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BROTHERS IN LAW

Birthright citizenship: legal takeaways of mice and men and elephants and dogs

By Akhil and Vikram Amar
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(Celal Gunes/Anadolu via Getty Images)

Brothers in Law is a recurring series by brothers Akhil and Vikram Amar, with special emphasis on measuring what the Supreme Court says against what the Constitution itself says. For more content from Akhil and Vikram, please see Akhil's free weekly podcast, "America's Constitution," Vikram's regular columns on *Justia*, and Akhil's new book, *Born Equal: Remaking America's Constitution, 1840-1920*.

Elephants don't hide in mouseholes. Dogs bark when something odd is afoot. Human beings (even members of Congress, sometimes) say what they mean. These common-sense mammalian maxims inform standard legal interpretation. (The preceding links are to opinions authored by Justices Antonin Scalia and Brett Kavanaugh, and Chief Justice John Roberts, respectively.)

When we apply these old saws to the birthright-citizenship issue at the heart of *Trump v. Barbara*, in which the Trump administration contends those born in the U.S. are not automatically entitled to citizenship under the 14th Amendment, it is astonishing how many factual and legal data points of every sort pile up on one pan of the balance scale and how little sits on the other pan.

Consider English and American jurisprudence before 1866. For hundreds of years, English and American courts generally recognized that native-born babies of foreign travelers were birthright English subjects and birthright American citizens, respectively. Had the 14th Amendment's citizenship clause aimed to change this fundamental framework, we should expect to see tons of

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clear evidence of this change. Yet no textual dog barked; the amendment's text said absolutely nothing about *parental allegiance* or *parental domicile* and absolutely nothing about *mothers versus fathers*: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Had the amendment, like Trump's current attempted *Executive Order* and his main Supreme Court brief, in fact pivoted on parentage and parental domicile and parental allegiance, elephant-size questions would have arisen about which parent or parents counted as the pivot point or points, and about exactly how to implement parental-domicile and parental-allegiance requirements in the aftermath of mass emancipation and mass rebellion. (For a nice exploration of some of the many complexities of parental domicile alone, see César Cuauhtémoc García Hernández's recent *SCOTUSblog* column.)

Also, no notable person or institution in the drafting process or the ratification process – no prominent member of Congress, no major newspaper – barked to alert Americans that venerable common-law rules were being dramatically changed.

Consider next the actual practice of the Lincoln administration, which clearly acknowledged the birthright citizenship of native-born babies, whether or not these babies' parents were themselves citizens or permanent residents or even lawfully present in the United States. Had the amendment aimed to repudiate this clear Lincoln Administration policy, countless Lincoln allies in Congress would have barked their heads off. None did.

Consider next congressional practice in the years immediately after the amendment launched. Had birthright citizenship pivoted on the precise legal status of a given baby's alien parents, wouldn't Congress have focused on this pivot in judging the citizenship qualifications of would-be Congress members of alien parentage? But evidently no one in Congress did this. **No dog barked.**

Consider next executive practice in the late 19th century. Which native-born Americans were denied citizenship papers on the grounds that their parents were not Americans or that they were here only temporarily? The **Trump administration** points to only two such instances, out of the countless thousands of persons who presumably fell into this category. And in both cases, there are strong reasons to doubt Trump's take. These two cases, both from 1885, never went to court. In neither case did the executive branch squarely focus on the birthright citizenship clause. And in each case, a good argument could be made that the native baby had subsequently renounced American citizenship, having accepted foreign citizenship via the native's own post-natal actions and/or the actions of the native's lawful guardian on behalf of the native.

Consider next the judicial precedents in the late 19th century. Which native-born person was ever denied citizenship by the judiciary in this era on proto-Trumpian grounds?

Consider also judicial precedent for the entirety of the 20th and 21st century thus far. Which modern court anywhere has ever embraced Trump's understanding of the birthright citizenship clause?

Now consider executive practice throughout the entire 20th century and 21st century until the second Trump administration. Which president (including Trump in the first Trump administration!) ever took Trump's current position? As Roberts recently stressed in a related context involving Trump's unprecedented stance on **tariffs**, "the fact that no [prior] President has ever found [tax or tariff] power in IEEPA is strong evidence that it does not exist."

Finally, consider Congress between 1868 and the present moment. Which congressional statute ever said anything like Trump is now saying?

So much for roaring silences. Now let's attend to booming affirmative statements and decisive actions that proverbially speak even louder than words. Let's return, as proper originalists, to the words of the amendment itself, words that focus emphatically on the baby, not the parents. *The text speaks of "all persons born," not "all persons who give birth."* Let's fold in the clear statements and actual practices of the Lincoln administration and the centuries of common-law that preceded the amendment. Let's add the countless statements of Reconstruction Republicans on the campaign trail in 1866 and affiliated newspapers making clear the amendment's aim to citizenize all persons born on American soil and born "**under the American flag.**"

Let's now factor in – and what a wow factor it is! – the *millions* of native-born persons affirmatively

recognized as citizens post-1868 by the U.S. government, regardless of the status of their parents at the instant of their birth. Let's notice that such persons include even American-born babies of supposed enemy-alien Japanese parents who gave birth to their children in U.S. detention centers at the height of World War II. These children were emphatically treated as U.S. citizens by all relevant US officials.

Let's also note that in 1940 and 1952 Congress in a pair of **landmark enactments** squarely echoed the clear language of the 14th Amendment as definitively glossed by executive practice, judicial precedent, and popular understanding. And let's not forget the affirmative statements of every *single* notable court to rule on birthright-citizenship issues from 1868 to the present moment.

If law and facts mean anything at all – anything! – then surely the *Babara* case is easy-peasy. Countless dogs never barked over the years; elephantine problems lurk in the cracks and crevices of the Trump administration's made-up mousetrap; the plain words of the 14th Amendment and later landmark statutes mean just what they say; and the emphatic actions of all branches of the federal government for more than a century and a half roar louder than Niagara Falls.

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Cases: [Trump v. Barbara \(Birthright Citizenship\)](#)

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