey found that a majority of Republicans, and nearly two-thirds of Trump primary voters, considered “being Christian” an important criterion for being an American; 30 percent of Trump primary voters regarded European heritage as another important criterion.)

“The weaknesses of America’s egalitarian liberal republican traditions as civic

ideologies,” Smith writes, “have recurrently permitted and indeed fostered conditions in which illiberal, inegalitarian” policies have flourished. “The clear lesson is that failure to take the political requirements of nation-building seriously may produce morally culpable complicity in malevolent forms of national community.”

Liberalism’s defenders, in short, must supply a compelling alternative to the tribalism lately on the rise in the US and around the world.

Francis Fukuyama, the political theorist who famously suggested in 1989 that the impending “universalization of Western liberal democracy” signaled “the end point of mankind’s ideological evolution,” has lately turned his attention to this very issue. The bind facing modern democracies, he posited during a September campus visit, is that they afford only a “generic recognition” to citizens who demand more. This has fueled an identity politics in which various groups, emphasizing their marginalization from the body politic, advance “group claims of injustice in ways that contradict liberal values.” The adoption of this tactic by right-wing figures, on behalf of majoritarian ethnic or religious groups who have in fact traditionally dominated political life and still have the numbers to do so, has turned it into a particularly dangerous weapon.

It is not good for democracy, Fukuyama contended, if “everyone is aligning into identity groups that are fixed by the way you were born.” The antidote, he declared, lies in cultivating a stronger sense of collective national identity. But “it has to be a civic identity,” he stressed, rooted in “a certain set of universal principles.” In America’s case, he suggested, that would be “belief in the US Constitution, in the rule of law, in the principle of equality embodied in the Declaration of Independence. You would say an American is somebody who believes in these things.”

But if nominal belief in universal principles hasn’t been sufficient in the past,

## Walls or Welcome Mats?

### Economic Perspectives on Immigration

In 2016, the Wharton Public Policy Initiative published a pair of issue briefs addressing immigration’s impacts on the labor market and the public treasury. According to Howard F. Chang, the Earle Hepburn Professor at Penn Law, “the single most important lesson that economics holds for immigration policymakers is that immigration restrictions are costly.”

Greater labor mobility would be expected to boost global GDP anywhere from 5 to 197 percent, according to a variety of studies. Chang noted that immigration may have a “small” adverse impact on low-skilled domestic laborers, but that US natives gain overall. “To the extent that immigration has any adverse effect on the distribution of income among natives,” he argued, “redistribution through progressive tax reforms rather than through restrictive immigration policies” would yield the optimal economic outcome.

Fears that immigrants overburden the public treasury, Chang observed, are belied by a 1997 National Research Council study that remains the “most comprehensive and authoritative study in the field.” The NRC study was the first to incorporate the projected fiscal effects of immigrants’ descendants—who tend to have higher incomes and pay more taxes—when measuring the overall impact. By that measure, “the average recent immigrant in 1996 has a positive fiscal impact of \$80,000 in net present value.”

But drilling down past the “average” immigrant gives some credence to anxieties over the admission of low-skilled immigrant workers. Workers with more than a high-school education represent a positive fiscal impact of \$198,000 in net present value, and those with only a high-school education are worth \$51,000. But for immigrants who have not completed high school, the fiscal impact drops below zero to -\$13,000.

For the full issue briefs, visit [tinyurl.com/PPI-Labor](http://tinyurl.com/PPI-Labor) and [tinyurl.com/PPI-Treasury](http://tinyurl.com/PPI-Treasury).

as Smith argues, the future calls for a stronger supplement in order to achieve a just society. And that is why the issue of consent looms so large in his thinking.

One of the biggest challenges facing democratic citizenship today, he has written, is the prospect that “the rhetorical triumph of the ideal of democracy is being accompanied by the practical eclipse of democratic practices.” The increasing sway of supra-national organizations has fostered feelings of powerlessness in the US and around the world (as entities like the European Union or International Court of Criminal Justice agitate the right, while the World Trade Organization and multinational corporations infuriate the left). There is a gnawing sense that judiciaries have become more assertive and determinative of policy than legislative bodies (hence the conviction that Supreme Court appointments present nothing less than existential stakes).

“The reality of governance in the 21st century is that most citizens experience it as the preserve of a variety of economic and political experts and elites, and they are right to do so,” Smith observes. Global challenges do in fact require expertise and decision-making at levels far removed from “the scale of a New England town meeting.” But there are costs when citizens feel they have lost control—and the US’s approach to illegal immigration has exacted an especially high price.

The original sin of modern US immigration policy, in the eyes of many immigration opponents, was the Reagan-era Immigration Reform and Control Act of 1986, which was taking shape as Schuck and Smith wrote *Citizenship Without Consent*. That “amnesty” failed to stanch the flow of unauthorized immigrants. Schuck and Smith worried that if “an increasing number of newcomers [can] claim political membership only because their parents” were



seen to have exploited the rules, hostility toward them would metastasize into broader xenophobia. The result would be “harsh policies born of resentment and prejudice” targeting a wider spectrum of legal immigrants and citizens. Smith thinks their anxiety has been borne out in developments like the Trump administration’s cancelation of DACA “Dreamer” protections, detainment of juvenile asylum seekers, crack-downs on (high-skilled) H-1B and (low-skilled) H-2B visa admissions, sweeping cuts to refugee resettlement, and the Muslim-targeted travel ban.

These are symptoms, Smith believes, of a perceived loss of control. And they can have negative consequences for citizens as well. The USA Patriot Act, for instance, initially appeared to eliminate certain legal procedural rights for aliens—but the Bush administration argued that citizens under suspicion could be stripped of them too. More recently, the *Washington Post* reported on a “surge” in the number of US citizens thwarted in their effort to obtain passports, because the State Department regarded their birth certificates as “potentially fraudulent.”

“Although economically and politically conservative measures are often advanced in nationalist tones,” Smith notes, “[o]ften they simply reduce the level of rights both [citizens and aliens] can claim.”

The antidote Smith prescribes is a reinvigoration of consensual democratic decision-making where it matters most: defining the national community. If “citizenship laws made nationality as much a matter of choice as possible, then Americans could more genuinely regard their Americanism as something they could define as they saw fit.” They could, in short, regain a sense of control.

In a 2008 article in Penn’s *Journal of Constitutional Law*, Smith made a case that Congress had effectively expressed the electorate’s will regarding birthright citizenship; the repeated and conclusive failure of 15 (now 25) years’ worth of restrictionist

bills amounted to a clear expression that Americans, through their elected representatives, have consented to reading the Fourteenth Amendment as guaranteeing birthright citizenship to children of all aliens born on American soil.

But that is not the only or even primary issue that concerns Smith. Partly because of his experience being subjected to the draft during the Vietnam War, he believes—and argued in *Citizenship Without Consent*—that the government should notify all 18-year-old Americans of their right to expatriate themselves and permit those who do to remain permanent resident aliens.

## Measures targeting aliens often make life harder for citizens as well.

Somewhat more provocatively, he argues that the US is not likely to do away with the “differentiated citizenships” that have characterized its history—and should in fact embrace some of the possibilities they present.

“I think we waste a lot of time when we say we just want to do away with all that, when we *don’t* seriously want to do away with all that,” he says. “We just want to do away with certain forms of it.” Someone who cites the ideal of strictly uniform citizenship to oppose special legal safeguards or remedies afforded to historically maltreated racial groups, for instance, may simultaneously prefer to exempt female citizens from mandatory registration for potential military conscription, or excuse religious business-owners from certain obligations that bind secular ones.

“The more honest way to discuss it,” Smith says, “would be to focus on which

forms do we want to do away with and why, and whether we are acting consistently.”

Like James Madison, he sees “robust and explicit contests” among clashing views—including illiberal ones—as salutary to civic health. (Smith departs from some of his liberal brethren by insisting that a meaningful cosmopolitan pluralism must make room for traditional religionists who espouse illiberal principles. Allowing a fundamentalist baker to refuse to make a custom cake for a gay wedding, for instance, may be a “reasonable accommodation” as long as the broader marketplace offers sufficient alternatives. “If so many people refuse

to sell you a cake that you can’t get a cake, then we have to outlaw that. If the truth is you can get a cake from 20 places, but you can’t get it from this one place—and that pisses you off because you don’t like the guy’s attitude, but in fact you can still get a cake—I think we allow that.”)

Legislatures, operating within constitutional guardrails, are superior arenas for forging political consent not only because they are the most democratic but because their decisions are always subject to reversal or refinement. So long as the clashing continues, and combatants believe they have the capacity to shape tomorrow’s outcome if not today’s, perhaps Americans would have better cause to see America’s exceptionalism in terms of an ongoing civic project rather than through the lens of ethnicity, gender, or other criteria that privilege some people over others in morally unacceptable ways.

“The US is not an inherently and automatically liberal democratic nation,” Smith writes. But understanding it as a series “of serious struggles among people, movements, principles, and causes with different aims and interests—struggles in which the actors a particular citizen decides to regard as the ‘good guys’ may not always, perhaps even not often, win” could give “the national story a plot” that energizes citizens with an awareness that it’s up to them to make the next chapter better.

“What you want,” he says, “is to have as democratic a process of defining peoplehood as possible, and to push within that democratic politics to make the choices as inclusive and egalitarian as possible, so that that definition of who we the people are may expand over time—but expand in a way that is sustainable because people have agreed to it, and it hasn’t been imposed on them.”

Maybe that would also foster a mindset more conducive to pursuing supra-national governance in some contexts, sub-national governance in others, and recognizing the reality that growing numbers of people claim membership in multiple polities. More than 2.5 billion people live in countries that permit dual citizenship. Many people legally live and work—be it in corporate suites or poultry plants—in nations not their own. Some countries have granted increased autonomy to sub-units, like Catalonia and Scotland. (And it bears remembering that America’s founders assumed that citizens’ primary loyalties would lie with individual states [See “Gazetteer,” pg. 22.]

“The long-term future of the globe,” Smith hopes, will entail “breaking down a system of nations claiming absolute sovereignty into networks of more cooperative political communities in which movement in and out is accepted [by] semi-sovereign nations that recognize authority in some areas, and in others [acknowledge] the desirability of flexible cooperative memberships and government relationships.”

## Further Reading

### By Rogers Smith:

- “The Question of Birthright Citizenship” (with Peter Schuck), *National Affairs*. 2018.
- Political Peoplehood: The Roles of Values, Interests, and Identities*. 2015.
- Still a House Divided: Race and Politics in Obama’s America* (with Desmond King). 2011.
- Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008, *University of Pennsylvania Journal of Constitutional Law*. 2008.
- “The Challenges Facing American Citizenship Today,” *Political Science and Politics*. 2005.
- Stories of Peoplehood: The Politics and Morals of Political Memberships*. 2003.
- The Unsteady March: The Rise and Decline of Racial Equality in America* (with Philip Klunkner). 1999.
- Civic Ideals: Conflicting Visions of Citizenship in US History*. 1997.
- Citizenship Without Consent: The Illegal Alien in the American Polity* (with Peter Schuck). 1985.
- Liberalism and American Constitutional Law*. 1985.

### About Birthright Citizenship:

- Garrett Epps, “The Citizenship Clause: A Legislative History,” *American University Law Review*. 2010.
- Gerald Neuman, *Strangers to the Constitution: Immigrants, Border, and Fundamental Law*. 2010.
- Cristina Rodriguez, “The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment,” *University of Pennsylvania Journal of Constitutional Law*. 2009.
- Ayelet Sachar, *The Birthright Lottery: Citizenship and Global Inequality*. 2009.
- James Ho, “Citizenship by birth—can it be outlawed?” *Los Angeles Times*, March 10, 2007.
- Joseph Carens, “Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States,” *University of Toronto Law Journal*. 1987.

That is less an expectation than an aspiration, but one Smith believes to be especially consonant with America’s purpose. And that is to “extend meaningful enjoyment of the basic rights to life, liberty, and happiness to ‘all people of all colors everywhere.’ Those are Lincoln’s words: ‘all people of all colors everywhere,’” Smith stresses. “That’s not just a matter of individual self-interest, or even the exercise of my own rights for my own pursuit of happiness. It’s a claim that we want through our collective endeavors to make sure that all people have these basic opportunities. And

that’s a kind of liberal republicanism,” he says, “that I still think is a pretty good vision.”

When I asked Smith how it felt to find himself on the same side of the Citizenship Clause debate as nativists who espouse quite a different vision, he said, “It feels horrible.” He offered no elaboration. It wasn’t a very good question. Later I asked a better one. Steve Bannon, Trump’s former chief strategist and perhaps the most prominent figure in the rise of the “alt-right,” had recently insisted to journalist Michael Lewis that his movement was not about “ethno-nationalism” but about citizenship. “We’ve got to make citizenship as powerful as it was in the Roman republic,” Bannon told Lewis. When I asked Smith what he thought of that, he grew animated.

“There are some dimensions of citizenship we need to strengthen—and there are some we need to diminish,” he began. “Roman citizenship, after all, became a form of imperial citizenship in which Rome claimed rightful authority to rule the world. We don’t need that. But Roman citizenship also was willing to extend full membership to anyone throughout the empire who became a citizen. If they could make it to Rome, they could participate in the Assembly ... And it also permitted them considerable flexibility in continuing to worship their own gods and pursuing their own customs and law. It accommodated lots of differences. We can use that. And the republican tradition of being willing to make sacrifices for the common good, we can use that, too.

“So there are dimensions of citizenship that we need,” Smith concluded. “But the one that we most need to combat is the sense that the only obligations that matter are to those who are currently juridically my fellow citizens, and that we’re entitled to put the interests of our citizen body over the rest of the world without any concern or doubt. What we don’t need is ‘America first and only.’”