

The Future of Birthright Citizenship

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[00:00:00.4] Jeffrey Rosen: On May 15th, 2025, the Supreme Court will hear oral arguments about the constitutionality of President Trump's executive order seeking to end birthright citizenship for the children of undocumented immigrants. Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, Gabriel Chin of the University of California, Davis School of Law, Amanda Frost of the University of Virginia School of Law, Kurt Lash of the University of Richmond School of Law, and Ilan Wurman of the University of Minnesota Law School. Join We The People for a debate about the scope of the citizenship clause of the 14th Amendment. Enjoy the show.

[00:00:58.0] Jeffrey Rosen: Thank you so much for joining us. "Jack" Chin, Amanda Frost, Kurt Lash, and Ilan Wurman. Amanda Frost, let's start with you. On January 20th, the Trump administration issued an executive order which said that children born in the United States would only be granted citizenship if at least one of their parents is a US Citizen or a lawful permanent resident. Tell us why you have concluded that that executive order is inconsistent with the text, history and precedent surrounding the 14th Amendment?

[00:01:52.0] Amanda Frost: Yes, and thank you for having me. And I'm looking forward to the conversation with this group. Let me just say there's lots of interesting and hard constitutional questions out there, and I don't think this is one of them. And the reason I say that is because every method of constitutional interpretation supports what I'll call, as a matter of shorthand, the universalist view. That is, the view that everyone born in the US is a citizen, with a few narrow exceptions for the children of diplomats, children born into Native American tribes, and children of occupying armies, which, happily, we're not facing that prospect at the moment. So, first, the text supports this universalist reading and is at odds with the Trump administration's restrictivist reading. Second, the original understanding is reflected in legislative debates. Third, long standing judicial precedent beginning in 1898, but continuing on through the modern era, where the courts repeatedly said that it adopts the universalist reading executive branch interpretation until January 20, 2025, the congressional interpretation such that we'd have to rewrite our entire immigration code were this Trump administration executive order to take effect, because Congress has always assumed that universal birthright citizenship is the rule, at least since 1940.

[00:03:09.5] Amanda Frost: But most important to me is the overarching purpose of the 14th Amendment. To end caste in America, to ensure all people are equal at birth. And if this

executive order went into effect, every single person in America's citizenship would be under question, and that question would be thrown to the courts, which the Reconstruction Congress certainly didn't want, and under the control of the executive branch, which is even more certain it wouldn't have wanted. It wanted to create a clear rule and hope that we would not continue debating this. That's what they said. So I'm in some ways sorry that we seem to be doing that right now.

[00:03:41.6] Jeffrey Rosen: Thank you so much for that introduction. Ilan Wurman, you have taken a different view in the New York Times and in an important scholarly article that you have posted recently. Tell us why you believe that the children of illegal immigrants may not necessarily be subject to automatic birthright citizenship.

[00:04:07.6] Ilan Wurman: Let me start with a few framing points, and I'm also excited for this conversation, and thank you for having me. The Supreme Court, of course, in *Wong Kim Ark* resolved that the children born of domiciled Chinese immigrants to the United States, couldn't be made citizens under the naturalization laws and a treaty with China, but they were domiciled permanent residents in the United States. They had a lawful residence. The Supreme Court mentioned both points multiple times, and the Supreme Court concluded in that case that their children born to them in the United States were citizens. That doesn't address either question of the Executive Order, which deals with unlawfully present individuals or unlawful entrants or the children born of temporary sojourners. There was a case by a single judge in 1844 that said the birthright citizenship rule applied to the children born of temporary sojourners. That's this famous *Lynch v. Clark*. There were two appellate judges in New York. This was also in New York that strongly disagreed, not totally incompatible with it, but strongly suggested a contrary rule in 1860. This certainly is not a settled question if by settled we mean the courts have decided this definitively.

[00:05:24.2] Ilan Wurman: It has actually never decided either question until recently. Maybe there's been a common understanding, maybe Congress has adopted another understanding. But I want to address the birthright default rule under the 14th Amendment, which again has this phrase subject to the jurisdiction. So just in the introductory nutshell that I have, there were these traditional exceptions for ambassadors and invading armies, for example, but we all know that also the drafters and advocates of the citizenship clause and the Civil Rights act And then the 14th amendment, all of them intended to exclude almost all of them, but effectively all of them intended to exclude Native Americans subject to tribal authority and possibly other groups of Native Americans without existing tribal authority. But certainly that. And the question is, why would a Native child born under tribal authority not be subject to the jurisdiction of the United States in the sense of the amendment? And the answer they gave is that the United States doesn't exercise.

[00:06:30.6] Ilan Wurman: What I will describe as a complete municipal jurisdiction over them. So the United States did exercise some jurisdiction. It was not universally held, but it was widely understood that they were within the territory of the United States. I know there's some dispute about that, but I really don't. I think that is the best reading of the debates and the general understanding. So they were within US territory. They were subject to US jurisdiction. For example, with respect to crimes involving a tribal member and a non tribal member. There's the

General crimes Act of 1817. So in what sense were they not subject to the jurisdiction of the United States? Well, because they were dependent nations, under international law, the United States could not exercise legitimately.

[00:07:13.7] Ilan Wurman: Of course it could if it wanted to, but it couldn't legitimately do so under international law. It couldn't legislate for the municipal rights among tribal members. So a contract dispute between two tribal members, a property dispute between two tribal members and so on, they still had jurisdiction. The tribe still had jurisdiction over their own tribal members' municipal rights. And in this sense, the jurisdiction of the United States was less complete. So that's exactly how Jacob Howard, who introduced the amendment, okay. Explained it. He said, what do we mean by subject to the jurisdiction? He said, a full and complete jurisdiction that is coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive or by the judicial department.

[00:07:58.3] Ilan Wurman: That is to say, the same jurisdiction and extent and qualities applies to every citizen of the United States now and then. The Native Americans or the Indians subject to tribal authority, he said, were born within the limits of the US but they were not subject to this full and complete jurisdiction. And he said, for example, we have no power to punish an Indian who's connected with the tribe for a crime committed upon him by another member of the same tribe. So it's important to understand why this exception, this exception to complete municipal jurisdiction.

[00:08:26.8] Ilan Wurman: And in a nutshell, and then I'll stop for my introductory portion, a rule of international law provided that one sovereign did not exercise a complete municipal, domestic, legislative or judicial jurisdiction over the municipal rights and relations of dependent nations, right and their members. Now, this is important because this also explains other exceptions like ambassadors and armies. Why couldn't we exercise jurisdiction over ambassadors, for example. Chief Justice Marshall said, we could if we wanted to. It's our choice not to do that. But the point is, under international law, it would have been illegitimate to do that. So there was an international law exception to the exercise of a complete legislative or judicial jurisdiction.

[00:09:11.7] Ilan Wurman: Why does this matter? Because the traditional view of birthright citizenship that Professor Frost says is just well accepted and not a difficult question ignores a substantial amount of evidence that the drafters, the principal drafters of the citizenship clauses of the fourteenth Amendment and Civil Rights act thought that the children born of temporary sojourners would be excluded. Okay, the traditional views cannot explain that. So when I say who thought this, Lyman Trumbull, the chair of the Judiciary Committee in the Senate who introduced the Civil Rights Acts provision, wrote in a letter to Andrew Johnson, it would make citizens of children born to domiciled aliens.

[00:09:54.8] Ilan Wurman: Jacob Howard, Excuse me. William Fessenden, the chair of the Joint Committee on Reconstruction, suggested strongly that it wouldn't include that it was in a slightly different context. James Wilson, the chair of the House Judiciary Committee, when introducing the Civil Rights Act system citizenship clause, said it would not include the children born of ambassadors or of temporary sojourners. Jacob John Bingham, the principal author of the

rest of Section 1 in 1859, suggested the domicile was important. Two secretaries of state in the 1880s denied passports to persons born in the United States because they were born to parents who were temporarily sojourning.

[00:10:33.0] Ilan Wurman: And the court Wong Kim Ark emphasized time and again the domicile mattered. Maybe they were all wrong, but that's a lot of people who really were in the know more than anybody else right to be wrong about this and the international law might provide an explanation, namely, under international law, it was generally held that a sovereign did not have complete legislative jurisdiction over all the municipal rights of temporary visitors, particularly related to capacity, personal status, marriage, citizenship. Okay, they could decline to exercise judicial jurisdiction in cases involving transient visitors. And another example is they were transient visitors, but were not subject to militia duty, but domiciled foreigners were. In this sense, they didn't exercise complete jurisdiction. So, the last sentence. An international law framework of complete jurisdiction, of exceptions to a complete jurisdiction explains not only the traditional exceptions, not only native tribes, but all this evidence about domicile and how the domicile mattered that the traditional views cannot explain.

[00:11:34.7] Jeffrey Rosen: Thank you so much for that. Jack Chin, Ilan Wurman argues in his article that it's widely recognized the framers of the 14th Amendment were not presented with issues of illegal migration or large numbers of temporary visitors. But you have argued in an important 2021 article that it's not the case that the Framers were unaware of the future problem of illegal immigration. And you argue you examine slave trade laws to challenge the contention of the category of immigrant parents here in violation of US Law simply did not exist at the time of the framing. Tell us more about your argument that since the Framers knew about illegal immigration, the meaning of the 14th amendment is not ambiguous for the children of illegal immigrants.

[00:12:18.8] Gabriel "Jack" Chin: So we did not have widespread and systematic immigration regulation in the United States at the federal level until arguably the 1880s. But we did have plenty of immigration regulation before that. We had, as everybody now knows, the Alien Enemies act, which provided for the removal from the United States of some people under certain circumstances, but more systematically and with a longer life. In 1803, there was a law that made it illegal under federal law for people of color to come to the United States in violation of state law. And so that was an early immigration regulation, which if people violated it, they were here in violation of the law. The broadest category of illegal immigration before, after the Civil War.

[00:13:10.6] Gabriel "Jack" Chin: It was in effect at the time of the 14th Amendment, was the slave trade regulation. And that was one of the first projects of the early congresses to restrict US participation in the slave trade. Ultimately, in 1808, the slave trade was abandoned. And then there was this development of policy choices about what was to happen with enslaved people brought to the United States in violation of law. And the policy crystallized in 1819. And in 1819, Congress passed a law that said if people are brought to the United States in violation of the slave trade law, then they are to be deported to a colony that was funded by the United States, largely in Liberia.

[00:14:04.5 Gabriel “Jack” Chin: And so there was extensive funding of interdiction efforts. The African squadron was there ships to stop the illegal slave trade. There was domestic enforcement, both in terms of money that was paid to people who turned in trafficked slaves in the United States, and for US Officers to track down people who were brought here in violation of the slave trade laws. And a famous example of this was the Amistad action, where enslaved people on a ship killed their captors, took over the ship, and wound up in the United States. And the issue. One of the issues in that litigation, which ultimately went to the Supreme Court, was were they brought here in violation of the slave trade laws, in which case they have to be deported? The trial judge in the district of Connecticut ordered them deported, went to the Supreme Court, and the Supreme Court ultimately said no, you don't have to be deported because you came here as a free, liberated ship. So this was something that everybody knew, everybody was aware of, that there were undocumented people coming to the United States and that there were vigorous efforts to track them down and deport them.

[00:15:40.3 Gabriel “Jack” Chin: At the time the 14th Amendment was being considered and debated, and the reasons for it were generating this was an important issue before Congress. In every one of Abraham Lincoln's what we now call State of the Union addresses, he said, one of the terrible domestic problems that we have to deal with is the illegal slave trade. There were like 10 appropriations bills passed during and after the Civil War to enforce the slave trade laws. And so this was something that was clear, it had to be on the minds of Congress as they were debating the 14th Amendment. And yet when they passed the 14th Amendment, everybody seemed to agree. I haven't heard any scholar or historical jurist question this. All of the African Americans born in the United States, including those whose parents were illegally trafficked here, were made citizens by the 14th Amendment.

[00:16:45.0 Gabriel “Jack” Chin: And so even though we didn't have general immigration law at that time, we did have a strict policy with regard to the people who were affected by the 14th Amendment, namely enslaved African Americans. And they were made citizens in spite of the status of their parents. And I think that goes to something that Professor Frost addressed, which is the desire of Congress and the states that ratified the amendments to have a clear, bright line, all encompassing rule that would not depend on the Supreme Court, which they deeply distrusted because of Dred Scott, that would not depend on the Executive Branch, which they deeply distrusted because President Johnson vetoed the Civil Rights act of 1866, which was a statutory grant of citizenship to former African Americans.

[00:17:49.9 Gabriel “Jack” Chin: And they deeply distrusted many of the states, particularly the former Confederate States. They didn't want them to be able to create categories or generate tests because after the Civil War, they adopted the Black Codes. And of course, they had engaged in the Civil War in the first place. So I think there is good reason to think that Congress and the states that enthusiastically ratified the 14th amendment looked for what the Supreme Court has called in other jurisdictional contexts, a readily administrable bright line rule that we would be able to tell on the day a person was born, the moment a person was born, definitively that they are a citizen or not a citizen.

[00:18:38.1 Gabriel “Jack” Chin: We have lists of every diplomat that's accredited to the United States. So there's a finite, determinate category of people whose children will not be

citizens. We can identify them. Fortunately, we have not had the situation where there are enemy troops in hostile occupation of any part of the United States in many, many years. And so we don't have to apply that. And so the idea that somehow poor silly Congress, they left this giant gap, they weren't thinking very carefully and they missed something significant that I think is not a plausible reading of the drafting history and enactment of the citizenship clause of the 14th amendment.

[00:19:34.8 Jeffrey Rosen: Thank you so much for all that. Kurt Lash, you have argued that history supports a Prima 3 or a presumptive assumption of birthright citizenship that can be only overcome with strong positive evidence that a child is born into a familial context of refusal or counter allegiance to the United States. And you think the evidence is close, but it's possible that children of illegal immigrants could be excluded as a matter of originalism under this test. Tell us why you've reached that conclusion and who should decide on a case by case basis whether or not children of people who enter illegally should be admitted?

[00:20:12.4 Kurt Lash: Of course. And first of all, thanks, Jeff, for you and the National Constitution center for hosting the discussion. I think it's great that we're here trying to work through these issues. It's great to see Ilan and Amanda and Jack work it all through. I guess as the textualist originalist, I'm happy to be the person to actually read the text that we're talking about right now. According to Section 1 of the 14th Amendment, drafted in 1866 and ratified in 1868, all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. This is the text that some people are saying is very easily understood. But as all experiences with President Trump have shown us, things that we might think are easy end up being quite complicated. Like Section 3 of the 14th Amendment, which we went through last year. My historical research has looked at that clause, and I think that actually you need to investigate history and the context in which it was adopted in order to understand it. This idea that a person notices that there are two requirements.

[00:21:31.1 Kurt Lash: There's not a birthright citizenship statement. To be a natural born citizen, you have to meet two requirements. You have to be born in the United States. And then secondly, you also have to be born subject to the jurisdiction of the United States. And I know that a number of people writing on this issue believe you look at those words subject to the jurisdiction of the United States, and what they see in those words is some kind of statement of that's a Reference that everybody knew referred only to a narrow, enclosed set of historically recognized common law exceptions or also including Native American tribes. Well, that isn't obvious from the text at all. Of course, you would only be able to come to that conclusion if you investigate the history. And if you investigate the history of the clause, you find out that it wasn't a term of art at all. That wasn't a phrase that everyone knew referred to a narrow set. Those words were drafted over a series of months, beginning the early months of 1866, extending all the way through the summer, and issues of discussions regarding citizenship that began under the Civil Rights act and then ultimately became the first sentence of Section 1 of the 14th Amendment.

[00:22:40.7 Kurt Lash: And it took hours and hours of debate, amendment and construction before it finally covered what they wanted it to cover and didn't cover what they didn't want it to cover. They ended up drafting a 14th amendment that clearly divides citizens from non citizens.

You have the opening texts of the 14th Amendment which talk about the privileges or immunities of citizens of the United States. And then there's a sudden change. Then it starts talking about a broader set of natural rights that belong to all persons, due process rights and equal protection rights. So they knew and declared in that clause that there's a major distinction between the set of rights that belong to all persons and those that belong to citizens. Those that belong to citizens are critically important. Ultimately, that's going to go through both year and year, your civil rights, and then only a certain subset of that is going to become people with the rights of suffrage. So they were very careful in drafting this clause in terms of who was going to be admitted into that particular text. The first purpose, of course, was to reverse Dred Scott and to establish a race neutral basis for establishing American citizenship.

[00:23:50.2 Kurt Lash: But they also wanted to make sure that the people who became citizens had the proper amount of allegiance. And this is what Ilan has written about, that I've written about. And that I think is just inescapable when you look at the actual debates of the 39th Congress. To be subject to the jurisdiction of the United States meant to have a sufficient or requisite allegiance to the United States. And this was expressly declared by the Senate Judiciary Chairman, Lyman Trumbull. What do we mean by subject to the jurisdiction of the United States? Not owing allegiance to anybody else? That's what it means again. Now, where they got that allegiance reading was not something they just came up with during the 39th Congress. This reflects a citizenship tie to conditions of allegiance, which was long established under antebellum American law. Again, that's something that Ilan has spent a lot of time establishing. And the allegiance that they were looking for didn't have to do with the allegiance of the newborn. Who's not going to say a pledge of allegiance to anyone. The key to the child's presumed allegiance had to do with the allegiance of the parents to which the child was born.

[00:25:00.1 Kurt Lash: This is why that a child born in the United States to parents who were ambassadors, diplomats, even though they're born in the United States, they were not born subject to the jurisdiction of the United States because they were presumed to share the same foreign allegiance that the parents did. This idea of the allegiance and the key allegiance being tied to the parents was also echoed in the 39th Congress. You have the very important Ohio Representative John Bingham, the drafter of most of Section 1, declaring in the middle of those debates in the early months, every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution, a natural born citizen. So they all knew what they were trying to do. They're trying to craft a clause that would establish race-neutral natural born citizenship, but which would also be keyed upon a reasonable presumption of allegiance on the part of the child.

[00:25:58.3 Kurt Lash: And no foreign allegiance. And one of the key examples of foreign allegiance at the time involved children born to parents who were members of Indian tribes. Indian tribes were treated as quasi foreign nations whose members were subject to treaty based agreements just like every other foreign nation.

[00:26:15.3 Kurt Lash: And tribal members could become citizens if Congress naturalized the entire tribe or if individual members formally presented themselves for naturalization. But absent that kind of presentation, neither they nor their family were viewed as having subjected themselves to the jurisdiction of the United States and they weren't considered citizens. Now, an

additional issue regarding Native American tribes also came up during the debates. And that had to do with tribal members who had separated themselves from their relationship with tribal governments. And they were now living in the United States without authorization and without seeking any kind of formal process of naturalization.

[00:26:53.1 Kurt Lash: The Framers expressly addressed that group and stated that the children of parents in those unaligned tribal groups were not to be made citizens because once again, they were still presumed to be formally holding allegiance to their native tribe. In the article that I write, we take that history, that allegiance based reading which seems so abundantly supported by the Congressional testimony, and try to apply it in situations facing us today. For example, citizens of foreign governments who entered the United States without authorization and without formally presenting themselves to American authorities for determination of allegiance and naturalization.

[00:27:33.6 Kurt Lash: And I think that that clearly models the same kind of or very closely models the situation that they discussed in terms of the foreign governments which they called Native American tribes. Then finally, Jeff, as to your last question, who makes this determination? This prima facie rule that I believe is the best approach would treat any child born in the United States as prima facie or as presumptively a citizen of the United States, subject only to the presentation of affirmative evidence that they were born into a family or to parents who either refused allegiance to the United States or who held some type of hostile or counter allegiance to the United States. Absent that type of disqualifying proof, the child remains presumptively a citizen. So no one, if they could, if a child can show that they're born in the United States, that's all that needs to be shown, the burden would be on somebody else actually to produce evidence that they believe that they were born into a family situation that disqualified them.

[00:28:37.0 Jeffrey Rosen: Thank you so much for that. Amanda Frost, you've heard the thoughtful arguments on all sides. Please give our audience a sense as fully as you can of why you've concluded that the meaning of the phrase subject to the jurisdiction thereof was explained well in Wong Kim Ark. To exclude by the fewest and fittest words only the following groups, the children born of alien enemies, children of diplomatic representatives of a foreign state, as well as the children of Indian tribes. Why you've concluded that's a closed class that does not include the people who Ilan Wurman and Kurt Lash have identified and why everyone else falls within the fundamental rule of citizenship by birth.

[00:29:20.5 Amanda Frost: Yeah. And I'll just first say that the idea that you're presumably a citizen, unless the government is going to take you to court, I assume, and then present evidence about how you or your parents have a hostile view of the United States. I find that a terrifying conception of citizenship and one that it would be pretty easy to see being abused by an administration that has already talked about deporting homegrown Americans. So I truly would hope that would never become our rule. But I'll explore this idea of allegiance a little more thoroughly because it's the idea. It's one of the main arguments of the Trump administration in court, and I'll say it's lost across the board by judges appointed by Republicans such as Ronald Reagan and George Bush, as well as, of course, democratically appointed judges. So it has been a losing argument. It's been called blatantly unconstitutional. But here, this idea of allegiance

really troubles me. It's so at odds with what the Reconstruction Congress intended and at odds with our laws and policies and practices today, including our immigration laws. So a couple points to make about it. First, this argument assumes everyone agrees that the formerly enslaved people were meant to be citizens.

[00:30:28.3 Amanda Frost: We all agree about that. So this argument says they owe allegiance. That's the word used in the United States of America. These people that were kidnapped and enslaved by our nation owe allegiance, and that's why they're citizens. So I entirely agree they're citizens, but I don't think they owe us allegiance. If I was kidnapped and taken to another country today and enslaved, I don't think I would owe that country my allegiance, and I don't think the formerly enslaved people did. So that's one argument against the allegiance. The second thing, I'm guessing we all agree, we haven't talked about it, but that the children of the Confederates, in the Confederacy, born to the military generals and leaders of the Confederacy who sought to secede from the nation, that those children, I believe, are birthright citizens under the broad reading of the citizenship clause, which we've always adopted in this country until January 20th. But if you think it requires allegiance of the parents, then none of those people are citizens, including all their direct descendants, many of whom are alive today. The third piece of the allegiance argument assumes that it demonstrates your lack of allegiance if you enter the United States in violation of immigration law.

[00:31:35.8 Amanda Frost: A couple things about that. First of all, about half, even more than of our undocumented immigrant population entered legally and then overstayed. It's quite possible under immigration law to overstay and then to adjust status and become legal again. My question is, if you happen to give birth in the month in which you're out of status, which the immigration law recognizes can happen and allows you to get back in status, your child's automatically not a citizen because you violated immigration laws at the moment the child's born. Then the parent goes on to be legal, but the child is illegal. Or what about the fact that I am a birthright citizen with a passport, but I do have to follow immigration laws. For example, I can't employ undocumented immigrants, something, by the way, that this administration does not enforce, even though it seems to be enforcing every other law. And also, I can't enter outside of the port of entry or without showing my passport. So if I violate that law and enter my country in violation of law, do I now lack allegiance and lack citizenship. It's nonsensical. And finally, I'll go back to the original understanding, which was a couple of pieces here that I think are worth emphasizing.

[00:32:39.6 Amanda Frost: One, as Jack so eloquently said, undocumented immigrants were not unknown in 1866. Congress was well aware of that problem with many different groups, not just formerly enslaved people, but also people who came in in violation of state laws that barred people from coming in with disease or who had been convicted of crimes or were impoverished. People came in in violation of the laws then, just as they do now. Congress knew it well. Congress didn't include them. Also, tourism is not new, and temporary visitors are not new. Congress was well aware of them. The only group it mentioned accepting from this universal birthright citizenship rule that it was creating were the children of diplomats, Native Americans, and hostile armies. Why even mention diplomats if all temporary immigrants aren't covered by definition? Diplomats are temporary. They're not planning to stay. So why even bother carving that out? It just makes sense. And the fact, of course, that what Congress wanted to do, and here

I'll quote from Jacob Howard, he said this new law, this citizenship clause that I have proposed, which was adopted exactly as he proposed it, he said, I want to remove all doubt as to what persons are or are not citizens of the United States.

[00:33:53.5 Amanda Frost: If he was here right now, he'd say, the last thing I want is to be debating this in the courts of America. He just saw what the Supreme Court did in Dred Scott. He certainly wouldn't have trusted the executive. Several other senators said the same thing. They wanted a clear bright line rule so that we wouldn't allow our executive branch and our courts to pick and choose who was an American based on somebody else's view of who had allegiance to the United States. And the last point I'll mention is the consequences of this would be devastating. 300,000 children under that executive order every year would be born, some of them stateless. All of them could be deported the day they're born. All of them could be denied the rights and benefits of citizenship. It would put in question all of our citizenship, including anyone who has an ancestor who violated the law and give the government enormous control over which members of the population could remain in the US with the rights of citizenship to vote and hold office, and which could be deported or deprived of those rights. That is the last thing this Reconstruction Congress wanted when enacted the 14th Amendment to create equality for all born in the United States, which was the overarching goal of that amendment.

[00:35:00.0 Jeffrey Rosen: Thank you so much for that. Ilan Wurman, you just heard Amanda Frost argue that the last thing the Reconstruction Congress wanted was for the executive to pick and choose who should be a citizen. They wanted a bright line rule. And she argues that the Congress's treatment of the children of Confederate rebels suggests that a bright line, rather than a case by case rule, was called for. Tell us about your response and why you believe that the text and history of the 14th Amendment suggests a less categorical rule dependent on congressional enforcement.

[00:35:38.8 Ilan Wurman: So all of Professor Frost's points are thoughtful and well taken. And I think, you know, they, in my view, establish that you can make plausible arguments on both sides of this. I happen to think that my position on this is. Is still correct, and I'll explain why, with respect to enslaved people and whether formerly enslaved people to freed people were citizens, and then rebels, and there's a lot of else that professor Frost said, that's thoughtful. That deserves a response. And I probably won't get to it, but I do think they wanted a bright line rule, which was to declare once and for all that the formerly enslaved, the newly freed people were citizens. And so how does this connect to allegiance? Does the allegiance view somehow refute that? I think it's important to recognize that most of the participants in the debate, not. Not all. And some people were confused and some people didn't talk.

[00:36:29.0 Ilan Wurman: But the people who participated and the people who were sort of in the know here on both sides, Democrat and Republican, tended to believe that the freed people were not aliens. So the rule with respect to aliens lawfully here, illegally here, temporarily here, domiciled here. Right. Is actually a separate question. How did this come up? The Democrats wanted to say, actually, in the civil rights discussion before the 14th Amendment's text, can Congress declare by statute. That the freed people are citizens of the United States? And the Democrats said, no, you can't, because they aren't aliens. We Congress have a power to naturalize, which is the power to make citizens out of foreigners, out of aliens. But the newly

freed people, the formerly enslaved people, they're not aliens. They don't have allegiance to some other government. And so they were using this in a twisted way. They wanted to say they weren't birthright citizens because they were of African ancestry, and, oh, we can't make them citizens because we can't naturalize them. They were trying to have it both ways. Okay, what was the response from the Republicans?

[00:37:45.0 Ilan Wurman: Yes, some people thought, yeah, well, we could kind of use our naturalization power kind of close enough. But the general view was we agree they aren't aliens, which is why we think they are birthright citizens. Okay? And Representative Shellabarger from Ohio has sort of the clearest articulation of this. He said under international law, enslaved class, enslaved people were not citizens and they were not aliens. Okay? They were a different class of people. Their ancestors might have been carried into slavery generations ago, 200 years ago, okay? They weren't aliens in the traditional sense. They had no allegiance to anybody else. The only thing under international law that kept them from being citizens or natural born citizens was their enslaved condition. And Shellabarger said, that's what we've gotten rid of. That's what we've gotten rid of. And therefore, under international law, they are. Now we, you know, are natural born citizens. You don't recognize that because of Dred Scott. So we're simply declaring what already is. We're not naturalizing them.

[00:38:49.1 Ilan Wurman: We are declaring what the law already is. So under international law that the framework that I propose, Congress exercised complete jurisdiction over them. No other sovereign exercised any sort of jurisdiction over them. So at least my theory, maybe not Kurt's, but I'll let him speak to it. You know, I think Kurt can get there and that's what he'll say.

[00:39:10.3 Ilan Wurman: They would. They would be covered. As for rebels, super short point. This was actually a fundamental distinction that the English common law had made. Okay, why were alien friends, okay, for example, subject to alien friends being aliens who come into the realm from a friendly nation. They were subject to treason, prosecution. Treason. You're a foreigner. What do you mean you're subject to treason? They were subject under the common law to treason prosecutions because the common law held that they were under a temporary and local allegiance to the sovereign and under the sovereigns, temporary and local protection. That is why they could be tried with treason if they had never entered into that exchange of allegiance for protection. If they came into the realm as enemy aliens, an alien enemy couldn't be tried for treason.

[00:40:00.1 Ilan Wurman: An alien enemy would be put to death by martial law instead. The laws of war, not the municipal law of treason. So the fact that the rebels committed treason is all the more proof that they were within the allegiance and under the protection of the sovereign, which is why we could charge them with treason.

[00:40:19.6 Jeffrey Rosen: Thank you so much for that. Jack Chin, your response to Ilan Wurman's arguments about why both the kids of Confederate rebels and formerly enslaved people should not be considered to have Allegiance to foreign sovereigns. And your thoughts about whether the framers of the 14th Amendment could have intended that the Executive get to decide on a case by case basis who's a citizen and who's not.

[00:40:50.6 Gabriel “Jack” Chin: So Professor Wurman talked about enslaved people in general, but my concern specifically was with people trafficked here in the 1850s, 1840s, 1860s, in violation of the slave trade laws. They, I think pretty clearly, were aliens and were citizens of the country from which they were kidnapped or trafficked or sold or whatever. And they would not be nationals or citizens or subjects of the United States standing alone. And therefore their children would be the children of people who were here unlawfully subject to deportation under the 1819 law. Were they made citizens by the 14th amendment, those children born here? I believe so. I also think that some of these questions have been answered by the Supreme Court, and I don't think that we can completely ignore that.

[00:42:00.9 Gabriel “Jack” Chin: In a series of decisions, the Supreme Court has held that the children of people who are here unlawfully or who had entered fraudulently or entered illegally were citizens. In one case they said, of course, this person became a citizen at birth. And the Allegiance theory was addressed in the very important case of Wong Kim Ark in 1898. And what the Supreme Court said was to hold that the 14th Amendment of the Constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage who have always been considered and treated as citizens of the United States.

[00:42:48.8 Gabriel “Jack” Chin: And the problem that's created by this allegiance theory is one that Professor Frost alluded to, and that is it rolls backwards in time. And Professor Lash's proposal has a humane burden of proof on the government, but it doesn't quite work because at least systematically, because there are many, many legal opportunities for one person to challenge the citizenship of another. For example, in the voting context, it's not just the government. Anyone can say, that person who's trying to vote, he's not a citizen. I challenge them. There are some states that prohibit non-citizens from owning land.

[00:43:38.1 Gabriel “Jack” Chin: And if somebody is holding land, that I think should come to me, and I think that if they are illegally holding it, that it's mine, I can challenge their citizenship in a lawsuit and say they might have been born in the United States. But if you look at all of their great great grandparents, they were unnaturalized immigrants. And because their great great grandparents were unnaturalized immigrants, their children also didn't have allegiance. Notwithstanding that they were born here and their children didn't have allegiance. And therefore this person who's lived in the United States, whose family has lived in the United States for six generations, is not a citizen because under the theory of The Executive Order 2, non citizen parents, non citizen, non green card parents cannot give birth to a citizen.

[00:44:31.0 Kurt Lash: And if that rule is true, then it's been true since 1868 and before. So I think again, going back to the idea that a readily administrable bright line rule was something that the framers of the 14th Amendment wanted to adopt, I think the rule in Wong Kim Ark is a readily administrable bright line rule, but one with open ended. Once you start saying that there's an open ended number of exceptions, you don't get to say but only the ones I like. And the last thing I'll say is I don't think that the 14th Amendment exceptions are based on international law. I think they're based on a decision by positive United States law, such as the Indian commerce Clause, to have its own exceptions that happen to be the same as international law. But they're

not a decision by the United States that our citizenship law is going to be based on foreign law, which is something that the Supreme Court in *Wong Kim Ark*, I think correctly, specifically rejected.

[00:45:58.7 Jeffrey Rosen: Thank you so much for that. Kurt Lash, your response to Jack Chin's argument that Congress wanted a bright line rule, that Congress viewed the 14th Amendment as something that would be enforced primarily by Congress and not by the executive and judges, and that once you start creating exceptions on a case by case basis, you open yourself up to the possibility of judicial determination of who's a citizen and who's not in a case by case way that we've never seen before in American history.

[00:46:34.7 Kurt Lash: Well, a lot I agree with Ilan, a lot of very thoughtful challenges and comments here. Jack, I tend to agree with you. I'm not sure I'm completely on board with the international law model, although I think Ilan has done remarkable work that deserves to be taken seriously. Amanda, I agree with both you and Jack that there was concerted effort and agreement that they wanted a bright line rule that was easily administrable, that would end all questions. And you can find that throughout the Congressional record. However, what they were talking about did not have to do with the status of people who were illegally in the country. What they were talking about was *Dred Scott*. They were talking about a situation where it had been disputed as to whether or not black Americans could be citizens of The United States. It wasn't clear whether or not *Dred Scott* was still the law. It was disputed. Republicans, of course, rejected the reasoning of *Dred Scott*, but it had not yet been reversed by another Supreme Court case. And then, even more importantly, whatever you thought about race based rules for national citizenship, they needed to establish a race neutral rule for local state citizenship as well, because these were the black codes.

[00:47:56.4 Kurt Lash: The black codes were denying equal civil, and by civil, we mean citizen, equal citizen rights to black Americans in the Southern states. So that was their key purpose. And they wanted to. Whatever else happened, it had to be clear that there was no longer a color bar to becoming a United States citizen. What was not clear, however, was how to frame it in a way that would only bring on board those with requisite allegiance to the United States. And you're not going to find anyone talking about a bright line rule there. Instead, when you go to the congressional debates, you're going to find mayhem. They struggled and struggled with finding words and approaches that covered not only every international kind of situation with ambassadors, but also how to deal with the experience of Native American tribes. And once they got language that they thought would cover the Native American tribes, then they learned while they were debating that they were members of Native American tribes that had separated from the tribal government but yet were still considered to be foreign citizens. So they struggled mightily to come up with a rule that all the way to the very end they felt was the best they could do in order to create a rule that would require some type of requisite allegiance.

[00:49:16.1 Kurt Lash: So we shouldn't be surprised at all if it's a difficult kind of clause to interpret. They found it difficult to craft, but they were very clear about what kind of rule it was that they were seeking. And that was an allegiance based rule. Now, in terms of the Confederacy, which I think is kind of a fun example, but I think Ilan has really put his finger on it, note there is an allegiance based reading. You are presumed to owe allegiance. Amanda, this kind of goes to

your point about whether or not babies owe allegiance. Ilan's presented wonderful work about the jurisprudence that birth within a country kind of raises a natural form of allegiance for protection. He has a wonderful analysis along those lines. Anyhow, all the Confederates were born citizens and they couldn't get out of treason by claiming that they had somehow dissolved. They had successfully seceded from the Union. No, you hadn't successfully succeeded from the Union. And so when they tried to pass, Thaddeus Stevens tried to pass legislation based on the idea that they had to prove their citizenship. Again, here's John Bingham, my go to person for understanding the 14th amendment, quote, rebel treason and revolt does not make them a foreign nationality, nor put them or the states in which they reside beyond the jurisdiction of the United States States, nor absolve them from their allegiance to this government.

[00:50:49.1 Kurt Lash: The allegiance rule. Again, very much informing what he's doing. And of course, yeah, you are still Confederates, you're born in the United States, you're still citizens, you still can be subject to treason. Now, as for the existence of former slaves who had been illegally brought into the United States through the horrific practice of the international slave trade, Jack, I think your article's outstanding. Was you and you and Bethany, who would. Who had produced that?

[00:51:22.9 Gabriel "Jack" Chin: Paul Finkelman.

[00:51:23.8 Kurt Lash: Oh, Paul Finkelman. Paul Finkelman. That's right. I'm thinking of a difference. Different articles. You and you and Paul. And again, talking about the immigration laws and the efforts to raise money to take care of these people who had been illegally brought into the United States, I thought was fascinating. I think it's very important. But I noticed when you get to the end of the article and we reach after abolition, the deportations all stop and we don't find any evidence. And I've looked for this and other people have challenged me on this, but there simply isn't any reference at all to a category of illegally present smuggled former slaves, and certainly no evidence that any of them were deported. And I have to agree with Ilan, and I'd love to keep talking to you about this, but when I look at the language of Lincoln and the Freedmen's Bureau act, and especially the second Reconstruction act, they, all of those laws and all of those statements presume that the freedmen were citizens.

[00:52:24.0 Kurt Lash: And so that's why the Freedmen's Bureau, without questioning whether or not they were legally in the country or not, the Freedmen Bureau was giving the freedmen acreage, temporarily, unfortunately, but still giving them acreage on the assumption that they were citizens. Lincoln was assuming that they were citizens. He wanted them brought into the Union army, and then he wanted them to be allowed to vote, right? In Louisiana, only citizens are allowed to vote. And then the second Reconstruction act, of course, registered en masse thousands of freedmen in the South. And all of those registrations presumed that residency within the state was prima facie evidence of citizenship. And there isn't evidence of a single person disqualified on the grounds that they were not legally present in the United States. So I really think in your exchange with Shook and Smith, I actually do think that they believed that through abolition and through the eradication of slavery, they had made the freedmen prima facie citizens. And certainly their children would be as well. But it's an important topic. I think it's one that we're still investigating.

[00:53:41.9 Jeffrey Rosen: Thank you so much for that. And thanks to all of you for a really thoughtful and illuminating discussion of an extremely important topic. We have three minutes left. And my only job at the NCC is to ensure that we end on time. I think we should have very brief closing statements of about two minutes each. And I'm going to ask Amanda Frost and Ilan Wurman to sum up for both teams in the hope that that will give our audience the essence of the argument. So, Amanda, in just about two minutes, please tell the We The People audience why you believe that President Trump's executive order is unconstitutional.

[00:54:20.6 Amanda Frost: Yeah. So first I'll just say, yeah, Kurt, of course John Bingham thought the children of confederates were citizens because they were born in the US he didn't adopt the allegiance based theories. He adopted my view and the view that everyone had up until January 20, at least, all the decision makers in Congress and the courts, that we have universal birthright citizenship with very narrow exceptions. So I started off by saying every source, every method of constitutional interpretation supports the universalist view, which is the view that has been shared by courts and by Congress and by the executive until January 20th. That's the text. If you're writing a text where you want to exclude people, you don't say all persons born are naturalized. That's legislative history. Where they listed very discreet exceptions like the children of diplomats and the children of Native American tribes. They didn't mention all these other groups which as Jack has already referenced, were well known to Congress at that time. We've got a long standing history, starting with Wong Kim Ark, but going until the 1980s. And the reason the court hasn't said more to the Supreme Court on this is because it's been a non issue.

[00:55:19.1 Amanda Frost: No one has questioned it. And as I said, we'd have to rewrite our immigration code. And the consequences for American families, all of us, every single person giving birth, whether they've been in the United States for 200 years, their family or not, will now have to prove their lineage and ancestry if this executive order goes into effect. And of course, this is exactly what the Reconstruction Congress did not want. It wanted a clear bright line rule. It wanted to end the questioning of citizenship in Dred Scott. Which, by the way, went beyond the enslaved persons and the free blacks who they said weren't citizens. Taney said also not citizens are any, "inferior or subordinate class". Guess who would have been included in that for Chief Justice Taney or for maybe future administrations like the one we have today. Anyone who disagreed with them, anyone of various different races. Anyone who they decided was an enemy of the United States would therefore not be a citizen. Under that view, the final point I'll make is that the Constitution is supposed to serve us. This provision has served America well. Not every country has universal birthright citizenship.

[00:56:22.5 Amanda Frost: We do. And one thing America does better than Europe, which doesn't have this rule, is we integrate the children of immigrants beautifully. They power our economy. They are a reason our nation has thrived over the last century. And to lose this rule would be to lose something that is working so well for the United States of America and that is deeply, fundamentally American. We're all equal at birth.

[00:56:44.2 Jeffrey Rosen: Thank you so much for that. Ilan Wurman, in just three minutes or less, please tell the We The People audience why you think that parts of President Trump's executive order may not violate the Constitution.

[00:56:57.1 Ilan Wurman: Sure. And so just the question is, what theory here, under whatever methodology you have connects most of the dots because all the theories have some holds. And so, for example, the theories on offer I haven't heard Amanda or Jack dispute the evidence that a lot of people thought domicile was relevant. Their theory cannot account for that. Now, they might have an explanation, and I'm having a debate tomorrow with a scholar who I know has an explanation that actually they didn't mean what they said and it's more nuanced than that, and that's fine. But if the evidence does in fact suggest that several people in the know thought the domicile was relevant, no other theory can explain it. The international law theory can. It explains the exception for native tribes, it explains what they said about native tribes, and it explains the other historical exceptions. So it fits a lot of the data. What is the bottom line for the executive order? Well, I think the lower court injunctions should probably be vacated and claims should be brought on a more case by case basis in this context, because maybe the answer is different for temporary sojourners who, you know, were under a temporary and local allegiance, but over whom there wasn't this complete jurisdiction in the international law sense.

[00:58:16.6 Ilan Wurman: Maybe it's different for them compared to the rule with respect to unlawful entrants versus people that oversee stays. I didn't even mention this, but some scholars took the view that the children born of temporary sojourners could elect US citizenship if they came back within a reasonable time of attaining an age of majority. All this is a way of saying that as you know, maybe the Trump administration's executive order is unconstitutional in some respects, but that doesn't that would not justify a universal pre enforcement injunction, which is what the Supreme Supreme Court is addressing on May 15. And I would just encourage a more careful, nuanced development of the law because I hope if anyone takes anything away from this, it's that actually there are open questions about this and the various immigration statuses might matter. And this can't be one size fits all. It may not be a one size fits all in terms of the history and the text and the theory and so on.

[00:59:14.6 Jeffrey Rosen: Thank you so much Amanda Frost, Ilan Wurman, Jack Chin, and Kurt Lash for a nuanced, thoughtful and illuminating discussion of birthright citizenship. Look forward to seeing everyone again soon. Thank you.

[00:59:15.2 Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock and Greg Sheckler. Research was provided by Gyuha Lee and Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Check out The New Constitution 101 course at constitutioncenter.org/khan101. Sign up for the newsletter at constitutioncenter.org/connect and always remember that the National Constitution center is a private nonprofit. We receive almost no government funds and this podcast and all of our work is only possible thanks to the generosity of people from across the country who are inspired by our non partisan mission of constitutional education and debate. Please consider supporting our efforts by donating today at constitutioncenter.org/donate on behalf of the National Constitution Center, I'm Jeffrey Rosen.