The Breakfast Club

Constitutional Minute for 25 January 2025

"I Will End Birthright Citizenship"

"'*I will end birthright citizenship* on my first day in office" proclaimed Donald Trump in a televised interview with NBC News Anchor Kristen Welker on December 8, 2024.

Most of us who understand the U.S. Constitution knew immediately that there were at least two problems with Trump's promise: 1) that modifying the interpretation of birthright citizenship would require the aid of the Supreme Court, and 2) if #1 did not work to his advantage, modifying the wording of the 14th Amendment itself would require an amendment to the amendment, a virtual impossibility in today's hyper-partisan climate.

When the Executive Order was published it confirmed that Trump did not intend to end the concept of birthright citizenship, per se, the children born in the U.S. of U.S. citizens would still automatically be citizens, his focus was exclusively on ending the practice of expectant mothers entering the U.S., whether legally or illegally, for the specific purpose of having their baby achieve "automatic" U.S. citizenship.

Worldwide, the anchor baby "industry" (if it can be called that) was estimated to rake in $277 Million in 2024.[1] Most expectant mothers understandably head to the United States. "In 2005, Ireland amended its constitution to become the *last country in Europe* to abolish unconditional jus soli citizenship, as a direct result of concerns over birth tourism."[2] (emphasis added)

Now that the Attorneys General of 23 states, plus some municipalities have filed suit against President Trump's Executive Order and at least one Seattle, Washington federal judge has ordered a temporary restraining order against enforcement, it is time we examine the issue.

I'll begin by repeating the contents of Trump's short EO:

> "**PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP**
>
> EXECUTIVE ORDER
>
> January 20, 2025

[1] See https://www.coherentmarketinsights.com/industry-reports/birth-tourism-market.

[2] Wikipedia contributors, "Anchor baby," *Wikipedia, The Free Encyclopedia,* https://en.wikipedia.org/w/index.php?title=Anchor_baby&oldid=1265662301 (accessed January 24, 2025).

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. The privilege of United States citizenship is a priceless and profound gift. The Fourteenth Amendment states: "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." That provision rightly repudiated the Supreme Court of the United States's shameful decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which misinterpreted the Constitution as permanently excluding people of African descent from eligibility for United States citizenship solely based on their race.

But the Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the United States. The Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not "subject to the jurisdiction thereof." Consistent with this understanding, the Congress has further specified through legislation that "a person born in the United States, and subject to the jurisdiction thereof" is a national and citizen of the United States at birth, 8 U.S.C. 1401, generally mirroring the Fourteenth Amendment's text.

Among the categories of individuals born in the United States and not subject to the jurisdiction thereof, the privilege of United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.

Sec. 2. Policy. (a) It is the policy of the United States that no department or agency of the United States government shall issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship, to persons: (1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth.

(b) Subsection (a) of this section shall apply only to persons who are born within the United States after 30 days from the date of this order.

(c) Nothing in this order shall be construed to affect the entitlement of other individuals, including children of lawful permanent residents, to obtain documentation of their United States citizenship.

Sec. 3. Enforcement. (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Commissioner of Social Security shall take all appropriate measures to ensure that the regulations and policies of their respective departments and agencies are consistent with this order, and that no officers, employees, or agents of their respective departments and agencies act, or forbear from acting, in any manner inconsistent with this order.

(b) The heads of all executive departments and agencies shall issue public guidance within 30 days of the date of this order regarding this order's implementation with respect to their operations and activities.

Sec. 4. Definitions. As used in this order:

(a) "Mother" means the immediate female biological progenitor.

(b) "Father" means the immediate male biological progenitor.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,

January 20, 2025."

All the hoopla is, of course, over these words found in Section 1 of the Fourteenth Amendment:

> "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."[3]

But before the 14th Amendment was proposed by Congress and ratified by the states, there came the Civil Rights Act of 1866, passed at the first session of the Thirty-ninth Congress on April 9, 1866, which began with these words:

> "Be it enacted… that all persons born in the United States, *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States; (emphasis added)

Notice the difference in wording: in 1866, the phrase was "*and not subject to any foreign power."* When the 14th Amendment was passed less than two years later -- *by the same Congress!* -- the phrase had changed to "and subject to the jurisdiction thereof."

The difference is not insignificant. Question: Is a visitor to our country, whether here legally or illegally, still subject in any way to the jurisdiction of his former country? Could the government of Mexico, learning that a Mexican criminal had fled to the U.S., legally file for extradition of that person? Of course; the reason Mexico can do this is that the person remains, to some extent, still under the jurisdiction of his native country. We'll revisit this question later.

Key features of Trump's EO include these statements:

1. "[T]he Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the United States."
2. "The Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not "subject to the jurisdiction thereof."

Both statements are correct as stated, however, as the saying goes: "It's complicated. There is wide disagreement as to the meaning of the phrase; and that is the crux of the problem.

8 USC §1401 lists eight different circumstances under which a person can be a U.S. citizen at birth, and none of them directly address the issue of babies born to mothers who are in the U.S. unlawfully or temporarily. The question turns on the meaning of "subject to the

[3] U.S. Constitution, 14th Amendment, at https://constitutioncenter.org/the-constitution/full-text.

jurisdiction thereof." Because most modern commentators don't want to reveal how contested that phrase is, they will skip over it.

The Heritage Guide to the Constitution has a good discussion of this issue here. To quote Heritage: "Debate [on the phrase] has focused on three groups of persons: Native Americans, children born in the United States of foreign diplomats, and children born in the United States of unnaturalized aliens."

As regards Native Americans, "Beginning in 1870, Congress began extending offers of citizenship to various Indian tribes. Any member of a specified tribe could become an American citizen if he so desired. The Indian Citizenship Act of 1924 granted full U.S. citizenship to American Indians. 8 U.S.C. § 1401(b)."

The issue of the citizenship of U.S.-born children of foreign diplomats is little disputed. Diplomats clearly remain under the jurisdiction of their native countries' governments and are exempt from U.S. law (try giving a diplomat a ticket for illegal parking). The diplomat must even apply to have their child granted permanent residence (and thus a Green Card). Once the child reaches the age of majority, they may apply for U.S. citizenship like any other alien.

Which brings us to "the children born in the United States of unnaturalized aliens." The question divides immediately into those unnaturalized aliens in the country with permission (holding a Visa or Green Card) and those here without either.

In the case of alien parents in the United States legally, the Supreme Court precedent is *U.S. v Wong Kim Ark* (1898). Wong Kim Ark was born in San Francisco in 1873 to Chinese immigrant parents who remained subjects of the Emperor of China (i.e., they made no attempt to become naturalized U.S. citizens). In 1882, Congress passed the Chinese Exclusion Act[4] which prohibited Chinese nationals from immigrating to the U.S. for 10 years, and made Chinese immigrants already legally in the country permanent legal aliens by excluding them from ever obtaining U.S. citizenship. In 1890, at the age of 17, Wong Kim traveled to China for a temporary visit and returned the same year. Upon return, he was readmitted to the U.S. without controversy. In 1894, Kim once again visited China, returning in August of the following year. This time, however, he was denied reentry based on the charge that he was not a U.S. citizen. Why Wong Kim's was treated differently in the second re-entry when the rules remained the same was never explained in court documents. Wong Kim was eventually allowed to exit his ship and enter the U.S., resuming his job as a dishwasher but he continued to be viewed as an alien, not a citizen. Somehow, Wong Kim found the resources to sue, and the case finally reached the Supreme Court in 1897.

[4] Repealed in 1943.

> "The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "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."[5]

The 6-2 majority opinion, delivered by Associate Justice Horace Gray, contained these words:

> "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." ... The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," " faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual-as expressed in the maxim *protectio trahit subjectionem et subjectio protectionem*[6] and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity,"[7] so long as they were within the kingdom."

After an exhaustive, 54-page opinion that examined every minutiae of English common and statute law, seemingly with the sole purpose of overwhelming those vacillating on the subject with the sheer volume of words, Justice Gary answers simply: "For the reasons above stated, this court is of opinion that the question must be answered in the affirmative."

In dissent, Associate Justice Fuller proceeded to demolish the entire 54-page argument that English common law must govern in this case:

> "Obviously, where the Constitution deals with common law rights and uses common law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving as it does international relations, and political as contradistinguished from civil status, international principles must be considered, and, unless the municipal

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[5] https://supreme.justia.com/cases/federal/us/169/649/#tab-opinion-1918089

[6] "Protection draws allegiance, and allegiance draws protection."

[7] "Aliens in friendship," i.e. alien friends.

> law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction.... It is beyond dispute that the most vital constituent of the English common law rule has always been rejected in respect of citizenship of the United States."

As to the meaning of the Jurisdiction Clause, Fuller believed: "the Fourteenth Amendment prescribed the same [jurisdiction] rule as the [1866 Civil Rights] act."

Fuller concludes by stating:

> "In other words, the Fourteenth Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; *nor... does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens*...Tested by this rule, Wong Kim Arli never became and is not a citizen of the United States, and the order of the District Court should be reversed." (emphasis added)

Based on the majority opinion, Wong Kim had become a U.S. citizen at birth.

The problem of applying the holding in Wong Kim to today's immigration circumstances is that the concept of "illegal immigrant" was just coming into vogue in 1897. I could find no record of when Wong Kim's parents immigrated to America, but it was certainly before his birth in 1873. The 1882 Chinese Exclusion Act was the first ever attempt to exclude from legal immigration a particular class or group of people; previously, immigration law was nearly non-existent.

By the way, for those interested in the history of U.S. immigration policy, CATO institute provides a nice summary here.

The next case that is often cited in justifying birthright citizenship of the children of illegal immigrants is *INS v Rios-Pineda* (1985). That case dealt with whether the Attorney General's denial of a request of an illegal immigrant couple to suspend their deportation process was within the AG's discretionary authority. The Court found, unanimously, that the AG had operated within his discretion.

Unfortunately, in the Syllabus of the opinion, where the basic details of the case are described, the narrative contained these words:

> "Deportation proceedings were then instituted against respondents, who by that time had a child, *who, being born in the United States, was a United States citizen*."

This off-hand statement constitutes what is called *obiter dictum*[8] of the opinion and not the opinion itself. *Obiter dictum* is "a judge's incidental expression of opinion, not essential to the decision ***and not establishing precedent***."[9] (emphasis added)

The court had not been asked to determine the citizenship status of the child. Whoever wrote the Syllabus of the case, almost certainly one of Associate Justice Byron White's clerks, simply made the assumption that the couple's child was a citizen. In the text of the opinion itself, Justice White makes no mention of the child or the child's citizenship status.

Not knowing the distinction between the holding of an opinion and the dicta of an opinion, many now claim the pronouncement of citizenship was, in fact, the decision of the court. For example, the United States Conference of Catholic Bishops boldly declares in an article on their website:

> "In 1985, in INS v. Rios-Pineda, the Supreme Court in a unanimous decision held that the children born in the United States to unauthorized immigrants are U.S. citizens."

Unfortunately for the Bishops the Court did no such thing! Dicta are not the "holding" of the court.

But speaking of dicta, in *The Slaughterhouse Cases* of 1872, a case decided only four years after the ratification of the 14th Amendment (and twenty-six years before *Wong Kim)*, the court said:

> "The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, ***and citizens or subjects of foreign States born within the United States***."[10]

To which statement should we attach greater weight: a statement, in dicta, four years after the 14th Amendment was ratified, or a statement, again in dicta, 117 years after the Amendment was ratified that comes to a contrary conclusion? In a recent essay, Edward J. Erler is sure of the answer:

> "[t]he [1866] act was passed and the [14th] amendment proposed *by the same congress*, and it is not open to reasonable doubt that the words "subject to the

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[8] "That which is said in passing."

[9] https://www.google.com/search?client=firefox-b-1-d&q=obiter+dictum+definition.

[10] In *Wong Kim*, Justice Gray mentions *The Slaughterhouse Cases*, but completely ignores the "subjects of foreign States" discussion.

> jurisdiction thereof," in the amendment, were used as synonymous with the word 'and not subject to any foreign power,' of the act."[11] (emphasis added)

The last Supreme Court case I'll mention is *Plyler v. Doe*, 457 U.S. 202 (1982), a case asking whether children in the United States *unlawfully* were nevertheless entitled to public education. The court decided that excluding such children from public education systems violated the *Equal Protection Clause* of the Fourteenth Amendment. But the court stopped short of considering the birthright question or calling illegal immigrant children actually citizens. In a *footnote* in the majority opinion, Associate Justice Brennan observed, "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident immigrants whose entry into the United States was lawful, and resident immigrants whose entry was unlawful." Is a footnote in a decision legally binding? Glad you asked. Answer: it depends. Footnotes are considered part of the opinion and have the presumption of legal weight, but footnotes can also constitute dicta if they don't bear on the question before the court; in such cases they thus would not set precedent. The question before the court dealt with equal protection, not birthright citizenship.

The Left, knowing that their case for extending birthright citizenship to the babies of illegal immigrants is constitutionally weak but nevertheless enjoys widespread public acceptance, generally doesn't bother to quote the pesky Jurisdiction Clause. An example: "Ratified in 1868 to secure equal treatment for African Americans after the Civil War, *the Fourteenth Amendment guaranteed birthright citizenship for all persons born in the United States*."[12] (emphasis added). That statement, as you should now be able to see, is false.

Obviously, the term "illegal immigrant" today carries much more "baggage" and pejorative connotation today than earlier in our country's history, and has become very divisive. The issue of illegal immigration is complex and emotional, and birthright citizenship is one of the issue's many contours. Unrestrained illegal immigration imposes an extreme financial burden on this country; the prospect of a baby born to an unlawfully present mother automatically becoming an American citizen makes illegal immigration even more attractive, exacerbating an already challenging problem. Over the last fifty years, both parties have had the opportunity to address the birthright citizenship problem and have done nothing. It is now time to settle it, once and for all, with the President's emergency powers.

What We Can Expect Now?

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[11] Edward J. Erler, The Case Against Birthright Citizenship, The American Mind, Jan 17, 2025. Accessed 24 Jan 2025 at https://americanmind.org/salvo/the-case-against-birthright-citizenship/.

[12] https://immigrationhistory.org/timeline/

The Seattle judge immediately issued a statement that the President's EO is "blatantly unconstitutional," so we know the eventual outcome there. The Trump administration will appeal to the 9th Circuit Court of Appeals, which I predict will sustain the judge's decision, and then Trump will ask for a speedy hearing at the Supreme Court.

I don't know which way the Supreme Court is going to rule on this case *if* they decide *to* take it. Will the conservatives have the four votes necessary to hear the case? Probably, but they could also decide to leave the Left's expansive interpretation of the birthright citizenship clause intact. The conservative majority has shown a consistent respect for historical interpretation and usage of terms -- rebuking the "living constitutionalists" -- and I think the historical record supports a finding that any residual jurisdiction of a foreign power must be considered when determining birthright citizenship eligibility. I believe, with Justice Fuller, that *Wong Kim Ark* was wrongly decided, that resting the decision on English Common Law was incorrect, and perhaps more than one Justice on the current court agrees. In any case, Chief Justice Roberts will hold the wild card here; but, based on past performance (*NIFB v. Sebelius* particularly), I'm not confident he will play it correctly.

Stay tuned.

Addendum 1, 26 January 2025

To my complete surprise, less than 24 hours after publishing my Constitutional Minute last night, two more essays, here and here, were published today which completely support the points I made in the Minute:

1. That the phrase "and subject to the jurisdiction thereof" is not being correctly understood today, that those who supported the Civil Rights Act of 1866 and the 14th Amendment had a very different understanding of the phrase.
2. That the *Wong Kim Ark* decision was improperly reasoned and thus incorrectly reached, as Associate Justice Fuller stated in his dissent. It was improper for Justice Gray to base his reasoning on English Common Law. In 1776, that might have been proper, but ninety years later American and English Common law had long before parted paths.

I encourage you to read the hyperlinked essays above and this new one by John Eastman that repeats many of the arguments he made in his essay I link to in "For Further Reading."

It is encouraging to see respected scholars standing up for a new look at the issue of birthright citizenship. No one is arguing for a complete abandonment, certainly not as it applies to the children of American citizens. But the case for abandoning citizenship in the case of illegal immigrant mothers and "anchor babies" born of mothers temporarily in the country, is gaining welcome traction.

I hope to see more essays and articles on this issue in the coming weeks and months. Please read them and starting making the case for modifying the policy in the newspapers and to your friends on social media.

Stay tuned.

Addendum 2, 28 January 2025

The Birthright Citizenship issue continues to percolate, which is wonderful; the more coverage the controversy gets the more likely Americans will actually take a moment to think about it. I only hope the issue doesn't get replaced by a new "crisis du jour," causing people to put birthright citizenship on the back burner.

I want to take a moment to correct a statement I made in my original 25 January Minute. I said "modifying the interpretation of birthright citizenship would require the aid of the Supreme Court" or "an amendment to the [14th amendment."

I now see it will actually require neither.

Like many people, I've been ignoring Section Five of the 14th Amendment, which reads:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The first time such a sentence appeared in the Constitution was in the previous amendment: the 13th. Although the phrase is often criticized by originalists as an improper expansion of Congress' power, it might prove to be the one thing that leads to fixing the birthright citizenship problem without involving either the Supreme Court or Article V.

Simply stated, this clause gives Congress the constitutional authority to define the phrase in Section 1 of the Amendment anyway they want. Through simple statute law, Congress can define the phrase "*and subject to the jurisdiction thereof"* to exclude the babies of illegal immigrant or temporary resident mothers, who remain, at least in part, subject to the jurisdiction of their native countries.

If they wanted to go further and be inclusive rather than exclusive, Congress could instead extend birthright citizenship only to babies born on U.S. soil to two married U.S. citizens, or they could require at least one parent to be a citizen, whatever makes the most sense and has the greatest support among the people. I would vote for the former.

But what about the *Wong Kim Ark* decision? Since 1897, the Supreme Court's interpretation in this case has granted birthright citizenship to all babies born in the U.S. to parents here legally (and, wrongly in my view, to all here illegally as well). We can't undo the citizenship already granted, that would constitute an ex post facto law; but Section Five

of the amendment, ratified in 1868, predates *Wong Kim* and clearly gives Congress "enforcement" power over the Amendment whenever they decide to invoke it. Once the limiting statute is passed it will be the "law of the land" going forward.

Last time I checked, Republicans had majorities, if slim ones, in both chambers. Why not use those majorities to fix this?

What should you do?

Your elected Representative and Senators are eagerly waiting to hear from you on this matter. I'm certain of it.

For further reading:

The Case Against Birthright Citizenship, by Edward Erler

Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11, by John Eastman

The 14th Amendment does not confer automatic citizenship, by John Eastman

Tom Homan Is Right: Babies of Criminally-Present Aliens Are Not Citizens, by Paul Dowling

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