BROTHERS IN LAW

Birthright citizenship: reading the text and sidestepping the parent trap

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"The text is the law, and it is the text that must be observed," Justice Antonin Scalia famously insisted at page 22 of a notable book on legal interpretation. "Only the written word is the law," Justice Neil Gorsuch has opined in a watershed opinion. "Fidelity to the law means fidelity to the text," Justice Amy Coney Barrett has proclaimed in an important endowed lecture. "We're all textualists now," Justice Elena Kagan has observed in a famous exchange at Harvard Law School.

Proper textual analysis must heed both what the text says and what it does *not* say. Thus, the key slam-dunk textual fact at the heart of Chief Justice John Roberts' majority opinion in the landmark tariff ruling last month was that the statute that President Donald Trump invoked pointedly did *not* use the words "tax" or "tariff."

Here, then, are the decisive slam-dunk textual facts that doom Trump's executive order 14160 in the pending birthright-citizenship case: *The words "parent," "parents," "mother," and "father" appear nowhere in the text of the 14th Amendment's citizenship clause. Nor do these words appear in the text of the landmark 1952 statutory provision defining birthright citizenship. Yet Trump's made-up executive order uses the words "mother" and "father" a combined ten times.*

Trump and his legal and academic defenders have simply fabricated a welter of detailed parental rules – about *parental* citizenship, *parental* legal status, *parental* domicile, and *parental* allegiance.

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Too many critics of Trump and his allies have taken the bait, themselves focusing rather too much attention on parents. To borrow a phrase, they have fallen into the "Parent Trap."

The text of the 14th Amendment, by contrast, focuses entirely on the baby – on the person born, not the persons giving birth: "All *persons born* . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States." The words focus on the baby's birth-*place*, not her birth-*parentage*. For a faithful textualist, the inquiry is simple: Was any given baby born "in the United States" (that is, on American soil) and "subject to the jurisdiction thereof" – that is, "**under the flag**," as the framers and ratifiers glossing the 14th Amendment repeated ad infinitum. (For Reconstruction Republicans, "subject to" and "under" were textually synonymous, and "the flag" was a beautifully concrete stand-in for the rather more abstract word "jurisdiction.")

Let's now apply this text and this soil-and-flag test to a fun hypothetical, adapted from one of the most famous American novels of the era that produced the 14th Amendment: Nathaniel Hawthorne's **The Scarlet Letter**. Suppose a baby named Pearl is born in Boston in 1868 to a British immigrant mother named Hester. The secret biological father is Arthur, the local reverend; Hester's husband, a British physician named Roger, has not yet crossed the Atlantic.

Is Pearl a 14th Amendment birthright citizen? Of course she is. *Read the text.* Pearl was born on American soil under the American flag.

But now consider the Trump administration's made-up rules. If a child's constitutional birthright citizenship really turned on the legal status of her parents – as Trump insists with no textual foundation whatsoever – then the 14th Amendment's text would have needed to answer obvious second-order questions:

1. *How many parents?* Do both the mother and the father need to have a domicile in America, or just one?
2. *Which parent?* If just one, which one counts? The mother? The father? Either one?
3. *Who's the daddy?* Is lawful husband Roger the father, or secret adulterous paramour Arthur? What if both claim paternity? What if neither claims paternity? What if paternity is unknown? Must the government interrogate Hester?
4. *Who's the mommy?* What if the mother **dies in childbirth**, and the child is raised from infancy by her stepmother, aunt, or foster mother?
5. *What about **foundlings**?* What if both paternity and maternity are unknown? What if a baby Moses is left in a basket along the bank of the Mississippi or on the doorstep of a church?

These and closely related questions were not entirely hypothetical to the 14th Amendment's framers and ratifiers. A **landmark 1855 federal statute** granted statutory birthright citizenship to children born abroad "whose *fathers* were or shall be at the time of their birth citizens of the United States."

Contrariwise, longstanding American slave codes prior to the 13th Amendment generally decreed that a child born to a slave-mother took his or her *mother*'s slave status – even when that slave-mother had been impregnated by her own enslaver (as the character Cassy had been in Harriet Beecher Stowe's era-defining 1852 **Uncle Tom's Cabin**, and as the mother of the real-life Frederick Douglass likely had been). Yet the 14th Amendment said nothing whatsoever about "fathers" versus "mothers." *Read the text.*

And on "Who's the daddy?": Abraham Lincoln himself knew full well that his mother, Nancy Hanks, was likely illegitimate, but he never knew for sure the identity of his maternal grandfather. Many a slave child, from Frederick Douglass on down, likewise never knew their father's true identity. Nevertheless, the 14th Amendment – **emphatically Lincolnian in its origins** – plainly aimed to citizenize flag-and-soil babies without awkward scarlet-letter inquests into their actual biological lineage.

No matter how long one stares, the words "mother," "father," "parent," and "parents" are nowhere to be found in the text of the 14th Amendment. Nor did they feature prominently in public debates over the drafting and enactment of these provisions – precisely because these words and concepts were no part of the amendment's letter or spirit.

Nor does the phrase "not subject to any foreign power" appear in either provision. True, that phrase did appear in the 14th Amendment's precursor statute, the **Civil Rights Act of 1866**, which could arguably be read to exclude certain dual-citizen children of foreign nationals. *But the 14th Amendment dropped that phrase*, replacing it with the "subject to the jurisdiction thereof" standard. The 14th Amendment's **soil-and-flag rule** is definitely not narrower than the precursor statute's rule, but it may well be **broader**. (This point has been entirely missed by various lawyers and scholars on Trump's side, who have tried to make infinite hay of one or two stray comments by members of Congress using the word "parent" in discussions of the statute, but not the amendment.)

What about the traditional "exceptions" to the general rule? (These exceptions involve children born to foreign diplomats, children born on quasi-sovereign Indian land, children born behind the lines of an occupying enemy army, and children born aboard foreign-flagged warships.) At pages 3 to 4 of his **reply brief**, the solicitor general claims that the *Trump v. Barbara* respondents (represented by the ACLU) "recognize" multiple "exceptions" to birthright citizenship "based on parental status." We doubt that's the best reading of the ACLU's brief, but even if it is, it's surely not the best reading of the Constitution. To win the case, the solicitor general needs to outrun not just the respondents, or even the doctrine, but **the document itself**. And as we've explained in **prior writings**, the soil-and-flag touchstones cleanly explain both the scope and the limits of the Constitution's grand birthright-citizenship guarantee. The so-called exceptions are really just *applications* of the originalist "under the flag" principle.

True, one – and *only* one – of the birthright-citizenship rule's main exceptions, exempting an American-born child of a foreign diplomat, *is* parent-based. (The others, as Akhil's **amicus brief** carefully explains, are based entirely on birth-place, and in no way whatsoever on birth-parentage.) But even the tiny diplomat-child wrinkle, properly conceptualized, is an **exception that illustrates and confirms the under-the-flag rule**. A legal "**fiction**" of "**extraterritoriality**" treated diplomats and their children *as if* they were floating human chunks of foreign *soil*, with partial or total diplomatic immunity from America's laws. Indeed, diplomats and their broods were seen as personal extensions of the foreign sovereign.

To see this point most vividly, imagine that Queen Victoria herself visited America in 1869 and gave birth to a child on American soil. Were America to claim this heir to the British throne as an American citizen, war between America and Britain might well have ensued. The 14th Amendment, properly read, viewed neither Victoria nor her hypothetical baby as ever being squarely "under the American flag." The monarch, and her brood, and her diplomats, and their broods, were always in legal contemplation under the British flag, wherever they went, rather like British **warships in American waters**. But none of this extraterritoriality logic applied to American-born babies of foreign sojourners generally.

In any event, the diplomat's-child wrinkle was numerically trivial and easily administrable. Speaking on the Senate floor in the spring of 1866, Senator Benjamin Wade **brushed off** this wrinkle as "hardly . . . applicable to more than two or three or four persons." Also, the diplomat-child issue sidestepped many of the thorny issues a general parental focus would have raised. On *the how-many parents* and the *which-parent* questions: Obviously, the status of the *diplomatic* parent would govern. On the *who's-your-daddy* question: Obviously, the wrinkle applied only to babies *claimed* by a diplomat.

Of course, sound textual analysis must also consider the text's larger context and purpose. The plain aim of the 14th Amendment was to create rock-solid, bullet-proof citizenship for ex-slaves and their children – with no ifs, ands, or buts because of doubts about the *identity* or *citizenship* or *legal status* or *domicile* or *allegiance* of a given slave-child's *parents*. Reconstruction Republicans never aimed to give ex-Confederate states a loophole to withhold citizenship from a Black baby because he was born to the wrong "parents." The Trump administration's parental theory of birthright citizenship thus defies the 14th Amendment in both letter and spirit.

In lieu of the 14th Amendment's *clear, clean, geographic* rule, Trump's executive order substitutes *muddy, messy, genealogical* rules pulled out of thin air. In other words, the order invents rules to answer the questions the 14th Amendment never asked. By pure fiat, Trump declares that just one parent, either the "mother" or the "father," needs to be domiciled in America. *Just where does this rule come from?* (Where Trump's additional *domicile* rule comes from is yet another textual mystery.)

Trump defines the "father" as "the immediate male biological progenitor." *Never mind that DNA kits did not exist in 1868. Also, never mind that the law back then typically treated the mother's spouse as the father regardless of biology*. Trump defines a "mother" as "the immediate female biological progenitor," thus privileging genetic mothers over adoptive mothers. Hmmm. Imagine a C-section baby named Macduff born several minutes after his biological mother's death, and immediately adopted by his dead-mother's sister, per a legal instrument signed by the dying woman in her final moments of life. And foundlings? Looks like they're out of luck.

Now turn to a landmark provision of the 1952 Immigration and Nationality Act, **8 U.S.C. § 1401(a)**, which provides an **entirely independent basis** for invalidating Trump's executive order. According to its clear and complete text, "the following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof." Like the citizenship clause, nowhere does this provision use the words "mother," "father," "parent," or "parents." Trump simply reads these words into the law.

Not only does this rewriting do violence to this text read on its own; it also makes a mess of the statute as a whole. Congress knew these magic words, and indeed Congress used them quite clearly in several *other* clauses of the 1952 Act dealing with issues *unrelated* to soil-and-flag birthright citizenship. For example, **8 U.S.C. § 1101(b)(C)** referred to "the law of the *father's* residence or domicile"; **Section 1101(b)(1)(D)** to the child's "natural *mother* or . . . natural *father*"; and **Sections 1403(a) and (b)** to the "*father* or *mother* or both." **Section 1409(a)** later added a definition of "paternity" for children born "out of wedlock."

Oh, and here's yet another parent-problem for Trump: His made-up rules discriminate on the basis of sex, in likely violation of a 2017 equal-protection decision (on statutory birthright citizenship) captioned ***Sessions v. Morales-Santana***. By fiat, Trump treats mothers and fathers differently, using one standard for mothers ("unlawfully present . . . or . . . lawful but temporary") and a different standard for fathers ("not a United States citizen or lawful permanent resident"). That mismatch generates sex discrimination, because refugees and asylees have "lawful and *not* temporary" status according to an **official 2025 government implementation memo**. As a result, a baby born to a refugee mother and a temporary-worker father gets citizenship, but that same baby, with the parents' sexes reversed, does not. (We may well return to this issue in a later post.)

Read the key texts, and the correct outcome in the Trump case is crystal clear. Stray from these texts, and enormous problems abound, both substantively and methodologically. "Parent," "parents," "mother," "father" – the president has no power to read into the 14th Amendment or Section 1401(a) words that are simply not there. Faithful interpreters must beware the Parent Trap.

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Cases: **Sessions v. Morales-Santana**, **Trump v. Barbara (Birthright Citizenship)**

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