

Birthright Citizenship:

A Core Tenet of American Liberty

Jeremy L. Neufeld
Immigration Policy Analyst

Ricky Schneider
Immigration Policy Intern

Niskanen Center
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Key Takeaways

- ▶ Birthright citizenship is codified in the U.S. Constitution and is recognized by all branches of the federal government as good law.
- ▶ The legislative history of the Fourteenth Amendment and subsequent judicial precedent support the current interpretation of the Citizenship Clause.
- ▶ Birthright citizenship is good policy, as it contributes to the effective integration of immigrant communities.

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Preface

By Linda Chavez, Senior Fellow

American exceptionalism extends to its treatment of citizenship for the children of immigrants. The United States is one of only 34 countries to grant automatic birthright citizenship to all persons without other preconditions. It is no accident that most of those nations that grant citizenship at birth are countries whose populations are the product of immigration and remain multiethnic, multiracial societies, including the overwhelming majority of those in the Western Hemisphere.

Unlike other nations in which a sense of belonging is tied to a common culture and heritage, the United States needed to forge unity among an increasingly diverse population that would grow exponentially as we welcomed more immigrants. Our greatest leaders have always understood this. In a speech in July 1858, as he was running for Senate, Abraham Lincoln chastised those who had turned Independence Day into a kind of ancestor worship of the Founding Fathers:

We have — besides these, men descended by blood from our ancestors — among us perhaps half our people who are not descendants at all of these men; they are men who have come from Europe — German, Irish, French, and Scandinavian — men that have come from Europe themselves, or whose ancestors have come hither and settled here, finding themselves our equals in all things. If they look back through this history to trace their connection with those days by blood, they find they have none, they cannot carry themselves back into that glorious epoch and make themselves feel that they are part of us, but when they look through that old Declaration of Independence they find that those old men say that ‘We hold these truths to be self-evident, that all men are created equal,’ and then they feel that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the men who wrote that Declaration and so they are.

So, too, Ronald Reagan in his farewell address said, “This I believe is one of the most important sources of America’s greatness. We lead the world because unique among nations, we draw our people, our strength, from every

country and every corner of the world ... Thanks to each wave of new arrivals to this land of opportunity, we're a nation forever young, forever bursting with energy and new ideas, and always on the cutting edge; always leading the world to the next frontier..." But that sense of belonging has been undergirded by the right of all children born on U.S. soil — no matter where, when, or how their parents came here — to claim citizenship.

As the following pages show, birthright citizenship has been a part of American tradition going back to colonial times — albeit with the exclusion of both enslaved and indigenous people until later. The Fourteenth Amendment to the U.S. Constitution ended the disgraceful exclusion of African Americans from their birthright. Still, it would take longer for Native Americans to claim their rights through the Indian Citizenship Act of 1924.

Now, new threats to birthright citizenship have emerged in legal challenges and threats of legislation and executive orders from a president who wants to narrow the definition of who should be included in the idea of America. Though these efforts will likely fail of their own incoherence and legal shortcomings, nonetheless, we must remain vigilant and faithful to the proposition that we are one nation and one people and that all who are born here are fully American when they take their first breath.

Executive summary

Birthright citizenship is the constitutional guarantee that a person born on U.S. soil will be a U.S. citizen. The idea of birthright citizenship developed out of the English common-law principle of *jus soli*, literally “right of soil.” In practice, this means that with very few exceptions, anyone who is born on U.S. soil becomes a U.S. citizen at birth.¹

The Fourteenth Amendment to the U.S. Constitution established birthright citizenship in the United States in the aftermath of the Civil War. The amendment’s Citizenship Clause states that “[a]ll 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.” And the clause finds its statutory expression in the Immigration and Nationality Act (INA), which echoes the amendment, providing that “a person born in the United States, and subject to the jurisdiction thereof” shall be a national and citizen of the United States at birth.² The seminal case on birthright citizenship, *United States v. Wong Kim Ark*, explained the application and scope of the clause — specifically, it explained that the phrase “subject to the jurisdiction thereof” means someone who must obey U.S. law, and hence applies to the children of aliens.³

Critics have argued that birthright citizenship is ripe for abuse by encouraging undocumented immigration or “birth tourism.”⁴ However, there is no evidence that the system is being widely abused. Some critics have further argued that birthright citizenship is not actually required by the Fourteenth Amendment and could be restricted by Congress or the president without the need for constitutional amendment. This argument runs counter

¹ *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1329–31 (11th Cir. 1984), discussing diplomatic immunity in the United States. See also Article 43(2) of the “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),” (1977), which discusses combat immunity. Children of diplomats and foreign soldiers are the two primary categories that are excluded from birthright citizenship. This exclusion is due to the superseding international legal principles of diplomatic immunity and combatant immunity.

² 8 U.S.C. § 301(a) (Immigration and Nationality Act).

³ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁴ Center for Immigration Studies, “Birth Tourism: Facts and Figures,” January 23, 2020.

to long-standing precedent and the vast consensus among legal scholars, including originalists.

Birthright citizenship has been the law of the land since at least 1868. And it is good policy, too. Birthright citizenship is a strength, rather than a weakness, of the American immigration system, encouraging assimilation by allowing children of immigrants to participate in the life of their country as citizens. This streamlined citizenship system has demonstrable economic benefits for those individuals as well as those born to natives, while also providing the political benefits of quickly integrating new populations into the social and political life of the country.

The Citizenship Clause and the meaning of “subject to the jurisdiction thereof”

The first sentence of the Fourteenth Amendment is the Citizenship Clause, which reads, “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.”

The phrase “subject to the jurisdiction” of the U.S. lies at the center of skepticism about the legal basis of birthright citizenship. Some critics of birthright citizenship have claimed that the clause does not apply to those born in the United States to foreign nationals at all, and that birthright citizenship could thus be ended or restricted without constitutional amendment. For instance, Iowa Rep. Steve King, who will leave Congress next year after losing his Republican primary, introduced the Birthright Citizenship Act in an attempt to amend the INA to redefine “subject to the jurisdiction thereof.” The legislation would declare that those who are “subject to the jurisdiction of” the United States under the Fourteenth Amendment must have at least one parent who is a U.S. citizen or a lawful permanent resident.⁵

Michael Anton, a former Trump White House official, has likewise argued that birthright citizenship could be ended without amending the Constitution, suggesting that President Trump redefine “subject to the

⁵ Birthright Citizenship Act of 2017, H.R. 140, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/140>

jurisdiction of” by executive order. Anton argues that simple presence in the United States does not mean that someone is under the jurisdiction of the United States. Furthermore, Anton argues that those born to undocumented parents are not “subject to the jurisdiction of” the United States.⁶ His case mirrors that of Hans A. von Spakovsky, who claims that “birthright citizenship has been implemented by executive fiat, not because it is required by federal law or the Constitution.”⁷ John Eastman has likewise argued that Kamala Harris is likely not a citizen and ineligible for public office, even though she was born in the United States, because the Fourteenth Amendment doesn’t confer on her — or millions of other Americans — birthright citizenship.⁸

However, the plain language of the Fourteenth Amendment, its history, and long-standing precedent make clear that the clause guarantees birthright citizenship.⁹ To be “subject to the jurisdiction” is simply to be subject to the authority of the United States government and hence the phrase applies to the children of aliens, regardless of the legal status of their parents.

Legislative history

The Fourteenth Amendment to the U.S. Constitution was ratified in 1868, during the Reconstruction period that followed the Civil War and emancipation.¹⁰ The Citizenship Clause was a corrective to antebellum law, specifically the infamous *Dred Scott* decision, which held that blacks could not have standing to sue in federal court because they could not be U.S. citizens.¹¹

⁶ Michael Anton, “Citizenship shouldn’t be a birthright,” *Washington Post*, July 18, 2018.

⁷ Hans A. von Spakovsky, “Birthright Citizenship: A Fundamental Misunderstanding of the 14th Amendment,” *Heritage Foundation*, October 30, 2018.

⁸ John C. Eastman, “Some Questions for Kamala Harris About Eligibility,” *Newsweek*, August 12, 2020.

⁹ For example, *Black’s Law Dictionary* defines “jurisdiction” as “[a] government’s general power to exercise authority.”

¹⁰ The Civil Rights Act of 1866 was the first time the 39th Congress dealt with the issue of birth and citizenship. The Civil Rights Act of 1866 can be distinguished from the Fourteenth Amendment, as it was a conservative statute that required President Andrew Johnson’s signature to pass. The Fourteenth Amendment did not require any presidential approval to pass and was drafted by the more radical Joint Committee of Fifteen on Reconstruction. See Garrett Epps, *The Citizenship Clause: A Legislative History*, *Am. U. L. Rev.* 60, no. 2, (2010), at 349.

¹¹ *Dred Scott v. Sandford*, 60 U.S. 193 (1856).

Initial drafts of the Fourteenth Amendment did not include the Citizenship Clause. Senator Jacob Howard (R-MI) sponsored the clause's addition to the amendment. The addition was directly debated in the Senate, with some opposing the language for the precise reason that it would confer citizenship rights on the children of non-U.S. citizens.¹²

Howard explained the clause as “simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.”¹³ Republican Senator Edgar Cowan of Pennsylvania objected, arguing that citizenship should not be automatically extended, as the proposed amendment would do, to the children of Chinese immigrants or “Gypsies.”¹⁴ According to Cowan, states should have the right to limit citizenship to “my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions.”¹⁵ If one state wanted to exclude certain races from citizenship, it should be allowed, Cowan argued. But the text of the proposed Citizenship Clause, Cowan noted, would prevent states from making those restrictions. Unsurprisingly, Cowan would eventually vote against the entire measure.

John Conness of California, himself a naturalized U.S. citizen of Irish birth, responded, stating the Citizenship Clause “relates simply to the children begotten by Chinese parents in California, and it is proposed to declare that they shall be citizens ... I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States.”¹⁶ Cowan had specifically worried about automatically granting citizenship to the children of those who had “trespassed,” indicating that he interpreted the clause as applying to the children of immigrants who entered a state unlawfully, anticipating future concerns over the children of undocumented immigrants. But Conness, rather than implying that Cowan had misinterpreted the amendment, argued that it

¹² James C. Ho, “Defining ‘American’: Birthright Citizenship and the Original Understanding of the 14th Amendment,” *The Green Bag* 9, no. 4, 2006: 367–378.

¹³ Congressional Globe, 39th Congress, 1st session, 3148 (1866), at 2890, (remarks of Sen. Howard).

¹⁴ *Ibid.* at 2891, (remarks of Sen. Cowan).

¹⁵ *Ibid.*

¹⁶ *Ibid.*, (remarks of Sen. Conness).

would not be a common enough problem to make birthright citizenship undesirable.

The language, as proposed by Howard and supported by Conness, was added to the Fourteenth Amendment of the U.S. Constitution. It is important to note that all three senators' comments on citizenship were premised on a consensus interpretation of what the amendment would do. Nowhere in the record is that interpretation challenged, nor were any claims made that Cowan was misinterpreting the language of the amendment. The proponents and opponents of the amendment voted differently because they disagreed on whether birthright citizenship was desirable, not because they disagreed on how the amendment was to be interpreted. All agreed that it conferred birthright citizenship.

Another area of debate in the Senate centered on the issue of whether the children of American Indians would be considered U.S. citizens. The issue arose when Senator James R. Doolittle, Republican of Wisconsin, proposed amending the language to add "excluding Indians not taxed" to the Citizenship Clause. Illinois Senator Lyman Trumbull's responded by distinguishing the tribes by jurisdiction, explaining why the language would not be needed. "Can you sue a Navajoe [sic] Indian in court?" he asked. "Are they in any sense subject to the complete jurisdiction of the United States? By no means."¹⁷ Many of the tribes exercised a form of jurisdiction on their own territory in 1868. Trumbull pointed out that the language as written already excluded Indians not taxed because such Indians were under tribal jurisdiction. Senators accepted Trumbull's argument and Doolittle's amendment was voted down.

Senators understood the meaning of the Citizenship Clause as applying to anyone within the U.S., regardless of their parentage, provided they were subject to U.S. law. Diplomats everybody agreed, were not subject to U.S. jurisdiction. There were some disagreements about whether Indians were. But nobody expressed any doubt that the children of immigrants were.

Judicial precedent

Judicial precedents confirm the original meaning of the clause as understood by its authors and contemporaries to the debates — that is, that aliens and

¹⁷ Ibid., at 2892, (remarks of Sen. Trumbull).

their children are subject to the jurisdiction of the United States, meaning that those born in the United States are citizens, regardless of the legal status of the parents.

United States v. Wong Kim Ark, which began in August of 1895 with Wong Kim Ark's confinement and was finally decided by the Supreme Court in 1898, is the seminal case on the question. Wong Kim Ark was born in San Francisco in 1873 to Chinese parents who were not involved in Chinese diplomacy in any capacity.¹⁸ In 1882, Congress passed the Chinese Exclusion Act, thereby banning all Chinese labor immigrants.¹⁹ The law was the first to ban the immigration of an entire ethnic or national group to the United States.²⁰

In 1890, Wong Kim Ark traveled to China on a temporary visit and reentered the United States that same year. After traveling to China during a second temporary visit in 1895, Wong Kim Ark was denied permission to enter the United States under the Chinese Exclusion Act.²¹ Wong Kim Ark was detained by the customs collector at the port of San Francisco. Wong Kim Ark filed a writ of habeas corpus with the U.S. District Court for the Northern District of California, alleging that he was being unlawfully confined and deprived of his liberty. The attorney general argued that Wong Kim Ark was not a citizen despite his birth in the United States and could therefore be barred from entering the country under the Chinese Exclusion Act.

District Judge William Morrow considered the question of whether “a person born within the limits of the United States, whose father and mother were both persons of Chinese descent, and subjects of the emperor of China, but, at the time of birth, were both domiciled residents of the United States, is a citizen of the United States, within the meaning of the fourteenth amendment to the constitution.”²²

Morrow, in making his determination, noted that if the position of the government were to be applied to Wong Kim Ark, “it will inevitably result that thousands of persons of both sexes who have been heretofore considered

¹⁸ *Abdulaziz v. Metropolitan Dade County*, (1984), (Children of diplomats are immune from birthright citizenship because of diplomatic immunity).

¹⁹ 8 U.S.C. §§ 261 – 299 (Chinese Exclusion Act of 1882).

²⁰ *Ibid.* (The Act placed heavy restrictions on Chinese immigrants traveling to and from China and banned the immigration of new Chinese laborers to the United States.)

²¹ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

²² *In re Wong Kim Ark*, 71 F. 382, N.D. Cal., (1896), at 382.

as citizens of the United States ... will be, for all intents and purpose, denationalized and remanded to a state of alienage.”²³ According to Morrow, the question turned on whether the phrase “subject to the jurisdiction thereof” in the Fourteenth Amendment referred to an alien being subject to the laws of a foreign country where he is present (i.e., virtually anybody present without immunity), or rather only being subject to the political jurisdiction of a country (i.e., including only those aliens without any foreign allegiance).²⁴ Morrow turned to two earlier cases also decided in the Northern District of California, *In re Look Tin Sing* and *In re Chin King*, to answer this question in favor of the former interpretation.²⁵ Finding commonality between legislative, judicial, and public opinion on the definition, both cases held that “subject to the jurisdiction thereof” meant subject to the laws of the United States and not having absolute political allegiance to only the United States.²⁶ These holdings meant that the Fourteenth Amendment applied to foreigners who gave birth to children in the United States. Finding no conclusive Supreme Court precedent to the contrary, Morrow agreed with the earlier courts and held that “subject to the jurisdiction thereof” applied to Wong Kim Ark’s parents, thus making him a citizen at birth. Morrow accordingly granted the writ of habeas corpus, ordering the collector of customs at the port of San Francisco to release Wong Kim Ark.

Following an appeal by the government, the Supreme Court took up the case in 1898. The court rejected the government’s argument that Wong Kim Ark was not a citizen of the United States by a 6–2 vote. The majority opinion, authored by Justice Horace Gray, held that “the amendment, in clear words and in manifest intent, includes the children born within the United States of all other persons, of whatever race or color, domiciled within the United States. Every 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.”²⁷

Gray looked to English common law and early U.S. jurisprudence to reach this holding. Gray concluded that these early precedents helped establish the

²³ *Ibid* at 386.

²⁴ *Ibid*.

²⁵ *Ibid*, citing *In re Look Tin Sing*, 21 F. 905, D. Cal., (1884); *In re Chin King*, 13 Sawy. 333, 35 Fed. 354, (1888).

²⁶ *Ibid*.

²⁷ *U.S. v. Wong Kim Ark*, at 474.

meaning of the jurisdictional language of the Fourteenth Amendment. Gray found that three centuries of English common law and numerous early U.S. legal decisions all found the same definition of jurisdiction and allegiance as it pertained to birthright citizenship.²⁸ Gray found these “considerations to confirm the view ... that the opening sentence of the fourteenth amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions on citizenship.”²⁹ This broad and inclusive interpretation of the Fourteenth Amendment was meant to address nearly everyone born on U.S. soil, with the exclusion of the children of diplomats, and the unique circumstances surrounding American Indians.³⁰ Gray reasoned that the restrictive interpretation of the Fourteenth Amendment advocated for by the government “would deny citizenship to thousands of persons of English, Scotch, Irish, German, and other European parentage, who have always been considered and treated as citizens of the United States.”³¹

Many of the arguments raised in the dissent of *Wong Kim Ark*, penned by Chief Justice Melville Fuller, have survived as arguments against birthright citizenship.³² Fuller argued that the definition of the Fourteenth Amendment required the absolute jurisdiction of the U.S. federal government over a person to meet the “subject to the jurisdiction thereof” threshold. Fuller argued that no common-law rule on birthright citizenship existed prior to the Fourteenth Amendment and argued that neither the Civil Rights Act of 1866 nor the Fourteenth Amendment provided sufficient clarity on the scope of birthright citizenship.

Fuller also cited the *Slaughterhouse Cases* (1873) and *Elk v. Wilkins* (1884) as further justification for his dissent.³³ Citing these cases remains popular among modern proponents of interpreting birthright citizenship out of the

²⁸ *Ibid.*, at 460. Justice Gray found that uses of the word “allegiance” were synonymous with jurisdiction. Therefore, for a foreigner to have “allegiance” to a foreign power was not construed in the modern sense, but rather that “allegiance” simply meant within the state’s or crown’s jurisdiction.

²⁹ *Ibid.*, at 471.

³⁰ *Ibid.*, at 474. Justice Gray lists the full exceptions as follows: “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.”

³¹ *Ibid.*

³² *Ibid.*, at 479.

³³ *Ibid.*, at 487.

Fourteenth Amendment. Both Morrow of the District Court and Gray of the Supreme Court weighed and ultimately rejected these arguments.

The Slaughterhouse Cases gave close consideration to the Thirteenth, Fourteenth, and Fifteenth Amendments in the context of states' rights.³⁴ In dictum, the Court stated that "the phrase, 'subject to the jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."³⁵ Dictum is an incidental opinion by a judge on a matter not essential to the decision, and therefore not binding as precedent.³⁶ Noting that this sentence appears as mere dictum in the decision, Morrow went on to quote another section of the Slaughterhouse Cases, which states that "it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." This quote seems to directly contradict the first, as it more clearly supports the obvious nature of birthright citizenship.

Gray also quoted extensively from the Slaughterhouse Cases to prove that the sentence, cherry-picked by Chief Justice Fuller, did not fit with the spirit of the decision, which did not restrict access to U.S. citizenship, but rather the rights that the federal government protected against violations by the states.³⁷ Gray also noted that the imprecise language of the sentence at issue detracted from any weight that should be placed on it. In conclusion, both the District Court and Supreme Court found that the sentence in the Slaughterhouse Cases was dictum, not on point to the holding of the case, and that "it was unsupported by any argument, or by any reference to authorities."³⁸

In *Elk v. Wilkins*, which denied citizenship to John Elk, birthright citizenship skeptics see evidence that citizenship can be denied to individuals born on U.S. soil who have not naturalized. But Elk was born on an Indian reservation, and hence not subject to U.S. jurisdiction. For instance, if Elk had killed another Indian, he would not have been tried in U.S. court, but by the tribal authorities. Nothing comparable can be said for the child of an immigrant

³⁴ *In re Wong Kim Ark* at 390.

³⁵ *Ibid.*, citing the *Slaughterhouse Cases*, (1873).

³⁶ Dictum Definition, *Black's Law Dictionary* (9th ed. 2009), available at Westlaw.

³⁷ *Wong Kim Ark*, at 468. Justice Gray, citing the *Slaughterhouse Cases*, "the protection provided [by the fourteenth amendment] was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men."

³⁸ *Ibid.*

born in the United States, where there is no source of competing jurisdiction. If she commits a crime, for instance, she would be tried under U.S. or state law. *Elk v. Wilkins* would be irrelevant.

The holding in *Wong Kim Ark* reaches all foreign nationals, regardless of their immigration status. This follows because undocumented persons or other foreign nationals who are not diplomats within the United States are very much subject to its jurisdiction. This is supported by the basic premise that we largely recognize the U.S. government's authority to deport persons who are in the United States and do not hold some kind of status. To argue that undocumented persons are not subject to the jurisdiction of the United States is to say that undocumented persons need not respect any of the laws of this country. However, undocumented persons are in reality subject to a wide array of federal laws and regulations, including taxation, criminal, and immigration laws. The same logic applies to criminals who have violated the laws of the country. We do not say that simply because the criminal has violated the law that they are not subject to it; quite the contrary. Instead, criminal statutes are heavily enforced against those who violate them, whether they are citizens of this country or not.

Although the holding in *Wong Kim Ark* does not directly address children born to undocumented persons, any confusion on this issue was addressed in *Plyler v. Doe* (1982).³⁹ The Supreme Court in *Plyler* also interpreted the relevance of the Fourteenth Amendment. However, the Court interpreted the Fourteenth Amendment's Equal Protection Clause, rather than the Citizenship Clause. The Equal Protection Clause requires every state to afford equal protection of the laws "to any person within its jurisdiction."⁴⁰ The Court held in a 5-4 vote that Texas could not deny free public-school education to undocumented children.⁴¹

However, the Citizenship Clause was still directly relevant to the Court's holding in *Plyler*. Despite the 5-4 decision, all nine justices agreed that the Equal Protection Clause protects legal and illegal aliens alike.⁴² Importantly, all nine justices reached this conclusion precisely because illegal aliens are "subject to the jurisdiction" of the U.S., no less than legal aliens and U.S.

³⁹ *Plyler v. Doe*, 457 U.S. 202, (1982).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

citizens. In the majority opinion, Justice William Brennan explicitly rejected the contention that undocumented persons are not within the jurisdiction of the United States. Justice Brennan specifically cited the Citizenship Clause and the holding in *Wong Kim Ark* in reaching this conclusion.⁴³ Therefore, when combined with the holding in *Wong Kim Ark*, the holding in *Plyler* confirms that undocumented persons are subject to U.S. jurisdiction under the Citizenship Clause, and therefore their children become United States citizens. These holdings continue to be good law to this day.⁴⁴

Birthright citizenship as policy

While Steve King, Michael Anton, and a few other critics of birthright citizenship have argued that it can be ended by mere legislation or executive action, most correctly recognize that it would require constitutional amendment, and advocate for such an amendment on substance. Such critics include Sens. Lindsey Graham (R-SC),⁴⁵ Rand Paul (R-KY), and David Vitter (R-LA). Vitter has filed multiple legislative proposals to amend the Fourteenth Amendment to remove the Citizenship Clause entirely, with Paul signing on as co-sponsor at least once.⁴⁶ Senator Majority Leader Mitch McConnell has called for hearings on birthright citizenship in the past.⁴⁷

These opponents believe that the only way to get U.S. citizenship at birth should be via *jus sanguinis* (*right of blood*), thus covering only children of a qualifying U.S. citizen parent. They believe that eliminating *jus soli* would bring the United States more in line with modern notions of citizenship, deter illegal immigration, and stem “rampant” birth tourism.

However, they overlook substantive benefits to birthright citizenship and overstate the costs. Birthright citizenship prevents the creation of a category

⁴³ *Ibid* at 211, footnote 10.

⁴⁴ *INS v. Rios-Pineda*, 471 U.S. 444 (1985). See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), where the plurality opinion noted that alleged Taliban fighter Yaser Hamdi was “[b]orn in Louisiana” and thus “is an American citizen,” despite objections that at the time of his birth his parents were aliens in the U.S. on temporary work visas.

⁴⁵ Elyse Siegel, Lindsey Graham: “Birthright Citizenship Is a Mistake,” “We Should Change Constitution,” *The Huffington Post*, July 29, 2010.

⁴⁶ Vitter Amendment no. 284, S. 1408, 114th Cong. (2015), available at <https://www.congress.gov/114/crec/2015/03/11/CREC-2015-03-11-pt1-PgS1403-2.pdf>

⁴⁷ J. Taylor Rushing & Bob Cusack, “GOP Leader McConnell: Fourteenth Amendment Is in Need of Review,” *The Hill*, April 10, 2020.

of second-class citizens, while also allowing the children of immigrants to assimilate into American society faster and more effectively.⁴⁸ Denied full citizenship, children born to immigrant parents in our country would face an artificial and unnecessary barrier to living the American dream. These children, who had no control over the actions of their parents, would nonetheless be held responsible for their parents' decisions by living the life of a second-class citizen.

Overwhelmingly, Western Hemisphere countries have some form of birthright citizenship, whereas Eastern Hemisphere, or "old world," countries either do not or have strict limitations in place. This is largely due to the fact that Western Hemisphere countries in the 19th and early parts of the 20th centuries wanted to encourage immigration.⁴⁹ Allowing immigrants to move to the country and have their children, at birth, become citizens incentivized rapid incorporation into society.

The success of birthright citizenship in encouraging and facilitating assimilation of immigrant communities is widespread. Denying citizenship to the children of immigrants creates a sense of alienation and is one of the contributing factors to the lack of assimilation in Western European countries such as France and Belgium. Germany has turned increasingly towards birthright citizenship policies as a way to ease some of the tensions the country has experienced as a result of mass migration.⁵⁰

Citizenship and identity are seen as two of the leading factors in increasing the speed at which immigrant communities assimilate. If countries have rules that prohibit immigrants' children from becoming citizens, this delays or stalls the assimilation process, as those generations lack the ability to meaningfully participate in the nation's political and social institutions.

A historical hypothetical can help illustrate this point. For example, if the United States had started denying citizenship to the children of undocumented persons at the turn of the century, we would have between 3

⁴⁸ Ayelet Shachar, "The Birthright Lottery: Citizenship and Global Inequality" (Cambridge, MA: Harvard UP, 2009): 117-122. (Shachar discusses the deportation of foreign-born children who were brought to the United States when they were very young. These children are deported to a country they have no memory of or connection to for the sole reason that they are not protected by U.S. citizenship).

⁴⁹ Lyman Stone, "Why Birthright Citizenship is Good For America," *The Federalist*, 2018.

⁵⁰ *Ibid.*

and 6 million fewer U.S. citizens today.⁵¹ This would mean that today, the United States would have a significantly larger undocumented population than it already does, and for those 3 to 6 million people, the assimilation process would have been stalled.

In spite of higher levels of illegal immigration than many other European countries, statistics on English language skills, incarceration rates, income, and other metrics among immigrant populations all indicate that the United States is nevertheless much better than European countries at assimilating immigrants. Birthright citizenship is an important cause.⁵²

The specter of birth tourism

On January 24, 2020, the State Department's Bureau of Consular Affairs published a final rule amending its regulation on the issuance of B category nonimmigrant visas for temporary visitors.⁵³ The rule, effective immediately, established that consular officers would presume, until the applicant proved affirmatively otherwise, that a pregnant visa applicant who may give birth during the duration of her visa is traveling to the United States for the primary purpose of securing U.S. citizenship for her child.⁵⁴ The reasoning for the rule is that the State Department does not believe "birth tourism" is a legitimate activity that falls under the regulatory definitions of business or pleasure and that presuming the birth-tourist intent of pregnant visitors would be necessary to prevent illegitimate travel.⁵⁵

Under the rule, pregnant women who would otherwise be granted a B nonimmigrant visa must affirmatively rebut that presumption by providing other reasons for travel that the consular officer, in their discretion, deems credible. The rule also codifies a requirement already being enforced by consular officers that individuals seeking B nonimmigrant visas for the purpose of seeking medical treatment in the United States must provide

⁵¹ Ibid.

⁵² Ibid.

⁵³ U.S. Department of State, "Visas: Temporary Visitors for Business or Pleasure," *Federal Register* 85, at 4219 (January 24, 2020), <https://www.federalregister.gov/documents/2020/01/24/2020-01218/visas-temporary-visitors-for-business-or-pleasure>.

⁵⁴ Ibid.

⁵⁵ Ibid.

specific details and documentation about their treatment and whether they have the ability to pay all costs associated with said treatment.

The rule is in line with recent White House statements calling to limit or remove birthright citizenship. Certainly, there is substantial value in U.S. citizenship for one's child. There could also be potential benefits for the parent(s). Once the child reaches the age of 21, the child could potentially petition for the parent to join the child in the United States through an I-130 family petition. These children have been pejoratively referred to by the Trump administration and others as "anchor babies."⁵⁶ However, such a benefit is far off and there is certainly no guarantee that such an opportunity would ever come to pass.

There is very little research to support the idea that this practice is being widely abused. Recent investigations indicate that estimates of birth tourism have been widely overblown.⁵⁷ The latest data indicate that the scale of birth tourism is statistically indistinguishable from zero.⁵⁸

Conclusion

Birthright citizenship has been the law of the land since at least 1868. Any attempt to end it would require a constitutional amendment. But birthright citizenship is good on substantive policy grounds, too. Birthright citizenship generates economic benefits for those born to aliens as well as those born to natives, while also encouraging assimilation by integrating new populations into the social and political life of the country. And claims that the practice attracts "birth tourism" are unfounded, relying on exaggerated estimates.

Birthright citizenship has come under threat by legal challenges, proposed legislation, and proposed executive orders to define it out of the Citizenship Clause. These efforts will almost certainly fail on legal grounds. But a widespread perception that birthright citizenship is illegitimate poses a threat of its own, which can be averted only by understanding the history and benefits of this constitutional principle.

⁵⁶ Marshall Cohen, "Numbers to Know About Birthright Citizenship," CNN, November 1, 2018.

⁵⁷ Jeremy L. Neufeld, "The Birth Tourism Bogeyman," Niskanen Center, March 5, 2020.

⁵⁸ Jeremy L. Neufeld, "A Look at CIS's Revised Birth Tourism Estimate," Niskanen Center, March 18, 2020.