Trump's attack on birthright citizenship: Anatomy of an anti-democratic conspiracy

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Plans by the Trump administration and its allies in the legislative and judicial branches to eliminate birthright citizenship amount to a conspiracy against the democratic rights of the entire population, immigrant and non-immigrant alike. Not only would abolishing birthright citizenship be an extra-legal circumvention of the constitutional amendment process, it would strip millions of children of the protection of the Constitution and create an underclass of stateless minors.

Eliminating birthright citizenship would produce harrowing scenes without historical precedent. If applied retroactively, millions of people, from small children to the elderly, would be stripped of the rights to which they were entitled throughout their lives. The thousands of US-born schoolchildren who live with their parents in Mexico and who cross the border into the US every day would be turned away from their home country. Individuals who voted or used social programs would perhaps be subject to criminal prosecution or even removal from the country.

As great as this danger is on its own, the devastating implications of ending birthright citizenship go far beyond the undocumented population. Abolishing birthright citizenship would mark a qualitative new step in a legal counterrevolution and would fundamentally undermine a central revolutionary principle enshrined through the American Revolution and Civil War by arrogating to the federal government the power to determine who deserves the protection of citizenship and who does not. Once the capitalist state assumes this power, there is no reason to believe that it will stop with recent immigrants.

The argument made by opponents of birthright citizenship are not legally legitimate. Nor are they original, rehashing the counterrevolutionary arguments that were once used to defend slavery. They are yet another expression of the oligarchic character of the contemporary American political establishment.

In a December *Meet the Press* interview, Trump said he would "absolutely" end birthright citizenship, which he called "ridiculous," before lyingly adding, "Do you know if somebody sets a foot, just a foot, one foot, you don't need two, on our land, 'Congratulations you are now a citizen of the United States of America.'"

Trump insinuated that his administration would abolish birthright citizenship by executive order: "Well, we're going to have to get it changed. We'll maybe have to go back to the people. But we have to end it. We're the only country that has it, you know." Trump's threat to "go back to the people" might imply his administration is considering announcing a plebiscite to amend the constitution, an extra-legal measure often employed by Hitler to present his dictatorial maneuvers as having popular support. Because birthright citizenship is enshrined in the Fourteenth Amendment, the only lawful way to alter that provision is by amending the Constitution again, a process that would require a 2/3 vote in each house of Congress and the support of 3/4 of the 50 state legislatures or state ratifying conventions.

Nevertheless, Trump may also try to effectively end birthright citizenship by technical administrative maneuver, ordering his State Department and Social Security Administration to cease delivering passports and social security cards to the children of undocumented parents. It is even possible that Republican state and local officials will begin denying birth certificates to children born to parents who cannot prove their citizenship.

Efforts to end birthright citizenship are not new, but they have generally remained on the fringes. As Garrett Epps explains in his 2010 article *The Citizenship Clause: A "Legislative History,"* in 2010, an attorney with the Claremont Institute Center for Constitutional Jurisprudence named John Eastman served as counsel of record on an *amicus curia* brief filed with the US Supreme Court as it considered *Hamdi v. Rumsfeld*. The brief resuscitated many extreme right-wing arguments against birthright citizenship.

In *Hamdi*, the Supreme Court considered whether a Louisiana-born US citizen detained indefinitely as an "enemy combatant" during the George W. Bush administration's invasion of Afghanistan could sue for his release by writ of habeas corpus. The court held that the executive branch could not indefinitely detain a US citizen without due process.

In his brief, Eastman had argued that Hamdi was not even a citizen: "Mere birth to foreign nationals who happen to be visiting the United States at the time, as was the case of Hamdi, is not sufficient for constitutionally-compelled citizenship." Eastman, who is a former law clerk of Justice Clarence Thomas, became Trump's chief legal adviser during the 2020-21 effort to steal the 2020 election and conduct a coup to prevent the certification of the Electoral College. He presently faces felony prosecution in Nevada and Georgia. Eastman's prominence in the Trump cabal shows the reactionary pseudo-legal arguments are very much alive.

In June 2024, Republican Senators Marsha Blackburn (TN), Ted Cruz (TX) and now-Vice President Elect JD Vance (OH) introduced the "Constitutional Citizenship Clarification Act of 2024" which merits quoting at length and then breaking down:

> (1) the right of birthright citizenship, established by section 1 of the 14th Amendment to the Constitution of the United States, is rooted in the common law doctrine of jus soli and limited by the principle that it is not "the soil, but ligeantia [allegiance] and obedientia [obedience, submission] that make the subject born" a citizen;
>
> (2) the Supreme Court of the United States has long recognized that, under the principle of allegiance and obedience, the children of foreign diplomats or enemy troops born on United States soil are not entitled to birthright citizenship; and
>
> (3) under that same principle, the children of foreign spies, saboteurs, terrorists, or other hostile actors, as well as the children of illegal aliens, should not be entitled to birthright citizenship.

This language reveals that the ultimate target of the attack on birthright citizenship goes beyond the millions of children of undocumented parents—as serious a matter as this is on its own. By making citizenship dependent on allegiance and submission to the government, Trump and his allies are attempting to fundamentally alter the relationship between the government and the population by granting the executive branch the power to strip citizenship (and all of the democratic protections attendant to it) of those who fail to submit to the president or federal government.

The first section of the "Constitutional Citizenship Clarification Act" argues that the "common law doctrine of *jus soli*" is limited by the "principle" that "it is 'not the soil, but *ligeantia* and *obedientia* that make the subject born' a citizen."

The quotation in the text is from Calvin's Case, a 1608 decision of the English Court of the Exchequer Chamber holding that a child born in Scotland after the 1603 union with Britain was an English subject entitled to protection of English law. Calvin's Case became important in the United States, where it was in part relied upon for the new world, democratic principle of *jus soli*, that citizenship is available based on place of birth and not based on race or bloodline (*jus sanguinis*). The holding in Calvin's Case was that "whosoever is born within the fee of England, though it be another kingdom, was a natural-born subject." [1]

Asserting the conceptions of "allegiance" and "obedience," elements of the 1608 decision in Calvin's Case, in order to limit citizenship in the United States today is to apply monarchical conceptions of citizenship to the post-revolutionary democratic system. To the extent this argument remained in force after the American Revolution, it was foreclosed by ratification of the Fourteenth Amendment in 1868 in the aftermath of the Civil War, which concretized birthright citizenship in the US by extending it to the children of freed slaves and guaranteeing it for the children of immigrants.

Even within the context of the English monarchy, such statements as those emerging out of Calvin's Case were moderated substantially over the course of the rest of the 1600s, which saw the rise of Parliament and the establishment of a "constitutional monarchy" in the aftermath of the English Civil War of 1641–49 and the deposition of King James II in 1688. This change was motivated in no small part by the fact that subsequent to Calvin's Case the English set a precedent by severing Charles I's head.

The American Revolution brought into being a new relationship between the governed and the government, one where rights are not made available by a king on condition of obedience, but where "all men are created equal" and where "Governments are instituted among Men, deriving their just powers from the consent of the governed," in the immortal words of the Declaration of Independence. The democratic system of government established in the revolution was one in which people were not vassals who owed homage to their lords. Moreover, the American revolutionaries also insisted on the democratic principle that children could not be held accountable for crimes of their parents, including the most serious crime addressed in the Constitution: treason. Article III, Section 3, Clause 2 of the Constitution establishes that "No Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained."

The anti-democratic implications of the limitation of birthright citizenship by obedience to the state are vast. First, to whom or what entity do those seeking to defend their citizenship owe allegiance and loyalty? To the Constitution? The federal government? The president? More importantly, the act would seemingly also give the executive branch the power to denaturalize citizens based on their political views. If Congress or the president can strip citizenship from those born in the US to undocumented parents, why not strip citizenship of US-born individuals who make statements that indicate "disloyalty" or a lack of submission to government policies or particular government officials?

The argument of opponents of birthright citizenship is based on a demagogic warping of the revolutionary conception that government rests on the "consent of the governed." According to Eastman and others, immigrants present in the United States unlawfully are present without the consent of the American political community, and therefore cannot claim protection of the Fourteenth Amendment. Because immigrants are present without papers, it matters not how close their connections are to their home communities in the United States because by their very unlawful presence they have placed themselves outside of the political community and beyond the protection of the laws and the Constitution.

This argument, which overlaps with the Nazi conception of the *Volksgemeinschaft*, is based on an ahistorical reading of the birthright citizenship provision of the Fourteenth Amendment, which 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."

Not only does this argument ignore the fact that the bulk of the democratic protections enumerated in the Bill of Rights refers not to "citizens" but to "the people," it is also based on the same line of argumentation made by those who insisted that blacks were not citizens but chattel property.

In the Antebellum period, as slavery came under increasing political attack in the North, as Professor Epps explains, "pro-slavery jurists" began "to construct an alternative model of citizenship that could exclude American-born black people on the ground that the polity did not 'consent' to their membership." [3] Epps quotes James Kettner's 1978 book *The Development of American Citizenship*, which explains that before 1820, "Americans merely continued to assume that 'birth within the allegiance' conferred citizenship and its accompanying rights." [4] [5]

Epps writes that the "consent" argument was "advanced by state courts and lawyers anxious to justify and legalize the removal and exclusion of Native Americans and the permanent subordination of slaves and free blacks. That effort at doctrinal change bore fruit in the Supreme Court's decision in *Dred Scott v. Sandford*, a decision that was seen as extreme at the time and takes little account of the weight of legal authority that favored birthright citizenship." [6]

In *Dred Scott*, Chief Justice Roger B. Taney authored the most reactionary decision possible, holding that Scott was not a citizen and that therefore the federal courts lacked jurisdiction to hear his argument that he became free when taken to a free state. Taney's rationale was that individuals of African descent were not citizens because whites had not consented to their presence in the political community. Taney acknowledged that the Declaration of Independence held that "all men are created equal" and that the government derives its authority from "the consent of the governed," but he claimed that the signatories of the Declaration of Independence and framers of the Constitution:

> knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection. [7]

Taney and the majority struck down the Missouri Compromise of 1820 as unconstitutional, arguing that Congress could not violate *slaveowners'*

right to property by restricting slavery in any part of the country, including north of Parallel 36°30?. The decision raised the possibility of the expansion of slavery across the entire country (and western territories) and met with widespread popular revulsion across the North. In the aftermath of the decision, Abraham Lincoln responded by advancing an interesting argument as to the decision's legal legitimacy.

Responding to Stephen A. Douglas' claim that Lincoln and Republicans were urging disobedience with *Dred Scott*, Lincoln said:

> If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent. But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.[8]

Though couched in moderate language, this argument—that the Supreme Court's *Dred Scott* decision lacked legitimacy because it was produced by an illegitimate partisan court and lacked legitimacy in the eyes of the population—had a revolutionary kernel. The basic issue, which would emerge more consciously to the fore during the Civil War itself, was that it could not be simultaneously true that "all men are created equal"—the premise upon which Lincoln believed the entire legal edifice of American society was based—and that an entire segment of the population were not worthy of citizenship simply because of their ancestry.

In his article, Professor Epps quotes from numerous pamphlets and statements by revolutionary opponents of *Dred Scott.* For example, Epps cites the 1862 opinion of Lincoln's then-Attorney General Edward Bates, who was asked by Treasury Secretary Salmon P. Chase to answer the question whether men of African descent were "citizens" who were therefore statutorily able to command American ships during the Civil War. Bates answered, "yes."

> As far as I know, Mr. Secretary, you and I have no better title to the citizenship which we enjoy than "the accident of birth"—the fact that we happened to be born in the United States. And our Constitution, in speaking of *natural-born citizens*, uses no affirmative language to make them such, but only recognizes and reaffirms the universal principle, common to all nations and as old as political society, that the people born in a country do constitute the nation, and, as individuals, are *natural* members of the body politic… [9]

Bates rejected the rule from *Dred Scott* holding that the children of slaves were not citizens, explaining that "It is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in the parents. It is always either born with him or given to him directly by law." [10]

Alongside the Thirteenth Amendment banning slavery and Fifteenth Amendment guaranteeing voting rights, the three amendments are known together as the "Civil War Amendments" because they enshrined in law the rights won through four years of revolutionary struggle. The Fourteenth Amendment established that citizenship was *national* and universal. As Stanford University historian Richard White explains:

> The broad principles of the Fourteenth Amendment were clear. The Republicans sought to abrogate judicial interpretations of the Constitution that, in the name of federalism, had limited the extension of a uniform set of rights applicable to all citizens everywhere in the Union. Congress intended the new amendment to extend the guarantees of the Bill of Rights so that they protected citizens against actions by the state as well as by the federal government … The Republicans desired a national citizenship with uniform rights. Ultimately the amendment was Lincolnian: it sought, as had Lincoln, to make the sentiments of the Declaration of Independence the guiding light of the republic. It enshrined in the Constitution broad principles of equality, the rights of citizens, and principles of natural rights prominent in the Declaration of Independence… [11]

Opponents of birthright citizenship are forced to argue that the Fourteenth Amendment did not do away with the reactionary principles underlying the *Dred Scott* decision entirely, it merely held that people of *African descent* who were born in the US are citizens. They argue that unlike freed slaves, undocumented people are not "subject to the jurisdiction of" the United States and are therefore excluded from the Fourteenth Amendment's statement that "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States."

But this term was intended by the amendment's proponents to exclude from birthright citizenship the children of diplomats who were granted immunity from US law and therefore were plainly not "subject to the jurisdiction" of the United States. The second category of individuals to whom this provision applied were Native Americans, whose tribal independence was formally recognized by federal law, which at least on paper required US citizens to obtain passports before traveling into tribal jurisdiction.

The radical supporters of the Amendment considered precisely the question of the children of non-citizen parents during the contemporaneous Senate debate on the Civil Rights Act, authored by Senator Lyman Trumbull. An opponent of the bill, Senator Edgar Cowan of Pennsylvania, asked Trumbull whether language in the Civil Rights Act granting birthright citizenship except to those "subject to any foreign power" would naturalize "the children of Chinese and Gypsies born in this country," Trumbull replied: "Undoubtedly." [12]

In any event, the more limited grant of birthright citizenship settled upon by Congress in the Civil Rights Act (not "subject to any foreign power") was supplanted by the language of the Fourteenth Amendment ("not subject to the jurisdiction") when the latter was ratified by three-quarters of the states in July 1868.

The critical legal breakthrough made by the Fourteenth Amendment's grant of birthright citizenship was the recognition of a national basis of citizenship. Once and for all, the Amendment clarified that no state nor other institution of government—including the Supreme Court—could exclude such a broad class of people from citizenship. In this way the Fourteenth Amendment unquestionably placed the democratic principles of *jus soli* on an egalitarian basis.

The most substantial effort after the Civil War to restrict the birthright citizenship language of the Fourteenth Amendment came during the early years of Chinese Exclusion, when Congress began passing a series of increasingly restrictive laws denying Chinese laborers the ability to enter

the United States.

In 1894, a young man named Wong Kim Ark, who had been born to Chinese parents in San Francisco, was denied entry to the United States after returning from a visit to family in China and detained on a steamship off the coast of San Francisco for five months.

The Supreme Court ultimately ruled in Wong Kim Ark's favor, holding that no act of Congress could deny him entry to the United States because the Fourteenth Amendment guaranteed him birthright citizenship regardless of his race and parents' citizenship status. The Court specifically rejected the argument that his parents were not "subject to the jurisdiction" of the United States, holding:

> The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. [13]

Given that the court that handed down this decision was the same that had endorsed the racial segregationist principle of "separate but equal" two years earlier in *Plessy v. Ferguson*, the outcome in *Wong Kim Ark* should have put any legal question to bed. Today's opponents of birthright citizenship seek to avoid the application of *Wong Kim Ark* by claiming that decision did not apply to "undocumented" people, and also by adopting another argument from the period of Chinese Exclusion, asserting that an immigrant "invasion" is underway, which, according to their theory, means the children of undocumented parents are "enemies" who are still not "subject to the jurisdiction" of the United States.

The "invasion" argument was recently promoted by Judge James Ho, a Trump appointee on the Fifth Circuit Court of Appeals and former clerk for Supreme Court Justice Clarence Thomas. In a November 2024 interview with *The Volokh Conspiracy*, Ho declared that "birthright citizenship obviously doesn't apply in case of war or invasion. No one to my knowledge has ever argued that the children of invading aliens are entitled to birthright citizenship. And I can't imagine what the legal argument for that would be." [14]

Ho has gone so far as to argue in a 2024 concurring opinion in the Fifth Circuit case *United States v. Abbott* that Governor Abbot of Texas has the power to declare an immigrant "invasion" on his own and take extraordinary measures, including to declare war, without Congressional authority. Ho wrote:

> A sovereign isn't a sovereign if it can't defend itself against invasion. Presidents throughout history have vigorously defended their right to protect the Nation. And the States did not forfeit this sovereign prerogative when they joined the Union. Indeed, the Constitution is even more explicit when it comes to the States. Presidents routinely insist that their power to repel invasion is implied by certain clauses. But Article I, section 10 is explicit that States have the right to "engage in War" if "actually invaded," "without the Consent of Congress." [15]

At the Republican National Convention in 2024, Trump himself claimed that immigration at the US-Mexico border marked the "greatest invasion in history," a term he repeated often on the campaign trail. Trump refers to immigrants as having "occupied" parts of America, like Springfield, Ohio and Aurora Colorado. Trump has threatened to invoke the Alien Enemies Act of 1798 and the Insurrection Act, both of which give the president extraordinary powers to detain and deport immigrants without due process.

The invocation of either law, or the allowance of state declarations of "invasion," would mean the deployment of the military on US soil to arrest, detain and deport not only immigrants, but to repress the rights of citizens as well. The Constitution prohibits the president from suspending habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." Were Trump to invoke what is known as the Constitution's "Suspension Clause," it would eliminate the jurisdiction of civilian courts over criminal trials, meaning that anyone—citizen and non-citizen alike—could be detained indefinitely by the government without trial or any right to due process. The language used by Trump and his co-conspirators in Congress and the courts is aimed at using confusion over immigration to eviscerate the rights of the entire population.

The Democratic Party has made very little of Trump's threats against birthright citizenship. In January, Biden reacted with his trademark senility: "The idea we're going to change a constitutional birthright— if you're born in the country ... you're not a citizen? What's going on?" Biden said. During the 2024 campaign, Kamala Harris and the Democratic Party echoed Trump's threats of an immigrant "invasion," touting Harris' "tough on crime" role as a "border state prosecutor."

Any native-born American worker who believes they stand to benefit from government taking the power to limit citizenship by tests of loyalty and obedience—a power based on the same arguments that were used to defend slavery—had better wake up to reality. The attack on immigrant workers would necessitate the implementation of a full-scale military dictatorship even if the attack was limited "only" to millions of children of non-citizen parents.

But the implications of Trump's attack on birthright citizenship and the Fourteenth Amendment is an attack on the entire democratic understanding of national citizenship. As Abraham Lincoln said in 1855:

> As a nation, we begin by declaring that "all men are created equal." We now practically read it "all men are created equal, except negroes." When the Know-Nothings get control, it will read "all men are created equal, except negroes, and foreigners and Catholics." When it comes to this I should prefer emigrating to some country where they make no pretense of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy. [16]

It is urgent that the entire population, immigrant and non-immigrant alike, mobilize in defense of the most basic democratic principles won through the bitter struggles of the American Revolution and Civil War.

[1] 77 Eng. Rep. at 403.

[2] Garrett Epps "The Citizenship Clause: A 'Legislative History'," American University Law Review: Vol. 60: Iss. 2, Article 2 (2010).

[3] Ibid at 372.

[4] Id. at 372.

[5] James H. Kettner, *The Development Of American Citizenship*, 1608–1870, 296–97 (1978)

[6] Epps at 373.

[7] *Scott v. Sandford*, 60 U.S. 393, 410 (1857)

[8] Speech of June 26, 1857, available at: https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000091/000000/000004/restricted/dred_scott/lincoln.htm

[9] Epps at 378.

[10] Ibid.

[11] Richard White, *The Republic for Which It Stands*, at 74 (2017).

[12] Epps at 350.

[13] *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)

[14] Josh Blackman, "An interview with Judge James C. Ho," November 11, 2024. Available at: https://reason.com/volokh/2024/11/11/an-interview-with-judge-james-c-ho/.

[15] *United States v. Abbott*, 110 F. 4th 700, 725 (5th Cir. 2024) (Ho, J., concurring).

[16] Abraham Lincoln, Letter to Joshua Speed, August 24, 1855. Available at: https://www.nps.gov/liho/learn/historyculture/knownothingparty.htm.