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BROTHERS IN LAW

Birthright citizenship: hard questions – and the best answers – for Trump’s challengers

By Akhil and Vikram Amar & Samarth Desai
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In our [last column](#), we imagined grilling Solicitor General D. John Sauer in a moot court on birthright citizenship. Today, we reverse angles and imagine some of the hardest questions that tough-minded justices could ask the challengers’ lawyer, our friend and ACLU counsel Cecillia Wang, at Wednesday’s Supreme Court oral argument. We also offer what we think are the best answers to these tough questions.

Q1: Didn’t the 1898 precedent *United States v. Wong Kim Ark* limit its ruling to children of those “domiciled” in the United States?

A: There is some narrow language in the case at page 693 that the solicitor general has cherry-picked and over-read, but throughout the opinion there is much more language that sweeps far more broadly – language embracing *Lynch v. Clarke*, a high-profile antebellum New York opinion affirming the citizenship of a child of temporary sojourners, and English common-law principles of *jus soli* going back hundreds of years. This sweeping language best fits the 14th Amendment’s text and history, especially the strong position taken by the Lincoln administration, which was the key backdrop to the amendment.

Also, many later decisions of this court have read *Wong Kim Ark* sweepingly, to recognize the citizenship of children born on American soil and under the American flag, even when their parents were willful illegal aliens – as in the 1957 *Hintopoulos* case.

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Q2: Speaking of Hintopoulos, why didn't you stress this case more prominently in your merits brief?

A: In our brief in opposition to certiorari, we did plainly quote (at page 31) the *Hintopoulos* court's assertion that the child in that case was "of course, an American citizen by birth." Of course! Later in this litigation, we have relied on and have welcomed various amicus briefs and scholarly commentary that have highlighted *Hintopoulos*, a case that emphatically supports our position today.

Q3: You earlier mentioned "soil" and "flag." What is your position on the claim that some scholars have advanced that "subject to the jurisdiction" essentially means "under the flag"?

A: This is an elegant and historically well-supported theory that nicely wraps up the text in a clean package, making sense of both who is automatically citizenized (those born on the soil and under the flag) and who is not (those born on other soil or under other flags, such as Indian flags or occupying-foreign-army flags or embassy flags). This court need not accept this theory in every jot and tittle in order to rule for us – we win on so many theories! But if this court chooses to embrace the soil-and-flag approach, we of course clearly win.

Q4: Isn't illegal immigration a massive problem today – much bigger than it was in the 1860s? And doesn't your reading reward illegal immigration?

A: The government has many proper ways of deterring and even punishing illegal immigration that don't violate the clear rules of the Constitution itself. If parents have misbehaved, they themselves may be directly sanctioned. But innocent American-born children may not be decitizenized. The phrase "subject to the jurisdiction thereof" in the amendment has absolutely nothing to do with modern-day policy concerns about illegal immigration. Its text focuses on the "persons born," not the person or persons giving birth. Besides, the executive order ranges far beyond the children of unauthorized parents; it also tries to strip citizenship from countless children born to parents lawfully present – migrants invited to America on student visas and work visas, and others in line for green cards who have not yet received them.

Q5: Your affiliates have publicly called the government's position "profoundly cruel." As a matter of first principles, why is it fair that someone born on one side of the border is treated so much better than someone born on the other side? And unless everyone in the world is citizenized, won't there always be some sort of line? Why is your line fairer?

A: There may indeed always be some unfairness, even cruelty, in life; but our approach is more humane. It minimizes the likelihood of statelessness, which of course was a huge problem for much of the last century, especially in the mid-century era when America embraced landmark immigration acts whose letter and spirit and judicial gloss give respondents an independent basis for prevailing today. It is not every day that the ACLU, the U.S. Conference of Catholic Bishops, the Charitable Irish Society of Boston, and a broad consortium of faith-based organizations of all sorts are all passionately on the same side! The government's rules are at root blood-based and hereditary – caste-like and akin to the Old World order that America aimed to leave behind. Also, the government's rules are messy and made-up. Our rules, by contrast, closely track American practices and traditions of fairness that infuse the 14th Amendment, the letter and spirit of immigration statutes over the years, federal caselaw over the years, and even federal executive practice over the years – until, that is, this executive order.

Q6: Suppose a Russian-spy couple came to America and had a baby. How can you possibly insist that such a baby would be a U.S. citizen?

A: Constitutionally, children are not the same as their parents. Our Constitution repudiates corruption of blood and hereditary attainders; children cannot be punished or demeaned because of the misdeeds of their parents. Also, American citizens might themselves be tempted into Benedict Arnold-style treason or espionage, but here too it would be unconstitutional to de-citizenize their American-born children. Finally, let's turn the question around. Suppose the espionage is discovered long after the baby's birth. Shall we de-citizenize the person retroactively? One virtue of the 14th Amendment's clear and clean rule is that, when a baby is born, the government does not need to

worry about the countless complexities of how and when to determine parentage – a point powerfully made by Justice Brett Kavanaugh at oral argument in *Trump v. CASA*.

Q7: Aren't the exceptions to birthright citizenship "all based on parental status," as the solicitor general says at pages 3-4 of his reply brief? If so, why can't this court recognize additional parent-based exceptions?

A: The so-called exceptions are not really exceptions at all, but applications of the soil-and-flag rule. The excepted children are the very children born under non-American flags: tribal flags, occupying-army flags, and foreign-embassy flags. Crucially, *Wong Kim Ark* made clear at page 693 – the very page that the government tries to over-read! – that the set of exceptions is fixed and may not be expanded.

True, one – and only one – of the exceptions, involving the children of diplomats, is parent-based. But this category was understood in the 1860s in terms of a fiction of extraterritoriality and as involving only "two or three or four persons," to quote Senator Benjamin Franklin Wade. And this category also avoided many of the complexities raised by broad parent-based exceptions: How many parents? Which parent? Who's the father? The executive order's answers to these questions are totally made up. But in the case of diplomatic children, the law obviously focuses on the status of the diplomatic parent, and the wrinkle applies only to babies claimed by a diplomat.

As for the exceptions beyond diplomats, these exceptions are based solely on geography and not on parentage, as some of our supporting amici have shown. And, to repeat, *Wong Kim Ark* is emphatic that the categories of exceptions may not be expanded.

Q8: But didn't the 1884 case *Elk v. Wilkins* focus on whether Elk was "born a member of one of the Indian tribes" and not whether he was born on tribal land?

A: *Elk* has some ambiguous dicta, but it was indeed just that: both ambiguous and dicta. The case was about John Elk, who was conceded by all concerned to be a tribal Indian at birth. John Elk was in fact born on Indian land – not squarely under the American flag. He later left Indian land and tried to naturalize; that is what the case was about. In *Wong Kim Ark*, this court walked back some of Elk's loose language on other issues and expressly stated at page 682 that Elk "had no tendency to deny citizenship to children born in the United States of foreign parents . . . not in the diplomatic service of a foreign country."

Q9: Are you saying that a child of tribal Indians born off tribal land in, say, Chicago or Detroit, was a 14th Amendment citizen? More generally, how should this court today think about the "Indian" exception?

A: On Chicago and Detroit: The solicitor general can't point to a single decision actually denying citizenship to such a child. Of course, on our theory, no such case would ever have arisen, precisely because such persons were treated as proper 14th Amendment citizens by all branches of the American government at all relevant times.

In any event, and crucially, the Indian issue is not squarely before the court today, and Native American citizenship law is today quite different, thanks to the *Indian Citizenship Act of 1924*.

More generally: We urge the court to focus its attention on the text, history, and structure of the 14th Amendment itself, and the Lincolnian vision it embodied, as championed by Lincoln's Attorney General Edward Bates, Lincoln's Secretary of State William Seward, Lincoln's Treasury Secretary (and future Chief Justice) Salmon P. Chase, and Lincoln's first Vice President Hannibal Hamlin. Wading too deep into the cases between 1880 and 1900, including *Elk*, may lead this court into treacherous waters. This was of course the era of *Plessy v. Ferguson*, an era in which the court at times failed to redeem the 14th Amendment's true and full meaning.

Q10: Are you also saying that children of American-citizen parents born on Indian land or born behind occupied lines were not birthright citizens?

A: Not 14th Amendment birthright citizens – but likely birthright citizens under statutes, such as the *Naturalization Act of 1855*, providing birthright citizenship to a wide range of babies born to American parents overseas. The 14th Amendment sets a constitutional floor, not a ceiling. Congress

may go above and beyond that floor. Which is why even if some members of this court had any doubt about our 14th Amendment claims, we should still win under the **1952 Immigration and Nationality Act statute**, many of whose provisions went above the constitutional floor.

Q11: You earlier mentioned Lincoln's men. Weren't John Bingham and Lyman Trumbull also Lincoln men, and didn't they talk about "parents"?

A: What is most important is what the **text** says, and it nowhere speaks of "parents" or "mothers" or "fathers." Other contemporaneous legal texts, like the landmark **Naturalization Act of 1855**, did speak of "fathers." Congress knew how to use these words to grant citizenship, but the 14th Amendment did not use these words because they would have opened a **huge can of worms**.

Whatever Trumbull might or might not have said in a **private, unsigned, undated, unaddressed, uninfluential letter** about a draft version of a statute worded differently from the 14th Amendment, in public he made clear that even the children of wandering "Gypsies" were "undoubtedly" – **undoubtedly!** – citizens. And whatever Bingham might or might not have said or meant about that same statute (**it's complicated**), here are his last, best, and highly public words on the matter: "If a man is not a citizen of the country in which he was born, **in God's name** of what country is he a citizen?" (Note how this statement also solves the statelessness problem.)

Q12: Is the birthright-citizenship clause of the 1866 Civil Rights Act identical in every respect to its counterpart 14th Amendment clause, as some on the other side have claimed?

A: Probably not. Some have invoked comments by individual lawmakers claiming that the two are identical – but read the text! On the key issue of birthright citizenship, the **language of the act** – "not subject to any foreign power" – differs from the language of the amendment: "subject to the jurisdiction [of the United States]." We agree with this court's instinct in **Snyder v. United States**, per Justice Kavanaugh, that amended language may well signal amended meaning.

A baby born with dual citizenship – and of course both the act and the amendment address the baby, not the parent or parents – might indeed in some sense be subject to a foreign power (and thus fall **outside** the protective blanket of the act), but might also have been born squarely under the American flag (and thus fall **within** the amendment's protective blanket). The amendment needed to be at least as inclusive as the act in order to provide a solid constitutional foundation for it, but the amendment could and likely did sweep more broadly. (Elsewhere, the amendment went beyond the act in protecting noncitizen aliens – "persons" – above and beyond "citizens.")

Q13: You concede, do you not, that scholars have disagreed about the meaning of the 14th Amendment, and that some scholars have endorsed the government's position?

A: Yes. But the vast majority of distinguished scholars support us; and this group includes several scholars whom this court has frequently cited as particularly incisive constitutional commentators. Our scholarly supporters are also ideologically diverse, including, for example, **Michael Ramsey, Ilya Somin, Michael McConnell, John Yoo, Keith Whittington, Gerard Magliocca, Akhil Amar, Vikram Amar, Amanda Frost, Martha Jones, Gregory Ablavsky, Bethany Berger, and Kate Masur**, among countless others.

Q14: If you lose on the 14th Amendment, shouldn't you also lose on the 1952 INA, which uses the same words?

A: Of course not. For starters, the **1952 Act does not** use the same words in every respect. It says nothing of state residence for example — a **gobbledygook** textual point invoked by the solicitor general, to be sure, but he who lives by gobbledygook should die by gobbledygook. In 1952, **everyone in America** read the 14th Amendment through the prism of actual executive practice and established judicial caselaw (including a broad reading of **Wong Kim Ark**), and even the solicitor general admits that actual practice in the 1940s and 1950s runs hard against him. No other interpretation makes sense of the 1952 statute **as a whole** – for example, its refusal to use words such as "mother" or "father" or "parent" in its birthright-citizenship clause; its pointed use of these very words in other adjacent clauses; and its clear rules granting birthright citizenship to **foundlings**, regardless of their parents' immigration status.

Q15: If, as you urge, you win on the 1952 INA, why shouldn't the court start and stop there? Why should the court instead or in addition rule in your favor on constitutional grounds?

A: Only a constitutional ruling would do full justice to those whose equal inclusion in America has been besmirched by this order – including, as we say at page 2 of [our merits brief](#), millions of existing American citizens who are not formally decitizenized by this order but who fall under the shadow of this order's dark spirit. The great John Marshall and his court ruled broadly in great cases like *Marbury v. Madison* and *McCulloch v. Maryland*. Marshall did not begin and end *Marbury* merely by disclaiming jurisdiction. He used the case to say what the law is. *McCulloch* laid down first principles of constitutional law rather than treating the matter as a narrow issue of congressional statutory preemption. And in fairness to our fellow Americans who are immigration restrictionists, they should be told squarely by this court, now, that they cannot de-citizenize future American-born babies of foreign travelers by mere congressional statute; they will need to amend the Constitution to undo what Lincoln's generation in fact did. And that, your honors, and may it please the court, is the final reason for this court to go big in this case – to do full justice to the legacy of Abraham Lincoln.

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