BIRTHRIGHT CITIZENSHIP OF CHILD BORN TO ENEMY ALIEN VISITORS

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This is the story of *Mogridge v. United States*, in which the United States asserted, and a multinational commission held, that a child born in Pennsylvania to enemy alien visitors was a U.S. citizen even though he also acquired the nationality of his parents at birth and left the United States with them only a few weeks afterward. This compelling 1872 precedent undermines arguments for the narrow scope of birthright citizenship set out in President Trump's Executive Order 14160, "Protecting the Meaning and Value of American Citizenship."[1]

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Joseph Mogridge was born in Wayne County, Pennsylvania on April 29, 1813.[2] His British parents, Mary and Augustus, had wed six months earlier

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[1] The Executive Order would deny birthright citizenship to children whose mothers are either unlawfully present in the United States or lawfully present only temporarily unless their fathers are citizens or lawful permanent residents at the time of the child's birth. *See* Exec. Order 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025). But both of Mogridge's parents were temporary visitors. *See* Memorial of Joseph Fry Mogridge, 22 Mixed Comm'n on Brit. and Am. Claims, No. 345, at 1 (May 8, 1871) (visitors) ("Memorial") [https://hdl.handle.net/2027/nyp.33433113857423]*; infra* notes 3 and 4 and accompanying text (timeline of visit, including departure shortly after Mogridge's birth in April 1813). Some defend the Executive Order by arguing that the only children of aliens entitled to birthright citizenship are those whose parents come as aliens in amity. *See* Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html [https://perma.cc/55TH-7J3A]. Yet both of Mogridge's parents were British subjects and therefore came as enemy aliens. *See* Memorial, *supra*, at 1, 10 (both parents were British subjects, born in England); Declaration of War Against Great Britain, ch. 102, 2 Stat. 755 (June 18, 1812). And as an alien enemy male above the age of thirteen, Mogridge's father was liable to be "apprehended, restrained, secured and removed" from the United States under the Alien Enemies Act. *See* Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798).

[2] *See* Memorial, *supra* note 1, at 1. This article accepts relevant statements of fact in Mogridge's claim as true because the United States relied on them, and Britain did not challenge them.

in Liverpool and were visiting the United States despite the ongoing War of 1812.[3] Perhaps wisely, they returned with him to England a few weeks after his birth.[4]

Joseph grew up in England and always considered and presented himself as a British subject.[5] When it really mattered, however, the United States successfully asserted that he was a U.S. citizen by birth.[6] That defeated a legal claim he had filed against the United States for over $280,000, worth some $7 million today,[7] doubtless making his parents' visit the most expensive trip they would ever take.

Counsel for the United States in the case summarized its facts and explained its rationale in the House of Representatives in 1874. All those born within the sovereignty of the United States are citizens by birth regardless of their circumstances or the status, domicile, or length of presence of their parents. "That is the recognized rule within the United States; it is specifically provided for . . . by the fourteenth amendment to the Constitution of the United States."[8]

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Mogridge returned to the United States as an adult[9] and built a successful mercantile business.[10] When a friend urged him to vote in an antebellum congressional race, Mogridge declined, saying that he could not vote because he was not naturalized and did not want to naturalize because of an interest he had back in England.[11] Mogridge was devoted to the Union and suffered

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[3] *Id*. at 1, 9. Augustus and Mary apparently arrived in the United States in late December 1812. *See* KENNETH SCOTT, BRITISH ALIENS IN THE UNITED STATES DURING THE WAR OF 1812, at 280 (1979) (transcription of a registration in Pennsylvania of an enemy alien named Augustus Mogridge, age 24, present in the United States with his wife since December 20, 1812).

[4] Memorial, *supra* note 1, at 1.

[5] *Id*. at 1–2.

[6] Dem. to Memorial (Mogridge v. United States), 22 Mixed Comm'n on Brit. and Am. Claims, No. 345 (May 3, 1872) (filed by "ROBT: S. HALE, *Agent and Counsel of the U.S., &c.*") ("Demurrer"); Mogridge v. United States, 22 Mixed Comm'n on Brit. and Am. Claims, No. 345 (Nov. 18, 1872) ("Opinion"); 2 CONG. REC. 3460 (1874) (statement of Rep. Robert S. Hale) (noting that the decision in *Mogridge* recognized principle of citizenship by birth).

[7] Memorial, *supra* note 1, at 4–5 (losses and year); MEASURING WORTH, https://www.measuringworth.com/dollarvaluetoday/?amount=282822&from=1863 [https://perma.cc/H7PW-LX9U] (inflation adjustment).

[8] 2 CONG. REC. 3460 (1874) (statement of Rep. Robert S. Hale).

[9] Mogridge apparently married in Philadelphia in 1840. *See Married*, PHILA. INQUIRER, Mar. 21, 1840, at 2.

[10] Memorial, *supra* note 1, at 3, 13.

[11] Deposition of Joseph C. Turner (Mogridge v. United States), 31 Mixed Comm'n on Brit. and Am. Claims, No. 345, at 5 (June 27, 1872)

persecution and a threat of hanging while living in the South during the Civil War.[12] He was recognized as an Englishman, which exempted him from conscription, further incensing Confederates and causing trouble for him.[13] To add injury to insult, Union troops confiscated or destroyed virtually all his inventory in captured Southern cities where he did business.[14] This set the stage for his ultimately futile claim against the United States for compensation as a British neutral.

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Britain was ostensibly neutral during the Civil War. Nonetheless it violated many of its obligations as a neutral state,[15] and the United States violated the rights of many British subjects.[16] The two nations adopted the Treaty of Washington of May 8, 1871,[17] to deal with damages from those violations. Article XII of the Treaty created the Mixed Commission on British and American Claims to settle the claims of British subjects against the United States and of American citizens against Britain.[18] A newspaper from Newport, Rhode Island, where the Commission was to meet, reported that it would "bring together some of the highest legal talent of both countries."[19]

President Grant appointed James Somerville Frazer, a former justice of the Indiana Supreme Court, to the Commission.[20] Frazer was "a man of more than national reputation" whom Grant seriously considered for a seat on the

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[https://hdl.handle.net/2027/nyp.33433113857290] (link permanent).

[12] Memorial, *supra* note 1, at 4.

[13] *Id*. at 21–22.

[14] *Id*. at 3–5.

[15] *See* Treaty of Washington, Gr. Brit.-U.S., arts. I, VI, May 8, 1871, 17 Stat. 863, 865. The principal British violations involved allowing the "the fitting out, arming or equipping, . . . [and] departure" of what would become Confederate warships in and from British shipyards. *Id.* The C.S.S. *Alabama* was the most notorious of those ships. *See* ADRIAN COOK, THE ALABAMA CLAIMS: AMERICAN POLITICS AND ANGLO-AMERICAN RELATIONS, 1865–1872, at 15 (1975).

[16] *See* Robert S. Hale, *Report of Robert S. Hale, Esq.*, *in* 6 PAPERS RELATING TO THE TREATY OF WASHINGTON 9 (1874) ("Hale Report"). The principal U.S. violations involved the Union army's destruction or confiscation of property of British subjects. *Id.*

[17] 17 Stat. 863.

[18] *Id*. at 867–68 (for claims other than those relating to the Confederate warships). British subjects made 478 claims against the United States for approximately $60 million plus $36 million in interest. *See* Hale Report, *supra* note 16, at 8. The Commission allowed 181 of them totaling just under $2 million. *Id.* The Treaty created a separate commission to hear claims relating to the Confederate warships. *See* 17 Stat. 863, art. I. The *Alabama* Claims commission, which met in Geneva, was "the world's first great international tribunal of arbitration." *See* COOK, *supra* note 15, at 9, 207.

[19] *See Fifty Years Ago, Mercury, July 20, 1872*, NEWPORT MERCURY, July 22, 1922, at 8.

[20] *See* Hale Report, *supra* note 16, at 7.

U.S. Supreme Court.[21] Queen Victoria appointed Russell Gurney, a member of Parliament and of the Privy Council.[22] Grant and Victoria jointly selected Count Corti, "envoy extraordinary and minister plenipotentiary to the United States of His Majesty the King of Italy," as the third Commissioner.[23]

Grant also appointed Robert S. Hale as U.S. legal counsel before the Commission.[24] Hale was an attorney and had been special counsel to the United States defending abandoned and captured property claims in 1868–70.[25] He had also served in the House in the Thirty-Ninth Congress (1865–67).[26] Although not an active participant in the debates, he voted to override Andrew Johnson's veto of the Civil Rights Act of 1866[27] and in favor of the final passage of the Fourteenth Amendment.[28]

Mogridge filed a claim with the Commission. He also advertised the filing deadline and urged British subjects who had not yet filed to contact him for assistance.[29]

An early priority for the Commission was to determine who were British subjects or American citizens for purposes of the Treaty.[30] In particular, how did the Treaty apply to dual nationals? The United States asserted that persons who were U.S. citizens because of their birth here but British subjects because of their parentage were not British subjects for purposes of the Treaty.[31] Therefore, they could not assert claims against the United States.

The United States relied in part on *Drummond's Case*,[32] an 1834 Privy Council decision involving damage claims by British subjects against France under an Anglo-French treaty.[33] The Privy Council found that the treaty could not be interpreted to apply to someone born in France of British parentage. Although such foreign-born children were "formally and literally" British subjects under British statutory law, they could not be British subjects

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[21] *See* DONALD B. KITE, SR., *James S. Frazer*, *in* JUSTICES OF THE INDIANA SUPREME COURT 69 (Linda C. Gugin & James E. St. Clair eds., 2010) (internal quotations omitted).
[22] Hale Report, *supra* note 16, at 7.
[23] *Id*.
[24] *Id*.
[25] *See Robert Safford Hale*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, https://bioguide.congress.gov/search/bio/H000037 [https://perma.cc/3PJ3-DR8Z].
[26] CONG. GLOBE, 39th Cong., 1st Sess. 3 (1865). For the most complete account of Hale's life see *Death of Hon. Robert S. Hale*, BURLINGTON FREE PRESS, Dec. 15, 1881, at 3.
[27] CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1865).
[28] *Id*. at 3149.
[29] Joseph Mogridge, *Important to British Subjects*, TIMES-PICAYUNE (New Orleans), Mar. 7, 1872, at 5.
[30] Hale Report, *supra* note 16, at 11.
[31] *Id*. at 15–16.
[32] *Id*. at 16.
[33] *Drummond's Case*, [1834] 12 Eng. Rep. 492 (UKPC).

within the meaning of the treaty.[34] Neither the treaty nor the law of nations could prevent France from dealing with its own subjects as it saw fit.[35]

The Commission agreed and ruled two-to-one, with Gurney dissenting, that such dual nationals were not British subjects for purposes of the Treaty, citing *Drummond's Case*.[36] That sealed Mogridge's fate.

The United States demurred in *Mogridge v. United States* on the ground that Mogridge was a U.S. citizen.[37] J.M. Carlisle, counsel for Her Britannic Majesty, replied that Mogridge was clearly a British subject and suggested that nothing in international law, U.S. statutory law, or U.S. court decisions would impress U.S. citizenship on him or authorize him to claim it.[38] Carlisle must not have heard of the many Anglo-American findings that U.S. law incorporates the common law rule of nationality by birth, including birth to visiting or transiting aliens, such as *Inglis v. Trustees of the Sailor's Snug Harbour* (1830),[39] *State v. Manuel* (1838),[40] *Lynch v. Clarke* (1844),[41] the *Report of the Royal Commissioners for Inquiring Into the Laws of Naturalization and Allegiance* (1869),[42] and *McKay v. Campbell* (1871).[43]

The Commission allowed the demurrer on a two-to-one vote, with Gurney again dissenting.[44] Augustus and Mary Mogridge's visit to the United States had cost their son his standing to bring a claim for damages.

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[34] *Id*. at 499.
[35] *Id*.
[36] Hale Report, *supra* note 16, at 16.
[37] Demurrer, *supra* note 6.
[38] Reply to Dem. by United States (Mogridge v. United States), 22 Mixed Comm'n on Brit. and Am. Claims, No. 345, at 2 (undated).
[39] *Inglis v. Trs. of the Sailor's Snug Harbour*, 28 U.S. 99, 155 (1830) (Story, J., concurring in part and dissenting in part) (reciting the common law rule that "allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign").
[40] *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat. Eq.) 144, 151 (1838) (holding that "all free persons born within the State are born citizens of the State," including enslaved persons born in the State upon their manumission).
[41] *Lynch v. Clarke*, 1 Sand. Ch. 583, 638, 683 (N.Y. Ch. 1844) (holding that a child born to alien parents during a temporary visit to the United States is a U.S. citizen).
[42] *See* REPORT OF THE ROYAL COMMISSIONERS FOR INQUIRING INTO THE LAWS OF NATURALIZATION AND ALLEGIANCE viii, xii–xiv (1869) (all commissioners agreed that U.S. law incorporates the common law rule; a majority voted to retain the rule in Britain even though a minority objected, in part because it gives nationality to children of transiting mothers).
[43] *McKay v. Campbell*, 16 F. Cas. 161, 165 (D. Or. 1871) (No. 8,840) (holding that the Citizenship Clause of the Fourteenth Amendment is merely declaratory of the common law rule that applies under the original Constitution).
[44] Opinion, *supra* note 6.

Mogridge illustrates the breadth of the common law rule of birthright citizenship incorporated in both the original Constitution and the Fourteenth Amendment. Children born in the United States and subject to its jurisdiction are citizens by birth. The United States need not have exclusive jurisdiction over them, and their parents' status (including enemy alienage), domicile, and length of presence are irrelevant.

Mogridge reappears in 1874. Robert S. Hale, back again in the House of Representatives, summarized the case and its rationale when opposing H.R. 2199, an expatriation bill proposed by Rep. Ebenezer Hoar.[45] John Mikhail has cited some of Hale's statements to convincingly rebut arguments based on that proposal in support of the Executive Order.[46] Mikhail's critique is even more powerful considering Hale's position as counsel for the United States in the case. Hale's description of birthright U.S. citizenship was not his opinion. It was the official position of the United States before the world only four years after ratification of the Fourteenth Amendment.

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Mogridge then disappears for a century and a half. We have not found any reference to it since Hale's in 1874. We only found the case name and report by further researching Hale's summary from the *Congressional Record*. Only then did we discover to our surprise that Augustus and Mary Mogridge were enemy aliens, that Hale was counsel to the United States in the case, and that it was the United States' official position, not merely the Commission's holding, that Mogridge was a U.S. citizen by birth.

Mogridge now has a last hurrah. It joins the extensive body of authorities that together demonstrate the unconstitutionality of Executive Order 14160. Ironically, Mogridge's unwanted citizenship and wartime losses might indirectly help secure the promises of the Fourteenth Amendment for which the Civil War was fought.

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[45] 2 CONG. REC. 3460 (1874).

[46] *See* John Mikhail, *Birthright Citizenship and DOJ's Misuse of History in Its Appellate Briefs*, JUST SECURITY (Apr. 18, 2025), https://www.justsecurity.org/110212/birthright-citizenship-doj-misuse-history/ [https://perma.cc/Y9QE-BBXC].