



Birthright Citizenship and the Fourteenth Amendment

Citizenship, Generally

The United States confers citizenship based upon birth within the national territory and those born abroad to U.S. nationals. The concept of citizenship upon birth within the U.S. is known as *jus solis*. The United States does not merely adhere to *jus solis* as statutory provision; it is a guarantee of the Fourteenth Amendment of the Constitution.

Fourteenth Amendment and Children Born in the U.S.

The Fourteenth Amendment to the Constitution is a core tenet of American civil rights providing due process and equal protection under the law to all persons. It also establishes that all persons born or naturalized in the U.S. are subject to its jurisdiction and are U.S. citizens. Below we have highlighted the birthright citizenship language of the 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.

In recent months, there has been a call for the repeal of birthright citizenship for children born in the U.S. to unlawfully present parents. Proponents of repeal argue that the clause “subject to the [U.S.] jurisdiction” does not apply to the children of unlawfully present parents because they are not subject to U.S. jurisdiction. They maintain that the phrase -- “subject to the [U.S.] jurisdiction” -- confers citizenship only to children of those individuals who give their complete allegiance to the U.S. They posit that because citizens of foreign countries still owe “allegiance” to a foreign sovereign, children born on U.S. soil to non-U.S. citizen parents do not owe complete allegiance to the U.S.

This view of the Fourteenth Amendment is not supported by legislative history or by legal precedent. The principle of birthright citizenship for all persons born within the U.S. has been a strong and clear element of the U.S. Constitution, American law, and American values for nearly 150 years.

Legislative History & Direct Language of the Amendment

The legislative history surrounding the Fourteenth Amendment shows that Congress intended to give citizenship to all children born in the U.S., including children of immigrants. Indeed, this question was debated, and delegates who wanted to exclude children from U.S. citizenship lost the debate. Only two classes of children were explicitly excluded from U.S. citizenship at the time of the writing of the Fourteenth Amendment: (1) children of diplomats, and (2) children of some Native American tribes who maintained quasi-sovereign status in 1868. Today, the phrase “subject to the jurisdiction thereof” excludes from automatic citizenship only (1) U.S.-born children of diplomats of foreign countries, who generally have immunity from U.S. laws, and (2) children born to enemy forces engaged in hostile occupation of the country’s territory.

As noted earlier, those individuals or organizations that contend that the U.S.-born children of *unauthorized* immigrants are not U.S. citizens under the Fourteenth Amendment claim that undocumented immigrants are not subject to the jurisdiction of the United States. This argument is flawed in three respects. First, the text of the Fourteenth Amendment is straightforward and the language confers citizenship to those born in the U.S. Children of undocumented immigrants receive recognition as citizens because at the moment that they are born in the U.S. they become “subject to the jurisdiction” of the U.S. All laws and protections held by a child of an American citizen are equally held by a child of an undocumented immigrant. As such, the child of an undocumented immigrant may be taken into custody as part of a child abuse investigation, detained indefinitely, placed in foster care, and made adoptable by eliminating parental rights. *In re Adoption of Peggy*, 767 N.E. 2d 29, 32, 35-6 (Mass. 2002).

Second, the use of the phrase “subject to the jurisdiction thereof” is a reference to the exclusion of the Native American populations that were not subject to the jurisdiction of the U.S. due to the exclusive jurisdiction of their tribes. Cong. Globe, 39th Cong., 1st Sess. 498. Furthermore, the remarks of Senators Trumbull and Howard during the 39th Congress reveal that “subject to the jurisdiction thereof” simply implied that the individual could be summoned and sued in an American court and could be prosecuted criminally for actions taking place on U.S. soil. *Id.* (remarks of Sen. Trumbull). Thus, as noted above, this phrase excludes foreign ministers who had diplomatic immunity and Native Americans that were subject to the jurisdiction of their respective tribes. Without a doubt, individuals who are living in the U.S. without status do not fall within these two categories for they can be arrested and tried, they can buy and sell property, they can make contracts, and can be sued in tort. Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 Am. U.L. Rev. 331, 370 (2010). To impose a reading of this phrase to the contrary is to appropriate the intent of the Framers of the Fourteenth Amendment to fit an anti-immigrant agenda.

Third, individuals and groups that wish to exclude undocumented immigrant children from citizenship point to the absence of undocumented people in the U.S. at the time the Fourteenth Amendment was drafted. They assert that the Framers of the Fourteenth Amendment did not contemplate bestowing citizenship upon children of undocumented immigrants and, therefore, such a right cannot be conferred. This argument can be dismissed outright due to its historical misinterpretation. While it may be a valid statement to claim that the term “undocumented” or

“illegal” immigrant was not in use at the time, the concept of a population that the U.S. government could not track and was viewed as subversively present in the U.S. *was* a matter contemplated by the Framers. The legislative history reveals that the subject of how to treat the children of Gypsies born in the U.S. was broached and it was decided that the children of Gypsies would be U.S. citizens. Gypsies were described as “inassimilable, defiant, criminal, nomadic, and ungovernable”—adjectives frequently used by restrictionists to describe the undocumented population. *Id.*

U.S. Supreme Court Decisions

Decisions by the U.S. Supreme Court reinforce this understanding of the citizenship clause. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the U.S. Supreme Court confirmed that a child born in the U.S. to alien parents, is entitled to birthright citizenship under the Fourteenth Amendment. In this case, Wong Kim Ark was born in 1873 in San Francisco to Chinese parents who were not employed in any diplomatic or official capacity under the Emperor of China. After traveling to China on a temporary visit, he was denied permission to return to the U.S. The government argued that Wong Kim Ark was not a citizen, even though he was born in the U.S. By a 6-2 vote, the Supreme Court rejected the government’s argument.

The fourteenth amendment affirms the ancient and fundamental rule of citizenship within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualification (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes ...

United States v. Wong Kim Ark, 169 U.S. at 693.

Two recent cases support the understanding that any child born within the United States is a citizen regardless of the citizenship of the parents. *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *INS v. Rios-Pineda*, Justice White noted for a unanimous court that the “respondent wife (an illegal alien) had given birth to a child, who, born in the United States was a citizen of this country.” 471 U.S. 444, 446. In *Hamdi v. Rumsfeld*, the plurality opinion noted that alleged Taliban fighter Yaser Hamdi was “[b]orn in Louisiana” and thus “is an American citizen,” despite objections by various *amici* that, at the time of his birth, his parents were aliens in the U.S. on temporary work visas. 542 U.S. 507, 510; *see* 2004 WL 608887 (U.S.) (Appellate Brief).

Public Policy Concerns

A number of public policy considerations strongly argue against repealing the birthright citizenship clause of the Fourteenth Amendment.

First, restricting birthright citizenship can only be accomplished through a constitutional amendment -- an incredibly difficult and lengthy process. The Fourteenth Amendment cannot be changed through an act of Congress. Instead, the constitutional amendment process requires a

two-thirds majority vote in both houses of Congress or a similar vote in two-thirds of the state legislatures just to propose the amendment. Then, either three-fourths of the state legislatures must ratify it or ratifying conventions in three-fourths of the states must approve it.

Second, if being born in the U.S. does not establish citizenship, then the federal government would have to implement systems for producing, adjudicating, and recording the legitimacy of parents' documents upon the birth of a child. This would likely require the creation of a national registry of U.S. citizens and affect not only children of undocumented immigrants, but also the children of all American citizens.

Third, ending birthright citizenship for the children of unauthorized immigrants does not correlate to a reduction in illegal immigration. The Migration Policy Institute (MPI) recently published a report showing that repealing birthright citizenship leads to more unauthorized immigrants. <http://www.migrationpolicy.org/pubs/BirthrightInsight-2010.pdf>.

Fourth, repealing birthright citizenship would create an underclass of individuals who would live in the U.S. without rights and prospects or status. This would not serve the rule of law or the good of the nation. Similarly, if children of undocumented immigrants born in the U.S. were stripped of their American citizenship, they would run the risk of becoming stateless persons. These stateless persons would never have full civil rights in any country.

Fifth, it is unconscionable to punish children for the actions of their parents. In every sense the children born to undocumented parents are innocent persons and they lack the legal capacity to determine the relevance of their parents' legal status. These children have committed no crime. To hold children accountable for the crimes of their parents would be to imply that criminality is heritable. This kind of punishment would be akin to depriving the liberty of a felon's child. The Constitution protects against such a result; it holds that even the children of traitors are not subject to punishment for the deeds of their parents. U.S. Const. art. III § 3, cl. 1 ("no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted").

Unlikelihood of a Constitutional Amendment

It appears unlikely that a proposal to amend the Fourteenth Amendment will be met with much support in light of the historical desire to preserve the Constitution. Indeed, of the many thousands of amendments that have been proposed, only 33 have obtained two-thirds of both Houses and only 27 have succeeded in ratification. Moreover, such a proposal is unlikely to pass under the current membership of the U.S. Senate. However, were it to pass both Houses, surely a presidential veto by President Obama would follow and it is unlikely that Congress would have the two-thirds majority vote to override his veto.

Resources

Below are materials that we drew upon to write this memo. We appreciate all of the expertise set forth by these authors and organizations.

You can click on the underlined link below for a number of helpful resources on birthright citizenship developed by the Immigration Policy Center. **Resources on Citizenship Under the 14th Amendment** (Immigration Policy Center Fact Sheets, January 4, 2011).

Repealing birthright citizenship leads to more unauthorized immigrants by the Migration Policy Institute. <http://www.migrationpolicy.org/pubs/BirthrightInsight-2010.pdf>.

FAQ's on Defending Citizenship Under the 14th Amendment: <http://www.aclu.org/immigrants-rights-racial-justice/frequently-asked-questions-defending-citizenship-under-14th-amendme>

ACLU Press Release on model state legislative proposal: <http://www.aclu.org/immigrants-rights-racial-justice/aclu-urges-state-lawmakers-reject-discriminatory-bills-subvert-14th>

ACLU Statement on Defending the 14th Amendment: <http://www.aclu.org/immigrants-rights-racial-justice/defending-14th-amendment>

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