

learn from this and keep it from happening again to anybody... This case shows the enormous consequences of overreaching by a prosecutor. What has been learned here is that the internal checks on a criminal charge—sworn statements, reasonable grounds, proper suspect photo lineups, accurate and fair discovery—all are critically important.

How could this happen in a country which is supposed to have the finest justice system in the world? And, if it can happen to three kids whose families were able to mount the resources to fight back, how about the thousands who cannot? It should come as no shock, considering this case, that more than 200 prisoners have been exonerated since the advent of DNA evidence in the late 1980s, including fourteen innocent death row inmates. Or that the grand jury system, which has eroded greatly over time, failed in this instance. The grand jury was designed by our forefathers to serve as a strong and meaningful check on rogue prosecutors. But today, across our country, it seems, nothing like this system can be found in practice. As the authors describe, the grand jury in the Duke case did exactly what Nifong asked; it indicted the three players. It may shock the average citizen to know that

the Durham grand jury heard no testimony from (the accuser), (the other dancer who was there at the scene and told the police that no assault happened), any lacrosse player, any doctor or nurse, or anyone else with firsthand knowledge of what had happened. The only witnesses were two cops who had already lied repeatedly to the players and the court about the case

What corrective one draws from this story, if any, is open to debate, but what Taylor and Johnson convey clearly in *Until Proven Innocent* is just how much damage a rogue prosecutor can wreak. Anyone who reads it might well come to the conclusion that, had justice prevailed, it would be Nifong who should have been indicted, convicted, and sentenced to serve substantial time in jail.

## The Founders on Citizenship and Immigration: Principles and Challenges for America

BY EDWARD J. ERLER, THOMAS G. WEST & JOHN MARINI

*Reviewed by Margaret D. Stock\**

Given the prominence of immigration issues in American politics today, an up-to-date and scholarly volume on the Founders' views on immigration and citizenship issues could benefit those who seek an understanding of first principles. Unfortunately, *The Founders on Citizenship and Immigration*, a slim volume of four essays, will not answer the pressing need for an authoritative resource. The book is mostly not about the Founders, and provides little in the way of a scholarly addition to the debate. Instead, all but one of its

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essays simply repeat the restrictionist arguments made in the popular press in the last few years—often lacking citations, and nearly always without consideration of alternative, contradictory sources. Conservatives and libertarians who appreciate the value of understanding "original intent" when evaluating constitutional debate, and who would like to pursue this approach with immigration issues, will be disappointed.

The book's four chapters include an introduction and three essays, each written by one of the co-authors. Edward J. Erler's introduction offers a highly slanted view of the current politics of immigration—one with which many conservatives and libertarians would disagree. For example, in the first section, Erler states that "there is no special interest constituency for restricting immigration," and argues that expansive immigration legislation is repeatedly passed by a Congress oblivious to public opinion so that all immigrants—legal and illegal—can become "malleable clients for the ministrations of the welfare state." In fact, Congress in the past twenty years has found it quite difficult to pass any legislation favorable to immigrants—nearly all significant immigration legislation since 1986 has been "enforcement only" legislation. Congress has been extraordinarily sensitive to the views of angry restrictionist factions, such that a vocal group of anti-immigration "special interests" was largely responsible for the recent defeat of comprehensive immigration reform. In another example contrary to Erler's thesis, immigrants—both legal and illegal—have been mostly barred from obtaining welfare benefits since the 1996 welfare reform laws. Today, it is mostly U.S. citizens who are the clients of "the welfare state," such as it exists—as the State of Colorado found recently when it verified the status of all of its welfare recipients and found only U.S. citizens on the dole.

All three of the authors purport to rely on the Founders' views to support their conclusions, but the authors' policy prescriptions for today do not necessarily follow from the "founding principles" they discern in the Founders' words. In the introductory chapter, for example, Erler discusses Thomas Jefferson's opinions on the character of likely immigrants and what character would be necessary to make good citizens. According to Erler, Jefferson expressed concern that "most of the immigrants to America would be refugees from absolute monarchies" who would not have the habits necessary to make good American citizens because "the habits and manners of freedom are not so easily acquired." If one believes that this principle should determine which foreigners are permitted to immigrate, then presumably the United States should favor those immigrants who come from more democratic societies, and disfavor those from totalitarian regimes. But no one today would argue that Cuba is more democratic than Mexico—why then, do the book's authors apparently favor an immigration policy that gives automatic amnesty to almost all Cubans who arrive in the United States, while making it almost impossible for citizens of the far more democratic Mexico to immigrate legally?

Erler's second essay in the book focuses mostly on the birthright citizenship issue. Birthright citizenship is of intense interest to many conservatives and libertarians—but understanding whether the Fourteenth Amendment demands

that the children of illegal migrants are “natural born” U.S. citizens is not really a matter of the Founders’ intent, but rather a matter of the intent of those who ratified the Fourteenth Amendment. Erler wants to argue that these ratifiers would have denied birthright citizenship to the children of illegal immigrants. Here, however, he fails to acknowledge the key legislative sources that contradict his view. The debates in the record show that the ratifiers of the Fourteenth Amendment intended only to exclude from birthright citizenship three groups—the children of diplomats who held diplomatic immunity; Native Americans who were thought to be members of sovereign Indian nations and thus immune from U.S. civil and criminal law; and children born to an invading military force, which would be immune from U.S. civil and criminal laws under the laws of war. The ratifiers knew about the children of illegal immigrants, and certainly could have excluded them—many African Americans who were clearly granted birthright citizenship by the Fourteenth Amendment were themselves the children of African slaves who had been smuggled into the United States in violation of laws barring the importation of slaves. The ratifiers of the Fourteenth Amendment arguably did not have the intent that Erler wishes to attribute to them.

In the book’s third essay, co-author Thomas G. West returns to Jefferson’s somewhat contradictory views on immigrants, and goes on to conclude Jefferson would not approve of current immigration policy because recent immigrants, and especially “Hispanic immigrants,” are not “behaving themselves as well as the rest of America.” West does not provide much support for this assertion, and fails to mention recent and well-publicized contradictory studies suggesting that immigrants have lower crime rates than native-born Americans, are less likely to use drugs, do not drop out of military training as often, and are more likely to be employed. He also uses data that aggregates all Hispanics—both citizens and non-citizens, recent arrivals and those in the United States since the Founding—to infer that Hispanic *immigrants* are badly behaved as a race, and therefore should be barred from immigrating. Yet it is hard to be sure without further discussion that Hispanic immigrants as a group share the same characteristics as all Hispanics in the United States, and there are other explanations besides bad character for some of his “shocking” statistics. (Scholars have pointed out, for example, that a higher out-of-wedlock birth rate among Hispanic women is in part due to the fact that Hispanic women are much less likely than white women to seek an abortion for an unwanted pregnancy.) Without further details and discussion of the sources of West’s assertions, it is hard to accept that race alone reflects one’s statistical propensity to be a bad citizen, and thus that immigration policies should be race-based, as West apparently argues. This slip-up also undermines the book’s later argument that it is not other races that restrictionists fear but newcomers of bad character. The essay is also inartfully edited, such that it is often hard for a reader to follow the argument. West jumps around from topic to topic, concluding in the end that “the immigration question is inseparable from the question of the future of the administrative state, the future of modern liberalism.” With dire predictions about the death of the American Republic, West demands “an indefinite moratorium on almost all immigration” and increased

enforcement and employer sanctions. He has no explanation for how this view reconciles with the Founders’ grievance—found in the Declaration of Independence—against King George’s failure to pass laws “to encourage [foreigners’] Migrations hither.” Like the Founders who signed the Declaration, many of today’s conservatives and libertarians see immigration as a source of America’s strength, not a liability.

Early in the book, Erler asserts that American policymakers “no longer believe that there are regime principles or that questions of merit and character have anything to do with immigration.” While this statement is easily refuted by a passing glance at the numerous grounds of character-based inadmissibility and deportability found in the U.S. immigration code, Erler argues that in contrast to today’s policymakers, the Founders believed in a principle of race-blind equality in immigration matters. The last essay, by John Marini, argues that Progressive-era philosophies have embedded race and class as fundamental distinctions in modern American society, such that a return to alleged Founding principles of race-blind equality is impossible, and those who would base immigration policies on equality principles will inevitably be deemed racist by most listeners. Marini makes this argument in an attempt to justify modern restrictionist immigration policies, but his essay will not reassure those today who seek to avoid being labeled “racist” for making restrictive immigration arguments. While Marini tries to provide intellectual support for restrictionists by asserting that their arguments find support in equality principles of the Founding, his argument is so complex and cautious that only a dedicated and patient reader will appreciate its logic. (One must also be willing to ignore the numerous provisions of current immigration law that contradict his underlying thesis.) Marini’s detailed explication of Progressive-era restrictionist immigration policies will likely cause most readers to hear the echoes of Progressive-era racist restrictionists in modern restrictionists—and, as Marini implies, they cannot help but do this, because they are the product of the group-based politics of today.

Like Erler, Marini and West err in repeatedly claiming that today’s immigrants are highly dependent on welfare benefits, and that immigrants do not seek to become citizens. They are apparently unfamiliar with the 1996 immigration reform laws, which eliminated welfare benefits for most immigrants, required immigrants’ sponsors to reimburse the government for benefits given to the immigrants, and made severe distinctions between citizens and non-citizens in many other areas of political and social life. In the past ten years, laws giving preferences to citizens over non-citizens have proliferated. At the same time, increasingly harsh immigration laws—mandatory deportation, for example, for very minor offenses—have made life in the United States increasingly uncertain even for legal immigrants. Immigrants have responded by naturalizing at record rates. Thus, the authors’ concerns with the “devaluing” of U.S. citizenship seem misplaced—there may be some evidence that “natural born” citizens are not aware of the value of American citizenship, but immigrants surely are.

One of the characteristics of the current immigration debate has been that many conservatives and libertarians disagree on fundamentals. This book will do little to bridge the

gap. If the authors had simply tried to discuss the Founders' statements on immigration and citizenship, they might have met the objective promised by the title. Instead, the authors nearly always conclude that the Founders' views would support today's restrictionist views. The reality of the historical record is much more ambiguous. For a more balanced and intellectual treatment of the contradictions in the Founders' views, conservatives and libertarians would be better served by reading Rogers Smith's *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*.

In a scholarly book, one would expect both sides of the argument to be presented, and a logical and factually supported argument made why one side is more persuasive than the other. Such is the essence of an informed debate. Throughout this volume, however, the authors quote selectively from only one side, and seem ignorant of current immigration law. They neglect almost entirely the reasoned scholarship on the other side. Ultimately, they fail to add to "an open and honest public debate on immigration." This book will convince only those who are already in accord with the authors' views, or those who fail to appreciate that the lack of citations to the authors' more controversial statements reflects their lack of validity, not their general acceptance.



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