The New York Times https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html

GUEST ESSAY

Trump Might Have a Case on Birthright Citizenship

Feb. 15, 2025

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On his first day in office, President Trump issued an executive order that purports to end birthright citizenship for certain children. It does so despite Section 1 of the 14th Amendment, which declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

The central question raised by Mr. Trump's order is what it means to be "subject to the jurisdiction" of the United States. The answer most legal observers give is that it includes virtually anyone born on American soil, including those whom the order is meant to exclude, namely children born to parents in the country

illegally or temporarily. Indeed, on Monday, the American Bar Association described the order as an attack on a "constitutionally protected" right. Federal judges in four states have enjoined the order, with one claiming that it "conflicts with the plain language of the 14th Amendment."

Not necessarily.

The Supreme Court has held, in the 1898 case United States v. Wong Kim Ark, that children born here to permanent residents are citizens. But it has never squarely held that children born to those illegally present are citizens. When the court addresses that question — which it almost certainly must — it should consider the 14th Amendment's original purpose and the common-law principle of "jus soli," or birthright citizenship, which informed the original public meaning of the text. Both relate to the idea of social compact and contradict today's general assumption that the common-law principle depends solely upon place of birth.

The 14th Amendment's Roots

At the time of its adoption, the publicly known purpose of the 14th Amendment was to extend the benefits of the social compact — including, specifically, the privileges and immunities of citizenship — to African Americans newly freed after the Civil War. (Due in large part to a series of egregious Supreme Court rulings gutting the original letter and spirit of the amendment, that promise of equal citizenship was largely denied for decades.)

Abraham Lincoln's administration, rejecting the reasoning of Dred Scott v. Sandford, had already acknowledged that free African Americans were citizens. As Edward Bates, Lincoln's first attorney general, wrote in 1862, in an official opinion, "The Constitution uses the word 'citizen' only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other."

The equal protection clause, also found in Section 1 of the amendment, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause was based on the same allegiance-for-protection theory enunciated by Bates.

According to this view, individuals give up their personal executive power to enforce their inalienable natural rights and agree instead to obey the laws of civil society — to pledge, if you will, allegiance — in exchange for civil society's protection of those rights. As William Blackstone, an English authority widely read and respected by the founders, wrote, "Allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully."

Both the Lincoln administration and the Congress that proposed the 14th Amendment held this allegiance-for-protection view, with this difference: In England, the allegiance expected of a subject was obedience to the sovereign monarch in return for his protection. In the American Republic, where the people are sovereign, the allegiance expected of a citizen was obedience to the laws.

Who Bears Allegiance?

It is widely agreed that "subject to the jurisdiction" excluded the children of diplomats, Native Americans subject and with allegiance to tribal authority (this changed with the Indian Citizenship Act of 1924) and members of invading armies. The common-law principle of jus soli also excluded these groups. The crucial question is, why?

Many scholars take the view that "subject to the jurisdiction" meant simply subject to the power of the U.S. government, its army, its courts and its laws. This view, however, cannot explain several anomalies, including the status of children born to citizens residing within enemy-occupied territory, who appear to have been considered citizens if their parents remained loyal (the Supreme

Court outlined this scenario in the 1830 case Inglis v. Trustees of Sailor's Snug Harbor). And it cannot explain the status of children born to foreigners on foreign public vessels in U.S. waters, who were not considered citizens.

According to the allegiance-for-protection theory articulated in the Bates opinion, none of the excluded groups was "subject to the jurisdiction" of the United States because none of the members of these groups had entered into the social compact with the people of the United States and none gave allegiance to the United States.

That still leaves this question: Can a person within the territorial boundaries of a state enter into the social compact and give allegiance without being a citizen?

Yes. Calvin's Case was a 1608 judicial decision about who were birthright subjects of the English monarch, written by Edward Coke, one of the judges in the case and a legal thinker revered by the framers of the Constitution. It explained that foreigners who came in "amity" — friendship — gave a "local" allegiance to the sovereign and an "obedience" to the laws while residing in his realm such that they were entitled to the protection and benefit of those laws. Their children were therefore born under the protection of the sovereign and had to, in their own turn, give allegiance to the sovereign. They were natural-born subjects even though their parents were not citizens. The decision makes clear that both the parents' allegiance and the child's birthplace were relevant.

In Wong Kim Ark, the leading case on birthright citizenship, the Supreme Court explained that "jurisdiction" referred to being born "within the allegiance" of the sovereign. The court held that a child born of parents with a "permanent domicile and residence in the United States" was a birthright citizen. Wong Kim Ark's parents, as persons who came in amity, had entered into the social compact and were entitled to all the benefits of that compact, including not only

the protection of the laws but also the benefits of citizenship for their children. Under the common law, the court observed, “such allegiance and protection were mutual.”

This is also why, as prominent editions of Blackstone’s commentaries explained, invading armies were excluded. “It is not cœlum nec solum” — it is neither the climate nor the soil — that makes a natural-born subject, “but their being born within the allegiance and under the protection of the king.”

Have Unlawful Entrants Given Allegiance?

Which brings us to the children of people who are present in the United States illegally. Has a citizen of another country who violated the laws of this country to gain entry and unlawfully remain here pledged obedience to the laws in exchange for the protection and benefit of those laws?

Clearly, the parents are not enemies in the sense of an invading army, but they did not come in amity. They gave no obedience or allegiance to the country when they entered — one cannot give allegiance and promise to be bound by the laws through an act of defiance of those laws. Such persons can even be summarily removed from the country without judicial procedures of the sort that would protect citizens. If the allegiance-for-protection view informed the original meaning of the text, then they and their children are therefore not under the protection or “subject to the jurisdiction” of the nation in the relevant sense.

The executive order’s exclusion of children born to mothers who are “lawful but temporary” residents is a more complicated question not addressed here. And whether Congress ought to grant naturalized citizenship to children born to those illegally present in the United States is a policy issue distinct from whether the 14th Amendment has already done so. The Supreme Court has, in a footnote, presumed that the 14th Amendment’s jurisdictional phrase applied equally to people who are here illegally, but the issue was neither briefed nor argued in that case; nor was it material to its outcome.

When they finally consider this question, the justices will find that the case for Mr. Trump's order is stronger than his critics realize.

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