

HISTORY

POLITICS

# The Emancipation Proclamation Offers a Hint on What the Supreme Court Will Do About Birthright Citizenship



1862: President Abraham Lincoln reading the Emancipation Proclamation, which declared that all those enslaved in rebel-held territory would be "thenceforward, and forever, free." *MPI/Getty Images*



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by **Akhil Reed Amar**

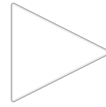
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**E**ight score and three years ago—on Sept. 22, 1862—President Abraham Lincoln issued a bold executive order, now known as the Preliminary Emancipation Proclamation, that changed the meaning of the Civil War and bent the arc of American history. In the process, Lincoln also gave today’s Americans a perfect template against which to measure our current president’s boldest executive order, which Donald Trump issued on the first day of his second term.

That order purports to reinterpret the Constitution’s guarantee of birthright citizenship, directing federal officials to withhold citizenship documents such as passports and social security cards from any baby born in the U.S. unless at least one of the newborn’s parents is a U.S. citizen or permanent legal resident. Lower-court judges across the country have strongly opposed this decree, placing it on hold, for now. The Supreme Court will likely rule on the matter sometime soon. A fresh look at Lincoln’s sweeping edict can help us predict how the justices will likely rule on Trump’s sweeping edict, and why.

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Before Lincoln issued his preliminary proclamation, the Union's sole official war aim had been to preserve the Union itself. But Lincoln began to shift that priority, ending his pronouncement with a zinger: *Come New Year's Day*, it read, "all persons held as slaves" in rebel territory "shall be then, thenceforward, and forever free."

Yet even as Lincoln pointed toward a future in which millions of Confederate slaves would soon become free, he also endorsed efforts "to colonize persons of African descent, with their consent, upon this continent, or elsewhere."

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As promised, on New Year's Day, 1863, Lincoln issued [the final Emancipation Proclamation](#). "All persons," he said, "held as slaves within said designated States, and parts of States, are, and henceforward shall be free." Lincoln's final proclamation also featured a thrilling change. All mention of subsidized colonization was gone; in its place was the news that freed men, if of age, could now join the

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Now that Black men were to fight alongside their white brothers in arms, it no longer

made sense to see these former bondsmen as Lincoln had once seen them—akin to the Israelite slaves in ancient Egypt, strangers in a strange land, destined for post-liberation emigration to some faraway place. Lincoln now began to envision them as not merely *free* Americans but also *equal* Americans, fighting for their *native* land, the land of their *birth*.

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In law—if not yet in fact, as the Union Army had only begun its work of sweeping the South clean—some three million souls who had gone to sleep enslaved the day before would wake up the next day as free men, women, and children.

By war's end in early 1865, Lincoln and his allies insisted that America needed to go even further. Not only must all Confederate slaves walk free; so must all enslaved persons in border states that still allowed slavery. Even more sweepingly, slavery itself must end, everywhere, immediately, and forever. This was the platform on which Lincoln won re-election in 1864—a re-election made possible by battlefield triumphs due in large part to Black arms-bearing.

Lincoln did not live to see the final adoption of the 13th Amendment in 1865, which essentially ended slavery everywhere in the U.S. Nor did he live to see three more constitutional amendments—the 14th, 15th, and 19th—that promised not just freedom but full birthright equality to America's Black citizens, and, later, to America's women.

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***Read more:*** [\*How the 14th Amendment's Promise of Birthright Citizenship Redefined America\*](#)

Still, it was Lincoln who set the stage for all these amendments. His September proclamation and January refinement precipitated today's constitutional system, a system based fundamentally on the proposition that all Americans are *born equal*.

Over the years, critics of Lincoln's actions have raised three big constitutional questions about his two big proclamations.

First, a federalism question: Did the central government have power to free slaves in individual states?

Yes. The Constitution was designed above all else for “common defense”—a phrase that appeared prominently in the Constitution’s Preamble and again in a later key passage. In order to win a war—especially a war that threatened the nation’s very existence—the federal government enjoyed plenary power to liberate slaves, as nations at war had commonly done long before the Constitution was drafted and ratified. In the Revolutionary War itself, Britain’s Lord Dunmore had emancipated large numbers of southern slaves as a war measure—a fact well-known in both the 1770s and the 1860s.

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Second, an executive-power question: Could President Lincoln act without a congressional statute expressly authorizing his proclamations in advance?

Yes. Lincoln was acting hand in glove with Congress, which was controlled by an anti-slavery party that he himself had co-founded and had led to a smashing electoral victory in 1860. His preliminary proclamation quoted at length key passages of Congress’s Second Confiscation Act, which he had signed into law in July 1862. That act had authorized the Union army to liberate a wide swath of enslaved persons who would thereafter be “forever free.” Though Lincoln’s proclamations went even further, they vindicated the emancipatory spirit of that congressional act. Also, the policy that Lincoln announced in mid-September would go into effect only in the new year. Congress thus had plenty of time to object, but never did. Instead, Congress continued to fund Lincoln’s war efforts and to support his general conduct of the war. Lincoln was commander-in-chief of America’s army in a time of an actual and indeed existential war that Congress had expressly, emphatically, and repeatedly blessed in every way. Within broad limits, he thus had both constitutional and statutory authority to wage that war as he saw best.

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Third, a rights question: could the government deprive masters of their property rights over slaves?

Yes. At most, a slaveholder might deserve just compensation for the loss of his slave property—an issue that could be litigated in court after the fact of immediate emancipation. Just as a government could take a man’s land to build a fort and take a man’s corn to feed an army, so it could take a man’s slaves to win a war.

In short, in both proclamations Lincoln was a consummate lawyer who paid exquisite attention to questions of constitutionality and scrupulously honored his oath of office to act *under* the Constitution, not over or outside it.

President Trump’s executive order on birthright citizenship stands in dramatic contrast.

On the federalism question: Nothing in the Constitution authorizes the federal government to deprive native-born Americans of their birthright citizenship.

On the executive-power question: America is not now at war, and the war power expressly claimed by Lincoln in his two proclamations does not apply.

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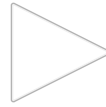
Most important of all, on the rights question: The Fourteenth Amendment vests every person born on American soil under the American flag with the right to be a free and equal citizen. This language directly derives from Lincoln’s and Lincoln’s allies’ most important words and deeds, beginning on Sept. 22, 1862.

On birthright citizenship, we can thus follow Lincoln, or we can follow Trump. But we cannot follow both, because Trump is trying to undo precisely what Lincoln and his allies did, beginning eight score and three years ago.

*Akhil Reed Amar teaches constitutional law at Yale and is the author of the newly-published Born Equal: Remaking America’s Constitution, 1840-1920.*

**Correction:** *The original version of this story misstated the year the 13th amendment was adopted. It was 1865, not 1965.*

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