

Historical issues in Supreme Court argument on birthright citizenship

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On April 1, the U.S. Supreme Court heard two hours of arguments in *Trump v. Barbara* to review lower-court rulings striking down President Donald Trump's executive order to end birthright citizenship for children born to parents who are undocumented or present in the United States on temporary visas.

The case turns on the fundamental democratic advances in equality that followed the defeat of the slave owners' rebellion in 1865 in the Civil War, the Second American Revolution. Based on comments of the nine justices, most observers believe the lower court rulings will be affirmed, although no ruling is expected before June.

D. John Sauer, who as Trump's personal attorney argued for immunity in the attempted coup of January 6, 2021, defended the order as U.S. Solicitor General. Trump attended—a first for a sitting president—glaring with his arms crossed like a Mafia boss trying to intimidate a turncoat witness. He left during the hearing, after Sauer was sliced and diced, including by several of the right-wing justices.

Trump then posted, “Kangaroo court!!” and, falsely, that “We’re the only Country in the World Stupid enough to allow ‘Birthright’ Citizenship!” There are at least 30 others, including Canada and Mexico.

Birthright citizenship is guaranteed by the Citizenship Clause of the Fourteenth Amendment, ratified three years after the Civil War. It 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.”

The Citizenship Clause ingrains *jus soli* into the Constitution, that all persons born on US soil are vested with equal citizenship, in contrast to the hereditary rights of *jus sanguinis*, citizenship by blood, the reactionary conception still in use by European capitalism, Middle Eastern monarchies and much of the rest of the world to deny immigrants and their offspring rights of equal citizenship, thus creating an oppressed caste of workers for increased exploitation.

Trump's executive order is based on a novel theory that children born in the US to non-citizen parents are not subject to federal jurisdiction, an absurdity that would strip millions of their US citizenship.

The jurisdictional exception has only been applied to offspring of foreign diplomats, who inhabit a jurisdictional bubble when in the US and, prior to the Indian Citizenship Act of 1924, certain Native Americans.

Trump's crude and ignorant assertion that the Citizenship Clause protects “the babies of slaves,” but not immigrants, is based on the Supreme Court's infamous 1857 decision in *Dred Scott v. Sandford* that people of African descent imported as slaves cannot be US citizens. During the run-up to the Civil War, however, official discrimination extended to the waves of European immigrants. Representatives of the Know Nothing Party enacted state laws barring them from government employment and imposing other legal disabilities.

During the Civil War, those same immigrants, many whose families fled the defeats of the 1848 democratic revolutions in Europe, enlisted in the Union Army. One example is Patrick Henry “Paddy” O’Rourke, born in

Ireland but named after the Revolutionary War hero. Rising to the rank of colonel, he died at Gettysburg leading the 140th New York Regiment, comprised largely of immigrants, in defense of the key Union position on Little Round Top, fighting next to the 20th Maine regiment led by Joshua Chamberlain.

Given this historical background, the Supreme Court in 1898 emphatically rejected any contention that the Citizenship Clause applied only to “babies of slaves,” ruling in favor of Wong Kim Ark, who was born in San Francisco to Chinese nationals, traveled abroad and then was denied reentry to the United States.

Sauer centered his argument on the contention that non-citizen immigrants owe “allegiance” to foreign powers and are not “domiciled” in the US. Neither term is used in the Citizenship Clause, however, and both terms focus on the subjective characteristics of the parents, rather than the rights of their offspring.

“Unrestricted birthright citizenship contradicts the practice of the overwhelming majority of modern nations,” Sauer asserted. “It demeans the priceless and profound gift of American citizenship.” In other words, eliminating birthright citizenship will create a caste of resident aliens without citizenship rights.

As the senior justice, arch reactionary Clarence Thomas spoke first, mulling a question about *Dred Scott* motivating the Citizenship Clause, confirming that he will likely vote to uphold Trump's executive order.

Chief Justice Roberts spoke next, exposing the flaws in Sauer's “jurisdiction” argument. “The examples you give ... strike me as very quirky, you know, children of ambassadors, children of enemies during a hostile invasion, children on warships, and then you expand it to a whole class of illegal aliens who are here in the country. I'm not quite sure how you can get to that big group from such tiny and sort of idiosyncratic examples,” Roberts said.

Sonia Sotomayor, one of the three moderate justices, referred to the famous exchange between senators Edgar Cowan of Pennsylvania and John Conness of California during the ratification debate. She noted that “the people who opposed the amendment kept saying we can't pass it because we're making citizens of gypsies, who have no allegiance to anybody, and we're going to make citizens of Chinese people, who can't be citizens because we're not going to permit them to be citizens.”

Sotomayor asked Sauer rhetorically, “What do we do with those debates and the fact that the proponents ... said everyone who's born in the US will be citizens?”

Reactionary Justice Samuel Alito rushed to protect Sauer. “What we're dealing with here is something that was basically unknown at the time when the Fourteenth Amendment was adopted, which is illegal immigration,” Alito said, comparing undocumented people to “a microwave oven” not invented at the time criminal theft laws were enacted.

Sauer responded as if Alito were his boss, saying, “I strongly agree with the way that you framed it, that there is a general principle that's a broad

principle that's adopted in the phrase 'subject to the jurisdiction thereof.'"

Moderate Justice Elena Kagan saw that Sauer was flip-flopping. "Most of your brief is not about illegal aliens," she said. "Most of your brief is about people who are just temporarily in the country, where there was quite clearly an experience of, an understanding of, that they were going to be temporary inhabitants."

The Fourteenth Amendment refers to "jurisdiction," not "allegiance" or "domicile," Kagan added. "I appreciate that jurisdiction has many meanings, but, you know, the first meaning is, like, if you're subject to jurisdiction, you're subject to the authority of."

Neil Gorsuch, nominated during Trump's first term, cited the unrestricted immigration when the Amendment was ratified. "If somebody showed up here in 1868 and established domicile, that was perfectly fine without respect to any immigration laws," Gorsuch said. "Why wouldn't we, even if we were to apply your own test, come to the conclusion that the fact that someone might be illegal is immaterial?"

"And just to circle back to Justice Kagan's point," Gorsuch added, "it's striking that in none of the debates do we have parents discussed. The focus of the clause is on the child, not on the parents. And you don't see domicile mentioned in the debates. The absence is striking."

Justice Amy Coney Barrett, like Gorsuch appointed by Trump during his first term, pointed to the many enslaved people whose children became citizens under the Fourteenth Amendment although their parents "were brought here unlawfully, in defiance of laws forbidding the slave trade."

Sauer responded, "Even though their entry may have been unlawful, Nineteenth Century antebellum law never treated their presence as unlawful. In fact, quite the opposite. A Mississippi statute ... says slaves in Mississippi have an infeasible domicile in Mississippi. In other words, even if they run away, if they get away, Mississippi says, nope, you still live here."

Coney Barrett responded, "You would say that their lawful presence is not dictated by whether they were brought here lawfully or not, and that's different from someone who, say, crosses the border unlawfully?"

Ketanji Brown Jackson, the third moderate justice, pointed out that were birthright citizenship to depend on the parents' legal status under federal immigration law, "the Fourteenth Amendment [would] turn then ultimately on Congress's will in a way that the Framers did not intend," thus gutting constitutional protection altogether.

"What do we do with the fact," Jackson asked Sauer, "that even at times in this country where we understood that the parents were declared enemies of the United States—I'm talking about World War II, and Japanese internment babies born in that circumstance were given birthright citizenship?"

In reference to Trump's wild claims that dozens of women impregnated by individual "Chinese billionaires" visit the US to give birth so the children acquire US citizenship, so-called "birth tourism," Roberts asked Sauer whether he had "any information about how common that is or how significant a problem it is." Sauer responded, "It's a great question. No one knows for sure," triggering the following remarkable exchange.

"You do agree that that has no impact on the legal analysis before us," Roberts said. When Sauer objected, Roberts said, "It certainly wasn't a problem in the Nineteenth Century."

Sauer rejoined with hyperbole, "We're in a new world now, as Justice Alito pointed out, where 8 billion people are one plane ride away from having a child who's a US citizen." Roberts replied, "Well, it's a new world, but it's the same Constitution," causing laughter in the courtroom.

Alito jumped to Sauer's defense again, repeating a Trump and Fox News' talking point that the US has an "unusual situation here because our immigration laws have been ineffectively and, in some instances, unenthusiastically enforced by federal officials."

Brett Kavanaugh, the third Trump nominee and the last justice to speak,

confronted Sauer with the wording of the Immigration and Naturalization Acts. "By the time of the 1940 and 1952 congressional actions, where Congress repeats 'subject to the jurisdiction thereof'... one might have expected Congress to use a different phrase if it wanted to try to disagree with *Wong Kim Ark* on what the scope of birthright citizenship or the scope of citizenship should be," Kavanaugh said, signaling that he too may vote against Trump, perhaps on narrow statutory rather than broad constitutional grounds.

The argument by ACLU National Legal Director Cecillia Wang, who represents a class of children and families affected by Trump's executive order, went smoothly, suggesting sympathy among most justices.

The exception was Alito. A supposed "textualist," he found the Citizenship Clause undecipherable, telling Wang, "'subject to the jurisdiction thereof' is like the puzzle wrapped in an enigma wrapped in a mystery."

"A boy is born here to an Iranian father who has entered the country illegally," Alito continued. "That boy is automatically an Iranian national at birth, and he has a duty to provide military service to the Iranian government. Is he not subject to any foreign power?" Alito asked.

Wang responded, "Again, Justice Alito, that would have meant that the children of Irish, Italian, and other immigrants, to which *Wong Kim Ark* refers ... would not have been citizens either because, if the only test is whether that US-born child is considered a citizen by another country under their *jus sanguinis* laws, then no foreign national's children would be included in citizenship."

Wang ended her argument with a ringing endorsement of the democratic principles at stake, explaining that the Citizenship Clause's framers rejected concerns that the offspring of immigrants "characterized as invaders, trespassers, and-law breakers" will become birthright citizens "without regard to parentage."

Wang pointed out that when the Fourteenth Amendment was drafted, "there had just been 15 or 20 years of unprecedented immigration from Ireland," and in response "the Know Nothing Party was dominant in the 1850s, just a decade earlier, and they were vehemently opposed to Irish immigration.

"Contrary to the government's arguments now," Wang concluded, the framers of the Citizenship Clause "had an intuition that was consistent with the founding aversion to inherited rights and disabilities."

The written decision is expected before the July 4 holiday.



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