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Why Trump Is Right About Birthright Citizenship

Tourists and illegal aliens aren't subject to the 'full and complete jurisdiction' of the United States.

By Chuck Cooper and Pete Patterson

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Two federal judges have issued injunctions against implementing President Trump's executive order interpreting the 14th Amendment's Citizenship Clause as denying birthright citizenship to children of illegal and nonresident aliens. Contrary to the overheated rhetoric of some commentators, this is an open question in our nation's jurisprudence—one the Supreme Court may have to decide.

The high court held in *U.S. v. Wong Kim Ark* (1898) that the U.S.-born child of foreigners lawfully and permanently domiciled in the country was a natural-born citizen. It didn't rule on the status of the children of those here temporarily

or unlawfully. There are serious arguments on both sides. Our study of the question has led us to believe that the text, history and structure of the Constitution demonstrate that such persons aren't natural-born citizens.

The text of the 14th Amendment doesn't make all persons born in the U.S. natural-born citizens of this country. Only those persons who are both born in and "subject to the jurisdiction" of the U.S. are accorded that status. To be sure, even those here only temporarily are subject to the jurisdiction of the U.S. to a limited extent. As Chief Justice John Marshall explained in *Schooner Exchange v. McFaddon* (1812), foreigners here on "business or caprice" owe a "temporary and local allegiance" to the U.S. and are therefore "amenable to the jurisdiction of the country" while they are here.

But that ephemeral jurisdiction doesn't equate to the jurisdiction required by the Citizenship Clause. Sen. Jacob Howard (R., Mich.), who sponsored the Citizenship Clause, argued that it "ought to be construed so as to imply a full and complete jurisdiction on the part of the United States." For this reason, the Framers understood the Clause not to cover members of Indian tribes, which the U.S. accorded a degree of autonomy by law. The government also lacked practical authority over what Howard called "wild Indians," who lived in areas not widely settled by Americans.

For similar reasons, the Citizenship Clause shouldn't be construed to cover the U.S.-born children of foreigners here only temporarily, because the ephemeral jurisdiction the U.S. has over them doesn't equal the full and complete jurisdiction the government has over citizens and permanent residents. As a leading 19th-century international-law treatise explained, "it is considered that *a fortiori* the children of foreigners in transient residence are not citizens, their fathers being subject to the jurisdiction less completely than Indians."

That limited jurisdiction evaporates the moment a foreigner leaves the U.S. By contrast, when citizens or green-card holders travel to a foreign country, they maintain their status, which confers burdens as well as privileges—including the duty to report all income to the Internal Revenue Service, to pay taxes if due, and potentially to be conscripted into the U.S. military. Citizens are subject to these obligations even if they move overseas permanently.

If we are correct that the 14th Amendment doesn't confer citizenship at birth to the children of lawful visitors, the same is obviously true of children whose parents' presence here is illegal. The continued presence of illegal aliens is the height of ephemerality—they are subject to deportation the moment they come to the attention of the national authorities. Their continued presence in the U.S. depends on evading the law rather than submitting or showing allegiance to it.

The broader structure of the Constitution provides additional support for the proposition that the 14th Amendment does not treat the children of those temporarily or unlawfully present as natural-born citizens. While the Constitution treats all citizens equally in almost every respect, only natural-born citizens are eligible for the presidency. The Framers adopted this requirement to ensure that the president would have the utmost loyalty. The Constitution thus “cuts off all chances for ambitious foreigners,” as Justice Joseph Story put it.

Granting natural-born citizenship to the children of those here temporarily makes a hash of this constitutional design. A person who is brought to the U.S. legally as an infant, grows up in this country, is lawfully naturalized and serves in the military can't be president. Are we really to believe that the framers of the 14th Amendment, whose primary objective was to assure that black Americans are equal citizens, incidentally and unnecessarily opened eligibility for the presidency to the children of foreign tourists?

The courts shouldn't inject such dissonance into our constitutional structure unless the text and history absolutely require it. Fortunately, the text and history of the Citizenship Clause show that it and the Presidential Eligibility Clause are in harmony. Only the children of those who are lawfully and permanently domiciled in the U.S. at the time of birth are entitled to citizenship by virtue of being born in the country.

Mr. Cooper is a founding member and chairman and Mr. Patterson a partner of Cooper & Kirk, a Washington law firm.

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