Garden State CLE Presents:

Born in the USA
But Am I a Citizen?

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Lesson Plan

Introduction

Overview Within hours of taking the Oath of Office on January 20, 2025, the President of the United States promulgated Executive Order 14160 (EO).

The EO sought to limit birthright citizenship for certain groups of children born in the United States after February 19, 2025. As currently constituted, it applies to the following children born after February 19th, who do not have a U.S. citizen or U.S. lawful permanent resident father at the time of their birth:

> (1) children with a mother who is unlawfully present in the United States at the time of the birth and
> (2) children with a mother who is lawfully but temporarily present in the United States at the time of the birth.

Instructor's comment: These last components are intended to end the practice of expectant mothers traveling to the United States for the sole purpose of giving birth.

There are no exceptions in the EO for any type of temporary immigration status, and there are no exceptions for foreign national parents who are in the green card process.

In defining who is deemed a mother or father for the purposes of the EO, the President defined "mother" to mean the immediate female biological progenitor and "father" to be the immediate male biological progenitor. Therefore, parents of adopted children and parents with legal but not biological parentage of a child are not considered to be a "mother" or "father" under the order.

Scope and Impact of EO

The EO is explicit that it applies only to children born after February 19, 2025. If the EO is permitted to go into effect, children born in the United States on or before February 19, 2025, will still be considered U.S. citizens after that date. Those who are U.S. citizens on February 19th will not lose or be stripped of their citizenship as a result of the EO.

Also, if it is permitted to take effect, the EO orders federal agencies to stop issuing documents that recognize U.S. citizenship for affected children after February 19th and to refuse to accept documents issued by state, local, or other authorities that recognize their U.S. citizenship. Families may find that they are refused U.S. passports by U.S. authorities for these children and refused issuance of U.S.-citizen social security numbers.

Further, since under the EO children born after February 19th to unlawfully present parents will have no U.S. immigration status, these children would be subject to deportation. For children born to parents with H-1B, L-1, TN, O-1, P, or any other lawful, temporary status, though the EO does not specify, these families would presumably be required to obtain evidence of their child's dependent nonimmigrant status through an immigration application.

Text - Executive Order 14160

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. The privilege of United States citizenship is a priceless and profound gift. The Fourteenth Amendment states: "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." That provision rightly repudiated the Supreme Court of the United States's shameful decision in Dred Scott vs. Sandford, 60 U.S.(19 How.) 393 (1857), which misinterpreted the Constitution as permanently excluding people of African descent from eligibility for United States citizenship solely based on their race.

But the Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the United States. The Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not "subject to the jurisdiction thereof." Consistent with this understanding, the Congress has further specified through legislation that "a person born in the United States, and subject to the jurisdiction thereof" is a national and citizen of the United States at birth, 8 U.S.C. 1401, generally mirroring the Fourteenth Amendment's text.

Among the categories of individuals born in the United States and not subject to the jurisdiction thereof, the privilege of United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's 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 United States citizen or lawful permanent resident at the time of said person's birth.

Sec. 2. Policy. (a) It is the policy of the United States that no department or agency of the United States government shall issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship, to persons: (1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth.

(b) Subsection (a) of this section shall apply only to persons who are born within the United States after 30 days from the date of this order.

(c) Nothing in this order shall be construed to affect the entitlement of other individuals, including children of lawful permanent residents, to obtain documentation of their United States citizenship.

Sec. 3. Enforcement. (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Commissioner of Social Security shall take all appropriate measures to ensure that the regulations and policies of their respective departments and agencies are consistent with this order, and that no officers, employees, or agents of their respective departments and agencies act, or forbear from acting, in any manner inconsistent with this order.

(b) The heads of all executive departments and agencies shall issue public guidance within 30 days of the date of this order regarding this order's implementation with respect to their operations and activities.

Sec. 4. Definitions. As used in this order:

(a) "Mother" means the immediate female biological progenitor.
(b) "Father" means the immediate male biological progenitor.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Judicial Action Enjoining Enforcement

Executive order enjoined pending resolution of the litigation by:

1) CASA, Inc. vs. Trump, 2025 WL 408636 (D. Maryland) February 5, 2025. (Affirmed by 4th Circuit)

2) State of Washington vs. Trump, 2025 WL 415165 (D. Wash) February 6, 2025 (D. Wash)

3) New Hampshire Indonesian Community Support vs. Trump, 2025 WL 440821, February 10, 2025 (D.N.H.)

4) Doe vs. Trump, 2025 WL 484070 February 13, 2025 (D. Mass)

Historical Background

The decision in Dred Scott vs. Sandford, 60 U.S. 393(1856) marks the beginning of this controversy.

The Court's intention in Dred Scott was to transform a pure political issue into settled law. Using the so-called "originalist" doctrine to interpret the Constitution, Chief Justice Taney wrote the majority opinion and ruled that: African-Americans are not citizens of the United States and have no rights privileges or immunities under federal law. Accordingly, the jurisdictional claim based upon diversity fails because Scott is not a citizen of the United States. [Note: As a slave, Dred Scott was not even a citizen of Missouri, a slave State at the time.]

Modern-day tenets of judicial ethics demand that appellate courts resolve contested issues on the narrowest of grounds and try to avoid constitutional issues whenever an alternative statutory solution is available. The Dred Scott decision could have been quickly decided on procedural grounds based upon lack or standing. But as a political entity in the antebellum era, the Court addressed a host of collateral issues, all of which favored slave states and the institution of slavery.

It is historically incorrect to posit that the Dred Scott decision caused the Civil War. However, the holding made resort to the judiciary to settle the legal disputes around the issues of slavery, states rights, nullification and the powers of the federal government impossible.

One thing is clear: This reviled decision was so bad that it took THREE amendments to the Constitution to undue its damage.

13th Amendment ratified on December 6, 1865 abolished slavery and involuntary servitude except as punishment for crime.
14th Amendment Ratified July 9, 1868 defined citizenship and made due process of law and equal protection of the law applicable to the states; and

15th Amendment ratified February 3, 1870 provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Legislation by the Reconstruction Congress 1865-1866

42 USA 1981 - The Civil Rights Acts of 1866 (April 9th) (Initially enacted over the veto of President Johnson. Re-enacted in 1870 following the adoption of the 14th Amendment)

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Instructor's comments: At the time it was enacted, it was understood that the statute would not apply to three distinct groups of people:

> Children of foreign ambassadors [The Slaughterhouse cases, 83 U.S. 36(1873) the Court noted in dicta that the phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States.];
>
> Children born on foreign public ships;
>
> Children of hostile, invading armies; and
>
> Children of Native Americans living on a reservation [i.e., Indians not taxed. Note that in 1924, Congress enacted a statute that conferred citizenship on Native Americans.]

These exceptions were carried over to the exclusions implied by the language of the 14th Amendment. (See Wong Kim Ark, supra).

The Dred Scott decision triggered a profound distrust of the Supreme Court's ability to decide cases related to slavery and civil rights in a fair manner. Thus, the 13th Amendment was used as a method of bypassing subsequent Supreme Court or Congressional review on the issue of constitutionality. The legislators in the Reconstruction Congress feared that a subsequent Supreme Court majority (or a future Democrat-majority Congress), might also declare the Civil Rights Act to be unconstitutional. As a result, the Congress proposed the 14th Amendment to assure that the intent of the legislation would survive in perpetuity. The Amendment was adopted in 1868 and thus allowed the Civil Rights Act to be amended and reenacted in 1870.

Instructor's comment - Video recreation from the 2012 film Lincoln

Text of the 14th Amendment

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Passed by Congress June 13, 1866, and ratified July 9, 1868

Interpretive Case Law

Wong Kim Ark, 169 U.S. 649(1898) concerned a man who was born in the state of California in 1873 to two non-citizen parents who had emigrated from China. Although they were not citizens and were ineligible for citizenship due to the Chinese Exclusion Act, the parents were lawfully in the USA, were technically subjects of the Emperor of China, had a permanent domicile and residence in the United States, were there carrying on business, and were not employed in any diplomatic or official capacity under the Emperor of China.
After Wong tried to return to San Francisco following a visit to China, he was denied re-entry because he was deemed not a citizen on account of his parents' Chinese citizenship.

The Supreme Court declared the denial of re-entry to be unconstitutional. It explained that the Citizenship Clause of the Fourteenth Amendment "must be interpreted in the light of the common law," under which the doctrine of *jus soli* ("right of soil"), rather than *jus sanguinis* ("right of blood"), applies.

> "The fundamental principle of the common law with regard to English nationality was birth within the allegiance. ... The principle embraced all persons born within the king's allegiance, and subject to his protection."

Determining Wong was a citizen, the Supreme Court held, "The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country ...."
The idea of citizenship being tied to place of birth was also discussed in *dicta* in the landmark decision of Plyler vs. Doe, 457 U.S. 202(1982) (footnote 10) where, in Wong Kim Ark, Justice Gray concluded that

> "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.

Instructor's comment – See comprehensive historical discussion in Fittisemanu vs. United States, 1 F.4th 862(2021) discussing the denial of birthright citizenship to those children born in the US territory of American Samoa, home of Saul Goodman's law school *alma mater*.

Other Contested Legal Issues

Anchor Babies – the Executive order is also intended to end the practice of conferring birthright citizenship on women who enter the United States, legally or otherwise, for the sole purpose of giving birth to a child on US soil and thus obtaining citizenship for the child.

Sanctuary Cities, Counties and States

Many of the current-day legal controversies related to immigration policy seem to echo those that were prevalent in the antebellum period of the 19th Century. Most significant is:

> Nullification – The theory of nullification holds that individual states have the inherent right under the federal Constitution to reject or simply ignore federal laws that they deem to be unconstitutional. It was initially crafted by several of the founders, including Jefferson and Madison (See the Kentucky and Virginia Resolutions of 1798). Nullification was widely used by disaffected states prior to the Civil War. However, its use was explicitly rejected by the Supreme Court just prior to the outbreak of hostilities. (See Ableman vs. Booth, 62 U.S. 506(1859) (challenging the provisions of the federal Fugitive Slave Act)). The Court ruled that the Supremacy Clause vests sole authority in the federal courts to determine the meaning and constitutionality of federal law.

The outcome of the Civil War ended the nullification controversy until the 1950's when southern states raised it again in an effort to prevent public school integration, as mandated under Brown vs. Board of Education, 357 U.S. 483(1954). As a result, nullification as a block to school integration was once again explicitly rejected by the Supreme Court in Cooper vs. Aaron, 358 U.S. 1(1958).

Commandeering of State Resources

In contradistinction to the foregoing, the Supreme Court has ruled on three occasions that states cannot be forced to expend their own resources in an aid to the enforcement of purely federal law. Prigg vs. Pennsylvania, 41 U.S. 539(1842); Printz vs. United States, 521 U.S. 898(1997) and New York vs. United States, 505 U.S. 144(1992).