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Justin McDevitt

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*FEATURE ARTICLE*

**BORN IN THE U.S.A.! YEAH,  
AND. . .? REVISITING  
BIRTHRIGHT CITIZENSHIP**

*by* JUSTIN McDEVITT

Some blast it as “invasion by birth canal”.<sup>1</sup> Others defend it as bedrock Americanism.<sup>2</sup> Whichever side of the fence (or the border) the calls come from, few topics stoke anger as readily as the policy of automatic birthright citizenship.

Should the United States grant citizenship to all children born on U.S. soil, even the children of illegal immigrants? More importantly, does the Constitution contain the right to birthright citizenship?

#### WHAT DOES THE CONSTITUTION SAY ABOUT BIRTHRIGHT CITIZENSHIP?

The Citizenship Clause of the Fourteenth Amendment reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”<sup>3</sup> The Supreme Court in 1848 held that “persons of color” could not be citizens of the United States,<sup>4</sup> even those who are born on U.S. soil.<sup>5</sup> The amendment, one of the “Civil War Amendments”, was Congress’s rejection of the *Dred Scott* decision.<sup>6</sup> It silenced those who questioned whether birthright citizenship should apply to all Americans or only to white people.<sup>7</sup>

But the controversy of interpretation arises from the caveat in the middle of the clause. What exactly did the drafters of the amendment mean by “and subject to the jurisdiction thereof”? Those in favor of birthright citizenship usually read this as an exemption for the children of diplomats, enemy soldiers, and Native American tribes, recognized as sovereign or quasi-sovereign at the time.<sup>8</sup> To those holding this view, jurisdiction means simply the requirement to obey the laws of the land.<sup>9</sup>

Those opposed to this view, however, dismiss it as over-simplified.<sup>10</sup> Instead, they equate jurisdiction with the English common law principle of allegiance.<sup>11</sup> If one’s allegiance lies elsewhere than the United States, one cannot be “subject to the jurisdiction” of the U.S., and would not have access to citizenship through birth in it.<sup>12</sup> The distinction is between *jus soli* (“right of soil”) and *jus sanguinis* (“right of blood”).<sup>13</sup> Does citizenship extend to children based on the citizenship of their parents or on their place of birth?



The Supreme Court answered this question in part in 1898. In *United States v. Wong Kim Ark*, the Court held that a child of Chinese immigrant parents was indeed a U.S. citizen under the Fourteenth Amendment because he was born on U.S. soil.<sup>14</sup> Those opposed to universal birthright citizenship, however, point out that Wong Kim Ark's parents were legal immigrants. Thus, they assert, the Supreme Court has never clearly ruled on the issue of whether the children of illegal immigrants are citizens upon their birth within the United States.<sup>15</sup>

Decades later, the Court reinforced *Wong Kim Ark* in a footnote to a case involving undocumented immigrants.<sup>16</sup> That case, some argue, did not involve the Citizenship Clause but the Equal Protection Clause of the Fourteenth Amendment.<sup>17</sup> Furthermore, the case did not require the Court to make that distinction, leading one scholar to call the footnote "pure dictum – a gratuitous statement unnecessary to the decision of the case."<sup>18</sup>

### WHAT *SHOULD* THE CONSTITUTION SAY ABOUT BIRTHRIGHT CITIZENSHIP?

Whatever the constitutional status of current policy may be, much of the discussion centers on what people believe the law *should* be.<sup>19</sup> This other half of the coin draws an entirely unique set of arguments - practical, legal, historical, and moral.

On the one hand, supporters of birthright citizenship – and even some detractors – agree that abolishing it would not fix the problem of illegal immigration.<sup>20</sup> Instead, it could very likely grow the undocumented population.<sup>21</sup> It could also create cultural apartheid<sup>22</sup> and even a caste system formed around parentage.<sup>23</sup> Others argue that the children themselves have done nothing wrong and should not be punished for the illegal acts of their parents.<sup>24</sup>

On the other hand, critics argue that granting birthright citizenship is outdated in a world so easy to navigate.<sup>25</sup> For example, as Sen. Jeff Sessions told reporters, “I’m not sure exactly what the drafters of the amendment had in mind, but I doubt it was that somebody could fly in from Brazil and have a child and fly back home with that child, and that child is forever an American citizen.”<sup>26</sup> Instead, as Rep. Duncan Hunter recently articulated at a rally, “it takes more than walking across the border to be an American citizen. It’s what’s in our souls.”<sup>27</sup>

### WHAT EFFECTS WOULD ABOLISHING BIRTHRIGHT CITIZENSHIP HAVE?

A Pew Hispanic Center study recently found that around 340,000 children were born in 2008 to at least one undocumented parent.<sup>28</sup> These births accounted for approximately eight percent of all births in the U.S. in 2008.<sup>29</sup> Because of high fertility rates and other demographic factors, this percentage is likely to continue increasing.<sup>30</sup> So it appears that any change to current law would affect millions of people directly and all Americans indirectly.

Scholars and researchers of all political stripes have offered numerous conjectures about the practical effect of switching from a *jus soli* to a pure *jus sanguinis* system of citizenship. One of the chief arguments for abolishing

birthright citizenship is that it would turn back the tide of illegal border crossings by removing a tangible – and valuable – incentive.<sup>31</sup>

Roy Beck, executive director of NumbersUSA, an immigration-reduction organization, told Bloomberg News, “You can’t give away your citizenship so cavalierly.”<sup>32</sup> Similarly, Prof. Lino A. Graglia writes that birthright citizenship is “the greatest possible inducement to illegal entry.”<sup>33</sup> “They come here to drop a child,” echoed Senator Lindsey Graham to Fox News.<sup>34</sup>

Yet the alarmist rhetoric<sup>35</sup> is often dismissed as partisan posturing.<sup>36</sup> Many migration experts attribute the influx not to the allure of an American passport, but to the lack of opportunity in immigrants’ home countries.<sup>37</sup>

Former U.S. Attorney General Alberto Gonzales, a Republican whose grandparents, he admits, immigrated under questionable circumstances, agrees.<sup>38</sup> In an interview with Bloomberg News, he offered, “I don’t think many people coming into this country and crossing without documentation do so to become citizens. They come to this country to provide for themselves and their families a better life.”<sup>39</sup>

It is unclear what impact abandoning birthright citizenship would realistically have on unauthorized immigration flows.<sup>40</sup> As Michael Wildes, an immigration lawyer and former mayor of Englewood, New Jersey, put it in an interview with Fox News, “America has always been a beacon to immigrants.”<sup>41</sup>

The strongest case that opponents of birthright citizenship then make is that illegal immigrants and their children are a drain on public resources.<sup>42</sup> Recently, former House Minority Leader John Boehner, speaking on NBC’s *Meet the Press*, added his influential voice to the fray: “In certain parts of our country, clearly our schools, our hospitals are being overrun by illegal immigrants – a lot of whom came here just so their children could become U.S. citizens.”<sup>43</sup>

There is data to suggest that undocumented immigrants consume more government resources than they contribute. While they, according to one estimate, pay roughly \$16 billion in federal taxes a year, they also cost the federal government \$26 billion in services.<sup>44</sup>

But changing the system would have its own costs. Eliminating automatic birthright citizenship would also eliminate the automatic element. This means

that *all* parents giving birth in the U.S. would now be required to prove their child's right to citizenship, a new burden for citizen parents.<sup>45</sup> It would require a new bureaucracy and both state and local regulation.<sup>46</sup> Ending birthright citizenship, therefore, would lead to bigger government.

In addition, Prof. Jennifer Van Hook of Pennsylvania State University presented a study by the Migration Policy Institute, which estimates that shifting to a policy of *jus sanguinis* would increase the undocumented population in the U.S. anywhere between 44 percent and 250 percent by 2050.<sup>47</sup> Prof. Van Hook found that “[e]ven assuming an immediate and complete halt in new illegal immigration, repeal of birthright citizenship would generate a large U.S.-born unauthorized population that has the potential to grow.”<sup>48</sup> This implies marked increases in government spending both in border control and in the investigation and removal of an even larger body of undocumented immigrants than at present.<sup>49</sup> Thus, the net cost is also unclear.

Critics of the current policy also argue that immigration on today's scale erodes the identity and facilitates the cultural breakup of America.<sup>50</sup> The United States has always struggled to incorporate waves of new immigrants.<sup>51</sup> But supporters of birthright citizenship argue that it actually encourages assimilation.<sup>52</sup> And because more and more Americans have roots in the immigrant experience,<sup>53</sup> even discussing abandoning *jus soli* has the potential to offend a large group of voters.<sup>54</sup>

Instead, birthright citizenship gives immigrants and their children a stake in their new country, supporters argue.<sup>55</sup> One survey found that 98 percent of undocumented immigrants wanted to learn English.<sup>56</sup> Without that investment, one writer for the Economist warns, “You end up with a lot of resentful, displaced young people who are permanently differentiated. . .and have nowhere to ‘return’ to.”<sup>57</sup> These proponents of maintaining birthright citizenship point to recent immigrant unrest in France as an indication of what may come if the U.S. adopts equally restrictive policies.<sup>58</sup>

#### WHAT WOULD IT TAKE TO ABOLISH BIRTHRIGHT CITIZENSHIP?

Indicative of how contentious the birthright citizenship debate is, the two sides are even at loggerheads on how current policy could legally be changed.<sup>59</sup> On its face, it would seem that another constitutional amendment is necessary to

repeal the Citizenship Clause of the Fourteenth Amendment.<sup>60</sup> However, as previously stated, many (if not most) proponents of abandoning birthright citizenship contend that the Supreme Court has merely misinterpreted the Citizenship Clause.<sup>61</sup> In that case, today's Supreme Court could overturn current policy simply by declaring that the Citizenship Clause does not confer automatic citizenship to the children of illegal immigrants.<sup>62</sup>

To this effect, legislators in Congress and in state legislatures have recently introduced bills that seek to restrict or abolish birthright citizenship.<sup>63</sup> They do this hoping that it will force the Supreme Court to decide the applicability of the Citizenship Clause to the children of illegal immigrants.<sup>64</sup> In the meantime, Rep. Hunter has suggested that immigration officials should deport citizen children of undocumented parents if the parents themselves are being deported.<sup>65</sup>

#### IS MEANINGFUL REFORM POSSIBLE?

No immigration discussion is complete without a nod to securing the borders<sup>66</sup> and enforcing already existing immigration laws.<sup>67</sup> Secretary of Homeland Security Janet Napolitano – herself a border state governor before assuming her current post – and other federal and state officials have pled for Congress to take up comprehensive immigration reform.<sup>68</sup> In fact, many politicians attribute the growing cry for the repeal of the Citizenship Clause to federal inaction.<sup>69</sup>

To complicate matters, immigration reform is not a purely domestic issue. As Douglas Massey of the Mexican Migration Project testified before the Senate Judiciary Committee, “[D]ata clearly indicate[s] that Mexican immigration is not and has never been out of control. It rises and falls with labor demand.”<sup>70</sup> Part of the solution, therefore, would be a greater dedication to the development of neighboring economies, particularly in Central America.<sup>71</sup> That may be a hard sell to critics who believe the problem can be fixed with a sturdy border fence.<sup>72</sup>

## WHERE DOES THE UNITED STATES GO FROM HERE?

Few countries practice automatic birthright citizenship today. In fact, as a Center for Immigration Studies report recently found, “The United States and Canada are the only advanced economies in the world which (sic) grant automatic birthright citizenship to children of illegal and temporary aliens.”<sup>73</sup> Interestingly, the same study finds that almost every country in the Americas *does* practice it.<sup>74</sup>

In Chile, for example, Prof. Macarena Rodriguez, a specialist in immigration law at Alberto Hurtado University in Santiago, notes a similar dilemma. “The Chilean Constitution says that everyone born in Chile is a *chileno*,” excluding only the children of diplomats and of “transient foreigners.”<sup>75</sup> The problem, she says, is that unelected administrative officials decide who qualifies as “transient foreigners”, often drawing protests of discrimination.<sup>76</sup>

The United States of America has never been afraid to be unique, especially when it comes to welcoming outsiders. As leading immigration scholar Prof. Cristina Rodriguez writes, “[I]f ever there were a case for maintaining American exceptionalism, the 14th Amendment is it.”<sup>77</sup> And, while even the kindest host may close the door eventually, it should still be done politely.

## NOTES

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3 U.S. CONST. amend XIV, § 1.

4 Saenz v. Roe, 526 U.S. 489, 502-03 n.15 (1999); Sara Catherine Barnhart, *Second Class Delivery: The Elimination of Birthright Citizenship as a Repeal of “The Pursuit of Happiness”*, 42 GA. L. REV. 525, 548 (2008).

5 Scott v. Sandford, 60 U.S. 393, 419-21 (1857) (“Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.”).

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immigration\_lindsey\_graham.html (“They wished to directly repudiate the *Dred Scott* decision, which said that citizenship could be granted or denied by political caprice. They purposely chose an objective standard of citizenship — birth — that was not subject to politics.”); *see also Amending the amendment: A challenge to an American birthright*, ECONOMIST, Aug. 19, 2010, available at <http://www.economist.com/node/16846798/> (“This is settled law that righted the most egregious wrong in our constitution.”).

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8 James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 TEX. REV. L. & POL. 161, 163-64 (2007).

9 *Id.*

10 John Feere, *Birthright Citizenship in the United States: A Global Comparison*, BACKGROUND (Ctr. for Immigration Studies, Washington, D.C.), Aug. 2010, at 7, available at <http://www.cis.org/articles/2010/birthright.pdf>.

11 *Id.* at 8-9.

12 *Id.*

13 *Id.* at 5.

14 *United States v. Wong Kim Ark*, 169 U.S. 649, 693-94 (1898) (“The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory.”).

15 Feere, *supra* note 10, at 11. *See also* Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. L. REV. & POL. 1, 10 (2009). (“Whatever the merits of *Wong Kim Ark* as to the children of legal resident aliens and however broad some of its language, it does not authoritatively settle the question of birthright citizenship for children of illegal resident aliens.”).

16 *Plyler v. Doe*, 457 U.S. 202, 211-12 n.10 (1982) (stating that “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.”). (citing C. Bouve, EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 425-427 (1912)).

17 Feere, *supra* note 10, at 10.

18 Graglia, *supra* note 15, at 11.

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21 Julia Preston, *Citizenship From Birth Is Challenged on the Right*, N.Y. TIMES, Aug. 6, 2010, available at <http://www.nytimes.com/2010/08/07/us/politics/07fourteenth.html> (emphasis added); *see also* Jordan, *supra* note 20 (“[S]uch a change would instead increase the size of the illegal population.”).

22 *Bill Would Eliminate Birthright Citizenship*, FOXNEWS.COM (Nov. 27, 2005), <http://www.foxnews.com/story/0,2933,176664,00.html>.

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30 *Id.*

31 Jordan, et al., *supra* note 19.

32 Dodge, *supra* note 25.

33 Graglia, *supra* note 15, at 4.

34 Preston, *supra* note 28.

35 See Editorial, *Xenophobia: Fear-Mongering for American Votes*, N.Y. TIMES, Aug. 5, 2010, available at <http://www.nytimes.com/2010/08/06/opinion/06fri1.html>.

36 Rodriguez, *supra* note 23.

37 *Id.*

38 Dodge, *supra* note 25.

39 *Id.*

40 See Knigge, *supra* note 20 (“People will still migrate to the United States, even if their children are not guaranteed US citizenship.”); *Top Republicans*, *supra* note 26 (“altering it would weaken a fundamental American value while doing little to deter illegal immigration.”); Alex Nowrasteh, Op-Ed., *Repealing Birthright Citizenship Is a Mistake America Can't Afford to Make*, FOXNEWS.COM (Aug. 13, 2010), available at <http://www.foxnews.com/opinion/2010/08/12/alex-nowrasteh-immigration-assimilation-children-birthright-hispanic-laws/> (“The negative consequences would. . .vastly outweigh any imagined benefits.”).

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48 Jordan, *supra* note 20.

49 Van Hook, *supra* note 47, at 7.

50 Jack Citrin, et al., *Testing Huntington: Is Hispanic Immigration a Threat to American Identity?* (Am. Pol. Sci. Assoc., Washington, D.C.), Mar. 2007, at 31, available at [http://www.apsanet.org/imgtest/PerspectivesMar07Citrin\\_etal.pdf](http://www.apsanet.org/imgtest/PerspectivesMar07Citrin_etal.pdf).

51 Editorial, *supra* note 35.

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54 *Bill Would Eliminate*, *supra* note 22.

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56 *Not criminal, just hopeful: Reform of America's immigration laws has stalled. Will this week's huge demonstrations revive or smother it?*, ECONOMIST, Apr. 12, 2006, available at <http://www.economist.com/node/6802645/>.

57 M.S., *supra* note 55.

58 *Bill Would Eliminate*, *supra* note 22.

59 For brief iterations of the opposing Constitutional positions, see Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329 (2009) and Ho, *supra* note 8.

60 Preston, *supra* note 28. This would require a two-thirds vote in each chamber of Congress and ratification by three-fourths of state legislatures to take effect. U.S. CONST. art. V.

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62 *Id.*

63 *Id.* at 4-5.

64 Jones, *supra* note 52. For examples of state legislation see Gerald Walpin, Op-Ed., *WALPIN: 14th Amendment never meant for illegals*, WASH. TIMES (Aug. 24, 2010, 5:23 PM), available at <http://www.washingtontimes.com/news/2010/aug/24/14th-amendment-never-meant-for-illegals/>; Nick Wing, *Arizona Immigration Law Architects Turn Sights On 14th Amendment, Birthright Citizenship*, HUFFINGTON POST (SEPT. 13, 2010, 03:51 PM), available at [http://www.huffingtonpost.com/2010/09/13/arizona-14th-amendment\\_n\\_714524.html](http://www.huffingtonpost.com/2010/09/13/arizona-14th-amendment_n_714524.html); *Lawmakers in 14 States Craft Bill to Deny Citizenship to 'Anchor Babies'*, FOXNEWS.COM (Oct. 19, 2010), available at <http://www.foxnews.com/politics/2010/10/19/lawmakers-states-craft-deny-citizenship-anchor-babies/>.

65 *Congressman*, *supra* note 27. ("Hunter's spokesman Joe Kasper said Thursday that the congressman's position is that U.S.-born children of illegal immigrants should stay with their parents unless there is a legal guardian who could take care of them.").

66 See e.g. Holmes, *supra* note 29.

67 See e.g. Ewing, *supra* note 53.

68 Alexander Mooney, *White House: 14th Amendment change 'just wrong'*, CNN.COM POLITICAL TICKER (Aug. 13, 2010, 2:38 PM), <http://politicalticker.blogs.cnn.com/2010/08/13/white-house-14th-amendment-change-just-wrong/> (“I am surprised, to say the least, that discussion is being had about amending the United States Constitution before we even get to the table on amending the statutes that actually carry out immigration policy. I think that’s where the action needs to be. And any talk of amending the Constitution is just wrong.”).

69 Sifuentes, *supra* note 24. It is also noteworthy to mention that “comprehensive immigration reform” is a term used by both parties in very different ways. To most Republicans, it usually means a tightening of the screws on lax enforcement. To most Democrats, it means the expansion of legal immigration avenues and perhaps even a “path to citizenship” for those undocumented immigrants already in the U.S. See e.g. Markos Moulitsas, *Immigration is Dems’ key*, HILL (Jan. 19, 2010, 7:05 PM), <http://thehill.com/opinion/columnists/markos-moulitas/76883-immigration-is-dems-key?page=1#comments>.

70 Julia Nissen, *New Attacks on Birthright Citizenship: “Anchor Babies” and the 14th Amendment*, COUNCIL ON HEMISPHERIC AFF. (Oct. 17, 2010), available at <http://www.coha.org/new-attacks-on-birthright-citizenship-“anchor-babies”-and-the-14th-amendment/>.

71 *Id.*

72 *Not criminal*, *supra* note 56.

73 Feere, *supra* note 10, at 14.

74 *Id.* at 15.

75 Interview with Macarena Rodriguez, Professor of Law, Alberto Hurtado University, in Santiago, Chile (Oct. 6, 2010).

76 *Id.*

77 Rodriguez, *supra* note 23.