

Unsettling the Law: Donald Trump's Declaration on Birthright Citizenship, the Claremont Thesis, and Jim Crow Constitutionalism

RICHARD CHEW

Virginia Social Science Journal | Volume 53 | 2019 | Pages 36 – 48

ABSTRACT President Donald Trump's pronouncement about ending birthright citizenship by executive order reveals the alt-right influence of the Claremont Institute on the administration. Their agenda, referred to in this article as the "Claremont Thesis," rests on a consensualist theory of the Fourteenth Amendment's Citizenship Clause and a revitalization of the Privileges or Immunities Clause. If adopted as public policy, it would establish a new form of "Jim Crow constitutionalism," or judicial or legislative efforts that create or sustain systemic inequalities. The article explores the Claremont Thesis in four parts: its theoretical basis, how its proponents stoke cultural animosities, a review of constitutional mechanisms intended to advance the agenda, and the efforts of politicians and jurists they hope will fulfill the agenda.

AUTHOR RICHARD CHEW Virginia State University

INTRODUCTION

In the days leading up to the 2018 U.S. mid-term elections, President Donald Trump declared that he could end birthright citizenship with an executive order. Legal scholars, pundits, and politicians immediately weighed in on the issue, and, by and large, dismissed Trump's view as flatly ill-informed.¹ By quickly shelving the idea as a non-starter, many political observers did not comment on the greater significance of Trump's declaration, which points to the influence within the administration of alt-right thinking about the Constitution. In his interview with Axios on HBO, Trump announced: "It was always told to me that you needed a constitutional amendment; guess what? You don't." The president continued, "You can definitely do it with an act of Congress, but now they're saying I can do it just with an executive order" [emphasis added].² The exchange raises the question, who are the "they" saying an executive order can overturn birthright citizenship? Axios on HBO went on to identify Michael Anton, the former deputy assistant to the president for strategic communications, who left the executive branch in April 2018, and John Eastman, the director of the Center for Constitutional Jurisprudence, as the significant influences behind the Trump administration's proposed initiative. Both individuals are senior

fellows at the Claremont Institute in Upland, California.

The Claremont Institute was founded in 1979 by Harry Jaffa, a maverick right-wing intellectual who criticized prominent American conservatives for failing to emphasize the centrality of natural rights philosophy in American constitutionalism. Its self-proclaimed mission "is to restore the principles of the American Founding to their rightful, preeminent authority." While no individual member of the Claremont Institute has ever put forth a comprehensive manifesto and writers associated with the institute "might not," according to Michael Anton, "think of themselves as a coherent club," when their individual efforts turn to immigration, citizenship, civil rights, and the Fourteenth Amendment, they cite one another as authority, build off of each other's work, and reaffirm conclusions made by their colleagues. In this way, their writings form an echo chamber or a tightly woven Venn diagram of political thought, and at the center rests a surreptitious strain of alt-right thought and jurisprudence that will be referred to in this article as the "Claremont Thesis."³ The ideas and arguments embedded in this obscure line of thinking have never garnered much support from anyone across the spectrum of legal scholarship.

1 Julie Hirschfeld Davis, "President Wants to Use Executive Order to End Birthright Citizenship," *New York Times*, October 30, 2018.

2 Jonathan Swan and Stef W. Kight, "Exclusive: Trump Targeting Birthright Citizenship with Executive Order," Axios on HBO, October 30, 2018.

3 Michael Anton quoted in Scott Lucas, "How California Gave Us Trumpism," *Politico Magazine*, April 18, 2017. Anton joked that Michael Anton even joked that, "if they are having meetings, they're doing it without me." On the idea of an "echo chamber," see Kathleen Hall Jamieson and Joseph Cappella, *Echo Chamber: Rush Limbaugh and the Conservative Media Establishment* (New York, 2008).

Yet, based on President Trump's comments to Axios, which he repeated once again in August 2019, this fringe movement has managed to find a receptive audience in the highest political office in the United States. For these reasons, the implications of the administration's case against birthright citizenship go well beyond the parameters of just the current immigration debate, and the legal arguments and political agendas of those whispering in the President's ear deserve further academic scrutiny. This paper will draw the curtain back on the headlines to discuss the major players involved, explore how their views are positioned as legal arguments, and then describe their ultimate political objectives and the means by which they hope to enact them.⁴

The "Claremont Thesis" rests on two premises about the Fourteenth Amendment. The first is based on a consensualist theory of citizenship where no nation can automatically claim a person as a citizen and no individual has an automatic right to citizenship regardless of the circumstances of their birth, their ancestry, or any other standard. The Claremont Thesis is not the first effort to impose a consensualist reading on the Citizenship Clause of the Fourteenth Amendment. During the early-to-mid 1990s, a version of this approach, grounded in the idea of community approval, gained some influence among policy makers and received a considerable amount of scholarly attention. Then the terms of the debate changed. As Robin Jacobson points out, "the understanding of consensualism shifts in the late 1990s; consensualism begins to become associated with allegiance rather than community approval."⁵ The Claremont Thesis was at the forefront of this new movement to make citizenship conditional on allegiance, but there has been little scholarly attention paid to it. Journalists, primarily on the left, have repeatedly exposed the racial and homophobic biases expressed by many writers associated with the

⁴ "President Trump Again Claims He Can Abolish Birthright Citizenship—But Legal Precedent Isn't On His Side," *Time*, August 21, 2019; and "Trump Wants to Abolish Birthright Citizenship. Can He Do That?" *The New York Times*, August 22, 2019. On the Claremont Institute see Jeet Heer, "The Pro-Trump Intellectuals Who Want to Overthrow America," *New Republic*, October 4, 2016, <https://newrepublic.com/article/137410/pro-trump-intellectuals-want-overthrow-america>; Jon Baskin, "The Academic Home of Trumpism," *The Chronicle of Higher Education*, March 17, 2017; and "Mission and Overview," *The Claremont Institute*, <https://www.claremont.org/page/claremonts-mission/>.

⁵ Robin Jacobson, "Characterizing Consent: Race, Citizenship, and the New Restrictionists," *Political Research Quarterly* 59, no. 4 (2006): 645-54. The earlier consensualist argument was advanced by Peter H. Schuck and Rogers Smith in *Citizenship Without Consent* (New Haven, CT: Yale University Press, 1985). Most scholars reject Schuck and Smith's conclusions as either misinformed or racist. See esp. Gerald Neuman, "Book Review: Back to Dred Scott?" *San Diego Law Review* 24, no. 2 (1987): 485-500.

Claremont Institute, pointed out the Claremont Institute's influence on and support for "Trumpism," particularly with regard to anti-establishment rhetoric and political correctness, and have occasionally shined a spotlight on these writers' immediate public policy opposition to birthright citizenship for the children of illegal immigrants.⁶ Yet there has not been a thorough academic exploration about how the consensualist approach in the Claremont Thesis has the potential to redefine American citizenship and have much broader consequences for the Fourteenth and Fifteenth Amendments in terms of civil rights. This article is meant as a corrective to that oversight.

The second premise of the Claremont Thesis calls for a specific type of revitalization for the Fourteenth Amendment's Privileges or Immunities Clause. If acted upon as public policy, the Claremont Thesis would create a narrow interpretation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and subsequently limit current legislative protections for voting rights under the Fifteenth Amendment. A similar constriction of these amendments has happened before. During the late nineteenth century, many jurists employed a narrow interpretation of the Thirteenth, Fourteenth, and Fifteenth Amendments, and segregationist politicians used these decisions to validate the creation of Jim Crow laws.⁷ Once again narrowing the Fourteenth and Fifteenth Amendments would establish the basis for a new form of "Jim Crow constitutionalism," a phrase used in this article to denote any judicial or legislative efforts that create or sustain systemic inequalities using constitutional arguments. Such an approach would reverse what most Americans have considered settled law with regard to civil rights generally, including what constitutes discrimination, the extent to which voter suppression is permissible, who has the right to vote, and even the definition of who is and who is not a citizen. Long-established doctrines in American jurisprudence, including *jus soli* (right of soil) and a range of mechanisms designed

⁶ See esp. Baskin, "The Academic Home of Trumpism"; Heer, "The Pro-Trump Intellectuals Who Want to Overthrow America"; Kathryn Joyce, "At Claremont Institute, Christine O'Donnell Was Taught the ABCs of Homophobia," *Nation*, October 12, 2010; Tina Nguyen, "The Intellectual Origins of Trump's Chilling Immigration Plan," *Vanity Fair*, October 30, 2018; and Priscilla Alvarez, "Trump's Plan to End Birthright Citizenship Takes Direct Aim at the Constitution," *Atlantic*, October 30, 2018.

⁷ Brooks Simpson, "Mission Impossible: Reconstruction Policy Reconsidered," *Journal of the Civil War Era* 6, no. 1 (2016): 85-102; Pippa Holloway, "'A Chicken-Stealer Shall Lose His Vote': Disenfranchisement for Larceny in the South, 1874-1890," *The Journal of Southern History* 75, no. 4 (2009): 931-62; John Hope Franklin, "The 'Legal' Disenfranchisement of the Negro," *The Journal of Negro Education* 26, no. 3 (1957): 241-248; and Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2004), esp. ch. 6.

to ensure civil rights and equal protection under current law, including protected classes, affirmative action, and adverse or disparate impact theory, would be either side-stepped or rendered unconstitutional.

To be fair, it's tempting and even reasonable within the context of the current immigration debate to ignore the Claremont Institute's approach to the Constitution as being so far outside the mainstream of American jurisprudence that it does not warrant our attention, and simply dismiss President Trump's reiteration of their views as political posturing. After all, the arguments against arbitrarily ending birthright citizenship, especially by an executive order, are seemingly airtight.⁸ But simply ignoring this movement would be a mistake. Much like the segregationists of old, the proponents of the Claremont Thesis would not achieve all of their objectives at once. The Supreme Court's decision in *Plessy v. Ferguson* did not happen the moment Reconstruction ended; it took a generation of legislative and judicial efforts that undermined the Reconstruction Amendments before the country crossed that line. Fulfillment of the Claremont Thesis is the end game for this new generation of alt-right thinkers. To appreciate these broader constitutional implications, it is important to understand how proponents of the Claremont Thesis would accomplish it in a series of four steps: (1) establish a theoretical basis for redefining the Fourteenth Amendment, (2) stoke cultural animosities to justify the impetus for radical change, (3) connect the thesis to constitutional and legal mechanisms to advance the agenda, and (4) fulfill their political goals through influence, the enactment of public policy, and a revolution in constitutional jurisprudence.

The central figure in the Claremont Thesis's original theoretical explication was Edward J. Erler, a former professor at California State University, San Bernadino. Erler believes that the Fourteenth Amendment effectively established a two-part test for citizenship that was contingent upon the reciprocal consent of both the governed and the government. According to Erler, "a citizen had to be born or naturalized in the United States and subject to its jurisdiction."⁹ These two requirements for citizenship

8 The doctrine of *jus soli* was the common law practice in colonial America, remained the common law practice throughout the states during the early republic, and received judicial affirmation by a New York court in the 1844 case *Lynch v. Clarke*. See Lee, "Birthright Citizenship." It was then enshrined in the Fourteenth Amendment (U.S. Const. Amend XIV §1) and affirmed by the Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

9 Edward J. Erler, "From Subjects to Citizens: The Social Compact Origins of American Citizenship," in Ronald J. Pestritto and Thomas G. West, eds., *The American Founding and the Social Compact* (New York: Lexington Books, 2003), 167.

arise because of the inclusion of a jurisdictional clause in the Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States." According to nearly all constitutional scholars, from originalists to radicals, the inclusion of the jurisdictional clause is only meant to assure that the doctrine of *jus soli* does not extend to U.S.-born children of foreign diplomats, or, in other words, the one group of people born in the U.S. who are not subject to the jurisdiction of American laws. This is not only the understanding of the jurisdictional clause shared by almost all legal scholars, it is also the international definition of jurisdiction that is accepted by the United States.¹⁰ Yet, Erler and the other members of the Claremont Institute take issue with this premise and contend that the jurisdictional phrase has been misinterpreted for well over a century.

Erler believes that in the context of the Fourteenth Amendment, jurisdiction is actually a divided concept. "Partial" jurisdiction means that a person is simply subject to the laws of the nation; this would include everyone except those who have diplomatic immunity. In contrast, "total" jurisdiction of the nation over an individual is conditional on that person providing consent to be governed. One can ascertain a person's consent by establishing that person's allegiance, a conclusion Erler draws from the racially driven debate in Congress at the time of the Fourteenth Amendment's passage over whether the new language of the constitutional amendment denied citizenship to Indians as the previous 1866 Civil Rights Act had done. According to Erler, several senators, particularly Lyman Trumbull (R, IL), believed that even partial allegiance to one's tribe meant that total allegiance to the United States, and thus the consent to be governed, was absent. Without consent, jurisdiction is not present, and, when a person is not fully and completely subject to U.S. jurisdiction, the United States is under no obligation to recognize that person's citizenship. Of course Trumbull never connected jurisdiction and allegiance; this connection is assumed and then extrapolated by Erler. When Trumbull drafted the Civil Rights Act of 1866, he stated to President Andrew Johnson that "the Bill declares that 'all persons' born of parents domiciled in the United States, except untaxed Indians, to be citizens of the United States." Nevertheless, Erler seizes on this evidence, ignores the clear statement of *jus soli* and then focuses on the racially-driven exception made for "untaxed Indians." He goes on to argue that the racist exception proves that citizenship is not a birthright after all and therefore has

10 United Nations, *Treaty Series*, vol. 500, pg. 95: Vienna Convention on Diplomatic Relations, April 18, 1961, Article 37.

to be conditional for everyone based on whether or not “total” jurisdiction is present. He ignores that the Fourteenth Amendment excludes the language on “untaxed Indians” and simply extends the fiction that Trumbull somehow intended citizenship to be conditional on allegiance connected to a concept of divided jurisdiction. His ahistorical analysis is subsequently repeated time and again within the echo chamber of the Claremont Thesis.¹¹

The implications of Erler’s two-part test for citizenship have obvious ramifications for the U.S.-born children of illegal immigrants, and possibly immigrants in general. Although any child born in the United States passes the first criteria for citizenship, the assumed allegiance of the child’s illegal immigrant parents informs the issue of consent for Erler. The idea is somewhat hypocritical because this part of Erler’s analysis relies partially on the idea of *jus sanguinis* (“right of blood”), and his presumption also changes over time depending on an immigrant’s place of origin. He states that British colonists arriving in America in the seventeenth century were, by way of their emigration, expatriates who severed their allegiance to England. For Mexicans, Hondurans, Guatemalans, Filipinos, Vietnamese, and other immigrants arriving in the United States in the early twenty-first century, the act of emigration is not seen as evidence of a revocation of allegiance to the country of origin. Erler states that an illegal immigrant today is a citizen of another nation and owes allegiance to that nation; the U.S. government is thus not under any obligation to extend its own consent for citizenship to the U.S.-born children of an illegal immigrant. This is where the reciprocal nature of the extension of citizenship arises. Erler contends that “no individual can be ruled without his consent, nor can any individual join an already established community without its consent,” and “no community is obliged to accept new members.”¹²

Yet Erler goes much further. The Claremont Thesis doesn’t just call for an end to birthright citizenship for the U.S.-born children of illegal immigrants; it calls for an end to birthright citizenship for everybody. Erler rejects *jus soli* completely, deriding it as a feudal doctrine appropriate to monarchies and subjecthood but wholly incompatible in a republic or with the idea of citizenship. He writes that “it would be difficult to imagine a more antirepub-

lican basis for citizenship.”¹³ He believes that passage of the Expatriation Act in 1868, which provided citizens with the right to renounce their own citizenship, proves that the Congressional intent of the Citizenship Clause of the Fourteenth Amendment was to wholly reject the antiquated notion of *jus soli*. Being born in the territorial area of the United States is therefore insufficient for citizenship. These two points are repeated over and over again by writers associated with the Claremont Institute, such as John Eastman and Michael Anton.¹⁴ It raises the question of whether or not allegiance may be assumed for a U.S.-born child who has a parent who is a U.S. citizen. Initially, the answer is yes. Erler contends, “The allegiance of the children properly follows that of the parents,” which is another nod to the idea of *jus sanguinis*. Yet, the answer is more complicated. Erler also states, “The republicanism of the Declaration [of Independence],” on which all constitutional jurisprudence should be based, “made allegiance strictly dependent on ‘some overt act or consent,’” and that “In republican government allegiance is held in trust, not in perpetuity.” Given that consent must be reciprocal between governed and government, and that allegiance must be total, not partial, the government could be in a position to determine what allegiance means and by what standard it is recognized. In legal terms, if allegiance becomes the standard, there is no standard at all. The U.S. government could consider a person’s identification with a particular group, ideology, or even a political party as a form of partial allegiance that contravenes the idea of consent. The enforcement mechanism would be statutory and require only a Congressional majority.¹⁵ As a result, the United States would be within its constitutional authority, according to the Claremont Thesis, to withhold its consent for citizenship, either in part or in full, to any person or group of people, regardless of whether they were born in the United States, based on whatever the current majority in Congress decides is the standard for a person’s allegiance.

13 Erler, “From Subjects to Citizens,” 164.

14 Ibid., 189. Also see John Eastman, “From Feudalism to Consent: Rethinking Birthright Citizenship,” The Heritage Foundation, March 30, 2006; and Michael Anton, “National Review’s Latest Defense of Birthright Citizenship,” *Claremont Review of Books*, September 18, 2018, <https://www.claremont.org/crb/basicpage/national-reviews-latest-defense-of-birthright-citizenship/>.

15 For any person for whom *jus soli* does not automatically confer citizenship, the Congress is empowered to determine what conditions, if any, need to be met for citizenship to be conferred. This power of “statutory citizenship” includes naturalization but it has also been used to extend the doctrine of *jus sanguinis* to children born outside the territorial area of the United States. See 1 Stat. 103 (1790). The Indian Citizenship Act of 1924 extended *jus soli* to all Indians born within the territorial limits of the United States. See 8 U.S.C. ch. 12, subch. III §1401b.

11 Erler, “From Subjects to Citizens,” 167-68. On Trumbull’s views, see Mark Shawhan, “The Significance of Domicile in Lyman Trumbull’s Conception of Citizenship,” *Yale Law Journal*, no. 6, 119 (2010), 1351-60.

12 Ibid., 169-70, 182. Also see Edward J. Erler, “Birthright Citizenship and Dual Citizenship: Harbingers of Administrative Tyranny,” *Imprimis* 37, no. 7 (July 2008).

Erler only discusses expatriation as an individual choice, and he never explicitly raises the issues of ideology or party in association with concept of expressed allegiance. Yet, members of Congress have attempted to expand the government's powers of expatriation based on allegiance, and other members of the Claremont Institute have directly connected party affiliation and ideology to allegiance and citizenship. Together they have laid the foundation stones to advance the second step in the Claremont Thesis. The central figures involved in bringing these cultural animosities to a boil to generate the momentum for change are Thomas Klingenstein, who is chair of the board for the Claremont Institute, Michael Anton, a senior fellow at Claremont and the former deputy assistant to the president for strategic communications in the Trump administration, and William Voegeli, who is the senior editor for the Claremont's flagship if somewhat mercurial publication, *The Claremont Review of Books*.

The ideas of multiculturalism and globalism are at the heart of what Claremont writers divine as an "existential threat" to allegiance, identity, citizenship, and American civilization itself. Klingenstein believes multiculturalism "replaces American citizens with so-called global citizens." It is "mutually exclusive" to being an American and a concept that "will ultimately destroy America." He then connects the idea to party, casting the 2016 U.S. presidential election as "a contest between a woman [Democratic nominee Hillary Clinton] . . . leading a movement to destroy America and a man [Republican nominee Donald Trump] who wanted to save America." In this way, Klingenstein equates multiculturalism with contemporary American liberalism and the entire Democratic Party, rendering both profoundly, fundamentally, anti-American. In Donald Trump, Klingenstein sees a politician raising the question, "Who are we as a nation?" and in Hillary Clinton he sees a politician who is not "a citizen of America but a citizen of the world." He argues that Clinton's use of the word "deplorables," a reference to uncivil behavior she associated with Trump campaign rallies, demonstrated that she "did not recognize the 'deplorables' as fellow citizens."¹⁶ Of course, Clinton never made any of these connections with regard to citizenship. Her comment pertained to the need for greater civility and social responsibility, and Klingenstein's interpretation of her statement reveals much more about how he understands the concept of citizenship than it reveals about Hillary Clinton's views. Klingenstein's colleague, William Voegeli,

16 Thomas D. Klingenstein, "Our House Divided: Multiculturalism vs. America," *The American Mind a Publication of the Claremont Institute*, <https://americanmind.org/essays/our-house-divided-multiculturalism-vs-america/>.

adopts a similar line of analysis.

Voegeli sees two groups within the United States. The first group, who are decidedly American, unequivocally embrace patriotism as the preeminent cultural value, stress the necessity of a shared national identity, and see a high degree of social cohesion as a necessary prerequisite for a republic's survival. Indeed, while Voegeli concedes that such social cohesion or sense of national identity may arise from a variety of causes including language, religion, and geographic proximity, he draws on the work of John Stuart Mill to argue that the strongest bonds of social cohesion arise from a sense of tribalism based on "political antecedents; the possession of a national history, and consequent community of recollections." The second group in the United States, who are decidedly un-American, shun patriotism and national identity as inherently prejudicial microaggressions and champion globalism and multiculturalism instead as political aspirations. Their ultimate goal, according to Voegeli, is the creation of a "single global authority" that would obliterate American identity, American borders, and American sovereignty.¹⁷

Erler confirms that a globalist, multicultural agenda is contrary to his idea of expressed allegiance, and this connects his thoughts to the dog whistles his colleagues choose to sound. He writes, "Multiculturalism, we are told, is a necessary consequence of the respect for human dignity, and any demands made on behalf of the nation-state for exclusive allegiance or for assimilation are contrary to respect for 'universal personhood.'" He concludes that "swearing 'true faith and allegiance' to a regime that is continually under construction and informed by progressively evolving principles would be strangely hollow."¹⁸ So, if the original intent of the Fourteenth Amendment's Citizenship Clause, as argued by Erler, was meant to withhold citizenship to anyone whose allegiance to the United States was even partially in question, then the anti-Americanism and lack of connection to the ideals of citizenship that Klingenstein, Voegeli, and Anton ascribe to globalists, multiculturalists, liberals, and most of the Democratic Party could be seen as proof of a lack of consent by the governed and thus become the basis for the government to expatriate. Indeed, members of Congress have already drafted legislation that would help establish a connection between partial or questionable

17 William Voegeli, "Diversity and Its Discontents," *Claremont Review of Books* 17, no. 3 (2017): 8-14.

18 Edward Erler, "Hedging Allegiance," *Claremont Review of Books*, 6, no. 3 (2006), posted August 7, 2006, <https://www.claremont.org/crb/article/hedging-allegiance/>.

allegiance and expatriation.¹⁹

In 2012, legislation was introduced, and was then re-introduced in revised forms from 2014 onward, that would allow the U.S. government to strip U.S. citizens of their citizenship for becoming members or participating in the activities of organizations designated by the Department of State as targeting U.S. nationals for acts of terror. Although these recent efforts have not been directly a part of the Claremont Thesis and have been motivated primarily out of a perceived need for expediency addressing national security issues, the precedents that would be set by these actions would become accessories to the broader agenda of the Claremont Thesis. The first such bill, the Enemy Expatriate Act (HR 3166 and S. 1698), was co-sponsored by Joe Lieberman (D, CT) and Mark Brown (R, MA) in the Senate, and Charlie Dent (R, PA) and Charles Altmire (D, PA) in the House. Beginning in 2014, Sen. Ted Cruz (R, TX) unsuccessfully pushed for passage of an Expatriate Terrorist Act for several years, and Rep. Steve King (R, IA) joined Rep. Dent's numerous efforts in the House in 2017.²⁰

While these acts of expatriation would be consequences for actual acts of terrorism, it is worth noting that Michael Anton rhetorically connected the Hillary Clinton campaign to the 9/11 terrorists in his essay the "Flight 93 Election," where he casts the 2016 presidential campaign as "the final test of whether there is any virtue left in what used to be the core of the American nation." From Anton's perspective, voting for Trump against Clinton was akin to charging the cockpit to keep the terrorists from destroying the White House. Voting Democratic thus became akin to committing an act of terror, or, at the very least, abetting what would become, in Anton's mind, the treasonous policies of a Clinton administration. If the electorate chose Clinton, the republic would die thanks to open borders championed by a leftist-progressive "junta" that would lead to "the ceaseless importation of Third World foreigners with no tradition of, taste for, or experience in liberty."²¹

19 Nancy L. Green, "Expatriation, Expatriates, and Expats: The American Transformation of a Concept," *The American Historical Review* 114, no. 2 (2009): 307-28.

20 The proposed expatriate acts, including S.2779 (2014), S.247 (2015), S.361 (2017), H.R. 545 (2016), H.R. 4186 (2016), and H.R.1021 (2017) would have revised the section of the 1952 Immigration and Nationality Act dealing with circumstances for the loss of citizenship (8 U.S. Code Ch. 12 Subch. III Part III § 1481).

21 Publius Decius Mus [Michael Anton], "Flight 93 Election," *Claremont Review of Books*, September 5, 2016, <https://www.claremont.org/crb/basicpage/the-flight-93-election/>.

For the Claremont Thesis, expatriation based on terrorist connections is limited. It would help push the agenda forward by setting a precedent for the removal of citizenship, but it would not fulfill the goal of withholding citizenship prior to the establishment of reciprocal consent, nor would it confirm that "overt acts" are necessary to reaffirm allegiance based on whatever statutory standard the Congress endorses. The achievement of this goal is a much more difficult proposition than simply espousing a constitutional philosophy and then appealing to fears over illegal immigration; it requires the reversal of more than 130 years of judicial precedent and the embrace of Jim Crow era decisions. This is what the third step of the Claremont Thesis seeks to accomplish, and the central figure connected with this agenda is John Eastman, the director of the Center for Constitutional Jurisprudence, a public interest law firm associated with the Claremont Institute.

Eastman argues that the Supreme Court erred in its interpretation of the Fourteenth Amendment in the 1890 case *United States v. Wong Kim Ark* by ignoring the original intent of the amendment's authors. He specifically takes aim at Justice Horace Gray who failed to appreciate, according to Eastman, the difference between "partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of that sovereign's laws, and complete political jurisdiction, which requires allegiance to the sovereign as well." The connection to Erler's interpretation of the Fourteenth Amendment is unmistakable, and Eastman cites Erler as the authority for his conclusions.²² Of course, Gray's decision did not confuse these matters, contrary to Eastman's criticism. Gray's view of the jurisdictional clause in the *United States v. Wong Kim Ark* case was entirely consistent with the meaning and intent of the Fourteenth Amendment; the only people born in the United States who are not subject to its jurisdiction are children born on U.S. soil into the family of a foreign diplomat. The only way that this positive construction of the jurisdictional clause can be interpreted in any other way is if one ignores the intent of the amendment or superimposes racist standards on it. This is precisely what Eastman does by claiming that the previous Supreme Court interpretation of the Fourteenth Amendment in the *Slaughterhouse Cases* of 1873 is the valid one. By advancing his argument this additional step, Eastman takes the Claremont Thesis back to the first era of Jim Crow constitutionalism.²³

22 John Eastman, "From Feudalism to Consent: Rethinking Birthright Citizenship," *The Heritage Foundation*, March 30, 2006.

23 *Slaughterhouse Cases*, 86 U.S. 36 (1873).

Throwing out decades of jurisprudence, or, in the case of Wong Kim Ark, more than a century of judicial decisions, would normally give an American constitutional scholar or jurist a moment of pause because it ignores the doctrine of stare decisis. This bedrock of American jurisprudence literally translates as “to stand by things decided,” but is commonly referred to as “settled law” or the “law of precedent.” The concept embraces the idea that judicial decisions should be based on precedent; the longer-standing the precedent, the stronger the case becomes for seeing an issue as settled law. As Justice William O. Douglas commented in 1949, “Stare decisis serves to take the capricious element out of the law and give stability to society. It is a strong tie that the future has to the past.” Justice Robert H. Jackson went further, remarking “I cannot believe that any person who at all values the judicial process . . . would abandon or substantially impair the rule of stare decisis.”²⁴ Indeed, the idea of settled law was the key to Sen. Susan Collins (R, ME) giving her consent to the appointment of Brett Kavanaugh to the U.S. Supreme Court, which happened at nearly the same time as Trump’s declaration. Collins stated: “long-established precedent is not something to be trimmed, narrowed, discarded, or overlooked. Its roots in the Constitution give the concept of stare decisis greater weight such that precedent can’t be trimmed or narrowed simply because a judge might want to on a whim.”²⁵ Convinced that Kavanaugh would pay heed to settled law or stare decisis concerning privacy rights and reproductive rights, Collins gave her consent to his appointment. Compared to the more contemporary issues that Collins considered within the realm of settled law, birthright citizenship should be considered a granite fixture of American jurisprudence with more than 130 years of reaffirmations.

Eastman admits that in its vertical form, meaning that

24 Timothy Oyen, “Stare Decisis,” Cornell University Law School, Legal Information Institute, updated March 2017, https://www.law.cornell.edu/wex/stare_decisis; William O. Douglas, “Stare Decisis,” *Columbia Law Review* 49, no. 6 (1949): 736; and Robert H. Jackson, “Decisional Law and Stare Decisis,” *American Bar Association Journal* 30, no. 6 (1944): 334. The literature underscoring the centrality of stare decisis to American law spans more than a century. See esp. H. Campbell Black, “The Principle of Stare Decisis,” *The American Law Register* 34, no. 12 (1886): 745-56; “No-Clear-Majority Decisions: A Study in Stare Decisis,” *The University of Chicago Law Review* 24, no. 1 (1956): 99-156; Henry Paul Monaghan, “Stare Decisis and Constitutional Adjudication,” *Columbia Law Review* 88, no. 4 (1988): 723-73; Jeffrey Seagal and Howard Spaeth, “The Influence of Stare Decisis on the Votes of United States Supreme Court Justices,” *American Journal of Political Science* 40, no. 4 (1996): 971-1003; Jordan Wilder Connors, “Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology,” *Columbia Law Review* 108, no. 3 (2008): 681-715; and Jonathan Mitchell, “Stare Decisis and Constitutional Text,” *Michigan Law Review* 110, no. 1 (2011): 1-68.

25 Stavros Agorkas, “Read the full transcript of Sen. Collins’s speech announcing she’ll vote to confirm Kavanaugh,” *Vox*, October 5, 2018.

lower courts should follow the decisions of higher courts, the doctrine of stare decisis is the entire basis for Article III of the U.S. Constitution. In its horizontal form, meaning courts should follow their own precedents, it is the lynchpin in making judicial review practicable. Yet John Eastman has no problem with readily ignoring stare decisis when it comes to any issue in which he sees a conservative principle at stake, and he is fully prepared to plunge into constitutional revision as long as that which is being revised is a liberal or progressive idea.²⁶ Without any pretense of stare decisis, Eastman argues that Justice Samuel Freeman Miller’s opinion in the Slaughterhouse Cases provided the correct interpretation of the Citizenship Clause and that Miller’s dicta was subsequently reaffirmed by the Supreme Court’s ruling in *Elk v. Wilkins*.²⁷

Miller wrote that the principal purpose of the Fourteenth Amendment was to “establish the citizenship of the negro” but that it served two additional functions. The second, which Eastman primarily focuses upon, is that many senators hoped to exclude Indians from achieving U.S. citizenship. Based on this racially-driven exception, Eastman concludes that there has to be an understanding of allegiance to the United States to be a citizen of the United States. He admits that “the jurisdiction clause of the Fourteenth Amendment is somewhat different from the jurisdiction clause of the 1866 Act,” and that the “positively phrased ‘subject to the jurisdiction’ of the United States” in the Fourteenth Amendment “might easily have been intended to describe a broader grant of citizenship than the negatively phrased language from the 1866 Act, one more in line with the modern understanding.” But Eastman chooses to ignore this progression and the fact that Trumbull never intended the 1866 Act to deny birthright citizenship, and concludes that there has to be intersectionality between a concept of “total” jurisdiction, a requirement of allegiance, and the granting of citizenship. This second part of Miller’s opinion thus provides the Jim Crow era legal precedent to turn Erler’s interpretation into constitutional action. When combined with the need for total allegiance and the vitriolic condemnation of progressivism, multiculturalism, and other leftist ideas that Klingenstein, Voegeli, and Anton find anti-American and the epitome of globalist citizenship as opposed American citizenship, the subversion of the Fourteenth Amendment by way of the Claremont Thesis would be complete. Yet Miller’s opinion continues to what he considers his third

26 John Eastman, “Stare Decisis: Conservatism’s One-Way Ratchet Problem,” in Bradley Watson, ed., *The Courts and the Culture Wars* (New York: Lexington Books, 2002), 127-37.

27 *Elk v. Wilkins*, 112 U.S. 94 (1884).

and most important point.

For Miller, “the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established.”²⁸ This third section of Miller’s opinion eviscerated the Privileges or Immunities Clause of the Fourteenth Amendment, and, by narrowing the scope of the clause, the door was wide open for segregationists to pass targeted state laws that denied civil rights to African Americans.²⁹ Eastman surreptitiously ignores that portion of Miller’s opinion because he is in favor of reviving the Privileges or Immunities Clause, as are other writers associated with the Claremont Institute. They see the clause as the embodiment of natural rights and that it “was meant to protect the fundamental natural rights that every legitimate government was bound to respect.” In this way, the clause incorporated not just the Bill of Rights, but “the Jeffersonian tradition of individual liberty” that rests at “the core of the ‘pursuit of happiness’ about which Jefferson wrote so eloquently in the Declaration of Independence.”³⁰ Given the seemingly unbounded defense of the privileges or immunities of U.S. citizens, including even the open-ended idea of the pursuit of happiness, there is a reasonable expectation that Eastman and his colleagues would stand against Jim Crow constitutionalism and be avid defenders of the rights of Americans facing persistent and recurring forms of discrimination today. The reverse is the case.

The Claremont Thesis would deploy a revitalized Privileges or Immunities Clause as a bludgeon against the constitutional measures adopted by civil rights leaders in the twentieth century under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. By sweeping aside the mechanisms that dismantled the Jim Crow regime, the Claremont Thesis would permit persistent and recurring patterns of discrimination to fester unchecked in the twenty-first century, thus signaling a new era of Jim Crow constitutionalism. To understand how Eastman and others associated with the Claremont Thesis would accomplish this, it is important to briefly review the history of how civil rights advocates created those mechanisms and successfully undermined the first era of Jim Crow constitutionalism. This discussion will provide the needed historical context for why the Claremont Thesis’s use of the Privileges or Immunities Clause represents a different type of challenge to civil rights

protections that departs from traditional conservative arguments. The Claremont Thesis’s revitalization of the Privileges or Immunities Clause can establish a way to summarily end current civil rights measures and provide the means whereby they cannot be recovered. The fulfillment of that political goal is the fourth and final step in the Claremont Thesis.

The constitutional basis for the creation of the Jim Crow regime would have been rendered moot if the Privileges or Immunities Clause had been embraced in the *Slaughterhouse Cases*. Such a decision could have provided a bulwark for equality and opportunity in the wake of the Civil War before discrimination became systemic in the Jim Crow system. Unfortunately, once the apparatus of systemic discrimination was entrenched, equality and opportunity needed to be recovered as opposed to simply sheltered. For that reason, the modern civil rights movement in the late twentieth century did not seek to overturn the Jim Crow regime through a revival of the Privileges or Immunities Clause, and this part of the amendment continued to languish in a constitutional stupor.³¹ Instead, a new generation of jurists embraced the Equal Protection and Due Process Clauses of the Fourteenth Amendment in novel ways to turn the tide. Although many civil rights activists fought hard for and enjoyed some limited victories on behalf of equal protection in the early twentieth century, the renaissance for civil rights under the Equal Protection Clause began with the idea of suspect classification.³² The legal concept is grounded in the idea that historically certain groups have faced such protracted, consistent, systemic discrimination that membership in that group likely makes them the target for or subject of discrimination. Thus, the onus of proof in such situations should be on the government or institution to demonstrate why a law, regulation, or even a private action is not discriminatory when that law, regulation, or action affects or burdens a person who is a member of a suspect classification.³³

The origins of the concept may be traced to a footnote in Justice Harlan F. Stone’s opinion in the 1938 case *U.S.*

31 Philip B. Kurland, “The Privileges or Immunities Clause: ‘Its Hour Come Round at Last?’” *Washington University Law Review* No. 3 (1972): 406.

32 V.F. Nourse and Sarah McGuire, “The Lost History of Governance and Equal Protection,” *Duke Law Journal* 58, no. 6 (2009): 955-1012.

33 For the origins, definition and articulation of “suspect classification,” see Bertrall L. Ross II and Su Li, “Measuring Political Power: Suspect Class Determinations and the Poor,” *California Law Review* 104, no. 2 (2016): 323-91.

28 *Slaughterhouse Cases*, 86 U.S. 36, at 73 (1873).

29 See above, note 4.

30 John Eastman, “Re-Evaluating the Privileges or Immunities Clause,” *Chapman Law Review* 6, no. 1 (2003): 126.

v. Carolene Products, dubbed by Justice Lewis Powell as “the most celebrated footnote in constitutional law.”³⁴ Stone stated that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” Stone’s mention of a “special condition” anticipated the idea of “suspect class,” and “more searching judicial inquiry” was a harbinger for “strict scrutiny.” These concepts then became the centerpiece of Justice Hugo Black’s opinion in the 1944 case *Korematsu v. United States* which became the first application of the “strict scrutiny” standard to a “suspect classification.” The judicial idea of suspect classification then became the legislative idea of a “protected class” under Title VII of the Civil Rights Act of 1964, which designated race, color, religion, sex, and national origin as protected classes. Subsequent legislation and executive orders broadened the number of protected classes so that by 2018 the list also included age (over forty), disability, pregnancy, gender identity, sexual orientation, and genetic information.³⁵

The fight against discrimination broadened in the decade following the passage of the Civil Rights Act of 1964. Under the rules adopted by the Equal Employment Opportunity Commission (EEOC), which was established in 1965 under Title VII, equal protection for protected classes was extended to include cases of adverse or disparate impact, meaning situations where a law, regulation, or action is not overtly discriminatory but nevertheless adversely affects members of a protected class. A series of presidential executive orders buoyed efforts for affirmative action, or policies designed to rectify past and current discrimination and ensure against future discrimination.³⁶ The Supreme Court then upheld the new interpretation of the Equal Protection Clause in the 1971 case *Griggs v. Duke Power Co.*, endorsing the constitutionality of both

34 *U.S. v. Carolene Products*, 304 U.S. 144, at 152 n.4 (1938); and Lewis Powell, “Carolene Products Revisited,” *Columbia Law Review* 82, no. 6 (1982): 1087. Also see Peter Linzer, “The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone,” *Constitutional Commentary* 12 (1992): 277-303.

35 *U.S. v. Carolene Products*, 304 U.S. 144, at 155 n.4 (1938), and *Korematsu v. U.S.*, 323 U.S. 214, at 216 (1944). Title VII of the Civil Rights Act of 1964, 78 Stat. 241 (1964); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; Patsy T. Mink Equal Opportunity in Education Act, 86 Stat. 235 (1972); the Pregnancy Discrimination Act of 1978, Pub.L. 95-555; the Americans with Disabilities Act, 104 Stat. 327 (1990); and Genetic Information Nondiscrimination Act, 122 Stat. 881 (2008); Executive Order 13087 (1998); Executive Order 13672 (2014).

36 Executive order 10925 (1960), Executive Order 11246 (1965), Executive Order 11375 (1965), and Executive Order 11625 (1971), Executive Order 12138 (1979).

disparate impact (or adverse impact theory) and affirmative action. Although myriad legal challenges were subsequently launched against these civil rights measures, no challenge has proven successful in wholly overturning the constitutional basis for them.³⁷

The enabling legislation to ensure voting rights under the Fifteenth Amendment occurred with the passage of the Voting Rights Act of 1965.³⁸ As with the use of the Equal Protection Clause to ensure civil rights for “suspect classifications,” the voting rights legislation focused on need for the government to combat discrimination in places where historically, certain groups have faced protracted, consistent, systemic discrimination. The act empowered the judiciary to suspend any qualifications, prerequisites, standards, practices, or procedures that have been used to either deny the vote or “dilute” the vote based on race. The federal government may then retain jurisdiction over the rules governing elections for that area for as long as it deems necessary. The tally for the Voting Rights Bill was overwhelmingly bipartisan, and its provisions were extended or strengthened in 1970, 1975, 1982, 1992, and 2006. The reauthorization in 2006 extended the act’s provisions for twenty-five years.³⁹

In the decades that followed the renaissance of the Equal Protection Clause, traditional conservative opposition to affirmative action, disparate impact, and protected classes tended to focus on the idea of fairness or the idea that such measures were no longer necessary. Beginning in the 1970s, conservatives charged that civil rights protections, particularly affirmative action, allowed lesser-qualified candidates to gain positions over more-qualified candidates. The value of diversity, in their view, was outweighed by the value of individual merit. As late as 2012, the Republican National Committee’s official platform, “We Believe in America,” stated that “we reject preferences, quotas, and set-asides, as the best or sole methods through which fairness can be achieved, whether in government, education or corporate boardrooms . . . Merit, ability, aptitude, and results should be the factors that determine advancement in our society.”⁴⁰

37 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Terry Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (New York: Oxford University Press, 2003).

38 Civil Rights Act of 1957, 71 Stat. 634 (1957), Civil Rights Act of 1960, 74 Stat. 86 (1960), and Voting Rights Act of 1965, 79 Stat. 437 (1965).

39 Chandler Davidson, *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton: Princeton University Press, 1994); and Charles Bullock, Ronald Keith Gaddie, and Justin Wert eds., *The Rise and Fall of the Voting Rights Act* (Norman, OK: University of Oklahoma Press, 2016).

40 “We Believe in America: 2012 Republican Platform,” page 16.

Other conservatives, including pundits Lou Dobbs and Candace Owens, and think tank analysts Peter Ferrara and Heath McDonald, have claimed that the United States is a post-racial society in which racism against people of non-European ancestry is no longer a public policy concern and protective status is no longer required.⁴¹ Justice Sandra Day O'Connor and Chief Justice John Roberts share this view, although their timetables and understanding of race relations are different.

The 2003 case *Grutter v. Bollinger* considered whether or not the denial of admission to a white student at the University of Michigan Law School due to an affirmative action policy violated equal protection under the Fourteenth Amendment. Delivering the majority opinion, Justice O'Connor stated: "student body diversity is a compelling state interest," and as such, "Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest."⁴² This decision upheld affirmative action as constitutional but Justice O'Connor added a qualification: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." This view was in line with conservative opposition to protected classes and affirmative action, although O'Connor's timetable for when these civil rights measures should no longer be necessary was put off until approximately 2028. Chief Justice Roberts's timetable was more expedited, at least in regard to voting rights. In the 2013 case *Shelby County v. Holder*, Roberts held that fifty years after the Voting Right Act's passage "things have changed dramatically." He argued that "the conditions that originally justified" the act "no longer characterize voting on covered jurisdictions," and that the Fifteenth Amendment "is not designed to punish for the past; its purpose is to ensure a better future."⁴³ At the heart of the case was the formula stated in Section 4(b) of the Voting Rights Act, which enabled federal authorities to determine if discrimination against voters was evident in a jurisdiction. If it was, then Section 5 provided remedies and oversight by the federal government. The result of the *Shelby County* decision was the invalidation of section 4(b) of the 1965 Voting Rights Act, which made the protections afforded in section 5 irrelevant.

41 Eric Boehlert, "Move Over Climate Deniers, Here Come Racism Deniers," *Media Matters for America*, July 26, 2013; and Shira Tarlo, "CPAC 2019: Candace Owens claims racism is over, because 'I've never been a slave,'" *Salon*, March 2, 2019.

42 *Grutter v. Bollinger*, 539 U.S. 306, at 308 (2003).

43 *Shelby County v. Holder*, 570 U.S. ____ (2013), slip op. at 2, 13, 20.

Liberals and progressives bemoaned the *Shelby County* decision as a boon for voter suppression efforts in the years that followed, and a 2018 report by the U.S. Commission on Civil Rights confirmed many of these fears.⁴⁴ Yet Roberts's opinion left the door open for Congress to reinstate safeguards. Roberts admitted that "voting discrimination still exists; no one doubts that," so a change in the formula in Section 4(b) of the Voting Rights Act by which racial discrimination is accounted was possible—a result that liberals hoped for after the 2018 mid-term elections, and a public policy that the new Democratic majority pursued immediately in H.R. 1 (2019).⁴⁵ The Claremont Thesis would make such an eventuality virtually impossible. It departs from traditional conservative thinking espoused by O'Connor and Roberts, and adopts an unprecedented form of opposition that renders any recurrence of civil rights protections through the Equal Protection and Due Process Clauses unconstitutional. The reintroduction of the Privileges or Immunities Clause on very specific lines represents the key to their approach.

According to Eastman, the Privileges or Immunities Clause "is one of three or four constitutional provisions" that are "designed to codify the natural rights views of many of our nation's leading founders." The clause "cannot be understood apart from the natural law principles of the Declaration from which they were drawn."⁴⁶ The consequences of this interpretation are very clear. In this reading of the Fourteenth Amendment, which is shared by few constitutional scholars, the Privileges or Immunities Clause trumps the Equal Protection Clause whenever the two constitutional principles are in conflict because the natural rights embodied in that clause supersede all other considerations.⁴⁷ In a manner, citizens become the ultimate protected class, and, as such, any laws, regu-

44 U.S. Commission on Civil Rights, "An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report."

45 *Shelby County v. Holder*, slip op. at 2, 24; and Myrna Pérez, "A new Congress could restore the promise of the Voting Rights Act," *The Hill*, August 6, 2018.

46 Eastman, "Re-Evaluating the Privileges or Immunities Clause," 124, 128.

47 The scholarship on the Privileges or Immunities Clause runs the entire political spectrum with little agreement as to its original meaning or current interpretation. See esp. John Harrison, "Reconstructing the Privileges or Immunities Clause," *Yale Law Journal* 101, no. 7 (1992): 1385-1474; M. Akram Faizer, "The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon," *Penn State Law Review* 121, no. 1 (2016): 61-100; Kurt Lash, "The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment," *Georgetown Law Journal* 99, no. 2 (2011): 329-434; and Trisha Olson, "The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment," *Arkansas Law Review* 48, no. 2 (1995): 347-438.

lations, or actions which differentiate between citizens, either by race, sex, religion, or any other classification, are unconstitutional. Eastman writes that, “the primary purpose of government and law is to . . . offer equal protection to each individual citizen—not to groups defined by something as irrelevant to our common humanity as skin color.” The result of such a doctrine would lead to the summary end of the administrative and legal mechanisms developed under the Equal Protection and Due Process Clauses during the twentieth century which represent, according to the Claremont Thesis, nothing more than racial preferences that abridge the privileges or immunities of citizens in what have been non-suspect classifications.⁴⁸

Eastman finds it unfortunate that conservatives have rejected “natural rights jurisprudence altogether” and, in doing so, have turned their backs on the constitutional arguments they need to fulfill their goal of ending affirmative action and protected class status. A renaissance for the Privileges or Immunities Clause, as interpreted through the Claremont Thesis, promises success where decades of conservative action fell short. Such a renaissance could arise from political influence and a new era of jurisprudence in the Supreme Court. Those who seek this change, as well as the adoption of a consensualist approach to citizenship contingent on a person’s expressed allegiance, hope that the hour has arrived for this fourth and final step in the Claremont Thesis.

The unlikely political hero of the Claremont Thesis is Donald Trump, though the forty-fifth president was not the obvious or automatic choice to become the standard bearer. Conservatives like Ann Coulter, Michael Savage, and Laura Ingraham, all of whom relish being deliberately incendiary, immediately embraced Trump for his acerbic and nasty rhetoric about immigrants, Democrats, liberals, and the media, his tirades against anything deemed “political correctness,” and his brazen espousal of American exceptionalism. Yet the members of the Claremont Institute were not sold at first on the former reality TV personality. Charles Kesler, who is now one of the most avid Trump supporters at the Claremont Institute, considered making a contribution to *National Review*’s “Never Trump” issue.⁴⁹ That should not come as a surprise. The professor of government was once the promising scion

of the conservatives, co-editing a book in the 1980s with William F. Buckley, Jr., the godfather of modern American conservatism, on the movement’s bedrock principles.⁵⁰ In the end, Kesler decided against it, “not because I was determinedly pro-Trump, but because I couldn’t write a negative piece when I wasn’t really feeling negative, although I wasn’t endorsing him, either.”⁵¹ William Voegeli similarly could not wrap his arms around Trump in 2015 but fell short of rejecting him as well, writing a 2015 article entitled “The Reason I’m Anti-Anti-Trump.”⁵² Then everything changed.

During the 2016 presidential campaign, Klingenstein, Anton, Kesler, and other Claremont writers started to see Trump as a right-wing break from the modern American conservative movement they now disdained. Their cautious, arms-length curiosity transformed into unabashed glorification that’s, at times, built up Trump into almost a messianic figure. Klingenstein sees conservatives and Republicans as “complicit” with liberals, progressives, and Democrats in allowing America to fall under the spell of what he terms postmodern multiculturalism. He believes that “conservatives have been dazed by Trumpism” because Trump “is virtually the only one on our national political stage defending America’s understanding of right and wrong, and thus nearly alone in truly defending America. This why he is so valuable—so much depends on him.”⁵³ Kesler agrees, writing that “the conservative movement peaked in the Reagan years,” then sunk into a torpor of “self-satisfied contentment” that led to a unified Bush-Clinton era. Trump stands alone as the way to blast the old establishment away, by which Kesler means both political parties as they were aligned in 2016.⁵⁴ Michael Anton is even blunter, writing that “Conservatism, Inc.” has done “nothing” for nearly two decades and is as much a part of the impending collapse of American civilization as liberals are. He believes that “only in a corrupt republic, in corrupt times, could a Trump rise” to save us

50 William F. Buckley, Jr. and Charles Kesler, eds., *Keeping the Tablets: Modern American Conservative Thought* (New York, Harper Row, 1988).

51 Kesler quoted in Baskin, “The Academic Home of Trumpism.”

52 William Voegeli, “The Reason I’m Anti-Anti-Trump,” *Claremont Review of Books*, December 28, 2015, <https://www.claremont.org/crb/baskinpage/the-reason-im-anti-anti-trump/>.

53 Klingenstein, “Our House Divided.”

54 Charles Kesler, “Thinking About Trump,” *Claremont Review of Books*, 18, no. 2 (2018). Kesler had previously expounded on the idea, and Trump’s own declarations, that the forty-fifth President is not a movement conservative in any way, and that he represents a fundamental turn in the long history of the Republican Party. See Charles Kesler, “The Republican Trump,” *Claremont Review of Books* 17, no. 1 (2016/17).

48 John Eastman, “The Death Throws of Preference,” *The Heritage Foundation*, August 1, 2001.

49 The issue of *National Review* with the cover “Conservatives Against Trump,” which featured articles by twenty-two conservatives opposing Trump, was issued on January 21, 2016.

all from “a dying republic.” For Anton, the 2016 election represented America’s last chance and it featured Trump as the redeemer; anyone not voting for him had to be “part of the junta, a fool, or a conservative intellectual.”⁵⁵

The connective tissue between Trump and the Claremont Thesis is easy to see with regard to immigration. Trump’s contempt for immigrants from “shithole” countries was certainly compatible with the Claremont writers’ own xenophobic inclinations.⁵⁶ By the time of the Axios on HBO interview, if not before, Anton and Eastman had obviously captured the president’s attention on the issue and made their arguments his own. Yet the Claremont Thesis’s influence with Trump does not end with the idea of ending birthright citizenship. The focus on allegiance and the division between an American identity and a globalist, anti-American identity is evident from subtle rhetorical devices in Trump’s inaugural address, and then a more dramatic shift in language during the trade wars that started in 2018.

Throughout the 2016 presidential campaign, Trump set “Americanism” in opposition to “globalism” whenever he discussed trade. Of course, “Americanism” is a term without definition, open to interpretation by anyone using it, but Trump employed it as an extension of his campaign mottos “Make America Great Again” and “America First” in reference to foreign affairs and trade policy. In his first speech after the Brexit vote in the United Kingdom, he proclaimed, “It’s time to declare our economic independence once again” by retaking the White House from an administration that “worships globalism over Americanism.” He claimed that “this wave of globalization has wiped out totally, totally, our middle class.” He made this same, specific connection in his acceptance speech at the Republican National Convention in July 2016, stating that “Americanism not globalism is our credo.” He repeated the association in a speech to the Economic Club of New York, declaring “we must replace the policy of globalism which have it’s just taken so many jobs out of our communities and so much wealth out of our country and replace it with a new policy of Americanism.”⁵⁷

Trump’s inaugural address signaled a rhetorical shift from the standard campaign slogans to themes embed-

ded in the Claremont Thesis. The phrase “America First” makes a solitary appearance and the term “Americanism” is nowhere to be found, but the word “allegiance” is inserted in two strategic places. First, Trump describes his own oath of office as “an oath of allegiance,” which serves as an allusion to the oath that a person takes to become a naturalized citizen.⁵⁸ In line with Erler’s views, it is not enough to simply be born American; people need to affirm their allegiance to fulfill the two-part test. In transforming an oath of office into an oath of allegiance, Trump creates an allusion as having fulfilled that requirement moments after becoming president. Second, Trump sums up the philosophical basis for his presidency with a return to the language of the Claremont Thesis, stating, “At the bedrock of our politics will be a total allegiance to the United States of America, and through our loyalty to our country, we will rediscover our loyalty to each other.” The use of the qualifying adjective “total” should bear notice. In its generic form, the word “allegiance” denotes loyalty and commitment and carries the connotation of totality. But Erler, following the lead of Jim Crow era jurisprudence, draws the distinction between “partial allegiance” and “total allegiance.” The former is unacceptable in terms of affirming one’s consent to be governed, while the latter is required for the government to provide its own consent for citizenship. The line that follows also tips the president’s hand with regard to Claremont Thesis rhetoric when he states, “When you open your heart to patriotism, there is no room for prejudice.”⁵⁹ The line suggests that a Trumpist America would be a post-prejudicial America with no need for protected classes, affirmative action, or safeguards against disparate impact.

By the time Trump’s trade wars began, his steady drumbeat of invective against globalists led to a change in the dichotomy he employed during the campaign.⁶⁰ In his speech to the United Nations in September 2018, Trump proclaimed: “America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism.”⁶¹ The shift from “Americanism” to “patriotism” signaled a broader political idea not wholly governed by trade considerations. The president pivoted again just a month later, laying claim to being a nationalist. In an interview soon after he did not back away

55 Publius Decius Mus [Michael Anton], “The Flight 93 Election.”

56 Josh Dawsey, “President derides protections for immigrants from ‘shithole’ countries,” *Washington Post*, January 12, 2018.

57 “Donald Trump’s jobs’ plan speech,” Politico, June 28, 2016; “Donald Trump 2016 RNC draft speech transcript,” Politico, July 21, 2016; “Trump: We must replace globalism with Americanism,” CNBC, September 16, 2016.

58 Donald Trump, Inaugural Address, January 21, 2017.

59 Ibid.

60 The trade wars officially began on January 22, 2018. See Chad Bown and Melina Kolb, “Trump’s Trade War Timeline: An Up-to-Date Guide,” Peterson Institute for International Economics, December 1, 2018.

61 Ian Schwartz, “Trump Addresses the U.N.: We Reject the Ideology of Globalism, Must Defend Sovereignty,” *RealClearPolitics*, September 25, 2018.

from the term: “I’m fighting for the country. I look at two things, globalists and nationalists. I’m somebody that wants to take care of our country.”⁶² The reaction to the statement varied across the political spectrum. Most on the right dismissed these rhetorical shifts as semantics while those on the left primarily believed that references to globalists and nationalists were political dog whistles for white nationalist anti-Semitism.⁶³ Sometimes it takes an outside perspective to see the forest for the trees, and that is what Edward Luce provided. For the English financial journalist, the inflammatory rhetoric is the bedrock of Trumpism, which calls for “a contest of faiths over the essence of what it is to be American.”⁶⁴ From the perspective of the Claremont Thesis, if you are a nationalist then you show allegiance and, in turn, satisfy the test for citizenship as an American. If you are a globalist, you fail the test, and your un-American views should, in turn, disqualify you from citizenship.

Although Trump is an effective voice for the Claremont Thesis, the effort is, at its heart, one to reconceive the U.S. Constitution generally and the Fourteenth Amendment specifically. As such, political influence is important but judicial influence is paramount, and, if Donald Trump represents the political savior of the Claremont Thesis, Justice Clarence Thomas undoubtedly fills that role on the judicial side. This heroic status is clear in John Eastman’s review of Ralph Rossum’s book on Thomas’s judicial philosophy, which is only occasionally mildly critical of the justice. With regard to the issue of sovereignty on which Rossum believes that Thomas falls short of a genuinely originalist view, Eastman comments that “maybe Justice Thomas has seen something that Rossum and I do not yet see.”⁶⁵ It’s high praise when political pundits are willing to go wholly on faith and publicly concede the ground on an issue where their own predilections run in the other direction and admit they are willing to dig deeper to discover the error of their own ways. The veneration of

62 “Trump embraces the term nationalist,” CBS News, October 22, 2018; for the Fox News interview see Ian Schwartz, “Trump: Nationalism Means I Love the Country; I’m Not a Globalist, I Want to Take Care of U.S. First,” *RealClearPolitics*, October 28, 2018.

63 James Robbins, “Donald Trump’s nationalism isn’t racist or wrong it’s what America needs right now,” *USA Today*, October 25, 2018; Dana Milbank, “Trump’s America is not a safe place for Jews,” *Washington Post*, October 28, 2018; and Peter Beinart, “How Trumpian Nativism Leads to Anti-Semitism,” *Atlantic*, November 2, 2018.

64 Edward Luce, “Trump Divides US over What it Means to be American: President is successfully pitting country’s nationalists against its globalists,” *Financial Times*, October 25, 2018.

65 John Eastman, “Down to the Bare Wood: A Review of *Understanding Clarence Thomas: The Jurisprudence of Constitutional Restoration*, by Ralph A. Rossum,” *Claremont Review of Books* 14, no. 4 (2004).

Thomas went further a few years later when the Claremont Institute teamed up with the Federalist Society to host a celebration of the justice’s twenty-fifth anniversary on the Supreme Court. Lauded as the “lone jurist” who uses the principles of the Declaration of Independence as the standard for American jurisprudence.⁶⁶

Thomas emerged as an early opponent of equal protection jurisprudence in the 1994 case *Holder v. Hall* where he rejected the idea that African American voters needed protection under the Voting Rights Act of 1965 against vote dilution. He called such measures akin to “political apartheid” that are “repugnant to any nation that strives for the ideal of a colorblind Constitution.” Having undermined the idea of protected classes, he rejected the doctrine of affirmative action and further subverted the concept of protected classes a year later in the 1995 case *Adarand Constructors, Inc. v. Peña*. The case involved whether or not the federal government could provide financial incentives for contractors to hire “socially or economically disadvantaged individuals.” Thomas admitted “These programs may have been motivated, in part, by good intentions,” but they “cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”⁶⁷ Based on these decisions, many conservatives lay claim to Thomas as one of their own, yet Thomas’s ideas of constitutional jurisprudence, especially with regard to the Fourteenth and Fifteenth Amendments, are significantly different from his conservative colleagues, and it is really the Claremont Thesis, not the conservative movement, that can rightfully claim Thomas as a champion.

The split between Thomas and other conservatives was evident in the 2015 case *Texas v. Inclusive Communities Project*, which considered whether or not the Federal Housing Authority (FHA) can provide tax incentives to real estate developers to build housing for low-income people when such policies lead to minority-majority housing developments. Justice Anthony Kennedy, delivering the opinion of the court, provided a ringing endorsement for the importance of disparate impact as a mechanism to pursue equal protection.⁶⁸ Samuel Alito dissented, but

66 “The Jurisprudence of Clarence Thomas: 25 Years in the Court. Panel I: The Lone Jurist. Panel II: The Declaration as the Central Idea in American constitutionalism.” The Claremont Institute, October 24-25, 2016. On the role of the Declaration of Independence and the interpretation of the Fourteenth Amendment, see Erler, “From Subjects to Citizens,” 164-70.

67 *Holder v. Hall*, 512 U.S. 874, at 905-06, (1994), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, at 206 (1995).

68 Justice Kennedy, *Texas Department of Housing and Community Affairs, et. al., Petitioners v. The Inclusive Communities Project, Inc., et. al.*, No. 13-1371, 576 U.S. ____ (2015) slip. op. at 1-24.

limited his dissent to arguing that the 1968 act of the Congress that created the “FHA does not authorize disparate impact claims,” and “this Court has no license to expand the scope of the FHA to beyond what Congress enacted.” Alito also drew a distinction between disparate impact claims in housing and employment, all of which indicates that he sees the doctrine as constitutionally sound as long as it is limited and Congress authorizes agencies to pursue such claims.⁶⁹ By contrast, Clarence Thomas’s dissent rejected the idea of disparate impact altogether. He argued, “we should drop the pretense that *Griggs*’ interpretation of Title VII was legitimate.” The Civil Rights Act of 1964 contained neither an implicit nor “an express prohibition on policies or practices that produce a disparate impact.” As such, the concept is built on a foundation “made of sand,” and Thomas “would not amplify its error by importing its disparate-impact scheme into another case.”⁷⁰ He believes the entire idea was concocted by bureaucrats at the EEOC and then erroneously embraced by the Supreme Court. He concludes that, “divorced from text and reality, driven by an agency with its own political preferences,” there is no question that “our disparate-impact jurisprudence was erroneous from its inception.”⁷¹

Thomas is not just an opponent of the current mechanisms used to ensure equal protection. As per the Claremont Thesis, he would like to see a renaissance for the Privileges and Immunities Clause as well. In the 1999 case *Saenz v. Roe*, Thomas argued that “the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence,” and that he “would be open to reevaluating its meaning in an appropriate case.” This is especially welcome because the Equal Protection and Due Process clauses “have assumed near-talismanic status in modern constitutional law.” An appropriate reevaluation would “consider whether the [Privileges or Immunities] Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.”⁷² Thomas rejects the idea that the Fourteenth Amendment was ever meant to safeguard protections established as positive law, and argues that it was always intended to safeguard the fundamental rights of every citizen. Such an approach would solidify Eastman’s hopes for sidestepping Roberts’s and O’Connor’s conditional opposition to equal protection measures and enshrine a natural rights argument that would preclude

any future attempt to reestablish such measures.

If the Claremont Thesis proves successful in its judicial strategy, it would demolish civil rights protections as Americans currently understand them and invite the return of Jim Crow constitutionalism in which discrimination goes unchecked and voter suppression is allowed to fester. Liberals and progressives fear that a return to that era of constitutional misappropriation is already under way. The old Jim Crow constitutionalism involved literacy tests, poll taxes, checks against registration, grandfather clauses, and voter intimidation at polling places. The new Jim Crow constitutionalism involves opposition to same-day registration, “motor voter” laws, and voting by mail, and support for “exact match” laws, voter roll purges, address requirements for Native Americans, and shuttering of polling places in minority-majority areas.⁷³ The old Jim Crow constitutionalism embraced segregation and *de jure* or institutional racism in just about all of its forms. The new Jim Crow constitutionalism assumes that aversive racism, passive racism, “soft” racism, and other forms of *de facto* racism either do not exist or do not matter in a world where institutional racism has been checked by civil rights measures. Further, it assumes that if those civil rights protections as Americans know them now were simply lifted, the scourge of institutional racism would remain buried forever in the past.

John Eastman may be right that in many ways Clarence Thomas is a “lone jurist,” but this is where Trump can assume a different and potentially longer-lasting role in promoting the Claremont Thesis.⁷⁴ As of September 11, 2019, the Senate had confirmed 152 Article III judges nominated by Trump with another 35 nominations awaiting confirmation, and an additional 97 vacancies waiting to be filled. Together that amounts to one-third of all authorized federal judgeships under Article III.⁷⁵ Of course, not every Trump judicial nominee is a clone of the last and the next, but given the apparent influence of Eastman, Anton, and the Claremont Thesis on the president’s choices, the possibility of having other jurists amenable to the Claremont Thesis is clear.

The Claremont Thesis would turn the past into prologue. The creation of the Jim Crow system closed off many areas of citizenship to both African Americans and poor white Americans,

⁷³ Van Newkirk, “Voter Suppression is the New Normal,” *Atlantic*, October 24, 2018; Jelani Cobb, “Voter Suppression in the Age of Trump,” *New Yorker*, October 29, 2018; Carol Anderson, *One Person, No Vote: How Voter Suppression is Destroying Our Democracy* (New York: Bloomsbury, 2012); and Ari Berman, *Give Us the Vote: The Modern Struggle for Voting Rights in America* (New York: Picador, 2016), esp. 286-314.

⁷⁴ “The Jurisprudence of Clarence Thomas: 25 Years in the Court. Panel I: The Lone Jurist. Panel II: The Declaration as the Central Idea in American constitutionalism.” The Claremont Institute, October 24-25, 2016.

⁷⁵ *Biographical Directory of Federal Judges*, Federal Judicial Center, <http://www.fjc.gov>. Also see Catie Edmondson, “Trump’s Judicial Nominees Take Heat but Largely Keep Marching Through Senate,” *The New York Times*, December 11, 2018; and Alexander Bolton, “Left knocks Schumer over deal on judges ahead of Supreme Court battle,” *The Hill*, August 29, 2018.

⁶⁹ Justice Alito, *Texas v. The Inclusive Communities Project*, slip. op. at 2, 34.

⁷⁰ Justice Thomas, *Texas v. Inclusive Communities Project*, slip op. at 1

⁷¹ *Ibid.*, slip op. at 2-5, 7, 8-10, 12.

⁷² *Saenz v. Roe*, 526 U.S. 489 at 521, 527-528 (1999).

creating a society of the few, by the few, and for the few. The Claremont Thesis would resurrect the ghosts of an era best left in the past. Its advocates hope that political expediency over curbing and controlling illegal immigration will open the door to making citizenship conditional on allegiance. In such a society, the birthright that is denied to the child of an illegal immigrant can easily become a birthright that is denied to “natural born” Americans in years to come. Defenders of the Claremont Thesis wax patriotic about the integrity of elections, the “end of racism,” and the salvation of American civilization, all in the service of eroding that which they purport to save. In the wake of the Civil War, African Americans had every reason to hope that the departure of federal troops would not lead to the collapse of Reconstruction policies. By the late nineteenth century, after the terror campaigns of white supremacist groups and the success of segregationists at the polls, hope began to vanish. By the first decade of the twentieth century, the policies of Jim Crow constitutionalism had effectively reduced the status of African Americans to that of second-class citizens—or worse. It was a road that the United States should never have traversed in the nineteenth century and must not go down again in the twenty-first.

SUGGESTED CITATION

Chew, R. (2019). Unsettling the Law: Donald Trump’s Declaration on Birthright Citizenship, the Claremont Thesis, and Jim Crow Constitutionalism. *Virginia Social Science Journal*, Vol. 53 pp. 36-50.