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Birthright Citizenship Is a Constitutional Mandate

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The U.S. Constitution, as ratified in 1789, was a flawed charter. States could arbitrarily deny residents the liberties of citizenship, as the Supreme Court held in *Dred Scott v. Sandford*(1857). The 14th Amendment, ratified in 1868, righted that wrong by elevating citizenship above the political process. And although the amendment's framers were immediately concerned with freedmen, the language they chose was much broader: "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."

For well over a century, all three branches of government have relied on a shared understanding of this provision. People born in the U.S. are citizens, regardless of the citizenship of their parents. An executive order by President Trump cannot erase the original meaning of the Constitution.

Start with the text. When the 14th Amendment was drafted, the phrase "subject to the jurisdiction thereof" had a settled meaning: It referred to a person who was subject to U.S. law. Foreigners who visit are required to follow American laws. They are, in every sense, subject to U.S. "jurisdiction," or control. An exception is the children of diplomats, who are immune from American laws. Additionally, certain Native Americans born on sovereign tribal lands were also exempted, though the Indian Citizenship Act of 1924 made them citizens by birth.

A small contingent of scholars contend that the framers of the 14th Amendment did not intend to grant citizenship to the children of foreign nationals, especially if they are in the country unlawfully. They posit that the phrase "subject to the jurisdiction" refers to people who are not subject to allegiances, or loyalties, to foreign states. Volumes have been written about why these positions are inconsistent with the 14th Amendment's original public meaning. Two historical notes will suffice.

First, in the Civil Rights Act of 1866, Congress granted citizenship to "all persons born in the United States and not subject to any foreign power." The 14th Amendment, ratified only two years later, used different language: "subject to the jurisdiction thereof." The authors were well

aware how to deny citizenship to people with foreign allegiances. Instead, they focused on a person's relationship with American law.

Second, the framers of the 14th Amendment debated the question presented by President Trump's proposal. During the ratification debates, Sen. Edgar Cowan of Pennsylvania objected to the birthright-citizenship proposal: "Is the child of a Gypsy born in Pennsylvania a citizen?" he asked. "Is it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race?" Sen. John Conness of California answered that the children of Chinese and Gypsy aliens "shall be citizens" and he was "entirely ready to accept the provision proposed in this constitutional amendment."

Judges have affirmed Conness's view consistently. In 1898 the Supreme Court adopted it in *U.S. v. Wong Kim Ark*. The justices held that the 14th Amendment "affirms the ancient and fundamental rule of citizenship by birth within the territory . . . including all children here born of resident aliens."

It is true—as critics of birthright citizenship are quick to point out—that *Wong Kim Ark* considered only the status of a child born to lawfully resident parents. Therefore, they contend, the Supreme Court has not resolved the status of a child whose parents are not in the country legally. But this distinction makes no difference. If "subject to the jurisdiction thereof" refers to aliens who are subject to U.S. laws, it does not matter if the parents are in the country legally. The reason such people are called "illegal aliens" is that they are subject to U.S. law, and not in compliance with them.

The legal arguments against birthright citizenship are inconsistent—not only with the history of the 14th Amendment, but with over a century of practice, in which all governmental branches have recognized the children of foreign nationals as citizens. More than 150 years after the amendment's ratification, this "gloss" on the Constitution cannot be trumped by disputed definitions of "jurisdiction," or with outlier statements (sometimes misconstrued) during the ratification debates. Birthright citizenship is correct as an original matter and has been reinforced by widespread agreement within the republic.

There are many constitutional questions that sharply divide conservatives and liberals. Birthright citizenship should not be one of them.

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