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The Possibility of Ending Birthright Citizenship (audio with transcript)

Kermit Roosevelt III

University of Pennsylvania Carey Law School, krooseve@law.upenn.edu

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Interviewer: [Music Playing] welcome to Case in Point, produced by the University of Pennsylvania Law School. I'm your host, Ashton Lattimore. In this episode we'll be talking with Kermit Roosevelt, who is a professor of law at Penn, and an expert on constitutional law and conflict of laws.

Today, we'll be talking about the legal underpinnings of birthright citizenship in the United States, and whether President Trump could make good on his recent promise to do away with it by executive order. Thank you for joining us today Kermit.

Interviewee: Thanks for having me.

Interviewer: So, the legal source for US Birthright citizenship that people seem most familiar with is the 14th Amendment which was ratified in 1868., and the 14th Amendment states, "All persons born or naturalized in the United States and subject to jurisdiction therefore, are citizens of the United States, and of the state wherein the reside."

Since the ratification have there been other developments in the law that support his vision of birthright citizenship?

Interviewee: Well, there is a federal statute which repeats the words of the citizenship clause. And the significance of that is, that since it's ratification for over 100 years, it has been understood to grant citizenship to everyone born in the United States.

That's also pretty clearly the meaning of the statute. So, even if people know prevailed with an argument that oh, we've been interpreting the constitution the wrong way for 100 years, you do still have that federal statute in place.

Interviewer: At this point - or, since before this point in American History, have there been other attacks on birthright citizenship? Or, efforts to do away with it?

Interviewee: Well there is always a strain in American politics that is opposed to birthright citizen. And really this is the pre-civil war idea, this is the pre-civil war America. Because in The Declaration of Independence we talk about people's natural rights and the governments obligation to protect and secure those rights.

But everything that the declaration says is about relationships within a political community. It doesn't say, you have to respect the rights of outsiders - of people who aren't citizens. And before

the civil war and the reconstruction amendments the US constitution was bad in a number of ways, it recognized in protected slavery - that's one. But the other thing that it did - and this is according to the supreme court in the Dred Scott decision.

And the other thing it did was to say, that descendants of slaves can never become US citizens. So, there is gonna to be this class of perpetual hereditary outsiders. People who can never enter the US political community. People who will never have rights that we are bound to respect, and that's what birthright citizenship is designed to undue.

Interviewer:

So, at this point and time, the key phrase within the 14th Amendment that opponents of birthright citizenship seem to be hanging their hat on, is the clause subject to the jurisdiction thereof.

Basically, arguing that undocumented immigrants are present in the United States, but are somehow are not subject to the jurisdiction of the United States. And therefore, don't come within the birthright citizenship clause. Do you think there is any kind of solid basis for that?

Interviewee:

No, I think that's a pretty silly argument. Because subject to the jurisdiction thereof, really means just subject to our laws - obligated to follow our laws. And therefore, potentially a assimilable into our political community.

If you have someone who isn't bound by our laws, then they're not going to become a member of our political community. And who is that about? Well, given the way native Americans were treated at the time, it was about ____ if they're born into a tribe, they have tribal sovereignty, they're not completely subject to US jurisdiction.

And also, diplomats. So, foreign diplomats have diplomatic immunity, and their children do too. And when the children of diplomats are born in the United States, they're not subject to our laws in the same way.

But of course, that's not true at all with respect to undocumented immigrants. So, you know, you can imagine the police officer who sees the car weaving down the road, and thinks the person is driving drunk, pulls them over. And maybe they flash a diplomatic passport, and say diplomatic immunity, right? And they get out of

the ticket that way. You don't say I'm an undocumented immigrant, you can't arrest me, right that's just ridiculous.

Interviewer: So, apart from that kind of argument which you I think rightfully have described as pretty silly, do you think that there is any other kind of basis for this notion that there are people who are present in the United States, that would somehow be outside of the guarantees of the 14th Amendment and the statute that repeats that language.

Interviewee: I don't think so. But like I said, this is a strain of American political thought. It's basically the exclusive idea of citizenship, that there are American's and there are people who become Americans, and then there are people who can never become Americans.

And originally, I said this is about slaves, and the descendants of slaves, freed slaves, will they be able to join the US political community. Or, will they forever be outsiders? And of course, we don't have slavery anymore.

But if you think about the practical consequences of undoing birthright citizenship in the world that we live in it would reintroduce something alarming similar. So, you've got the undocumented immigrants. They come here, they're doing the work that Americans don't want to do. And this idea says, they won't be citizens. Their children won't be citizens - their children born here. Their children will also be unlawfully present. And their children's children will not become citizens.

And so again, you get this class of perpetual hereditary outsiders living in the shadows of society, doing the work that Americans don't want to do, who will never have the full range of rights that we are obligated to respect.

Interviewer: So, as you mentioned, this amendment and this concept kind of grew out of slavery in the United States. the other times when the question of birthright citizenship has come up in history, what's been the outcome? I mean, what can we kind of expect here.

Because, as you said, this would leave to sort of a perpetual hereditary underclass of people. So, is that something that would be unheard of in the United States at least after slavery? Or, is it something that we should fear?

Interviewee: Well it is something that we should fear. It would also be unheard of in the United States. The whole idea of the United States is equality, that we are equal citizens. And we don't have hereditary distinctions. We don't have distinctions based on birth or blood. And it's not supposed to matter who your parents were. So, it's very contrary to American ideas.

And if you look at what the Supreme court has done in the past, they have always rejected claims that subject to the jurisdiction is a limit on who can join the American political community. Or, who the government has to recognize as a person.

There is one case about the children of Chinese permanent residents. Chinese were not allowed to be naturalized as citizens. We had a racial exclusion there. But the children of Chinese residents, where the Supreme court said, grant it citizenship by the Birthright Citizenship Clause.

The other case in which this subject to the jurisdiction language came up was about different provision of the 14th Amendment the Equal Protection Clause, where we were in fact talking about undocumented immigrants. And the State of Texas was trying to say, we don't need to provide services to them, they don't have any equal protection rights because they're not persons basically under the equal protection clause. And the supreme court said no, subject to the jurisdiction, they are just means with the state basically.

Interviewer: Before the Supreme could reach the substantive question about what this text means - subject to the jurisdiction thereof. At least the way the President is currently threatening to go about this, he would do it by executive order. So, they would have to kind of answer the threshold question of whether or not he's able to make this kind of change through that mechanism. Is he able to do that?

Interviewee: No, he can't change the law by executive order. And of course, he can't change the constitution either. Everyone agrees with that. Presumably what he would do is to say, "Here is my new understanding of the law and the constitution. And I'm ordering my executive officials to act consist with that."

So, if you have the children of undocumented immigrants, we don't believe these people are citizens, we will treat them as if they are not citizens and if you don't like that, go to court. And that would tee up the question of whether this new interpretation is a correct interpretation of the constitution, or of the federal citizenship statute.

Interviewer: Based on the current composition of the Supreme court, do you think there are five votes for the notion that Trumps interpretation is a correct one?

Interviewee: I would be shocked if there were. But the Supreme have done things that have shocked me. The Supreme court has done things that should have shocked everyone over the past couple of hundred years, if you look at American history.

So, I don't think that we can rely on the Supreme court to protect us. There is often this idea that the constitution is a charter of American values, and the Supreme court is the guardian of the constitution and the Supreme court is going to protect American Values, but really American values are in the hands of Americans.

Interviewer: Outside of the Supreme court, what do you think would be the place that people should look to? Or, what actions should people take, you know if we're not able to depend on the Supreme court to defend against this kind of a change. What's the right next step for people who oppose it?

Interviewee: Ordinary politics. So, the path that American politics takes is supposed to be limited in some ways by the constitution. The constitution sort of sets up guardrails, so we can't go too far off course.

But those guardrails are of course sort of flexible and they're interrupted by judges, and judges are appointed by presidents. and in the long run the American people sort of get the constitution you could say that we deserve? You could say, that we want. You could say that we aspire to.

But what happens in practical terms depends largely on what ordinary Americans do, in the ordinary political process. And that means voting, that means protesting. All of the things the ways by which the American People make their voices heard.

Interviewer: Thank you. This has been a though provoking conversation. I appreciate you joining us today [*Music Playing*].

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