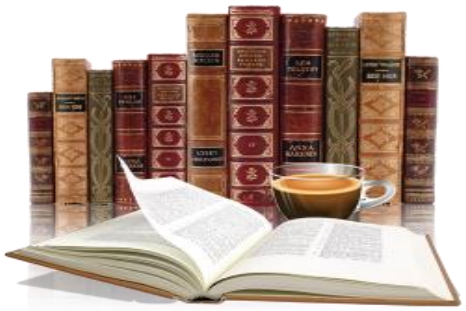
Birthright Citizenship and the Constitution



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INTRODUCTION

The issues facing the Thirty-Ninth Congress in 1865, were without question monumental in scope, historic in nature and second only perhaps to the Constitutional Convention in Philadelphia in 1787. One created a constitution and the other fundamentally changed it when it passed the Fourteenth Amendment. This amendment is considered by some as the most significant and covers so much ground it can almost be viewed as a mini constitution and has been referred to by some as the "second" constitution.

In a debate on the House floor, Representative Woodbridge said *"But, sir, great responsibilities rest upon the members of the present Congress. We are not writing history, which is difficult; we are making history, which is more difficult still. …… Sir, there has never been a day since the foundation of this Government when all the candor, the calmness, the deliberation, the foresight, the wisdom of Congress has been so imperatively demanded as now."*

The amendment contains five sections that define citizenship; outlines restrictions on what the states can do; gives congress the power to enforce the restrictions; changes the method of counting population for congressional representation, which in effect removes the Three-Fifths compromise in Article 1 of the constitution and deals with the civil war debt.

This paper addresses the constitutionality of our government's interpretation of the birthright clause in Section 1.

Jus soli or Jus sanguinis

The prevailing interpretation of the birthright clause in section 1 of the 14th Amendment, and what is being taught in our schools, is that anyone born in the United States is automatically a citizen including children of illegal immigrants. In view of the continual and growing illegal immigrant problem today, the question of whether the 14th amendment grants citizenship to children of illegal parents, or parents who are not U.S. citizens, is a question in dire need of a sound and fair answer. This becomes even more important when you consider that there are those who migrate here illegally only to have their child become a United States citizen which by its nature, ensures that the parent will not be deported. This is commonly referred to as having "anchor babies". There is also what is called "birth tourism" whereby pregnant women come here legally for the specific purpose of giving birth on United States soil.

The United States is without question a country of immigrants so it would seem to be a valid question to ask why we should care how the birthright clause in the Fourteenth Amendment is interpreted? One reason we should care is the Center for Immigration Studies said in 2010 that 300,000 to 400,000 children are born to illegal immigrants in the United States every year. That amounts to as many as 1 in 10 births are to a mother who is here illegally. If we extrapolate the 2010 figure to 2015, given the obvious increase in illegal immigrants since 2010, we can guess that there are probably close to a million births or more per year to illegal aliens. If you realize that these children and their parents now have access to welfare benefits, and ultimately initiate chain migration of the child's extended family and in-laws, it becomes obvious that no matter how one interprets the birthright clause of the Fourteenth Amendment the impact of basically what amounts to uncontrolled immigration is simply not sustainable from an economic point of view, exclusive of the social and other impacts this has as a consequence.

To their credit, there have been attempts in congress over the past few years, even by former Democrat Senator Harry Reed, to fix this problem but as yet, there appears to be no real desire to do so for one reason or another. Of course, not everyone perceives it as a problem, depending on their agenda and political ideology. Short of going through the process of changing or introducing a new constitutional amendment, which they are not likely to do, there is little congress can do in any event. They could of course write new law or change the current immigration law but they are also unlikely to do that and even if they did, legislative law cannot supersede the constitution. Another way would be through a Presidential Executive Order but that too cannot supersede the constitution. What we are left with then is accepting the current policy and do nothing, enact a constitutional change if needed, or do some type of an administrative change such as an Executive Order, depending on what the birthright clause of the Fourteenth Amendment actually says. It is imperative then that we understand what the birthright clause says, or doesn't say.

Previous to the Fourteenth Amendment, the United States did not have an official policy or position on what defined a United States citizen. It was generally thought or assumed that the English common law known as *jus soli*[1] would cover the citizenship question. Quite frankly, there was no pressing need to define or codify what constituted a United States citizen until the country was

[1] *Jus soli* is a rule of law that a child's citizenship is determined by their place of birth

faced with what to do with the thousands of newly freed slaves at the end of the Civil War, or War Between the States if you prefer. The Thirteenth Amendment abolished slavery but did not provide civil rights or citizenship to the newly freed slaves. So, the monumental task before the 39th Congress was what to do with the thousands of freedmen who had no citizenship status and therefore no basic civil rights. The Civil Rights Act of 1866, which was enacted over the veto of President Andrew Johnson[2], was designed by Senator Lyman Trumbull[3] to not only provide civil rights but also included a birthright clause to provide citizenship not only for the freedmen but to establish a general rule of law on citizenship. This birthright clause is very important in understanding the birthright clause in the Fourteenth Amendment, as will be shown later.

There were major problems or weaknesses inherent with the Civil Rights Act of 1866, however. First, congressional acts like this can be somewhat temporary since subsequent congresses can change it substantially or even nullify it altogether. Second, the Federal Government had no authority to enforce these rights over the southern states, who had enacted their own laws effectively prohibiting the negro from most rights. Third, in regard to citizenship, in 1857 the Supreme Court in *Dred Scott v. Sandford (60 U.S. 393)* ruled that a negro, slave or not, could not be a citizen of the United States. The Civil Rights Act was certainly not going to supersede the court's ruling on citizenship and it was basically in-effective in providing rights so the inexorable logic of events made it obvious that a constitutional amendment was going to be needed and thus, the Fourteenth Amendment was born. I would argue that the inexorable logic of events beginning with the Constitutional Convention in 1787, and before, made the Fourteenth Amendment inevitable. But that's a subject for another day.

Section 1 of the Fourteenth Amendment defines two types of citizens, or if you prefer, two ways of becoming a citizen, natural born and naturalization. One might very well ask why the Negro didn't automatically become a citizen with the passing of the Thirteenth Amendment which abolished slavery. The slaves did become freedmen at that point but abolishing slavery was one thing and providing citizenship or otherwise making the Negro equal with the whites was quite another and simply a bridge too far for some. To understand the prevailing attitude toward the African Negro in both the south and the north, slave or not, we need look no further than the man who would become known as the "Great Emancipator", Abraham Lincoln. In his fourth debate with Stephen Douglas in 1858, Lincoln said:

"I will say then that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races, [applause]-that I am not nor ever have been in favor of making voters or jurors of Negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together

[2] Andrew Johnson was a Tennessee Democrat who ran as Lincoln's Vice President to balance the ticket. He became president upon Lincoln's assassination.

[3] Senator Lyman Trumbull was a republican from Illinois and was head of the Senate Judiciary Committee. Senator Trumbull co-authored the 13th Amendment and on the same day he introduced the Civil Rights Act, he also introduced a bill to extend and expand the Freedmen's Bureau Act which also contained rights for the ex-slaves including 2nd Amendment rights to carry a weapon.

there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race."

In the same debate, Lincoln also said:

"He shall have no occasion to ever ask it again, for I tell him very frankly that I am not in favor of negro citizenship."

Abraham Lincoln's view of the negro is fairly representative of most whites at the time and it is interesting to note what Massachusetts Senator, and extreme abolitionist, Charles Sumner wrote in 1834 when seeing slaves for the first time. *"My worst preconception of their appearance and their ignorance did not fall as low as their actual stupidity. They appear to be nothing more than moving masses of flesh unendowed with anything of intelligence above the brutes."*

As a legal matter the Supreme Court ruled in 1857, in Dred Scott v. Sandford, 60 U.S. 393 (1857), that a negro whether slave or not, could not be an American citizen. In writing the majority opinion Chief Justice Roger B. Taney said:

"They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit."

What this illustrates is that being against slavery and considering the negro as anything other than inferior and subordinate to whites, was not the same thing and that is an important distinction to keep in mind. While it is easy to judge these views as racist, one has to first realize what it would have been like, as Senator Charles Sumner did, to view a totally uneducated African put to slavery on a plantation. While the view of Lincoln and others of his day toward the African slave, and tribal Indians for that matter, shows a certain amount of ignorance, it is also somewhat understandable given the circumstances of the day.

Still, some type of status for the new freedmen needed to be established and there were those, such as Senator Lyman Trumbull, author of the Civil Rights Act of 1866, who obviously realized that at the very least some civil rights had to be given to the Negroes. So, he included in the act the clause that *"all persons born in the United States are declared citizens, excluding Indians who are not taxed, and those who are subject to a foreign power."* This act is the first attempt to define what constitutes a U.S. Citizen and was probably included, at least in part, to nullify the Dred Scott case. It is important to note the wording in the Civil Rights Act of *"subject to a foreign power"* and the wording in the Fourteenth Amendment of *"subject to the jurisdiction"* which is key in understanding the birthright clause.

The first sentence in Section 1 of the Fourteenth Amendment:

"*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."*

As previously stated, the prevailing opinion and policy of the United States on citizenship is that anyone born on United States soil is automatically a citizen. Also as previously stated, that policy is identical to the English common law known as *jus soli*. When you look at the birthright clause in the Fourteenth Amendment, however, you immediately see a caveat limiting those who qualify to be citizens. The way it actually reads then is *"all persons born in the United States that are "subject to the jurisdiction"* thereof are citizens by birth, all others are not except those naturalized. Common sense and logic would then seem to dictate that you cannot have a policy of *jus soli* if you restrict or limit who it applies to. There are admittedly, somehow controversies over what "subject to the jurisdiction" means though so we will have to address that. Those who believe we have a *jus soli* birthright policy think that being under the jurisdiction of a country simply means having to obey their laws. That is not only an extremely simplistic view of jurisdiction, but to believe it you also have to ignore and/or mis-interpret other obvious aspects such as what the congress who passed it thought it meant.

Before looking at what congress thought "under the jurisdiction" meant when they debated the issue, let's look at what the Supreme Court concluded in *Elk v. Wilkins (112 U.S. 94 1884)*. First though, we need to look at the birthright clause that was in the Civil Rights Act of 1866:

"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;"

What we see in the birthright clause of the Civil Rights Act is close to being identical to the constitutional birthright clause with one important exception. The caveat regarding Indians not taxed is obviously different but the important difference is it tells us who is limited in the clause and that is anybody that is *"subject to a foreign power"*. Someone who is subject to a foreign power is obviously someone who is a citizen of another country and someone who is a citizen of another country is by definition not *"subject to the jurisdiction"* of the United States under the common definition of citizenship and international law. In this context then, jurisdiction logically means the United States has or does not have jurisdictional control of the person as a citizen. It also means that under the Civil Rights Act of 1866, we do not have a *Jus soli* policy.

Some have argued that since the wording in the Civil Rights Act and the Fourteenth Amendment are different, the two clauses had different meanings. *Elk v. Wilkins*, however, concluded that the courts could look to the Civil Rights Act to resolve any ambiguities in the meaning of the Fourteenth Amendment. Basically, to paraphrase, the court said that if you have any problems with understanding what jurisdiction means, you can use *"not subject to any foreign power"*. What that means contextually is an illegal alien, or other foreigner, is by definition a citizen of another country and are thereby subject to that country's jurisdiction and conversely not subject to the jurisdiction of the United States. This then says that our constitutional birthright policy is, or should be, *jus sanguinis*[4], or citizenship of parents, which is the policy of most countries of the world, rather than *jus soli,* or citizenship by location.

Most scholars who argue for *jus soli*, however, believe *Elk v. Wilkins* is not relevant because it deals with an Indian and Indians were dealt with differently. While that may be true, land that was

[4] *Jus sanguinis*, the rule of law whereby children are given the nationality or citizenship of their parents regardless of where they are born

considered to be Indian land, was considered sovereign land and that in turn means Mr. Elk would not have been born on United States soil. That fact would seem to make the case irrelevant to the birthright clause but its relevancy lies in the *"jurisdiction"* aspects of it and in its comparison to the wording in the Civil Rights Act of 1866. In *Elk v. Wilkins*, an Indian who had been born on Indian land was denied the right to vote because he was not a citizen. Elk complained that he had given up his allegiance to his tribe and vowed allegiance to the United States and therefore was under the jurisdiction of the United States.

While the definition of jurisdiction in the context of the birthright clause seems rather clear, I would put it in more simple and practical terms. I am a citizen of California but when I cross the border into the state of Nevada my "jurisdictional citizenship" does not change. I am under the jurisdiction of Nevada in that I have to comply with all their laws but Nevada has no legal jurisdiction over me, nor I to it, as a citizen to pay taxes, vote, serve as a juror or any other legal jurisdictional matters equated with citizenship. So, while I am in Nevada, or any other state or country, my jurisdictional citizenship remains with California and the United States just as the jurisdictional citizenship of someone who comes here illegally, or legally, remains with the country they are citizens of. To the point, foreigners cannot change their citizenship simply by walking across our border.

Before reviewing relevant law and court cases we need to understand what the people who framed and passed the Fourteenth Amendment thought "jurisdiction" meant. When the Fourteenth Amendment was before the Senate and the House there was considerable debate by both on who all would be included in the birthright clause. I will not cover it all but there was definitely concern about it covering some Indians, Chinese and so forth. Most of it was based on fear and prejudiced but nevertheless it shows a clear intent to limit who the birthright clause applied to and it is quite clear that had it applied to just anyone born on United States soil, *jus soli*, the amendment would not have passed; at least with the birthright clause in it. Senator Lyman Trumbull, who was head of the Judiciary Committee, and who I mentioned earlier introduced the Civil Rights Act of 1866, was very blunt and to the point about describing what was meant about being under the jurisdiction of the United States when he said *"What do we mean by subject to the jurisdiction of the United States? Not owing allegiance to anybody else. That is what it means"*[5]

What Senator Trumbull means is, jurisdiction means not being a citizen of another country since it is understood by all that citizenship, by its definition requires allegiance to one's country. Senator Trumbull also said in regards to American Indians, who were not granted U.S. Citizens until the American Indian Citizenship Act was passed in 1924: *"it cannot be said of any indian who owes allegiance, partial allegiance if you please, to some other Government that he is subject to the jurisdiction of the United States."*.[6] One can by extension and meaning apply Senator Trumbull's statement to those who are in the United States illegally since an illegal alien is without question and definition a citizen of another country and therefore owes at least some amount of allegiance to their country if not complete allegiance. One simply cannot be a citizen of one country and owe allegiance to another country under the basic definition of citizenship.

[5] Congressional Globe, Page
[6] *ibid*, Page

Senator Jacob Howard, a Republican from Michigan, who introduced the Fourteenth Amendment to the Senate, as a member of the Reconstruction Committee,[7] said: *"This will not, of course, include persons born in the United States who are foreigners, aliens, [or those] who belong to the families of ambassadors or foreign ministers".*[8] There are those who believe that Senator Howard is merely pointing out that diplomatic families were not included in the birthright clause. His statement is admittedly open to interpretation, but it appears to be more logical that he was identifying three classes of people who would not be included under the birthright clause. To simply point out something that would be obvious to the members of congress regarding diplomatic families seems a little odd.

Senator James Doolittle[9] of Wisconsin, was very concerned that the birthright clause not include Indians. *"I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians. I move, therefore, to amend the amendment-- "I presume he will have no objection to it--by inserting after the word "thereof" the words "excluding Indians not taxed."*.[10] In response to Senator Doolittle, Senator Howard said that he hoped that the amendment to the amendment would not be accepted and he went on to explain that Indians have always been regarded by our legislation and jurisprudence as being quasi foreign nations. Meaning as foreigners they are not under the jurisdiction of the United States and would not be included under the birthright clause. This is about as clear as one can get on what *"under the jurisdiction"* means.

Senator Edgar Cowan, a Republican from Pennsylvania, said: *"I am really desirous to have a legal definition of "citizenship of the United States." What does it mean? What is its length and breadth?".*[11] Senator Cowan covered a lot of ground in his comments, which is typical of most members of Congress, who were mostly Lawyers, and talked about the status of the Indians, Gypsies and the Mongol race. "*Are the states to lose control over this immigration? Is the United States to determine that they are to be citizens? .....Therefore I think before we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States, we ought to exclude others besides Indians not taxed."*[12]

As part of his comments on the subject, Senator Reverdy Johnson, a Democrat from Maryland, said: *"and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.".*[13] Another way of saying that might be to say "of parents who at the time belonged to the United States as citizens".

It is obvious that congress considered and intended that the birthright clause in the Fourteenth Amendment be restrictive and not include everyone simply because they are born on U.S. soil. While the Supreme Court has never directly ruled on the birthright clause, there are cases that are often cited to support the policy of *jus soli.* The two most cited cases are *Slaughter House Cases*

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[7] Contrary to what some believe, Senator Howard only introduced the 14th Amendment because the chairman of the Joint Committee on Reconstruction, Senator William Fessenden of Maine, was ill that day.

[8] Congressional Globe, Page

[9] Senator James Doolittle was a democrat turned republican and was chairman of the committee on Indian Affairs.

[10] Congressional Globe, Page

[11] *ibid*, Page

[12] *ibid*, Page

[13] *Ibid,* Page

(83 U. S. 38) in 1873 and in *United States v. Wong Kim Ark (169 U.S. 649 1897).* In my opinion, both of these cases are not only seriously flawed but have little relevance to the question at hand. These cases would be excellent examples of how wrong the Supreme Court can be, however, and the consequences of that.

Nevertheless, we need to take a brief look at the cases starting with the Slaughter House Cases since it was the first case involving the Fourteenth Amendment, and more importantly because the 5-4 decision against the amendment set the Supreme Court's view on this matter for the next fifty years or more even though the ruling was a classic case of the court legislating from the bench. The ruling was not based on what the Fourteenth Amendment says or what the framers meant but rather what Justice Samuel Miller thought it should say. In 1897 in Wong Kim Ark, Justice Horace Gray cited the slaughter House Cases and basically ignored what the Fourteenth Amendment says and made his ruling on British common law on the subject which was *jus soli*.

The relevant thrust of the Slaughter House Cases had to do with whether the Fourteenth Amendment applied to the case or not. At the heart of it is whether or not the amendment applied the Bill of Rights to the states. Up to this point in time it was clearly understood and confirmed by the Supreme Court (*Barron v. City of Baltimore*, 32 U.S. 243, 672 1833) that the Bill of Rights did not apply to the states. In writing the majority opinion Justice Samuel Miller concluded that there was a clear distinction between being a state citizen and being a United States Citizen, and that the privileges and immunities clause in the Fourteenth Amendment only pertained to United States Citizens, as it is written in the amendment, whereas the privileges and immunities clause in Article Four, Section Two of the United States Constitution pertained to each of the several states in treating all citizens equally according to their state constitutions.

Aside from this being a very narrowly based opinion, Justice Miller also made other comments that clearly show that he understood the intended purpose of the Fourteenth Amendment, to apply the Bill of Rights to the states, but he believed that applying the amendment to the states would give too much power to the Federal Courts and to Congress. Justice Miller, a well-respected justice, was of the opinion that when something so radically changed the constitution, such as this amendment, that a different interpretation was justified and that it was the court's responsibility to maintain a balance of power between the states and the Federal Government. He also somehow concluded that the framers could not have possibly meant to make such a change to the constitution anyway. Justice Miller made several other comments in the majority opinion, such as the amendment being designed only to grant former slaves legal equality and therefore did not apply to the general population and in another sentence, he admitted that it would have to apply to all.

While the minority opinions in the Slaughter House Cases seem to have fallen on deft ears it is important to note their opinions, particularly since they obviously got it right. Justice Stephen J. Field wrote the dissenting opinion and argued that the Fourteenth Amendment protects the fundamental rights and liberties of all citizens against state interference. In other words, the Fourteenth Amendment applies the Bill of Rights to the states. Justices Bradley and Swayne wrote concurring dissenting opinions and while their comments were similar to Justice Field's in regard to the Fourteenth Amendment, it is obvious that some of their comments were aimed at the comments of Justice Miller. Justice Swayne for example, felt it necessary to say *"This court has no authority to interpolate a limitation that is neither expressed nor implied, Our duty is to execute the law, not to make it."*

The position of the Supreme Court then from 1873 to the 1920s was that the "privileges and immunities" clause of the Fourteenth Amendment did not apply to the states and therefore by extension, the Fourteenth Amendment did not apply the Bill of Rights to the states. While that position is almost unbelievable, the court did finally decide that maybe the "due process" clause of the amendment did apply to the states. That one part of the amendment did not apply to the states, but another part of the amendment did, while ignoring the whole of the amendment, is completely unbelievable. Today, almost every case involving rights will include the Fourteenth Amendment.

While the case of Wong Kim Ark also has little to do with the birthright clause, it at least involves to some extent, citizenship. Wong Kim Ark was born in San Francisco to Chinese parents who were legally domiciled residents of the United States at the time of his birth, but eventually returned to China. While returning from a visit to China, Wong Kim Ark was not allowed to disembark from the ship by custom officials on the grounds that he was not a United States citizen and Chinese were barred from entering the United States at the time. This case actually raises a lot of questions but it is very clear and understood by all that it does not involve a child born to parents who were in the United States illegally. Therefore, that fact alone renders the case useless and irrelevant to the question of granting citizenship to children of illegal immigrant parents. It also does not address the question of the mother giving birth while being here legally, such as a tourist or other legal status.

While the court in effect, ruled in favor of Wong Kim Ark being a citizen, it basically ignored the Fourteenth Amendment in doing so and based it's ruling on English common law and not the constitution. As in the Slaughter House Cases the court seems to have decided what the ruling should be and then set about trying to find law, outside the constitution, that supported that decision. These two cases clearly show how biased and incorrect Supreme Court cases can be and the Wong Kim Ark case, while interesting, is clearly and obviously not relevant to the birthright clause of the Fourteenth Amendment. Any argument otherwise is totally erroneous.

It seems clear that the birthright clause in the Fourteenth Amendment does not include people who are in this country illegally or foreign citizens who happen to be on United States soil as legal tourists or even those who have a legal residence who have a child while here. The question now, however, is who does the Fourteenth Amendment refer to as being subject to the jurisdiction thereof, the parent or the child? If the child is a United States citizen at birth, how can it be subject to a foreign power or be expected to have any allegiance to any country or anything? The only logical conclusion, and one accepted by the majority of people, or at least questioned by few, is that it refers to the parent being subject to a foreign power and by extension, imputed, to the child. To further illustrate who "under the jurisdiction" refers to, the parent or the child in determining citizenship, a child born outside of the United States to parents, or a parent, of United States citizens, is considered to be a United States citizen[14]. Put another way, United States policy regarding Unites States citizens in foreign countries is *Jus sanguinis, not Jus soli.*

[14] A person born abroad in wedlock to two U.S. citizen parents acquires U.S. citizenship at birth under section 301(c) of the Immigration and Nationality Act (INA), if at least one of the parents had a residence in the United States or one of its outlying possessions prior to the person's birth. In these cases, at least one of the U.S. citizen parents must have a genetic or gestational connection to the child to transmit U.S. citizenship to the child.

Conclusion:

The Fourteenth Amendment to the United States Constitution does not grant United States citizenship to a child simply because of its birth on United States soil. Therefore, the current practice of doing so has to be considered as unconstitutional government policy and can therefore be changed by Executive Order or simply an immigration policy change. While the Supreme Court may at some point rule on the issue, an Executive Order would be sufficient and constitutional since it would simply be correcting an unconstitutional government policy.