4-1-2016

Birth Tourism and the Fourteenth Amendment

Zachary Heaton

Wesley Dean

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

Part of the Law Commons

BYU ScholarsArchive Citation
Available at: https://scholarsarchive.byu.edu/byuplr/vol30/iss1/13

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.
BIRTH TOURISM AND THE FOURTEENTH AMENDMENT

Zachary Heaton, Wesley Dean

INTRODUCTION

The Rolling Stone recently published an article about Ellie Yang, a Chinese citizen who flew to the United States with her husband from Beijing to deliver their child. The article articulates Ellie’s anxiety before coming to America and her desire to remain anonymous despite the fact that what she was doing was not technically illegal. While researching the best way to avoid scrutiny at customs, she read “since there are so many pregnant women now, if they’re all wearing the same thing, they know right away you’re pregnant.” Ellie decided to wear a maroon jacket and a gray dress with a flowing cowl.” Either the Yang family’s research paid off, or they were just lucky that day, because their only encounter with authorities was settled quickly when it was determined that they had enough money to pay for the hospital bills Ellie would have. She eventually delivered a baby boy, and, after a short stay in America, the family returned home to Beijing. In the future, Ellie’s son will be able to claim United States citizenship, benefitting from government programs such as our healthcare and free public education.

Birth tourism, the process the Yang family was involved in, is the practice of foreign residents travelling inside U.S. borders to give birth on American soil, with the expectation that their children will

1 Wesley Dean is a junior majoring in American Studies at Brigham Young University. He plans on attending law school in Fall 2017.

claim citizenship as adults. This kind of tourism is a large “industry” that operates without government regulation.

The number of children born in America due to birth tourism is difficult to estimate due to a lack of transparency as the owners of “maternity hotels” regularly fail to report taxes. Despite the shady nature of the industry, studies have been conducted to estimate its size. W.D. Reasoner with the Center for Immigration Studies estimated in 2011 that “200,000 children are born here annually to foreign women admitted as visitors; that is, tourists, students, guestworkers, and other nonimmigrant categories.” Since 2011, birth tourism has grown in popularity. Another news source reports “The number of Chinese women giving birth in the U.S. [has] more than doubled to about 10,000 in 2012, up from about 4,200 in 2008.” Right now the main limiting factor of birth tourism is the high cost. Estimates for maternity hotels range from $40,000 - $60,000 a month. This monetary barrier will become easier to hurdle as the wealth of the world, and specifically China’s middle class, increases. Historically birth tourism was nearly impossible because of the extremely high cost of travel. As technology advances these costs compared to wages will continue to fall. Already intercontinental travel is available as a vacation option to millions more than ever before.

Birth tourism is also based on uncertain legal grounds. The birth tourism industry operates in a quasi-legal realm that is regularly held in check by law enforcement agencies but cannot be disbanded because of a lack of regulation or legal precedence required to restrict tourism expressly for the purpose of giving birth. The Los Angeles Times recently wrote an article on the situation:

The businesses, known as “maternity hotels” or “birthing centers,” present a headache for local government and law enforcement because it is not necessarily illegal for foreign


nationals to give birth in the U.S. Many agencies openly advertise services offering assistance in getting newborns a U.S. passport and extolling the benefits that come with American citizenship, including public education and immigration benefits for parents.\(^5\)

While these hotels are not illegal, a recent raid of a maternity hotel reported that, “while no arrests were made, the authorities suspected future charges could be brought against the owners of the hotels based on tax evasion and money laundering for hiding income from the lucrative business.”\(^6\)

Controversy has arisen over the constitutionality of unconditional *jus soli*, or the right to citizenship of those born on U.S. soil. Attempts to alter the wording of the Fourteenth Amendment have been mired by the complexity and breadth of immigration issues. United States courts currently recognize claims to citizenship based on *jus soli*, regardless of affinity to the United States or actual merits of citizenship. However, the courts should follow Supreme Court precedent and the express intentions of the original authors of the Fourteenth Amendment to end the exploitation of this amendment by the birth tourism industry.

**Background**

Internationally, abuses of the reasonable and intended applications of *jus soli* similar to those reported in the *Los Angeles Times* have led to reforms restricting loopholes granting citizenship to persons born within the borders of a nation to alien parents. For instance, no European country allows for unrestricted *jus soli*. Another example of this type of reform is Australia’s Nationality Law, which contains a clause that other nations have successfully used to restrict birth tourism. The clause states:


\(^6\) Id.
“a person born in Australia after the commencement of the *Australian Citizenship Amendment Act 1986* shall be an Australian citizen by virtue of that birth if and only if: (a) a parent of the person was, at the time of the person’s birth, an Australian citizen or a permanent resident; or (b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.”7

Birth tourism is not only an international problem but also an old one. A *New York Times* article from 1983 lamented the exploitation of American citizenship laws stating, “These babies will have the rights and entitlements of any other citizen, including free public education, Social Security, Medicare, voting and the right to hold public office.”8 This utilization of a country’s resources without contributing positively to that society violates the social contract. There is responsibility inherent to citizenship that the average birth tourism baby would not have lived up to when claiming citizenship. Despite considerable long-term opposition to birth tourism, the industry has continued to grow.

The United States and Canada are currently the only developed countries with an advanced economy that unrestrictedly grant citizenship based on claims of *jus soli*.9 Because of this a common practice has emerged for birth tourism babies to file for their parents to become citizens, acting as an “anchor” for their parents to legally come to America. Thus the children of some immigrants are sometimes referred to as “anchor babies.” This escalates the already growing number of people that could take advantage of this situation. The legitimacy of this type of claim is rocky at best and based mostly in tradition.

7 *Australian Citizenship Amendment Act 1986* (Cth) s 4.
The tradition of granting citizenship to anyone born on U.S. soil does not stem from legislation or from a ruling by the Supreme Court. Interestingly, precedence from both branches seems to contradict the tradition. The first, and arguably most important, case with regard to this type of claim to citizenship is *United States v. Wong Kim Ark* (1898). The justices reviewed his petition for citizenship under the Fourteenth Amendment. Mr. Wong, a twenty-seven year old man, had lived in the United States his entire life and as he had no other nation to call home it was determined he fell under the “jurisdiction” of the United States and was a citizen. In contrast, the archetypal modern baby of “birth tourism” claiming citizenship on the same grounds as Mr. Wong will never have set foot on U.S. soil having left before they took their first step. It is impossible to compare the situation of Wong, who was born and raised entirely in Los Angeles, to the situation of the Yang’s’ son, who was born on vacation but raised in China.

Justice Gray wrote that the question presented in the Wong Kim Ark case was “whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States.”\(^\text{10}\) Considering that birth tourism is limited by definition to those who do not have permanent residence in the United States, this Supreme Court ruling cannot be used as precedent in cases of birth tourism. However, the opinions of the justices do provide relevant insights into qualifications on legitimate claims to citizenship. Furthermore, no case since Wong has revisited a situation specifically involving claims to citizenship based upon jus soli. No case, including Wong’s, has provided sufficient answers to the legal questions that arise because of birth tourism.

**Jurisdiction**

The Fourteenth Amendment presents two prerequisites of citizenship. The first is they must be “Born or naturalized in the United States.” Second, they must be “subject to the jurisdiction thereof.”\(^\text{10}\)

\(^\text{10}\) *U.S. Const.* amend. XIV, § 2.
Here I will offer an interpretation of the phrase “subject to the jurisdiction thereof.”

The current wording of the Fourteenth Amendment and the phrase “subject to the jurisdiction thereof” is based on the earlier Civil Rights Act of 1866, which granted the right of citizenship to former slaves. The act reads, “All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”11 The author of the Act was Lyman Trumbull. Modern analysts have scrutinized his diction, concluding that by using the word jurisdiction, Lyman intended for only “domicile” residents to be given citizenship.12 According to the same analyst, “Domicile had an unambiguous definition in 1866: one acquired domicile in a nation or a particular place by moving there with the intention of making it one’s permanent residence.”13 This original, clearer wording and meaning are the source from which the citizenship clause springs.

In order to fully understand the reasons the original authors used the word “jurisdiction” we must understand the conditions and issues that existed during the formation of the Fourteenth Amendment. In my analysis, I wish to address two significant differences between 1866 and today: First, the existence of what at the time were considered non-citizen Indians on American land and second the modes of transportation available.

First, a record from the Congressional Globe, at which the wording of the Fourteenth Amendment is discussed, reveals the intent of the authors. A section discussing the change in wording by Mr. Trumbull taken from the 39th session of Congress is particularly enlightening: “Then it was suggested that we should make citizens of all persons born in the United States not subject to any foreign Power or tribal authority. The objection to that was that there were Indians not subject to tribal authority who yet were wild and untamed in

12 See Mark Shawhan, The Significance of Domicile in Lyman Trumbull’s Conception of Citizenship, 6 YALE L.J. 1351 (2016).
13 Id., at 1353 (discussing the meaning of the word “Jurisdiction” of the Citizenship Act of 1866).
their habits." They go on to discuss how they can exclude “non-tax paying Indians” from citizenship while including those Indians that were of “a more productive nature.” The Indians at the time lived on U.S. land but were not considered citizens because they chose not to pay taxes, and their behavior was not conducive to citizenship. They also discuss explicitly how best to word the amendment to exclude all those who were “subject to any foreign Power.” From this, we can surmise that citizenship, in the minds of the framers of the Fourteenth Amendment, included responsibilities and loyalties to the nation that went above that of a tourist. One could not expect a tourist to pay taxes or be considered loyal to the country they visited. Nor could one say that by touring a country they had renounced allegiance to their homeland. This comment from the same session of Congress distills this attitude:

There is a difficulty in framing the amendment so as to make citizens of all the people born in the United States and who owe allegiance to it. I thought that might perhaps be the best form in which to put the amendment at one time, ‘That all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;’ but, upon investigation, it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens and that that form would not answer. (emphasis added)

Clearly, it was not the intention of the authors of the amendment to change the wording in order to grant citizenship to those who intend to temporarily reside in the country. Rather, it was to be granted exclusively to those who had a deep and lasting allegiance to the United States. This type of allegiance cannot be gained from a temporary residence in the United States, especially if one is only a baby, as is the case in birth tourism.

Now consider for a moment the question of transportation. The world in 1866 was different than today. The means of travel were limited to boat, horseback or train, which could take months to get from country to country. It took roughly three weeks to travel from

14 Id.
China to the United States. The possibility of a pregnant women travelling to the United States to give birth so that the child may later claim citizenship was unrealistic because of the inaccessibility of travel and finite resources. Only with faster and cheaper modern modes of transportation, as well as higher salaries, has the option become feasible. In short, the concept of “birth tourism” in the 1800s would have seemed preposterous. The only case that was remotely similar to birth tourism and conceivable at the time was that of foreign diplomats visiting the United States. It was resolved that children of foreign diplomats would not have a right to American citizenship.\(^\text{16}\) We cannot rightly believe that the legislation of the 19th century should have had contingencies for such a remote a situation as birth tourism.

Considering these two major differences it becomes apparent that the framers of the Fourteenth Amendment had no intention of granting citizenship to any person born to those only temporarily visiting the United States.\(^\text{17}\) In fact it seems that their intention behind the phrase “subject to the jurisdiction” of the United States seems to have had the implied meaning “having an allegiance to the United States.” Thus the Indians not having allegiance to the United States while still being born on U.S. soil were excluded from citizenship. While the birth of a person within the United States does fulfill the first requirement listed in the fourteenth amendment and could be reasonably said to show at least a start of or a proclivity to, allegiance to the United States it does not follow that without the cultivation of the seed of patriotism that the individual could be said to have truly met the requirement of being in the “jurisdiction” of the United States. Especially if the individual does not intend to be domiciled to the United States or has not been as is often the case with birth tourism. Just as inventing any sort of legal binding between a person and their friend’s child that was born in their house on vacation would be preposterous in a court of law so too the invention of imaginary obligations on the part of the United States to any and

\(^{16}\) Feere, \textit{supra}, note 10.

every child that is born within her borders is preposterous. However it seems logical that if the child grew up under the care and protection of a certain person and developed an allegiance to them that a case could be made for the requirement of reciprocal considerations in a legal manner. It seems logical that the United States has a certain level of responsibility to those who are born within her borders and show an allegiance to her.

INTERPRETING THE FOURTEENTH AMENDMENT

The meaning concealed in the wording of the fourteenth amendment exposed thus far in this paper has been consistent with the rulings of the US supreme court in the cases of Elk v. Wilkins, Plyler v. Doe and United States v. Wong Kim Ark. In each case the question addressed was the matter of allegiance.

It seems necessary that a structure for measuring allegiance to the United States should be presented that is based on the rulings of the Supreme Court. It will help form a more correct understanding of the precedence these cases present. It is also appropriate to consider the requirements of naturalization as they are designed to define the obligations, actions and knowledge that constitute a citizen, presenting a sort of benchmark against which those claiming citizenship by the fourteenth amendment can be measured.

Based on the two main sources we will divide “allegiance to the United States” into two non-equal categories: First, the person is subject to the government and laws of the United States and no other nation. Second, the extent to which the person has invested their lives and property in the United States.

There could probably be found a plethora of other categories including but not limited to: A “fitness for citizenship”, intent to become domicil to the United States and public services performed. However, this paper will discuss only the three hereafter presented as they are most generally applicable and important. It seems that more discussion and research is warranted in this area in order to form a more comprehensive guide to assist in the determining of legitimate claims to citizenship.
The first benchmark to be considered should be that one must fulfill the laws and regulations of the United States for citizenship in order to be recognized as a citizen. They should also be subject to United States law in general and the penalties of those laws. That is, if an individual has not and does not uphold and sustain the law of the land then they have revoked, to some extent, the allegiance they may have possessed to that nation.

The second is simply that those who claim citizenship must be subject primarily to the United States. Which includes not possessing allegiance to any other nation. Note that this does not directly include the allegiance of the parents. However a parent’s allegiance can and should be considered in understanding the allegiance of the child.

The third is that investment of monies and resources in the United States including payment of taxes, time spent in country and services rendered to citizens among others indicative of allegiance. These requirements are already found in the reasoning of the Supreme Court decisions but have never been put into writing. The following three Supreme Court cases portray this.

In Elk V. Wilkins, this excerpt from the opinion of the majority is illuminating: “Though the plaintiff alleges that he ‘had fully and completely surrendered himself to the jurisdiction of the United States,’ he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen, by the State or by the United States.”18 Clearly taxes, and “treatment as a citizen” which fall under the second and first portions of allegiance respectively are connected with the ideal of citizenship. A similar case is referenced in which an Indian was granted citizenship however a difference of the tribes “ hav[ing] totally extinguished their national fire, and submitted themselves to the laws of the States” also supports the first.19 The dissention of the same case is quoted as stating in the analysis of the meaning inherent of the wording of the Fourteenth Amendment that of Indians born on US soil “such of them, at least, as resided

in one of the States or Territories, and were subject to taxation and other public burdens” would be considered citizens. Thus it seems that all were unified in the fact that the amendment was to be interpreted to mean that both were requisite for citizenship.

In U.S. v. Wong Kim Ark a similar pattern emerges. “Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom.” Both prerequisites were included in the decision of this case as this paragraph shows in order we have: 1) or did or committed any act or thing to exclude him therefrom they followed the laws of the land and did not commit any act that would cause them to justifiably lose good relations with the United States government. 2) As had but one residence, to wit, in California, within the United States he was invested in the United States he had his family business his education his life in California all of which were cited in the ruling as proving he had a right to citizenship.

Finally in the most recent Supreme Court decision Plyler V Doe these two requirements can be seen. From the upheld opinion of the justices I quote “Use of the phrase “within its jurisdiction” thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.” Implied is the understanding that a person to be considered “within the jurisdiction” must be within the state and subject to its laws. Now admittedly “within” and “subject to” are different phrases yet it seems that if a person is never “within” the jurisdiction then they could not be said to be “subject to” the same jurisdiction.

CONCLUSION

The desire to have life a life in America woven into the lives of your children’s future is noble. The blatant misinterpretation of constitutional amendments however is reproachable. Congressional action to revise the fourteenth amendment would be preferred if possible. However for the immediate future we must uphold in our courts that children born through “birth tourism” in the United States cannot be construed to have fulfilled all the requirements necessary to be considered a bona fide United States citizen under the Fourteenth Amendment as it stands. The fundamental issue at hand is the fulfillment of the second clause of citizenship namely “Subject to the jurisdiction [of the United States]” or in other words “having a deep and abiding allegiance and fulfilling implicit requirements of citizenship to the United States.”23 If through consistent compliance with U.S. law, contributions to the forwarding of the United State’s causes and possessing a general fitness for Citizenship in the United States the person in question has proved themselves to have been “under the Jurisdiction” of the United States then it seems expedient to grant rightfully obtained citizenship equal to that of any other member of the United States.

23 U.S. Const. amend. XIV, § 2.