An Objective Guide to Birthright Citizenship

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This is a guide to the constitutional issue of whether a child is a citizen if born in the United States to alien parents here illegally. If you are simply looking for arguments to bolster your political views, look elsewhere. If you are genuinely interested in the merits of this issue, keep reading.

The Fourteenth Amendment became part of the Constitution in 1868. Its first 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 in which they reside."

Although some claim that merely being born in the U.S. makes one a citizen, neither the Constitution nor the Supreme Court supports that view. The Fourteenth Amendment further specifies that one must be "subject to the jurisdiction" of the United States. The critical question is whether the child of a resident illegal alien meets that requirement.

Anyone who tells you this is an easy question is not telling you the truth. It is an extraordinarily difficult question.

What makes it difficult is not merely the politically and racially charged atmosphere surrounding it. What makes it difficult are problems common to interpreting the Fourteenth Amendment. The rest of the Constitution has many clauses that may seem obscure initially yet become clear in the light of contemporaneous law and history. But the Fourteenth Amendment is filled with endless fodder for dispute.

This is partly because we know less than we should about the amendment's ratification by the state legislatures. It is partly because the amendment's congressional drafters were not very competent. They sometimes were ignorant of existing constitutional law. They invented terms without defining them. And they ascribed meanings to terms different from established legal meanings. The phrase "subject to the jurisdiction" is a good example. We have only a few clues as to its intended meaning.

Additionally, none of the proposers discussed how the amendment would impact the children of illegal aliens – even though (contrary to modern assertion) everyone knew that such children were in the country. They were the offspring of Africans illegally imported as slaves after the ban on the slave trade (1808) and before the end of slavery (1866).

The Supreme Court has addressed the Fourteenth Amendment's "subject to the jurisdiction" language in three important cases. None of these cases definitively resolves our question. But they offer hints.

Elk v. Wilkins (1884) was decided before Congress extended citizenship to Indians who remained tribal members. In *Elk*, the Court ruled that an Indian born into a tribe was not a citizen unless naturalized under a statute or treaty. The *Elk* case is only weak evidence of the rule applied to foreigners. This is because the Constitution's text and history suggest that the citizenship standards for tribal Indians and foreigners are different. However, the *Elk* case does tell us that:

* "Subject to the jurisdiction" in the Fourteenth Amendment has a specialized meaning, different from the common meaning of "within a given territory and therefore subject to a court's order."

* This meaning is connected to the concept of "allegiance," a legal term traditionally used to determine whether a person is a natural born citizen.

* For deciding whether a child born in the U.S. receives citizenship under the Fourteenth Amendment, the relevant issue is the parents' allegiance when the child was born. The parents' or child's later decisions are irrelevant, unless the United States accepts them by statute or naturalization ceremony.

Two justices dissented from the holding in *Elk*. They accepted the connection between "jurisdiction" and allegiance. But they argued that an Indian becomes a citizen if he changes his allegiance by abandoning his tribe and becoming a member of his state's political community. Their version of allegiance thus depended partly on a person's intent.

United States v. Wong Kim Ark (1898) ruled that the U.S.-born child of two legally resident foreigners was a natural born citizen. Horace Gray, the same justice who wrote for the Court in *Elk*, also wrote for the Court in *Wong*. The result was different in *Wong* primarily because the Constitution implicitly made it easier for foreigners to get automatic citizenship than tribal Indians. But the underlying approach of *Elk* and *Wong* was similar in that citizenship by birth depended more on geography than subjective intent.

The most important lesson of *Wong* was this: the Constitution's version of "allegiance" was the version we inherited from Great Britain in 1776 – not versions prevailing in other countries or under international law. This agrees with the independent conclusion in my book, *The Original Constitution: What It Actually Said and Meant*.

As modified by parliamentary statute, the British version of allegiance was as follows:

* Birth in a country (or on a country's ships) normally creates a "natural allegiance" to that country.

* A child born abroad is in allegiance to a country, and is therefore natural born, only if his *father* is a citizen of that country and not engaged in treasonous or felonious activities. In Anglo-American law, a person's status usually followed that of the mother, but for allegiance the rule was *partus sequitur* ***patrem***.

* Foreign residents and visitors generally are in "local allegiance" to the host country, since they submit themselves to its laws and protection. Their children born in the host country are natural born citizens of that country.

* To this last rule, there are two exceptions: When the father is a foreign diplomat or a foreign invader, he has no allegiance to the host country, and his offspring are not citizens.

Two justices dissented in *Wong*. They argued that the British version of allegiance should not apply in America. They contended that parents in merely local allegiance should not bestow citizenship. For example, they stated that if a foreign power occupied U.S. territory, the natural allegiance of parents should pass U.S. citizenship to their children, even if those parents had a local duty to obey the conqueror.

In my view, the *Wong* majority was right to hold that the British version of allegiance applies to the original Constitution. But because of developments between 1789 and 1868, the dissent made a good argument that a newer, American version applied to the Fourteenth Amendment.

The Supreme Court's third case was *Plyler v. Doe* (1982). It ruled that a state's treatment of illegal aliens' children is controlled by the Fourteenth Amendment's Equal Protection Clause. The "subject to the jurisdiction" phrase was not at issue. Nonetheless, the strongly liberal majority inserted a footnote reading in part:

> *As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction*

> *with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.*

In my opinion, this footnote has little or no persuasive power. It merely recited the views of a commentator and was irrelevant to the matter under decision.

So where does that leave us?

Let's assume that the Court does not overrule the *Elk* and *Wong* cases. To rule against "birthright" citizenship, the Court would have to find a third exception to the precept that children born in the U.S. are U.S. citizens.

Those arguing in favor of citizenship will argue against another exception. They may point out that, unlike a diplomat or an invader, an alien who has violated immigration law still a duty to honor other U.S. laws. In other words, unlike the diplomat or invader, the alien owes local allegiance, and a father's local allegiance should be enough to grant citizenship to his child.

Citizenship advocates also can point out that unlike in *Elk*, our country has largely accepted the children of illegal aliens. Our officials generally let them stay in the country and even provide government benefits, such as drivers' licenses and public university tuition preferences.

Finally, advocates may argue that although the diplomatic and tribal Indian exceptions were mentioned during the Fourteenth Amendment debates, there was no mention of an exception for the children of Africans illegally imported. This implies that such an exception does not exist.

Opponents of citizenship may compare the illegal alien to the foreign invader whose mate produces a child in occupied territory. Both enter the country illegally, and neither should profit from his own wrong. This is different from the case of the captured slave, who is guilty of no wrong. Opponents can add that official acceptance of residence is not the same as acceptance of citizenship.

They may try to prove that illegal aliens often show no interest in abandoning their original citizenship. Opponents may then argue that the *Wong* dissent was correct to consider personal attitudes as well as mere geographic location.

These questions will be vigorously litigated, as they should be. My current bet is for the Court to rule in favor of citizenship.

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