

ARTICLE

Birthright Citizenship and a Nation's Responsibility to Its Children

Brook Thomas

Department of English, University of California, Irvine, CA, USA
Email: bthomas@uci.edu

(Received 27 May 2025; revised 11 July 2025; accepted 12 July 2025)

Abstract

This brief piece addresses the dispute sparked by Donald Trump's executive order denying birthright citizenship to two classes of people traditionally included under the citizenship clause of the Fourteenth Amendment. A primary goal is to provide a historical perspective on arguments made by both sides that are too frequently neglected in media coverage of the dispute. The piece does not predict how SCOTUS might rule, but it does make a case for the nation's responsibility to children who have violated no law. Through textual and historical analysis, it also refutes two law professors who propose an originalist interpretation of the Fourteenth Amendment that supports Trump's effort to deny birthright citizenship to children born to undocumented immigrants. Drawing on works of literature, this article hopes to clarify the consequences of the complicated legal issues involved, including the bigoted history of previous efforts to restrict birthright citizenship.

Keywords: birthright citizenship; *Elk v. Wilkins*; *Insular Cases*; textualism; *US v. Wong Kim Ark*

On the first day of his second term, Donald Trump unleashed a furor when he issued an executive order limiting the scope of birthright citizenship. Considering the order likely unconstitutional, various lower courts issued national injunctions against it. But on June 27, 2025, in a six-to-three decision, the Supreme Court ruled that the injunctions lack national jurisdiction. Creating a patchwork in which citizens in one state are not citizens in another, that decision prompted people from various states to bring a class-action suit against Trump's order. On July 10, 2025, a federal judge validated those bringing the suit, thus blocking the order until the Supreme Court rules on its constitutionality.

1. Historical background

There are two ways to become U.S. citizens: through naturalization, which is controlled by Congress, and by birth. The 1790 Naturalization Act included only “free whites,” and the infamous *Dred Scott* case of 1857 denied U.S. citizenship even to free African Americans born in the country. Chief Justice Roger Taney's rationale was that people of African descent were not part of “We, the People” who ratified the Constitution. In 1865, the Thirteenth Amendment abolished slavery in the United States, but *Dred Scott* was still on the books. The Civil Rights Act of 1866 addressed it by conferring citizenship upon “all persons born in

© The Author(s), 2025. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

the United States and not subject to any foreign power, excluding Indians not taxed.”¹ Because African Americans were not subject to foreign powers, they became citizens. Nonetheless, that language denied citizenship to children born to immigrants who had not expatriated from their native lands. The Fourteenth Amendment further complicated matters. Proposed by Congress in 1866 and ratified in 1868, it states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.”² What does it mean to be subject to U.S. jurisdiction?

The obvious answer is territorial determination, which follows common law precedent in which anyone born in the king’s territory was a subject of the king, with the exceptions of children of diplomats or invading armies. However, U.S. citizens beyond U.S. territory still have to pay taxes and, during the Civil War, were subject to military conscription. Likewise, immigrants to the United States who are not yet naturalized can still be subject to their home country. In an 1873 Supreme Court ruling on other matters related to the Fourteenth Amendment, Justice Samuel Miller wrote that the citizenship clause followed the 1866 Civil Rights Act’s exclusion of people “subject to any foreign power.”³ But Miller’s understanding of birthright citizenship was not essential for the outcome of the case and therefore lacked the power of a precedent.

Then the 1884 case of *Elk v. Wilkins* denied birthright citizenship to Native Americans born under tribal jurisdiction. According to Justice Horace Gray, although tribes were subject to U.S. jurisdiction, they were not *completely* subject to it. In addition, in 1884, law professor George Collins began arguing that the Fourteenth Amendment’s clause did not determine birthright citizenship territorially but followed Emile Vattel’s *The Law of Nations* (1757), which determined it by parental bloodlines.⁴ It took thirty years after the ratification of the Fourteenth Amendment for the Supreme Court to finally resolve the debate.

The 1898 case of *US v. Wong Kim Ark* involved a man born in California to Chinese parents who, under the new 1870 Naturalization Act, were still ineligible for citizenship. Aided by Collins, the U.S. government tried to deny Wong Kim Ark citizenship, arguing that, like his parents, he was a subject of China. Two justices agreed by citing Vattel that birthright citizenship is determined by parental descent, not “an inanimate piece of land.”⁵ But the six-justice majority ruled in Wong Kim Ark’s favor by adhering to a territorial determination, which, it insisted, applied to everyone, except tribal Native Americans and those under the two common-law exceptions.

Maxine Hong Kingston’s *China Men* gives a sense of what was at stake. Her book mixes autobiography, history, and myth to portray four generations of Chinese immigrants in her fictional family. The grandfather worked on the transcontinental railroad, whose completion in 1869 is illustrated in every U.S. passport. Although the grandfather was “an American for having built the railroad,” he was denied citizenship because, under the 1870

¹ Civil Rights Act of 1866 1866.

² In her dissent in *Trump v. Casa, Inc.* 2025, Justice Sonia Sotomayor mistakenly writes that “The States passed in 1866 and Congress ratified in 1868 the Fourteenth Amendment’s Citizenship Clause” (1). It was the other way around.

³ *The Slaughter-House Cases*, 83 U.S. 36 1873, 73.

⁴ Collins 1884. For more late nineteenth-century law review articles debating the meaning of the citizenship clause, see Thomas 2007, 278n25.

⁵ *United States v. Wong Kim Ark*, 169 U.S. 649 1898, 708.

Naturalization Act, no one of Asian ancestry could naturalize. Conditions worsened with an 1882 law that, with few exceptions, excluded Chinese from entering the nation. Yet, in a chapter called “The Laws,” Kingston celebrates *Wong Kim Ark*. “This decision has never been reversed or changed, and it is the law on which most Americans of Chinese ancestry base their citizenship today.”⁶ If, however, the Supreme Court upholds Trump’s order, many of those people would have been granted citizenship mistakenly.

2. The present debate

Wong Kim Ark outraged San Francisco’s James Phelan, whose slogan for his 1920 re-election campaign to the senate was “Keep California White.” Phelan proposed a new amendment that would have denied birthright citizenship to anyone born to parents who were ineligible for citizenship. In 1920, that meant anyone of Asian heritage. Phelan’s and other attempts to amend the Constitution have failed miserably. Trump hopes to accomplish a similar goal through his executive order. That order does not argue for Vattel’s determination by parental bloodlines of descent, which most countries have adopted. It simply adds two territorial exceptions to the ones identified in *Wong Kim Ark*. First, it denies citizenship to a child whose mother was “unlawfully present in the United States” and whose “father was not a U.S. citizen or lawful permanent resident at the time of said person’s birth.” Second, it denies citizenship to a child whose “mother’s presence in the United States at the time of said person’s birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a U.S. citizen or lawful permanent resident at the time of said person’s birth.” The first class targets undocumented immigrants. The second targets so-called “anchor babies,” whose foreign mothers come to the country to give birth and soon leave.⁷

Citing the Fourteenth Amendment and *Wong Kim Ark*, most of Trump’s critics assume that, if the Supreme Court rules on the order, it will declare it unconstitutional. But is that inevitable? *Wong Kim Ark* was necessary because the Fourteenth Amendment’s language is open to multiple interpretations. Furthermore, when *Wong Kim Ark* was born, his parents were in the country legally because, as a merchant, his father was not covered by the exclusion act. Trump’s lawyers can argue that *Wong Kim Ark* does not apply because undocumented immigrants and mothers on temporary visas, unlike *Wong Kim Ark*’s parents, have not established what the *Wong Kim Ark* majority called legal “domicile.”⁸

The most obvious rebuttal is that arrests of illegal immigrants prove that they are subject to U.S. jurisdiction. But *Elk v. Wilkins*’ ruling about “complete jurisdiction” allows Trump to argue that undocumented immigrants are not completely subject to U.S. jurisdiction.

Those opposing that claim can cite *Plyer v. Doe* (1982), which arose because districts in Texas tried to force undocumented children to pay tuition for K-12 education. A split court ruled that such a requirement violated the equal protection clause of the Fourteenth Amendment, which applies to persons, not citizens. The majority also ventured that *Wong Kim Ark* covered

⁶ Kingston 1980, 145, 156.

⁷ Executive Order 14610 2025. Forty years ago, Peter H. Schuck and Rogers M. Smith (1985) argued that the citizenship clause should not apply to children of illegal immigrants. However, unlike Trump, they embraced Vattel’s views of birthright citizenship. For a rebuttal, see Thomas 2007, 179–96.

⁸ *United States v. Wong Kim Ark*, 169 U.S. 649 1898, 693, 699, 700, 718, 720. For a progressive era discussion, see Cleveland 1927.

children born to undocumented parents. But, like Justice Miller's 1873 claim about people "subject to a foreign power," that statement lacks the status of a precedent because it was not essential for the outcome.

A *New York Times* op-ed gives the administration added ammunition. In addition to noting that Wong Kim Ark's parents were legally in the country, law professors Randy Barnett and Ilan Wurman argue that the framers of the Fourteenth Amendment conceived it as a "social compact" in which "allegiance" is exchanged for "protection" with allegiance displayed by "obedience to the laws." Under common law, people in the country who were not British nationals were conceded temporary loyalty to the monarch, but the professors argue that they had to come in "amity." Breaking laws of entry is not a display of amity. Thus, the amendment was not intended to include children born to illegal immigrants.⁹

This argument might appeal to Supreme Court originalists, but it is historically and linguistically flawed. Why aren't other violations of law a breach of amity? More importantly, "allegiance" never appears in the Fourteenth Amendment. "Protection" appears, but in the equal protection clause referring to persons, not citizens, with no qualifications about the persons included. In fact, if the framers wanted to describe an exchange of allegiance for protection, a model was historically available. Francis Lieber, an immigrant and acknowledged legal expert, proposed an amendment declaring that every citizen "owes plenary allegiance to the government of the United States, and is entitled to, and shall receive, its full protection at home and abroad."¹⁰ But the framers of the Fourteenth Amendment chose *not* to use Lieber's language.

Lieber's rejected amendment points to another flaw in the professors' originalist claims. Lieber's target was Confederates who had chosen allegiance to states, not to the nation. In 1866, the primary question of allegiance was about Confederates, not illegal immigrants. Far from displaying amity, Confederates invaded U.S. territory. Yet no one denied citizenship to their children born during the war. Indeed, when the Fourteenth Amendment was proposed and ratified, illegal immigration was not an issue. At that time, someone had to reside in the country for five years before becoming a citizen. Although 13 states allowed noncitizens to vote, other states had complaints about noncitizens voting. But there was almost no outrage about illegal immigration. In fact, states, not the national government, were in charge of regulating immigration. Widespread concern about illegal immigrants did not arise until the 1882 Chinese Exclusion Act.

By 1898, illegal immigration was a concern, and *Wong Kim Ark*'s majority addressed relevant cases. Nonetheless, it repeatedly pronounced that Native Americans and children of diplomats and invading armies were the sole exceptions to a territorial determination. It never added children of illegal immigrants to the list. Furthermore, it was the dissenters, not the majority, who appealed to *Elk v. Wilkins*' ruling about *complete* subjection to U.S. jurisdiction. Justice Horace Gray, who penned the opinion in both cases, disagreed.

3. Responding to a history of bigotry

Another not strictly legal factor affecting the debate is the bigotry accompanying efforts to limit birthright citizenship. The justices affirming Wong Kim Ark's citizenship were not

⁹ Barnett and Wurman 2025. For an extensive rebuttal, see Bernick, Gowder, and Kreis forthcoming.

¹⁰ Lieber 1865.

exempt from it. The same year as *Wong Kim Ark*, in *Williams v. Mississippi*, a unanimous Court upheld a provision in Mississippi's new constitution that effectively disfranchised most African Americans. Likewise, the majority did not know that later in 1898, the United States would declare war on Spain and acquire Puerto Rico, Guam, and the Philippines while annexing Hawai'i. Prejudices prevailed in the *Insular Cases* that decided the status of those territories. Clearly, the territories were subject to U.S. jurisdiction, but, ruling that they were not fully incorporated into the United States, a divided Court denied full citizenship to their dark-skinned inhabitants.¹¹

If Kingston's *China Men* documents *Wong Kim Ark*'s positive implications for Chinese immigrants, Carlos Bulosan's *America Is in the Heart* documents the *Insular Cases*' injustice. Set before the Philippines' 1946 independence, Bulosan's novel depicts Filipinos denied full U.S. citizenship despite birth within U.S. jurisdiction and eager expressions of allegiance. Aspirationally, the narrator's brother proclaims, "America is also the nameless foreigner, the homeless refugee, the hungry boy begging for a job, and the black body dangling from a tree." But, denied full citizenship, Filipino migrant workers faced political "terrorism" that curtailed their "civil liberties."¹²

The government's argument trying to deny *Wong Kim Ark* citizenship is another example of bigotry. The Solicitor General was ex-Confederate Holmes Conrad. Conrad contended that citizens are the people who compose a community. Echoing *Dred Scott*'s ruling that African Americans were not part of "We, the People," he argued that race and culture prohibited Chinese from joining the U.S. community. In contrast, *Wong Kim Ark*'s lawyers convinced even racially prejudiced justices by quoting Charles Sumner, a prominent racial egalitarian: "Here is the great charter of every human being, *drawing vital breath upon this soil*, whatever may be his condition and *whoever may be his parents*. He may be poor, weak, humble or black—he may be Caucasian, Jewish, Indian, or Ethiopian race—he may be of French, German, English, or Irish extraction; but before the Constitution all of those distinctions disappear ... He is one of the children of the State, which like an impartial parent, regards all of its offspring with equal care."¹³

Significantly, Sumner focused on children, not parents. Nonetheless, if Trump's order is upheld, children will be born in the United States with no nation to protect them. Because some undocumented people fleeing repressive regimes have lost their native citizenship, their children would be born stateless. Even *Wong Kim Ark*'s dissenters decried that possibility. Alluding to Edward Everett Hale's "The Man Without a Country," they wrote that U.S. law does not allow the "existence of a man without a country."¹⁴ Written during the Civil War to shame Confederates who betrayed their allegiance, Hale's story depicts a soldier whose disloyalty causes a military tribunal to forbid him from ever again setting foot on U.S. soil. If the Fourteenth Amendment allowed traitorous Confederates, like Solicitor General Holmes, to retain citizenship, should it not also grant citizenship to children who broke no laws?

Brook Thomas is Chancellor's Professor Emeritus of English and the Center for Law, Society, and Culture, UC Irvine. His specialty is 19th-century law and literature in the US. He has published six single-authored books and a case book on *Plessy v. Ferguson*. *The Literature of Reconstruction, Not in Plain Black and White* (2017) won the Hugh Holman

¹¹ On the *Insular Cases*, see Burnett and Marshall 2001.

¹² Bulosan [1946] 1973, 189, 204.

¹³ Salyer 2005, 73.

¹⁴ *United States v. Wong Kim Ark*, 169 U.S. 649 1898, 720.

Prize. He just completed *Pardoning the Klan: Remembering Reconstruction through a Tale of Forgiving and Forgetting*. He has held von Humboldt, DAAD, Woodrow Wilson Center, ACLS, and NEH Fellowships. His work has been translated into seven languages.

Author contribution. Conceptualization: B.T.

Conflicts of interests. The author declares none.

References

- Barnett, Randy, and Ilan Wurman. 2025. "Trump Might Have a Case on Birthright Citizenship." *New York Times*, February 15. <https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html>.
- Bernick, Evan B., Paul Gowder, and Michael Kreis. Forthcoming. "Birthright Citizenship and the Dunning School of Unoriginal Meanings." *Cornell Law Review*.
- Bulosan, Carlos. [1946] 1973. *America Is in the Heart*. University of Washington Press.
- Burnett, Christina Duffy, and Burke Marshall, eds. 2001. *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*. Duke University Press.
- Civil Rights Act of 1866. 1866. "An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication," April 9.
- Cleveland, Frederick A. 1927. "The Relation of Domicile to Citizenship." In *American Citizenship as Distinguished from Alien Status*. The Ronald Press, pp. 34–49.
- Collins, George D. 1884. "Are Persons Born Within the United States Ipso Facto Citizens Thereof?" *American Law Review* 29: 831–38.
- Executive Order 14610. 2025. "Protecting the Meaning and Value of American Citizenship." Fed. Reg. 8449, January 20.
- Kingston, Maxine Hong. 1980. *China Men*. Alfred A. Knopf.
- Lieber, Francis. 1865. *Amendments of the Constitution, Submitted to the Consideration of the American People*. Loyal Publication Society.
- Salyer, Lucy E. 2005. "Wong Kim Ark: The Contest over Birthright Citizenship." In *Immigration Stories*, eds. David A. Martin and Peter Schuck. Foundation Press, pp. 51–85.
- Schuck, Peter H., and Rogers M. Smith. 1985. *Citizenship Without Consent: Illegal Aliens in the American Polity*. Yale University Press.
- The Slaughter-House Cases*, 83 U.S. 36. 1873.
- Thomas, Brook. 2007. *Civic Myths: A Law and Literature Approach to Citizenship*. University of North Carolina Press.
- Trump v. Casa, Inc.* 2025, June 27.
- United States v. Wong Kim Ark*, 169 U.S. 649. 1898.

Cite this article: Thomas, Brook. 2025. "Birthright Citizenship and a Nation's Responsibility to Its Children." *Public Humanities*, 1, e115, 1–6. <https://doi.org/10.1017/pub.2025.10044>