
BIRTHRIGHT CITIZENSHIP: TWO PERSPECTIVES

By Gerald Walpin* and David B. Rivkin, Jr. & John C. Yoo**

Note from the Editor:

This pair of articles debates the original meaning of Section 1 of the 14th Amendment, seeking to answer the question: Does the 14th Amendment Guarantee Citizenship to Babies Born to Illegal or Transient Immigrants on U.S. Soil? Mr. Walpin answers “no,” arguing that treating immigrants and the children humanely does not require interpreting the Constitution to grant birthright citizenship. Mr. Rivkin and Prof. Yoo argue that the 14th Amendment does in fact require that anyone born on U.S. soil be granted citizenship.

The Federalist Society takes no position on particular legal or public policy matters. Any expressions of opinion are those of the authors. When we publish an article that advocates for a particular position, we generally offer links to other perspectives on the issue, including ones opposed to the position taken in the article. However, in this case, the controversial nature of the issue merited full treatment from both sides. As always, we invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

The 14th Amendment Does Not Grant Citizenship To Babies Born to Illegal Or Transient Immigrants on U.S. Soil

Gerald Walpin

The legal debate over so-called birthright citizenship has lately been spotlighted because of presidential candidate Donald Trump’s statements about immigrants and foreigners.¹ Mr. Trump’s position totally ignores that the words on the Statue of Liberty explain why America is the great country that it is: “Give me your tired, your poor, your huddled masses yearning to breathe free.”² Our country was literally founded by immigrants fleeing religious persecution, followed by waves of more refugees and others fleeing material deprivation. Because it accepted millions upon millions of immigrants, the United States remains the world’s sole rightful owner of the descriptive word, first applied in 1831 by Alexis de Tocqueville: “exceptional.”³

The meaning of the birthright provision in the 14th Amendment has been specifically put in issue by Trump’s questioning whether his opponent Ted Cruz’s birth in Canada to an American citizen allows him to be considered to be a “natural born citizen”—a prerequisite for serving as President. But current events also warrant a fuller examination of the provision as it is being invoked to provide U.S. citizenship to millions of non-Americans. Websites in many foreign countries induce pregnant women to come to and pay up to \$80,000 to “maternity hotels” in the United States, on the promise of American citizenship to the newly-born child who then returns to the

foreign country.⁴ Mexican pregnant women cross the border to give birth in near-border U.S. hospitals for the same purpose.⁵ Many illegal immigrants in this country have children with the expectation that the child will be a U.S. citizen at birth, and thereby anchor the parents to be able to remain here.⁶

I. THE RULE OF LAW MUST CONTROL

Aside from the contributions of immigrants to our country, there is another fact that has made the United States exceptional that overrides all else: from the very first day of our country, we have lived by the *rule of law*, with our Constitution being the supreme and controlling law. That means that the words of the Constitution control, and that they must be construed as the authors understood and intended—not as current judges might prefer.

One famous Supreme Court Justice, Hugo Black, well described the reason for this rule of construction: “I have an abiding idea that, if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution.”⁷ Oliver Wendell Holmes, another respected Justice, similarly instructed that a judge must construe a provision based on “what those words would mean in the mouth of a normal speaker of English, *using them in the circumstances in which they were used.*”⁸ The proper interpretation of a constitutional provision is best determined by abiding the words in the provision, the authors’ expressed statements as to what they thought it meant, and consistency with other relevant laws, both those enacted relatively contemporaneously and those then held still binding.

II. APPLYING RULE OF LAW PRINCIPLES TO THE BIRTHRIGHT CITIZENSHIP DEBATE

Applying these rule of law principles, how should we construe the words of the Birthright Citizenship clause of the 14th Amendment to the Constitution? Does the clause, as some now assert, give citizenship to a child on the sole condition that he or she was born on United States soil, even if (i) born to a foreign citizen mother who promptly returns to her native land where the child also is a citizen of that foreign country, or (ii) born to foreign citizens while they are illegally in this country? Let’s together do the analysis that is necessary to determine

* Mr. Walpin served as an Inspector General, following nomination by G. W. Bush and confirmation by the U.S. Senate, is a New York attorney, and author of *The Supreme Court vs. The Constitution* (Significance Press 2013). He is, and has been for many years, a member of the Federalist Society Board of Visitors.

** David B. Rivkin, Jr. is a partner at BakerHostetler, where he co-leads the firm’s national Appellate Practice. He also served in the Ronald Reagan and George H. W. Bush administrations. John C. Yoo is Heller Professor of Law at the University of California, Berkeley, a visiting scholar at the American Enterprise Institute, and a former official in the Bush Justice Department. He is co-editor with Dean Reuter of *Liberty’s Nemesis: The Unchecked Expansion of the State* (Encounter 2016).

what the rule of law requires.

We start with the relevant words of the 14th Amendment ratified on July 9, 1868. It requires that two conditions—not just birth in this country—be present for citizenship to be granted: (i) the baby must be “born . . . in the United States;” and (ii) when born, the baby must be “subject to the jurisdiction” of the United States. A cursory glance at the words themselves makes it clear that those who argue that mere birth within the United States results in citizenship fail reasonably to address this second requirement.⁹

Two Supreme Court opinions, both issued within the decade after ratification of the 14th Amendment are particularly relevant to construing the meaning of the Birthright Citizenship provision. Note that, because the meaning of the Birthright Citizenship provision did not determine the outcome in either case, the Court’s statements in both decisions are dicta, not binding holdings. But the Justices’ words should be considered authoritative insofar as they were expressed by Justices who lived through the enactment of the provision they were construing, and thus were well positioned to comprehend the meaning and intention of the words. These Court-expressed views on the meaning of the Birthright Citizenship provision should also be considered authoritative because the Justices were unanimous in making the statement in one case, and, in the other, the dissenters did not disagree with that particular point.

In the *Slaughterhouse Cases*,¹⁰ the Court wrote that “[t]he phrase, ‘subject to its jurisdiction’ was intended to *exclude from its operation children of . . . citizens or subjects of foreign States born within the United States.*” That is as absolute and complete a statement as can be imagined, and it would deny birthright citizenship to a child born in this country to undocumented immigrants or to a transient alien mother. Then, two years later, in *Minor v. Happersett*, the Court unanimously and expressly recognized the existence of “doubts” that citizenship was automatic for “children born within the jurisdiction without reference to the citizenship of their parents,” after noting that citizenship attaches only when the immigrant owes “allegiance” to this country.¹¹ These two Supreme Court rejections of automatic birthright citizenship for anyone born in this country, without regard to the parents’ citizenship status, are supported by facts undoubtedly known to those Justices, and certainly known to us.

During the same session in which Congress approved the 14th Amendment, it had already enacted the Civil Rights Act of 1866, providing that, for a U.S.-born baby to be a citizen, the baby must “not [be] subject to any foreign power.”¹² A child, although born in this country, who, after birth, returns with foreign citizen parents to, and lives in, the foreign country of which the child remains a citizen, is subject to that foreign power. Thus, that statute mandated that such U.S.-born children be denied U.S. citizenship. The record makes clear that, in considering the 14th Amendment, Congress did not repudiate the statute it had just enacted. Not even a single member introduced a bill to rescind that legislation. The absence of any attempts to walk back the statute suggests that Congress remained satisfied with that law, and that the same-session approval of the 14th Amendment did not signal any change of view.

Despite these facts, some might still question why, with this statute already enacted, it was necessary to adopt the 14th Amendment so shortly thereafter, if not to change the condition for granting citizenship. Others might ask why the 14th Amendment did not copy the negative requirement that the baby “not [be] subject to any foreign power,” but instead substituted the affirmative requirement that the baby must be “subject to the jurisdiction” of the United States. If one were to stop the analysis with the substitution, it certainly would leave reasonable questions. However, the statements made by the proposers of the 14th Amendment provide clear answers: The proposers sought to prevent any future Congress, by a simple majority vote, from altering or rescinding the civil rights statute.¹³ In contrast, altering or rescinding a constitutional amendment would require a two-thirds vote of each house of Congress and approval by three-fourths of the state legislatures—a vastly increased burden and, as history has shown, seldom obtained.

We do not know the specific reason for the change in phraseology. However, it is irrelevant in our search for the meaning of the Amendment, because Senator Jacob Howard, the Amendment’s co-author, described it as “simply declaratory of . . . the law of the land already,”¹⁴ referring to the Civil Rights Act already enacted. Thus, he was confirming that the 14th Amendment, with slightly different wording, was intended to constitutionalize the statute’s requirement that the baby must “not [be] subject to any foreign power.”

This conclusion that no change of meaning was intended was also confirmed by the provision’s prime author, Senator Lyman Trumbull, who explained to the Congress before it voted, that “subject to the jurisdiction thereof” required being “subject to the complete jurisdiction thereof,” meaning, as he put it, “not owing allegiance to anyone else.”¹⁵ As Thomas Jefferson earlier wrote, “aliens are the subjects of a foreign power,”¹⁶ and thus owe allegiance to another country; hence, the alien’s children are not U.S. citizens simply by virtue of birth on U.S. soil. Furthermore, Senator Howard’s explanatory words are nearly identical to the Civil Rights Act’s words “not [be] subject to any foreign power,” making explicit that the 14th Amendment was intended to put in Constitutional “stone” what Congress had first enacted as legislation. Applying that meaning, the U.S.-born child, returning to the parent’s country, is a citizen of and subject to that foreign country, and thus does not meet this requirement for birthright citizenship.

In its 1884 decision in *Elks v. Wilkins*, the Supreme Court adopted Senator Trumbull’s formulation that, to receive birthright citizenship, the parents must “not merely [be] subject in *some* respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, *and not subject to any foreign power,*” as well as owe the U.S. “direct and *immediate allegiance.*”¹⁷ Parents and child, returning to their native land of which they are citizens, remain subject to that foreign power and must show it allegiance, and thus do not give the U.S. “immediate allegiance.” An immigrant who violated U.S. law by entering or overstaying illegally also fails to show “allegiance,” which by definition requires loyalty and obedience to the law.¹⁸ William Blackstone, the famed English legal commentator in the period the 14th Amendment was

enacted, and to whom American lawyers, judges, and legislators then repeatedly cited and quoted in decisions, legal briefs, and statements in the legislatures, defined “allegiance” in this context as requiring that the subject “will demean himself faithfully.”¹⁹ An illegal alien, breaking America’s laws, by definition, certainly does not meet that requirement. Further, an illegal alien, while subject to the jurisdiction of U.S. courts, is not “completely subject to [U.S.] political jurisdiction” and, as a citizen of a foreign country, remains “subject to [a] foreign power”—thus falling outside of the Court’s stated requirements for birthright citizenship.

Most proponents of the assertion that the Birthright Citizenship provision grants citizenship to all non-diplomats’ babies born in the U.S. ignore the three Supreme Court decisions discussed above, and instead rely on the Court’s 1898 decision in *U.S. v. Wong Kim Ark*.²⁰ In that case, the Court granted citizenship to a child born in the U.S. to alien Chinese parents. But the Court made clear that its decision does not apply to the birth to a foreign alien mother who either promptly returns to the foreign country or is in this country illegally and therefore, under law, subject to deportation back to her foreign country. The Court expressly conditioned its decision on the facts that the parents “have a permanent domicil[e] and residence in the United States, and are there carrying on business.”²¹ Neither the parents nor the child are permanently domiciled here when, after birth, the parents and child return to and continue their allegiance to the parents’ native country. In *Wong Kim Ark*, the child who had been born on U.S. soil to Chinese parents had traveled to China, but only for temporary visits, and this was found not to undercut his claim to birthright citizenship due to his continued permanent and legal domicile in the U.S.²² Illegal status is more like returning to the foreign country than it is like temporary visits, for purposes of the Birthright Citizenship clause. An illegal alien is legally subject to deportation every day she is present on U.S. soil, unless she has been granted relief from deportation. Such a situation cannot be described as “a permanent domicil[e] and residence in the United States,” given that “permanent” is defined as “lasting or intended to last or remain unchanged indefinitely.”²³

Another reason the Birthright Citizenship provision does not give automatic citizenship to U.S.-born children of illegal or transient aliens is that there is no evidence that those who voted to adopt the 14th Amendment even considered such a scenario. The purpose of this portion of the 14th Amendment was, as one senator put it during the Senate debate on the 14th Amendment, “simply to declare that Negroes shall be citizens of the United States,”²⁴ and therefore guaranteed equal citizenship rights in the aftermath of the Civil War.²⁵

Furthermore, they could not have intended to grant citizenship to children of illegal aliens because no category of “illegal aliens” then existed. In 1866, when Congress approved the amendment, immigration was essentially unhindered; any immigrant was a *legal* immigrant, entitled to citizenship after a minimum residence period.²⁶ The first category of “illegal alien” was not created until 1875—nine years later—when federal law denominated the first aliens prohibited from entering; the only ones prohibited even then were convicts, prostitutes, and “orientals.”²⁷ Ellis Island, which housed the first federal

immigration inspection station, was not opened until 1892.²⁸ I have not seen any explanation from those who argue that the 14th Amendment provides citizenship to illegal or transient aliens’ babies born here that reconciles that position with the undisputed fact that no category known as “illegal alien” was then even imagined to exist.

The fact that there were no illegal immigrants when the 14th Amendment was enacted is not the only basis for concluding that the 14th Amendment was never intended to grant citizenship to a child born to transient aliens. To hold otherwise would require attributing to the enactors of this Amendment the intent to scuttle a provision of the original Constitution that was sacrosanct at that time and has remained so until the current date. Article II of the Constitution prohibits anyone who is not “a natural born citizen” from being president. John Jay, later the first Chief Justice of the Supreme Court, wrote a letter to George Washington, then presiding officer of the Constitutional Convention, that sheds light on the purpose of this provision. He suggested that it would “be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government.”²⁹ Such a “strong check” would be non-existent if a child of foreign parents, who left the U.S. following birth and lived as a citizen of that foreign land, owing it allegiance, could return at age 35, or even 20, and become president. That inconsistent continuing provision in the Constitution—not only never questioned, but specifically mentioned during the debate on the 14th Amendment³⁰—counsels a rejection of the theory that the Birthright Citizenship provision granted citizenship to any child of non-diplomat foreign citizens born in the U.S.

Proponents of the broad view of birthright citizenship also err in asserting their premise that two clauses of the Amendment section that contains the Birthright Citizenship provision—“within the U.S.” and “subject to [U.S.] jurisdiction”—are synonymous as applied to illegal and transient immigrants. But the Amendment’s authors, in fact, made clear that they did not believe that “subject to [U.S.] jurisdiction” meant the same as “within the U.S.” In the same section of this Amendment, it guarantees “any person *within its jurisdiction* the equal protection of the laws.” The “within” phrase was defined by co-author Senator Howard as meaning “all persons *who may happen to be within their jurisdiction*,” meaning that anyone physically present must be treated equally under our laws.³¹ In contrast, the Court has stated and later reaffirmed that “subject to jurisdiction” means much more: “owing ... direct and immediate allegiance.”³² No allegiance, and certainly not immediate allegiance, is given by a parent who, following birth, returns with her newly born baby to live in the country of her citizenship; nor does one who remains here in violation of law show such allegiance.

Further, Congress knows what words to use if it wants to declare that every non-citizen born within the United States is a citizen. The Indian Citizenship Act of 1924³³ provides that “all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States.” There is no reason to believe that the Congress of 1866 was any less able to use such words if it intended to provide citizenship to all persons born within the

territorial limits of the United States. That it did not use such words requires the conclusion that no such all-encompassing grant of citizenship was intended.

I am not the first person to reach this conclusion as to the meaning of the Birthright provision. In 1873—only five years after the ratification of the 14th Amendment—the U.S. Attorney General provided an official government opinion: “The word ‘jurisdiction’ must be understood to mean absolute and complete jurisdiction, such as the United States had over its citizens before the adoption of the amendment. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction only to a limited extent.”³⁴ Being subject only to a limited extent does not meet the requirement of “absolute and complete jurisdiction” necessary to obtain citizenship.

III. APPLYING THE RULE OF LAW IN A FAIR MANNER

Many proponents of the view that the Birthright Citizenship provision grants citizenship to any person born in this country, no matter the circumstances, argue that any other interpretation would cause this country to act inhumanely towards millions who have relied upon it. An example of a child born here 40 years ago to a then-illegal alien, and who lived here, and only here, as an American, knowing and speaking only English, being forcibly deported to a country this now-adult never knew, conjures up a totally unacceptable picture. I agree that it is unacceptable, but is not the necessary consequence of enforcing the 14th Amendment as intended by those who enacted it.

Realistically, the Supreme Court must decide this issue. To bring this issue before the Court, Congress must legislate that a child born on U.S. soil to an illegal or transient alien without domiciliary attachment and total allegiance to the United States is not thereby a U.S. citizen. If an illegal or transient alien thereafter gives birth, under this proposed new statute, she would be denied citizenship for the baby. Undoubtedly someone would then represent her to seek the courts’ help to obtain citizenship papers. In that way, a ruling on the meaning of this constitutional provision would be obtained after, presumably, it winds its way through the courts to the Supreme Court.

In the proposed enacted statute, Congress, I suggest, would be correct in preventing inhumane treatment of persons long ago born who have lived lawfully as American citizens. That can be accomplished by including a clause denying retroactive effect to children who were born in this country, prior to the statute’s enactment, and still resided here without any felony convictions. We would thus avoid repeated future violation of the true meaning and intent of our Constitution, without creating an inhumane picture.

The 14th Amendment Guarantees Birthright Citizenship to Every Person Born on U.S. Soil

David B. Rivkin, Jr. & John C. Yoo

Donald Trump’s call to end birthright citizenship roiled the Republican presidential primary late last year. Jeb Bush, John Kasich, and Marco Rubio embrace the traditional view that the Constitution bestows citizenship on anyone born on U.S. territory. Ben Carson and Rand Paul agree with Trump that Congress could dismantle birthright citizenship by itself. Meanwhile, Scott Walker and Ted Cruz acknowledge birthright citizenship, but seek a constitutional amendment to abolish it.³⁵ Conservatives should reject Trump’s nativist siren song and reaffirm the legal and policy vitality of one of the Republican Party’s greatest achievements: the 14th Amendment. Under its text, structure, and history, anyone born on American territory, no matter their national origin, ethnicity, or station in life, is an American citizen.

While the original Constitution required citizenship for federal office, it never defined it. The 14th Amendment, however, provides 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.”³⁶ Congress did not draft this language to alter the concept of citizenship, but to affirm American practice dating from the origins of our Republic. With the exception of a few years before the Civil War, the United States followed the British rule of *jus solis* (citizenship defined by birthplace), rather than the rule of *jus sanguinis* (citizenship defined by that of parents) that prevails in much of continental Europe.³⁷ As the 18th century English jurist William Blackstone explained: “The children of aliens, born here in England, are generally speaking, natural-born subjects, and entitled to all the privileges of such.”³⁸

After the Civil War, congressional Republicans drafted the 14th Amendment to correct one of slavery’s grave distortions of our law. In *Dred Scott v. Sanford*, Chief Justice Roger Taney found that slaves, even though born in the United States, could never become citizens.³⁹ The 14th Amendment directly overruled *Dred Scott* by declaring that everyone born in the U.S., irrespective of race, were citizens. It also removed from the majoritarian political process the ability to abridge the citizenship of children born to members of disfavored ethnic, religious, or political minorities.

The only way to avoid this straightforward understanding is to misread “subject to the jurisdiction thereof” as an exception that swallows the *jus solis* rule. Some scholars have argued—wrongly—that this language must refer to aliens, who owe allegiance to another nation and not the U.S.

Proponents of “allegiance” citizenship do not appreciate the consequences of opening this Pandora’s box. Among other things, such a standard could spell trouble for millions of dual-citizens, who certainly owe allegiance to more than one country. This is not an entirely speculative concern; during World Wars I and II, public sentiment ran strongly against German-Americans or Japanese-Americans.⁴⁰ More generally, the whole notion of national loyalty is open-ended, requires person-specific determinations, and would put the government in the business of reviewing the ancestry of its citizens.

Washington, D.C. and the states would have to pour even more resources into an already dysfunctional bureaucracy that cannot even control the borders. Reading allegiance into the 14th Amendment would largely defeat the intent of its drafters, who wanted to prevent politicians from denying citizenship to those they considered insufficiently American.

As a matter of constitutional interpretation, the 14th Amendment's reference to "jurisdiction" means only that the children fall under American law at birth. Almost everyone in the United States, even aliens, comes within American jurisdiction; otherwise, they could violate the law with impunity. "Subject to the jurisdiction thereof" refers to discrete categories of persons that American law does not govern, such as diplomats and enemy soldiers occupying U.S. territory during war.⁴¹ International law grants both diplomats and enemy soldiers protected status, when present on the soil of another state, from the application of that state's laws.⁴²

At the time of the 14th Amendment's ratification, one obvious group not subject to U.S. jurisdiction were American Indians residing on tribal lands, because the tribes exercised considerable self-governance. In the late 19th Century, the federal government began to regulate Indian life, substantially diminishing tribal sovereignty, and in 1924 it extended birthright citizenship to them.⁴³

The 14th Amendment's drafting history supports our reading. The Civil Rights Act of 1866, which inspired the Amendment, extended birthright citizenship to those born in the U.S. except those "subject to any foreign power" and "Indians not taxed."⁴⁴ If the 14th Amendment's drafters had wanted "jurisdiction" to exclude children of aliens, they easily could have required citizenship only for those with no "allegiance to a foreign power."

Significantly, congressional critics of the Amendment recognized the broad sweep of the birthright citizenship language. Senator Edgar Cowan of Pennsylvania, a leading opponent, asked, "[i]s the child of the Chinese immigrant in California a citizen? Is the child born of a Gypsy born in Pennsylvania a citizen?"⁴⁵ Senator John Conness of California responded yes, and later lost his seat due to anti-Chinese sentiment in his state. The original public meaning of the 14th Amendment—which conservatives properly believe to be the lodestar of constitutional interpretation—affirms birthright citizenship.

The traditional American position, finally, works no great legal revolution. The Supreme Court has consistently read the 14th Amendment to grant birthright citizenship. *United States v. Wong Kim Ark* upheld the American citizenship of a child born in San Francisco to Chinese parents, who themselves could never naturalize under the Chinese Exclusion Acts.⁴⁶ The Court held that "the Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and protection of the country, including all children here born of resident aliens."⁴⁷ It also explicitly rejected the argument that aliens, because they owed allegiance to a foreign nation, were not within "the jurisdiction" of the United States.⁴⁸ Critics of birthright citizenship respond that Ark did not involve illegal aliens and therefore does not apply to children of undocumented migrants. (While Ark's parents could not become citizens, they could reside here legally.) But

in 1898, federal law did not define legal or illegal aliens, and so the Court's opinion could not have turned on the legal status of Ark's parents.

In *Plyler v. Doe*, moreover, the Supreme Court held 5-4 that the 14th Amendment's Equal Protection Clause required Texas to provide public schooling to children of illegal aliens.⁴⁹ All nine Justices agreed 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."⁵⁰

The 14th Amendment settled the question of birthright citizenship. Conservatives should not be the ones seeking a new law or even a constitutional amendment to reverse centuries of American tradition.

Endnotes

1 Hunter Walker, *Donald Trump just released an epic statement raging against Mexican immigrants and 'disease'*, BUSINESS INSIDER (July 6, 2015), available at <http://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7>.

2 *What Is the Quote on the Statue of Liberty?*, YOUR DICTIONARY, available at <http://quotes.yourdictionary.com/articles/quote-on-statue-of-liberty.html> (visited 10/30/15).

3 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, part 2, page 36 (1840).

4 See, e.g., Abby Phillip, *Inside the shadowy world of birth tourism at 'maternity hotels'*, WASHINGTON POST (March 5, 2015), available at <https://www.washingtonpost.com/news/post-nation/wp/2015/03/05/the-shadowy-world-of-birth-tourism-at-californias-luxury-maternity-hotels/>; Lou Alfonso, *Born in the U.S.A.: Birth tourists get instant U.S. citizenship for their newborns*, NBC NEWS- ROCK CENTER (March 7, 2013), available at <http://rockcenter.nbcnews.com/news/2013/03/07/17225891-born-in-the-usa-birth-tourists-get-instant-us-citizenship-for-their-newborns?lite>; Cindy Chang, *Alleged maternity hotel in Chino Hills shuts down*, LOS ANGELES TIMES- L.A. NOW (Jan. 3, 2013), available at <http://latimesblogs.latimes.com/lanow/2013/01/chino-hills-maternity-hotel-shuts-down.html>.

5 See, e.g., Alana Semuels, *The Midwives of El Paso*, THE ATLANTIC (Feb. 4, 2016), available at <http://www.theatlantic.com/business/archive/2016/02/midwives-el-paso/459969/>; Molly Hennessy-Fiske, *Along the border, who's an 'anchor baby' is a guessing game*, LOS ANGELES TIMES (Sept. 3, 2015), available at <http://www.latimes.com/nation/immigration/la-na-texas-anchor-babies-20150903-story.html>.

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

7 *United States v. Wade*, 388 U.S. 218, 249 (1967) (Black, J., dissenting).

8 OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS*, 204 (1920) (emphasis added).

9 Some erroneously attempt to vitiate this second requirement for birth citizenship by suggesting that the phrase "subject to [U.S.] jurisdiction" was limited to excluding a child born to foreign accredited diplomats and American Indians. No basis exists to attribute such defective drafting to the authors; if that had been the limited purpose of the phrase, they would have named the two excluded categories, rather than describe an over-inclusive non-specific exclusion. Moreover, as discussed below, the Supreme Court and the U.S. Attorney General, shortly after the Amendment's adoption, did not so limit the "subject to the [U.S.] jurisdiction" provision.

10 83 U.S. 36, 73 (1873) (emphasis added).

- 11 88 U.S. 162, 167-68 (1875). It is significant that the Court emphasized that “it was never doubted that all children born in [the U.S.] of parents who were its citizens became themselves, on their birth, citizens also,” in contrast to expressly noting “doubts” as to the citizenship of children of non-citizen parents born on U.S. soil.
- 12 14 Stat. 27-30 (April 9, 1866).
- 13 See Senator Howard’s explanation at Congressional Globe, 39th Congress (1866), p. 2896: “We desired to put the question of citizenship... under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin who would pull the whole system up by the roots and destroy it...”
- 14 Congressional Globe, 39th Congress (1866), p. 2890.
- 15 *Id.* at 2893.
- 16 V Thomas Jefferson, *The Writings of Thomas Jefferson* 276 (1903).
- 17 112 U.S. 94, 102 (1884) (emphasis added).
- 18 See *Definition of Allegiance*, MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/allegiance>.
- 19 William Blackstone, *Commentaries*, THE FOUNDERS’ CONSTITUTION, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_4_citizenships1.html.
- 20 169 U.S. 649 (1898).
- 21 *Id.* at 653, 705.
- 22 *Id.* at 652-53. Those who assert a contrary view on this Birthright Provision also put misplaced reliance on one sentence in one judge’s opinion, taken out of context, in *Inglis v. Trustees Of Sailor’s Snug Harbor*, 28 U.S. 99 (1830). First, this ruling was rendered 38 years before enactment of the 14th Amendment and thus did not construe it. Moreover, that case concerned the impact of the Declaration of Independence on the citizenship of British subjects residing in the Colonies before the Revolution. As that judge stated, “[a]ntecedent to the revolution, the inhabitants of the Colonies, whether natives of the Colonies or of any other of the British dominions, owed no allegiance except to the British Crown.” *Id.* at 158. Given “the peculiar circumstances of the Revolution,” *Id.* at 159, that Judge described this case as “sui generis.” *Id.* at 157, involving an attempt to decipher citizenship of British subjects who were American colonists until they departed for Britain after the Revolution.
- 23 See *Definition of Permanent*, OXFORD DICTIONARIES, available at http://www.oxforddictionaries.com/us/definition/american_english/permanent.
- 24 Congressional Globe, 39th Congress (1866), p. 2897.
- 25 *Elk v. Wilkins*, 112 U.S. 94, 101 (1884).
- 26 Naturalization Act, ch. 54, 1 Stat. 566 (June 18, 1798).
- 27 Page Act of 1875, 18 Stat. 477 (March 3, 1875).
- 28 *Ellis Island: History and Culture*, NATIONAL PARK SERVICE, available at <http://www.nps.gov/ellis/learn/historyculture/index.htm>.
- 29 Letter from John Jay to George Washington (July 25, 1787), available at <http://founders.archives.gov/documents/Washington/04-05-02-0251>.
- 30 Congressional Globe, 39th Congress (1866), p. 2893.
- 31 *Plyler v. Doe*, 457 U.S. 202, 214-15 (1982) (quoting Senator Howard).
- 32 *Elk v. Wilkins*, 112 U.S. 94, 102 (1884), reaffirmed in *U.S. v. Wong Kim Ark*, 169 U.S. 649, 680 (1898).
- 33 43 Stat 253.
- 34 14 U.S. Attorney General Opinions 300.
- 35 See Mark Murray, *Where the GOP 2016 Candidates Stand on Birthright Citizenship*, NBC NEWS (August 18, 2015), available at <http://www.nbcnews.com/politics/2016-election/where-gop-2016-candidates-stand-birthright-citizenship-n411946>.
- 36 U.S. CONST. amend. XIV, § 1.
- 37 See, e.g., *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. 99, 164 (1830) (“Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country while the parents are resident there under the protection of the government and owing a temporary allegiance thereto are subjects by birth.”).
- 38 1 William Blackstone, *Commentaries* *373, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_4_citizenships1.html.
- 39 60 U.S. 393 (1857).
- 40 See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944), *Meyer v. Nebraska*, 262 U.S. 390 (1923).
- 41 *Cong. Globe*, 39th Cong., 1st Sess. 2890 (1866), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=11>.
- 42 22 U.S.C. § 254a et seq. (Diplomatic Relations Act of 1978, following principles introduced in the Vienna Convention on Diplomatic Relations).
- 43 Indian Citizenship Act, H.R. 6355, 68th Cong. (1924).
- 44 S. 61, 39th Cong. § 1 (1866).
- 45 See *Cong. Globe*, 39th Cong., 1st Sess. 2890, *supra* n.7.
- 46 169 U.S. 649 (1898).
- 47 *Id.* at 693.
- 48 *Id.* at 665.
- 49 457 U.S. 202 (1982).
- 50 *Id.* at 211 n.10 (citing C. BOUVE, EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 425-427 (1912)).

