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THE BATTLE OF BIRTHRIGHT CITIZENSHIP

Joshua White¹

The national immigration debate tends to center on the morality of amnesty for illegal aliens, the numbers of legal aliens and refugees a state should accept, and issues with immigration and the nation's security. However, there is another problematic undercurrent rarely examined in the realm of immigration. As reported by the Pew Research Center, 310,000 U.S.-born children were born to illegal alien parents in 2012.² In 2013 there were approximately 295,000 births in the United States to illegal alien mothers, accounting for almost ten percent of all births in the U.S. for that year. This is only a small part of a troubling trend: in 1980 only one percent of births, about 30,000, were to illegal alien parents. This trend is unprecedented and presents a serious problem to U.S. policy makers. Population growth among illegal alien families is at a rate beyond the United States' ability to assimilate. Additionally, the automatic bestowal of citizenship to children of illegal aliens represents a serious encroachment on the relative sovereignty and ability of the American citizen to self-govern.

This article claims, that, in contrast to current interpretation, the citizenship clause of the Fourteenth Amendment should protect the sovereignty bestowed by the Constitution on American citizens

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2 Jeffrey S Passel & D'Vera Cohn. *Number of Babies Born in U.S. to Unauthorized Immigrants Declines*. PEW RESEARCH CENTER (Sept. 11, 2015), <http://www.pewresearch.org/fact-tank/2015/09/11/number-of-babies-born-in-u-s-to-unauthorized-immigrants-declines/>.

by allowing them to determine citizenship policy and by restricting citizenship from the children of illegal aliens; therefore, it is imperative that Congress enact legislation specifying that children of illegal aliens do not qualify for birthright citizenship. This article will acquaint the reader with the benefits of a strict interpretation of the citizenship clause and a narrow application of birthright citizenship, explain how the history of the citizenship clause expanded self-government for Americans, describe how the wording itself places serious limits on birthright citizenship, and inform how the Constitution as a whole exists to expand the American citizen's right to self-govern.

I. BACKGROUND

Shortly following the Civil War, Congress passed several constitutional amendments, known as the Civil War Amendments,³ to overrule Dred Scott and grant citizenship and constitutional rights to former slaves. One of these Civil War Amendments, the Fourteenth Amendment, contains the Citizenship Clause, which states, "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."⁴ U.S. immigration law and policy is based on this clause and grants automatic citizenship to the children of American citizens born in the United States and excludes the children of foreign diplomats or representatives. Later, the Supreme Court greatly expanded the scope of birthright citizenship in *United States v. Wong Kim Ark*,⁵ in which they ruled that children of legal aliens qualified for automatic birthright citizenship. Since that time, U.S. agencies have further expanded, through simple policy decisions, the interpretation of the Citizenship Clause to include children of illegal aliens. While Congress itself has not taken any action to

3 *The Civil War: The Senate's Story*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Jan. 18, 2017).

4 U.S. CONST. amend. XIV, § 1.

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

grant citizenship status to children of illegal aliens, and the Supreme Court has never ruled on a case involving citizenship for children of illegal aliens, Congress has passed laws to clarify the Citizenship Clause. The Child Citizenship Act of 2000 granted citizenship to children born abroad or adopted if their parents were U.S. citizens and under U.S. jurisdiction.⁶ No other clarifying measures have since been taken by Congress.

II. HISTORICAL EXPANSION OF SOVEREIGNTY

The history of the Fourteenth Amendment sheds valuable light on the contemporary drafters' intended purpose of the Fourteenth Amendment, which illustrates its limits as well as the effects it had on the individual sovereignty of the American citizen. The historical interpretation of the Fourteenth Amendment through much of the nation's history was in line with the interpretation of the drafters and protected sovereignty for the American citizen during that time.

The Fourteenth Amendment was intended to apply to former slaves.⁷ As briefly explained above, the Fourteenth Amendment was one of the Civil War Amendments, which ended slavery, granted freed slaves citizenship and equal protection under the law, removed the African American population out of the tyranny imposed by the Black Codes, and granted male former slaves the right to vote.⁸ Even before the Fourteenth Amendment, Congress passed legislation specifically to grant citizenship to African Americans. The Civil Rights Act, passed by Congress in 1866, declared all former slaves to be citizens.⁹ The language in the act explicitly names African Americans as the beneficiaries, although there was resistance to the law by President Johnson and some in Congress. A constitutional amendment was

6 8 U.S.C. §§ 1431–33 (2000).

7 Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1301–02 (2015).

8 THE VA. COMM'N ON CONSTITUTIONAL GOV'T, "STATE ACTION" AND THE 14TH AMENDMENT; A STUDY OF JUDICIAL MISINTERPRETATION, 4–5 (1973).

9 *Id.* at 5.

seen as a way to solidify the new policy and prevent a subsequent administration and Congress from repealing the act and a way of ensuring that the southern states would cooperate in reconstruction.¹⁰ The former Confederate states were even required to ratify the Civil War Amendments in order to be admitted back into the Union. As is clear from the history, the entire purpose of the amendment was to institutionalize the 1866 Civil Rights Act that Congress had already passed and thus helped transition the country from the Civil War and into Reconstruction. Its aim was to ensure that the gains of the abolition of slavery and equal rights would not be undone by vetoes or repeals and limited the scope of its provision to this select purpose.

Opponents of this view may claim that the Civil Rights Act granted citizenship to American Indians. However, the text of the act itself disproves this claim and clearly defines the purpose of both the 1866 Civil Rights Act and the citizenship clause of Fourteenth Amendment as being limited to former slaves. While the text of the 1866 Civil Rights Act does mention American Indians, it limits citizenship to Native Americans from tribes that had paid taxes to the American government, which was a small percentage of the Native American population.¹¹ The tribe had to *prove* that they were not loyal to anyone else¹² and that they existed under American jurisdiction to qualify for citizenship. This was an exception to the overarching standard of denying citizenship to American Indians. Perhaps most tellingly, in 1870 a Senate Judicial Committee stated that the Fourteenth Amendment's purpose was to grant African Americans citizenship and did not extend to Native Americans. Since the Fourteenth Amendment was intended to institutionalize the Civil Rights Act, and the Civil Rights Act was limited to freed slaves, then Native

10 If the amendment were passed, Congressional Republicans believed that the state governments would be more likely to have state laws conform with the morality expressed in the amendment. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT. FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 111 (1988); LONNIE TURNER, *THE RIGHTS OF NATIONAL CITIZENSHIP: THE ABOLITIONIST'S CAUSE IN THE COURTS* (1973).

11 Civil Rights Act, ch. 31, 29 Stat. 27–30 (1866).

12 Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 510 (2008).

Americans should not be granted birthright citizenship under the Fourteenth Amendment. Congress would go on to pass laws making Native Americans eligible for citizenship in 1887, and unconditionally granting it in 1924,¹³ cementing that the Fourteenth Amendment did not grant citizenship to Native Americans because they were therefore outside of the jurisdiction of the United States. In our present circumstance, if the courts had interpreted the citizenship clause as encompassing more than freed slaves, then the children of illegal immigrants would have a claim on that same privilege.

The original purpose and strict limits the drafters of the Amendment intended are clear. The Fourteenth Amendment institutionalized the goal of the 1866 Civil Rights Act vetoed by President Johnson and effectively overturned the Supreme Court's decision in *Dred Scott*.¹⁴ The limits also are clearly visible, due to specific statements from Congress limiting the role of the Civil Rights Act to former slaves. An understanding of the history of the Fourteenth Amendment ties the Civil War, Civil Rights Act, and the Fourteenth Amendment together and establishes the historical, sovereignty-expanding purpose of the Fourteenth Amendment.

III. WORDING OF THE CITIZENSHIP CLAUSE

In addition to the intent of the drafters and the history and specific circumstance the Amendment was intended to apply to, the specific wording of the Citizenship clause also establishes the limits and protection of American sovereignty. The Amendment states, "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."¹⁵ While proponents of granting citizenship to the children of illegal aliens frequently cite the first part of the citizenship clause, they overlook "subject to the *jurisdiction* thereof."

13 *1924 Indian Citizenship Act*, NEBRASKASTUDIES.ORG, http://www.nebraskastudies.org/0700/frameset_reset.html?http://www.nebraskastudies.org/0700/stories/0701_0146.html (last visited Feb. 22, 2016).

14 *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

15 U.S. CONST. AMEND. XIV, § 1.

It is important to understand the entirety of this phrase while determining birthright citizenship for the children of illegal aliens.

The 1828 edition of Webster's Dictionary, commonly used by legal scholars to evaluate and examine older legal texts, defines jurisdiction as "the power to make, declare or apply the law."¹⁶ Jurisdiction, therefore, relies on the government's ability to legislate or govern over a territory or group of people or to manage or regulate. This ability to govern may be limited by other factors. When applied to the current issue of illegal immigration, several problems arise. Although the United States may have jurisdiction over the state the illegal alien resides in, the United States has been unable to exercise jurisdiction over the illegal alien personally. The illegal alien entered the country by circumventing the laws of the land and therefore its jurisdiction. The illegal alien continues to reside outside of that jurisdiction. In short, entering a country without the knowledge or permission of the country cannot place an individual completely under that nation's jurisdiction.

While this strict interpretation of jurisdiction has been subject to intense criticism and even allegations of racism,¹⁷ the benefits of such strict an interpretation are many. Aliens have always been subject to strict scrutiny in order to ensure that loyalty to the nation is preserved and passed on to those entering the nation. It prevents the value of citizenship from being diluted by extending it to those aliens who do not care for it, while extending it to those who do. Such an interpretation enshrines the founding and cultural values of the populace, protects the integrity of the electoral system and representation,¹⁸ and in the case of the United States, protects the

16 *Jurisdiction*, WEBSTER'S DICTIONARY, (1828), <http://webstersdictionary1828.com/>.

17 Brooke Huley, *Automatic Birthright Citizenship: How Europe Has Fallen and Why We Should Not Follow*, 19 SW. J. INT'L L. 353, 368–372 (2013); Saby Ghoshray, *Rescuing the Citizenship Clause from Nativistic Distortion: A Reconstructionist Interpretation of the Fourteenth Amendment*, 51 WASHBURN L. J. 272 (2012).

18 Charles Wood, *Losing Control of America's Future: The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465 (1999).

cultural heritage of Western civilization. This is not to say that aliens do not have these characteristics, only that a strict interpretation of jurisdiction allows the state to ascertain who has these characteristics. For example, the children of foreign diplomats, magistrates, or even invading soldiers, are currently not, and were not intended to be,¹⁹ granted citizenship in the United States, in part out of fears that children would have conflicting loyalty, but also because it has long been established that these children's parents were not under the jurisdiction of the United States. In *Mathews v. Diaz*,²⁰ the Court denied extending Medicare insurance to aliens because they were not completely under American jurisdiction, and loyalties of the aliens were not proven.

There is also substantial legal precedent which helps define how the drafters of the Amendment defined jurisdiction, and how it was originally enforced. In *McKay v. Campbell*,²¹ the court ruled that the plaintiff, whose mother was a Chinook Indian and father was a British citizen, had no claim on American jurisdiction, as both the British Empire and Chinook Nation acted independently of the United States, even though he was born on American soil.

*Elk v. Wilkins*²² concurred and even more strictly defined birthright citizenship. In this case, a Native American left his tribe and took up residence in Nebraska, living in a "white" community, joining the militia, and paying taxes. When he attempted to register to vote, he was denied the opportunity because he had not had American citizenship conferred to him. The court stated, "The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a

19 Kelly Gindele, *The Birthright of Citizenship as to Children Born of Illegal Immigrants in the United States: What Did the Drafters of the Fourteenth Amendment Intend?*, 34 N. KY. L. REV. 367, 369 (2007).

20 *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

21 *McKay v. Campbell* 16 F. Cas. 161 (D. Or. 1871).

22 *Elk v. Wilkins*, 112 U.S. 94, (1884).

citizen of the United States.”²³ As the court went on to explain, no one can take citizenship onto him or herself through actions. He or she had to be recognized by the government of the state, even if or he or she paid taxes or participated as a citizen would in American society.

Proponents of the view that the Citizenship Clause grants citizenship to the children of undocumented aliens will undoubtedly point to the case *United States v. Wong Kim Ark*,²⁴ in which the son of two Chinese immigrants was allowed to reenter the country and become a citizen despite immigration laws prescribing otherwise, and further point to the language in the decision granting citizenship to children “irrespective of parentage.” The Supreme Court did rule that Wong Kim Ark should be granted citizenship under the citizenship clause; however, there are several key differences between this case and others this article has already examined. In the *Wong Kim Ark* case, Wong Kim Ark’s parents were legal immigrants to the United States and were not representing the Chinese government. They lived in the United States and were legal residents at the time of their son’s birth. This is important to note because it fundamentally alters the nature of the case. The United States had allowed their entry and the Kim Ark family demonstrated that they had no other loyalties other than to the U.S. government; they were not representing or advocating for the Chinese government in any way. They were completely under U.S. jurisdiction at the time of Wong Kim Ark’s birth, a circumstance that fails to apply to the children of illegal aliens. It is logical that the Supreme Court would find this circumstance substantially different from the circumstance in which the illegal alien finds him or herself. The most that proponents of granting citizenship to the children of illegal aliens can claim while using this case as precedent is that citizenship should be granted to the children of legal citizens.

Because the decision in *Wong Kim Ark* denies citizenship to the children of “hostile”²⁵ aliens and grants it to the children of “resident aliens,” the modern application of the language “irrespective of

23 *Id.* at 654.

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

25 *Id.* at 658.

parentage” to the children of illegal aliens greatly complicates U.S. law and opens up a host of questions that need to be resolved. Is an alien who has illegally entered the United States, a “hostile” alien who cannot grant citizenship *jus soli* to their children according to the decision in *Wong Kim Ark*? If they are not, then what is a hostile alien? What are the differences between hostile and illegal aliens? According to the Department of Homeland Security, a permanent resident alien is an official status that refers to an “alien admitted to the United States as a lawful permanent resident.”²⁶ This implies that the current understanding of the term “resident alien” as used in *Wong Kim Ark* requires a legal admittance into the country. When these new questions are considered, it is clear that the status of illegal aliens has never explicitly been determined. This article maintains that illegal aliens do not have allegiance to the country, and while not children of foreign sovereigns, they cannot be called legal resident aliens and cannot qualify for the rights allotted to legal aliens.

Another case that proponents of the opposing view will likely quote is *Plyler v. Doe*.²⁷ *Plyler v. Doe* allegedly guarantees children birthright citizenship because they cannot be denied other rights like access to public schooling. The ruling in *Plyler v. Doe* was a hotly contested 5-4 ruling which did allow the children of illegal immigrants to attend public schools, but the ruling had little to do with the nature of the illegal entry into the United States on the side of the child’s parents and more to do with not discriminating against children for being placed in a circumstance beyond their control. Indeed, the issue of citizenship was irrelevant in the ruling, and the line connecting anti-discrimination in public schooling to citizenship for illegal aliens and their children is tenuous.

Congress has also taken steps to clarify the limits of jurisdiction in recent years by passing the Child Citizenship Act of 2000²⁸ and

26 *Permanent Resident Alien*, U.S. DEP’T OF HOMELAND SECURITY, <https://www.uscis.gov/tools/glossary/permanent-resident-alien> (last visited Jan. 26, 2017).

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

28 8 U.S.C. §§ 1431–33 (2000).

the proposed Birthright Citizenship Act of 2011.²⁹ These laws codify the processes and circumstances by which children who are adopted, born overseas, or born to only one citizen parent may receive automatic birthright citizenship. In these cases, Congress took deliberate steps to recognize certain classes of individuals under American jurisdiction and extended the privilege of birthright citizenship to them. The existence of these laws shows that the government of the United States can choose who falls under American jurisdiction and when to extend it. It also shows that Congress can act to clarify issues of jurisdiction and citizenship without infringing on the Fourteenth Amendment.

Consider another example. If one man were to enter into another man's house without the owner's knowledge, permission, or invitation, does he owe any loyalty to the owner of the house? Does the owner of the house bear responsibility for the other man's actions? Can the intruder make any claim upon the owner for sustenance or be justifiably angered when the owner returns and removes the intruder from his own property? The answers to these questions are clearly negative. Jurisdiction simply cannot exist when the power granting jurisdiction does not know to whom he or she is granting jurisdiction. It is illogical to assume that an illegal entrant can petition the owner for rights of citizenship when the owner does not know the petitioner is on the property and has not granted permission to the trespasser to be there.

IV. PURPOSE OF THE CONSTITUTION

Many seem to make the argument that the immigrant has a "right to immigrate"; as a "nation of immigrants" America has the responsibility to continue to accept immigrants, legal and illegal, and to do otherwise would be in violation of American values and "what we

29 Birthright Citizen Act, H.R. 140, 112th Cong. (2011).

stand for.”³⁰ These arguments seem to assume that the illegal act of one individual can grant citizenship upon another individual without the citizen, the true grantor of citizenship rights, ever entering the picture. Birthright citizenship policy is an issue of sovereignty, not just of the American government, but of the American people.

The right of states to manage their own matters is a long-held and universally accepted principle. Prior to the Treaty of Westphalia, states routinely interfered in each other’s domestic affairs. Contested territories were much more prevalent than they are today, and leaders would use force or intimidation to influence affairs in other nations. The treaty established the foundation for the modern interpretation of sovereignty: that states must coexist, respect the borders and governments of other states, and refrain from meddling in internal affairs.³¹ Later, the Montevideo Convention³² was a binding treaty signed by most countries in North, Central, and South America. In Article 1 of the convention, it establishes that a legitimate state has a legitimate border that it can control; in Article 4, that all states are equal and enjoy the same rights; and in Article 8 that “No state has the right to intervene in the internal or external affairs of another.” In Article 11, it maintains that borders must be respected. Granting the children of illegal immigrants citizenship *jus soli* violates every single one of these critical provisions in the Montevideo Convention and the Treaty of Westphalia. Since birthright citizenship in this context involves two people, the mother and the child, the illegal entry of the mother shows no respect for borders. It is an interference with the affairs of the state because it tries to circumvent the other laws and procedures for legal immigration and removes the right and jurisdiction of the state in choosing who becomes a citizen. The United States is one of the few countries in the world that has

30 Paul Lewis, *Barack Obama: ‘We Will Always Be a Nation of Immigrants’*, THE GUARDIAN (Nov. 21, 2014) <https://www.theguardian.com/us-news/2014/nov/20/obama-plan-shield-five-million-undocumented-migrants-deportation-speech>.

31 The Treaty of Westphalia (1648).

32 Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

such a liberal interpretation of birthright citizenship.³³ It is extremely doubtful that an American would succeed in granting her child citizenship in another country simply by giving birth there.

The role of government is to protect the citizen. In representative governments, the people decide policy through their elected representatives and the government is beholden to the citizens. It is simply outside of the state's jurisdiction to make domestic policy for another state. Indeed, it would interfere with the affairs of other states were the state to attempt to represent non-citizens outside of its borders. It is the government's responsibility to enact laws that protect the integrity of the state, defend its sovereignty, and execute its jurisdiction. Failure to fulfill these responsibilities is contrary to the very purpose of the state.

The United States established American sovereignty and provided for the beginnings of the American government in the Declaration of Independence. This document states, "Governments are instituted among men, deriving their just powers from the consent of the governed."³⁴ One of the duties of government is to protect the borders of the state; King George III's failure to protect the borders of the state was one of the reasons that justified independence. The document states, "[King George] has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers."³⁵ This is an obvious failure to protect the border. The phrase "deriving their just powers from the consent of the people governed" was further expounded on in the American Constitution, which established American citizens as sovereign over their own nation. Ultimately, citizens act through elected representatives who then make and enforce laws.

The current interpretation undermines the sovereignty of the American government and the American citizen because it removes the following rights: defending the border, selecting who has the

33 Jon Feere, *Birthright Citizenship in the United States: A Global Comparison*, CENTER FOR IMMIGRATION STUDIES (Aug. 2010) <http://cis.org/birthright-citizenship>.

34 THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

35 *Id.* at para 29.

privilege of entering the United States, and selecting who will receive the right of citizenship from citizens. Instead, the interpretation grants the power to decide immigration policy to a foreign national. As described in numerous court cases, American laws, international treaties, and the United States' founding documents, the nation has jurisdiction over its borders and can choose whether or not to grant citizenship. Even the court cases examined are an example of the American government regulating its own affairs. It is illogical to assume that the Constitution would grant American citizens sovereignty over their own affairs, only to include an amendment that would take away that sovereignty. The American citizen cannot effectively manage the border and regulate immigration when foreign citizens have the right to decide whether or not they will confer citizenship on someone else. The current interpretation of the citizenship clause is fundamentally opposed to the sovereignty established by the American Constitution.

In order to rectify this misinterpretation, it is incumbent on Congress to enact legislation clarifying the Fourteenth Amendment, establishing the bounds of jurisdiction, and restricting the citizenship of the children of illegal aliens. It is not necessary to amend the Constitution; instead, Congress need only act to protect American sovereignty as it has hitherto done through passing the Child Citizenship Act of 2000³⁶ and proposing the Birthright Citizenship Act of 2011.³⁷ Implementing the law will not require undue stress, the parent of any child need only present their own proof of citizenship in order to ensure its granting to the child.

V. CONCLUSION

In conclusion, this article maintains that the children of illegal aliens do not qualify for birthright citizenship and that Congress must pass legislation returning the power to control immigration and citizenship to the American people. The Constitution grants the American citizens sovereignty over their government to decide

36 8 U.S.C. §§ 1431–33 (2000).

37 Birthright Citizen Act, H.R. 140, 112th Cong. (2011).

policy through their elected representatives, and the current, incorrect interpretation of the Citizenship Clause that grants citizenship to the children of illegal aliens dismantles citizens' sovereignty in immigration policy. If foreign citizens have the power to decide who will become citizens of the United States, they usurp the citizen as sovereign of the citizen's own country. Furthermore, the Citizenship Clause was interpreted to expand individual sovereignty for recently freed slaves. The Supreme Court has upheld the power of the federal government to control immigration and naturalization, and that aliens cannot take upon themselves citizenship or place themselves under a foreign government's jurisdiction simply by moving to that government's territory. In short, protecting the citizen's control over the citizen's government is the purpose of the Constitution, and it would be entirely illogical to assume that an amendment should unravel that fundamental understanding.

Immigration always has and always will be a hotly contested topic. As the conversation waxes and wanes, it is crucial to remember that the alien is not the only individual with wants, needs, desires, and rights. The citizen also has these concerns. The citizens have the right to decide policy for the country they live in through their elected representatives. To surrender this right indefinitely is an injustice to the citizen and undermines the U.S. Constitution that protects the citizen's rights and sovereignty. Let the United States continue to perform its constitutional functions by protecting the desires and rights of the sovereign citizens and the government that represents them.