



Turning Our Backs on the 14th Amendment

Ongoing Attacks on Birthright Citizenship

By Tom Jawetz and Sanam Malik | November 9, 2015

Once again, the topic of birthright citizenship has resurfaced in the broader immigration debate. Immigration opponents are proposing legislation intended to undo this bedrock principle of American society written into the 14th Amendment of the U.S. Constitution: If you are born in the United States, you are a citizen.¹

Although the popular rhetoric² surrounding efforts to end birthright citizenship mainly focuses on the U.S.-born children of unauthorized immigrants, many legislative proposals to rollback this constitutional right would actually deny citizenship to children born to lawfully present immigrants—including nearly all foreign students, temporary workers, and even some lawful permanent residents.³ Removing or changing this crucial part of the Constitution would inevitably create a large class of less-than-citizens and stateless persons. It would also open up a bureaucratic Pandora's box by requiring the creation of new burdensome regulations and oversight that would affect the lives of every new parent in the United States.⁴ At the end of the day, such efforts undermine the intentions of the 14th Amendment, the nation's history, and the core values of inclusion and integration.

The 14th Amendment reaffirmed the traditional rule of birthright citizenship in order to banish caste systems

The United States' idea of inclusivity, that citizenship is derived from a person's place of birth—otherwise known as *jus soli*—rather than from a person's blood line—known as *jus sanguinis*—traces back to English common law in the 17th century, long before the founding of our republic.⁵ But, in the crucible of slavery and in the run-up to the Civil War, the U.S. Supreme Court abandoned this longstanding rule in the notorious 1857 *Dred Scott v. Sandford* decision when it held that children born in the United States to slaves—emancipated or otherwise—were not citizens themselves.⁶

Just 11 years later, the nation recommitted to the principle of birthright citizenship by enshrining the notion in the Constitution. Section 1 of the 14th Amendment—adopted in 1868—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.”⁷ When U.S. senators debated the clause in 1866, no one disputed that it would guarantee citizenship to the U.S.-born children of noncitizens.⁸ Rather, they debated the wisdom of the policy and some opposed the provision precisely because they opposed granting birthright citizenship to immigrant children of various races. While opponents of the clause ultimately lost, Sen. Edgar Cowan of Pennsylvania voiced these racist and nativist fears most loudly, arguing that granting birthright citizenship would interfere with the ability of a state that is being “overrun by another and different race” to “absolutely expel them.”⁹ Sen. Cowan continued:

*[I]s it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race? Are they to be immigrated out of house and home by Chinese? ... [I]f another people of a different race, of different religion, of different manners, of different traditions, different tastes and sympathies are to come there and have the free right to locate there and settle among them, and if they have an opportunity of pouring in such an immigration as in a short time will double or treble the population of California, I ask, are the people of California powerless to protect themselves?*¹⁰

Thirty years after the adoption of the 14th Amendment, the U.S. Supreme Court issued the landmark decision of *United States v. Wong Kim Ark*, providing that—with certain enumerated exceptions—all children born in the United States are American citizens regardless of the status of their parents.¹¹ The Court noted that the framers of the Constitution were well versed in the principles and history of the common law.¹² And, under English common law, children born in England to foreigners were considered natural-born subjects unless they were the children of foreign ambassadors or of “alien enemies, born during and within their hostile occupation of part of the King’s domain.”¹³ Wong Kim Ark was the U.S.-born child of Chinese immigrants who were themselves ineligible for citizenship under the laws at the time.

In the nearly 120 years since *Wong Kim Ark* was decided, the Court has several times referred to the American citizenship of children born in the United States to unauthorized immigrant parents as a settled question. In *Plyler v. Doe*—recognizing the right of unauthorized immigrant children to a free public education—all nine Supreme Court justices accepted the proposition that unauthorized immigrants are “within the jurisdiction” of a state for purposes of the Equal Protection Clause of the 14th Amendment, just as they are “subject to the jurisdiction of the United States” for purposes of the Citizenship Clause.¹⁴ In the 1985 case of *INS v. Rios-Pineda*, which pertained to a form of immigration relief that was then available to certain parents of U.S. citizens, Justice Byron White wrote for a unanimous Supreme Court that the respondents in the case—a married couple who were both unauthorized immigrants—“had given birth to a child, who, born in the United States, was a citizen of this country.”¹⁵

Renewed interest in gutting an important constitutional guarantee

Efforts to change the law with respect to birthright citizenship are not new. While some have called for a constitutional amendment to amend the Citizenship Clause of the 14th Amendment,¹⁶ there have also been regular efforts at the state and federal level to change the law without amending the Constitution.¹⁷ In 1995, the House Judiciary Committee’s subcommittees on Immigration and Claims and the Constitution held a hearing to examine “Societal and Legal Issues Surrounding Children Born in the U.S. to Illegal Alien Parents.”¹⁸ Hearing witnesses discussed one piece of pending legislation—the Citizenship Reform Act of 1995—that attempted to override the plain meaning of the Citizenship Clause by statutorily defining what it means for a child to be subject to the jurisdiction of the United States.¹⁹ Testifying on behalf of the Office of Legal Counsel of the U.S. Department of Justice, Walter Dellinger explained that, “My office grapples with many difficult and close legal issues of constitutional law. The lawfulness of this bill is not among them. The legislation is unquestionably unconstitutional.”²⁰

Ten years later, in 2005, the House immigration subcommittee returned to the topic in a hearing on “Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty.”²¹ And 10 years after that, as if on schedule, the issue of birthright citizenship has once more become a major topic of national conversation. Presidential candidates from both parties have been asked to weigh in on whether they support changes to the law, and earlier this year, the House immigration subcommittee held yet another hearing to consider whether birthright citizenship is “the right policy for America.”²² At that hearing, witness and University of Texas law professor Lino Graglia—who is no stranger to controversy on issues pertaining to race²³—argued that a statute overturning birthright citizenship would survive a constitutional challenge because “[t]he Constitution should not be interpreted to require an absurdity.”²⁴ Purporting to draw support from the English common law, Graglia analogized between unauthorized immigrants living and working peacefully in the United States and “alien enemies” who are engaging in a “hostile occupation” of a country.²⁵ His remarks echo the xenophobic specter of an immigration invasion popularized by nativists and racists such as John Tanton—the godfather of the modern anti-immigrant movement who co-authored the 1994 book *The Immigration Invasion*²⁶—as well as the fear-mongering tactics of groups that regularly spread untruths about immigrants bringing crime, spreading diseases, and other common and not-so-common misperceptions.²⁷

In today’s debate, there is renewed focus on the idea that immigrant women come to the country to give birth to so-called anchor babies so that they might gain protection from deportation and eventually gain citizenship. But, under U.S. immigration laws, a child cannot sponsor a parent for an immigrant visa until the age of 21.²⁸ Moreover, at that point, the unauthorized parent would frequently have to return and wait in his or her country of origin for 10 years before applying for permission to return. Additionally, many unauthorized parents find little reprieve from deportation by having a U.S. citizen child. Between 2010 and 2012, close to 205,000 parents of citizen children were deported

by Immigration and Custom Enforcement.²⁹ It is important to note that Deferred Action for Parents of American Citizens and Lawful Permanent Residents, or DAPA, also provides no incentive for immigrant women to have a U.S. citizen child—not only because DAPA’s implementation has thus far been blocked by the courts, but also because no person who had neither an American citizen child nor a lawful permanent resident child as of November 20, 2014, would be eligible for DAPA.³⁰

A new twist on old attacks against birthright citizenship is currently playing out in a lawsuit challenging the decision of Texas officials to deny birth certificates to the children of immigrants who only can establish their identity by presenting consular identification documents.³¹ Although the court recently declined to preliminarily enjoin Texas from refusing to issue official birth certificates in such cases, the court held:

*Plaintiffs have established, at a minimum, that deprivation of a birth certificate to the Plaintiff children results in deprivations of the rights and benefits which inure to them as citizens, as well as deprivations of their right to free exercise of religion by way of baptism, and their right to travel.*³²

That is to say, even if Texas did not succeed in preventing these children from obtaining citizenship by virtue of their birth in the United States, the state’s policies may well be depriving such children of the rights and benefits that all citizens should enjoy.

The creation of a burdensome and intrusive bureaucracy

Changing a principle that has endured for 150 years is not an easy task. Ending birthright citizenship would directly affect all families in the United States and place an enormous burden on the government. First, even if such a proposal were to pass constitutional scrutiny, it would mean that all new parents in the United States would have to provide sufficient documents to prove that they have the requisite lawful status to confer citizenship upon their children. What is currently an automatic process would turn into a new and stressful undertaking for all parents of a newborn child. The U.S. Department of Homeland Security currently charges a \$600 fee to cover the costs of assessing whether a child born abroad acquired American citizenship upon birth.³³ Charging a similar \$600 for each child born in the country—in essence a birth tax—would be not only expensive, but also disproportionately challenging for people of color and the poor who are far more likely than others to lack the necessary documents and be able to afford the required fees.³⁴

To administer this new law, the government would have to create and maintain a new registry to track each and every child born in the United States. With approximately 3.9 million children born in the country each year,³⁵ creating and maintaining a birth registry would be a cumbersome process that would be open to bureaucratic errors. Think about what it would be like if your children could be denied citizenship solely because a database erroneously marked you as ineligible to confer citizenship.

Growth of a permanent group of less-than-citizens and stateless persons

Today, 5.5 million citizen children have one or more unauthorized parent.³⁶ Any proposal to retroactively repeal birthright citizenship would render these children unauthorized and would likely push them into a permanent underclass. Whether retroactive or prospective, such a change would also leave many children without any nationality at all. The United Nations High Commissioner for Refugees reports that “[w]ithout the protection of citizenship or nationality, stateless individuals are highly vulnerable to discrimination and abuse.”³⁷

Eliminating birthright citizenship also would invite racial profiling and further inequality, particularly for women of color.³⁸ In 2010, a list containing private information pertaining to 1,300 women suspected of being unauthorized was sent to Utah law enforcement by two state government workers.³⁹ The document, a version of which also was sent to federal immigration authorities, contained the names, addresses, telephone numbers, dates of birth and—for pregnant women—due dates.⁴⁰

Other legal changes contemplated by opponents of birthright citizenship pose even greater threats to newly unauthorized children. Earlier this year, the House Judiciary Committee advanced a bill that would make it a crime to be unlawfully present in the United States.⁴¹ Were this bill to become law, the elimination of birthright citizenship would mean that a child born in the United States to unauthorized parents would—on that child’s 18th birthday—automatically be guilty of the new crime of unlawful presence. The combination of the two changes would essentially replace birthright citizenship with birthright criminality.

Standing up for America’s core values

Current law is simple and straight-forward: A person born on U.S. soil is automatically an American citizen. Following the House Judiciary Committee’s hearing on the topic earlier this year, Rep. Zoe Lofgren (D-CA) wrote that “[c]oming in the immediate aftermath of a bloody Civil War that tore this nation apart, the Fourteenth Amendment in many ways served to return us to our first principles: that all persons are entitled to equal protection and due process under the law.”⁴² Understanding the Citizenship Clause as a critical civil rights guarantee is the only way to do it justice. According to Cristina Rodríguez, professor of law at the Yale Law School, “[t]he Citizenship Clause . . . represents our constitutional reset button. It places all people, regardless of ancestry, on equal terms at birth, with a legal status that cannot be denied them.”⁴³

In many ways, little has changed from when the Citizenship Clause was debated in 1866. At the time, Sen. John Conness of California responded tartly to the nativist diatribe of Sen. Cowan by observing that “it may be very good capital in an electioneering campaign to declaim against the Chinese.”⁴⁴ So it should perhaps come as little surprise that, every few years, politicians continue to propose limits on birthright citizenship in order to pander to anti-immigrant constituencies. It is for that very reason that the 14th Amendment largely removed citizenship decisions from the political caprices of the majority. Standing up for birthright citizenship means standing up for core American values. Attempts to statutorily undermine this important guarantee are as unconstitutional as they are un-American.

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Endnotes

- 1 Sam Fulwood III and Marshall Fitz, "Less than Citizens," (Washington: Center for American Progress, 2011), p. 1, available at <https://cdn.americanprogress.org/wp-content/uploads/2012/12/55174537-Less-than-Citizens.pdf>.
- 2 Sen. David Vitter, "Let's get real and end birthright citizenship for illegal immigrants," *The Hill*, September 3, 2015, available at <http://thehill.com/blogs/congress-blog/civil-rights/252556-lets-get-real-and-end-birthright-citizenship-for-illegal>.
- 3 See *Loophole Elimination and Verification Enforcement Act*, H.R. 1196, 112 Cong. 1 sess. (2011); *Birthright Citizenship Act of 2015*, H.R. 140, 114 Cong. 1 sess. (2015); *Birthright Citizenship Act of 2015*, S. 45, 114 Cong. 1 sess. (2015).
- 4 Fulwood III and Fitz, "Less Than Citizens."
- 5 Alexandra M. Wyatt, "Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate" (Washington: Congressional Research Service, 2015), available at <http://www.fas.org/sgp/crs/misc/R44251.pdf>.
- 6 *Scott v. Sandford*, 60 U.S. 393 (1857).
- 7 U.S. Const. amend. XIV, § 1.
- 8 James C. Ho, "Defining 'American': Birthright Citizenship and the Original Understanding of the 14th Amendment," *The Green Bag* 4 (9) (2006): 367–378, available at <http://www.gibsondunn.com/publications/Documents/Ho-Defining-American.pdf>.
- 9 *Ibid.*
- 10 Jeff Jacoby, "Born in the USA, but not an American?," *The Boston Globe*, August 15, 2010, available at http://www.bostonglobe.com/editorial_opinion/oped/articles/2010/08/15/born_in_the_usa_but_not_an_american/.
- 11 Asian Americans Advancing Justice, "Wong Kim Ark, Constitutional Citizenship & Asian Americans," available at <http://www.advancingjustice-la.org/blog/wong-kim-ark-constitutional-citizenship-asian-americans#.V6YaysoeSp>. (last accessed October 2015).
- 12 *United States v. Wong Kim Ark*, 169 U.S. 649.
- 13 *Ibid.*, p. 655.
- 14 *Plyler v. Doe*, Civil No. 80-1538 (December 1, 1981), available at <https://www.law.cornell.edu/supremecourt/text/457/202>; Ho, "Defining 'American.'"
- 15 *INS v. Rios-Pineda*, 471 U.S. 444 (1985).
- 16 David Rivkin and John Yoo, "Ignore Trump — the issue of birthright citizenship has been settled," *Los Angeles Times*, October 27, 2015, available at <http://www.latimes.com/opinion/op-ed/la-oe-0906-rivkin-yoo-birthright-citizenship-20150906-story.html>.
- 17 Nathan Koppel, "Arizona Legislation Targets Birthright Citizenship," *The Wall Street Journal*, January 28, 2011, available at <http://blogs.wsj.com/law/2011/01/28/arizona-legislation-targets-birthright-citizenship/>.
- 18 House Committee on the Judiciary, *Societal and Legal Issues Surrounding Children Born in the U.S. to Illegal Alien Parents*, 104th Cong., 1995.
- 19 Citizenship Reform Act of 1995, H.R. 1363, 104th Cong. (1995).
- 20 Walter Dellinger, "Legislation Denying Citizenship at Birth to Certain Children Born in the United States," Testimony before the Subcommittees on Immigration and Claims and on the Constitution of the House Committee on the Judiciary, December 13, 1995, available at <http://www.justice.gov/sites/default/files/olc/opinions/1995/12/31/op-olc-v019-p0340.pdf>.
- 21 House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty*, 109th Cong., 1st sess., 2005.
- 22 House Committee on the Judiciary, Subcommittee on Immigration and Border Security, *Birthright Citizenship: Is it the Right Policy for America?*, 114th Cong., 1st sess., 2015.
- 23 Sam Howe Verhovek, "Texas Law Professor Prompts A Furor Over Race Comments," *The New York Times*, September 16, 1997, available at <http://www.nytimes.com/1997/09/16/us/texas-law-professor-prompts-a-furor-over-race-comments.html>.
- 24 Lino A. Graglia, "Birthright Citizenship for Children of Illegal Aliens, an Irrational Public Policy," Testimony before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, "Birthright Citizenship: Is it the Right Policy for America?," April 29, 2015, available at http://judiciary.house.gov/_cache/files/4a843066-6560-43e0-a9c5-0ac443715168/graglia-testimony.pdf.
- 25 Lino A. Graglia, "Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy," *Texas Review of Law & Politics*, 14 (2010), available at http://www.trolp.org/main_pgs/issues/v14n1/Graglia.
- 26 Southern Poverty Law Center, "About John Tanton," available at <https://www.splcenter.org/fighting-hate/extremist-files/individual/john-tanton> (last accessed November 2015).
- 27 Heidi Beirich, "Getting Immigration Facts Straight," available at <https://www.splcenter.org/fighting-hate/intelligence-report/2015/getting-immigration-facts-straight> (last accessed November 2015).
- 28 Louis Jacobson, "Fact-checking the claims about 'anchor babies' and whether illegal immigrants 'drop and leave'," *Politifact*, August 6, 2010, available at <http://www.politifact.com/truth-o-meter/statements/2010/aug/06/lindsey-graham/illegal-immigrants-anchor-babies-birthright/>.
- 29 Seth Freed Wessler, "Primary Data: Deportations of Parents of U.S. Citizen Kids," *Colorlines*, December 17, 2012, available at <http://www.colorlines.com/articles/primary-data-deportations-parents-us-citizen-kids>.
- 30 U.S. Citizenship and Immigration Services, "Executive Actions on Immigration," available at <http://www.uscis.gov/immigrationaction#2> (last accessed November 2015).
- 31 Molly Hennessy-Fiske, "Judge: Texas can deny birth certificates for U.S.-born children of some immigrants," *Los Angeles Times*, October 27, 2015, available at <http://www.latimes.com/nation/nationnow/la-na-nn-texas-immigrant-birth-certificate-20151016-story.html>.
- 32 Maria Isabel Perales Serna, et al. v. Texas Department of State Health Services, Vital Statistics Unit, et al., No. 15-cv-00446, at *9-10 (W.D. Tex. Oct. 16, 2015), available at <https://assets.documentcloud.org/documents/2462004/judge-pitman-order.pdf>.
- 33 U.S. Citizenship and Immigration Services, "N-600K, Application for Citizenship and Issuance of Certificate Under Section 322," available at <http://www.uscis.gov/n-600k> (last accessed November 2015).
- 34 Brennan Center for Justice, "Citizens Without Proof, A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification" (2006), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.
- 35 Centers for Disease Control and Prevention, "Birth Data," available at <http://www.cdc.gov/nchs/births.htm> (last accessed November 2015).

- 36 Manuel Pastor, Jared Sanchez, and Vanessa Carter, "The Kids Aren't Alright - But They Could Be" (Los Angeles, CA: Center for the Study of Immigrant Integration, 2015), pp. 1–2, available at http://dornsife.usc.edu/assets/sites/731/docs/DAPA_Impact_on_Children_CSII_Brief_Final_01.pdf.
- 37 United Nations High Commissioner for Refugees and Open Society Justice Initiative, "Citizens of Nowhere" (2012), p. 12, available at http://www.rcusa.org/uploads/pdfs/UN-HCR_OSJ_STATELESSNESS_REPORT.pdf.
- 38 Fulwood III and Fitz, "Less Than Citizens," p. 8.
- 39 CNN, "Utah says 2 state workers involved in creating list," July 19, 2010, available at <http://www.cnn.com/2010/POLITICS/07/16/utah.immigrant.list/index.html>.
- 40 Kirk Johnson, "Immigrant' List Sets Off Fears," *The New York Times*, July 14, 2010, available at <http://www.nytimes.com/2010/07/15/us/15utah.html>.
- 41 U.S. House of Representatives Judiciary Committee, "House Judiciary Committee approves Bill to Strengthen the Enforcement of Immigration Law," Press release, March 18, 2015, available at <http://judiciary.house.gov/index.cfm/2015/3/house-judiciary-committee-approves-bill-to-strengthen-the-enforcement-of-immigration-law>.
- 42 Rep. Zoe Lofgren, "Birthright Citizenship: Is it the Right Policy for America?" Post-Hearing Statement, "Birthright Citizenship: Is it the Right Policy for America?," May 4, 2015, at 2, available at https://lofgren.house.gov/uploadedfiles/zl_birthright_citizenship_posthearing_statement.pdf.
- 43 Cristina M. Rodriguez, "The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment" (New Haven, CT: Yale University, 2009), available at http://digitalcommons.law.yale.edu/fss_papers/4335.
- 44 Jacoby, "Born in the USA, but not an American?"