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Our prediction for how SCOTUS will rule on birthright citizenship

MANY COUNTRIES assign citizenship primarily on the basis of blood. America—along with about 30 other countries—does so primarily by place of birth. Since 1868, when the 14th Amendment was ratified, citizenship has been granted to "all persons born or naturalised in the United States, and subject to the jurisdiction thereof". On the first day of his second term, President Donald Trump sought to pare back that guarantee. Babies born in America to undocumented immigrants or temporary visa holders would no longer qualify, so as to protect "the meaning and value" of American citizenship, a status Mr Trump characterised as "a profound gift".

The Supreme Court heard oral arguments over whether that is lawful on April 1st, but Executive Order 14160, which set out the president's view, is no joke. The first judge to freeze the policy, a Reagan appointee, said it "boggles the mind" and is "blatantly unconstitutional". Similarly sceptical judges in Maryland, Massachusetts and New Hampshire agreed.

The administration's first response was to start a slightly different argument, against nationwide (or "universal") injunctions—the judicial tool that had thwarted its plans. Last June, in *Trump v CASA,* the Supreme Court sided with Mr Trump on the question of universal injunctions. Following that, a court in New Hampshire blocked the order on birthright citizenship after plaintiffs took a different approch, a class-action suit. In December the Supreme Court agreed to weigh in.

Trump v Barbara, the case before the court, tests the Trump administration's claim that the 14th Amendment "was adopted to confer citizenship on the newly freed slaves and their children"—but not to make citizens of "the children of aliens who are temporarily present in the United States or of illegal aliens". The argument turns on six words in the 14th Amendment: "and subject to the jurisdiction thereof". For more than a century

these words have been understood to exclude only the offspring of invading soldiers, foreign diplomats and Native Americans (until Congress granted them citizenship in 1924).

The administration says the offspring of undocumented immigrants and temporary visitors share a characteristic with people in those categories, namely that they are "not completely subject to the United States' political jurisdiction" and thus do not owe "allegiance" to the polity. Why? Their parents are either "domiciled elsewhere" (because they are temporary visa holders) or "lack the legal capacity to form a domicile in the United States" (because they are undocumented immigrants). No domicile, the reasoning goes, no allegiance. No allegiance, no citizenship.

The challengers—and the majority of legal scholars—say that reading is wrong. The families and lawyers challenging the order argue it clashes with the 14th Amendment's plain text, a statute that codifies it and more than a century of Supreme Court jurisprudence. The court "has repeatedly recognised the citizenship of children born in the United States to foreign-national parents", they argue, "regardless of their immigration status". Across decades of decisions, they say, the justices "never once" doubted that immigrant parents had a proper "domicile" on American soil.

Being judgey

The main precedent in dispute is *United States v Wong Kim Ark*, a Supreme Court decision from 1898 holding that a man born in San Francisco to Chinese parents was a citizen, even though his parents were barred from naturalisation. The Trump administration points out that Mr Ark's parents were lawful residents and claims the ruling says nothing about the offspring of undocumented people, or those on temporary visas. But that reading mischaracterises the majority's decision. Justice Horace Gray's opinion swept broadly, grounding citizenship in birth on American soil—not in the immigration status or legal domicile of the parents. The challengers argue that, with narrow exceptions, territorial birth suffices for citizenship. To read *Wong Kim Ark* otherwise, they say, is to turn it "on its head" and discard more than a century of settled understanding.

A few scholars have come to Mr Trump's defence, penning law-review articles and amicus briefs that develop the purported "allegiance" requirement for citizenship. But

the vast majority reject this approach, pointing to historical evidence supporting birthright citizenship as it has long been understood—and in near-universal terms since the end of the civil war. Anthony Michael Kreis, a law professor at Georgia State University, says the administration's argument focuses on the status of the parents while the 14th Amendment is about the child. "It's really hard to say that we've been doing it wrong for all these years," he adds, dismissing revisionist accounts that read historical sources "devoid of context".

Mr Kreis expects the court to reject Mr Trump's bid. Based on the briefs, SCOTUSbot, *The Economist*'s model forecasting Supreme Court rulings, agrees the administration will lose—by a vote of 5-4 or 6-3. But Anna Law, a legal historian at Brooklyn College, is not so sure. The case arrives at a moment when the court has shown a willingness to overturn long-settled precedents. Battles over who belongs, and on what terms, have been re-fought over and over. *Trump v Barbara* may be "an easy case", she says, but the fact that it's before the court "is quite scary".