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BROTHERS IN LAW

Birthright citizenship: more on Pete Patterson's claims

By Akhil and Vikram Amar on Mar 25, 2026



(Celal Gunes/Anadolu via Getty Images)

Attorney Pete Patterson's latest post on birthright citizenship repeats the biggest mistakes of his original post and also makes some new mistakes, chasing irrelevances and mangling the key legal issues. Today we will briefly highlight some of the biggest flaws of Patterson's latest essay. If Patterson would like to continue the conversation, we hereby invite him to do so as a future guest on Akhil's podcast.

Patterson opens by saying that "nowhere in [an] extended critique do [the Amars] appear to contest my [that is, Patterson's] basic argument." Of course we contest it – and presumably Patterson himself understands this at some level, else he wouldn't have responded at length.

In a key passage, Patterson says: "It would be incongruous for the national citizenship provision of the citizenship clause to make a child born to a married couple resident in (old) York, England, during a temporary visit to Florida an automatic birthright citizen of the United States." But – putting aside for the moment the 14th Amendment's citizenship clause – a landmark statute that says nothing whatsoever about state citizenship or state residence or parent or parents or married couples does exactly that. That act citizenizes any "person born in the United States, and subject to the jurisdiction thereof." Patterson says nothing about this statute, even though we have discussed it at length in our Patterson post and other posts and in Akhil's brief. Patterson's own amicus brief on behalf of Senator Eric Schmitt and Representative Chip Roy asks the Supreme Court to rule for

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Trump and reverse the court below without saying so much as a word about this statute, even though the statute represents a big chunk of what is legally at issue in *Trump v. Barbara*. This is bad.

The incongruities of Patterson's invocation of incongruity hardly end there. Why, on Patterson's view, which is in line with President Donald Trump's executive order on birthright citizenship, does just one American parent suffice to citizenize the baby? Where does Patterson get that rule? Like Trump, he just makes it up. And note that Trump's executive order would in fact citizenize Patterson's hypothetical Florida-born baby if the actual biological father was an American citizen, even if the British mother was married to a British man. But of course the 14th Amendment says nothing about this or about countless other parental configurations or parental issues. **It isn't about the parents** – that's the big point Patterson misses again and again.

Suppose that both British parents die before the Florida-born baby's birth by C-section. Florida is surely the only place the baby has ever known, and the amendment focuses on the baby – the "person[] born." Patterson keeps putting parents in the rabbit's hat and then keeps pulling them out. Presto! We emphatically do contest his basic argument; we reject his complete unwillingness to focus on the Amendment's text as written, which says nothing about the parents, much less their residence.

Oh, but citizenizing the baby, says Patterson, is incompatible with the baby's "full and equal dignity." Wow, that's Orwellian. If Patterson's point is that the baby might one day want to be a Brit, let the baby make that election upon maturity.

Patterson also invokes some musings of the great Justice Joseph Story that seemingly questioned birthright citizenship for American-born children of foreign travelers. But what Story in 1841 thought in passing about what, perhaps, the law should be is exceedingly far removed from what law was in fact enacted in 1868 and what law was later enacted in 1940 and still later re-enacted in 1952. (We should also note that Story, though great, was far from perfect. Akhil's 2021 book on the early republic showered praise on Story, but also said at page 555 that Story "often failed—trying to do too much, too fast." At footnote 22 of a 2022 amici brief, we and our co-amicus Steve Calabresi said that the "towering" Story "erred on many . . . issues." We listed several and pointed readers to similar comments by Justice Clarence Thomas at page 586 of *U.S. Term Limits, Inc. v. Thornton*.)

Patterson focuses on stray pronouncements from the 1860s that should never be equated with the text of the 14th Amendment itself, which he mangles, as we showed earlier and have shown again above. The amendment is not about the parents in any way, except in cases involving children of monarchs and diplomats, for unique reasons explained in our last post and in Akhil's brief. Patterson nowhere engages these points.

Patterson also continues to conflate the 1866 Civil Rights Act with the 1868 14th Amendment, which has different wording in its "jurisdiction" clause. We have twice highlighted this textual point on SCOTUSblog, and Akhil discussed a closely related textual issue at pages 194-97 of a 1998 book. Here, too, Patterson evades our key textual argument. We repeat our earlier mantra: **Read the text.**

Patterson tries to poo-poo clear and emphatic statements by key members of the Lincoln administration – Attorney General Edward Bates, Secretary of State William Seward, and Treasury Secretary (and future Chief Justice) Salmon P. Chase. We encourage readers to read these Lincoln Administration statements for themselves as useful context against which to construe the key 14th Amendment text itself. We should never forget that the 14th Amendment was essentially **Lincolnian** – a central theme of Akhil's recent book, *Born Equal*, which charts how Lincoln's ideas of birth equality evolved over time and shaped all three amendments ratified after his death and in his image. (Alas, Lincoln's name does not even appear in either of Patterson's posts or his amicus brief.)

Given that the words "subject to the jurisdiction" do not remotely mean what Patterson wants them to mean – they simply do not address parents or domicile – what then, on our view, do they mean? We believe that these words add an "under the flag" requirement to a companion "on the soil" requirement, and that this joint soil-and-flag requirement cleanly explains both who is citizenized at birth and who is not (the so-called exceptions, for those born in certain enclaves that are located on American soil but fall under different flags). This point is made at length in Akhil's brief; in at least five SCOTUSblog posts; in at least two of Akhil's books (at pages 351, 382, 391, and 439n* in 2005

and at pages 11, 517, and 520 in 2025); and in Akhil's essay on the citizenship clause on the National Constitution Center's website. Yet the key word "flag" nowhere appears in Patterson's most recent post. Nor did this key word appear in Patterson's first essay. Nor did this key word appear in Patterson's amicus brief. Patterson has simply failed to address one of our main points. This, too, is bad.

On Indians, we **challenged** Patterson to identify even a single case in which a court ruled that when tribal parents give birth off-reservation in Chicago (or any other ordinary American spot), the baby is not a birthright citizen. He has cited none. He invokes other Indian-related stuff long after 1868. These matters would take our present discussion far afield. But we do think he errs here, too – and on several other points that we shall not pursue today. Perhaps all these issues, and other bones of contention, can be discussed in a later *Amarica's Constitution* podcast episode, should Patterson wish to appear.

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Recommended Citation: Akhil and Vikram Amar, *Birthright citizenship: more on Pete Patterson's claims*, SCOTUSblog (Mar. 25, 2026, 4:07 PM), <https://www.scotusblog.com/2026/03/birthright-citizenship-more-on-pete-pattersons-claims/>

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