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BORN IN THE U.S.A.

But does the Constitution grant birthright citizenship? 14th Amendment says so

By James C. Ho

Children born in the United States are legally entitled to U.S. citizenship, regardless of the nationality of their parents. Some immigration-reform advocates believe that this entitlement encourages illegal immigration and should therefore be repealed. Others respond that this long-standing rule reflects well-established American values.

Whatever side one may take on this emotional issue, however, is beside the point, because the Constitution speaks directly to the issue of birthright citizenship. The only way to change the rule is a constitutional amendment — which is unlikely in the extreme. Proponents of immigration reform would be better off focusing their energies on proposals with a more realistic chance of success.

The first sentence of the 14th Amendment makes clear that birthright citizenship is a constitutional right, no less for the children of undocumented persons than for descendants of passengers of the Mayflower. Ratified in 1868, the amendment states: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States."

The primary purpose of this provision was to reverse the U.S. Supreme Court's infamous *Dred Scott* decision, which denied citizenship to U.S.-born people of African descent. But the amendment was drafted broadly to guarantee citizenship to virtually everyone born in the United States.

Proponents of repealing birthright citizenship argue that all aliens — both lawful and unlawful — are not "subject to the jurisdiction" of the United States because they swear no allegiance to it. But nothing in the 14th Amendment supports this interpretation.

When a person is "subject to the jurisdiction" of a court of law, that person is required to obey the orders of that court. The meaning of the phrase is simple: One is "subject to the jurisdiction" of another whenever one is obliged to obey the laws of another. The test is obedience, not allegiance.

The "jurisdiction" requirement excludes only those who are not required to obey U.S. law. This concept, like much of early U.S. law, derives from English common law. Under common law, foreign diplomats and enemy soldiers are not legally obliged to obey our law, and thus their offspring are not entitled to citizenship at birth. The 14th Amendment merely codified this common-law doctrine.

Members of the 39th Congress debated the wisdom of guaranteeing birthright citizenship — but no one disputed the amendment's meaning. Opponents conceded — indeed, warned — that it would grant citizenship to the children of those who "owe [the U.S.] no allegiance." Amendment supporters agreed that only members of Indian tribes, ambassadors, foreign ministers and others not "subject to our laws" would fall outside the amendment's reach.

The U.S. Supreme Court has long taken the same view. In 1898, the court held in *United States v. Wong Kim Ark* that the U.S.-born child of Chinese immigrants was constitutionally entitled to citizenship, noting that the "14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory... including all children here born of resident aliens."

The court has reiterated this view in subsequent decisions. In *Plyler v. Doe* (1982), the majority concluded, and the dissent agreed, that birthright citizenship under the 14th Amendment extends to anyone "who is subject to the laws of a state," including the U.S.-born children of illegal aliens. And in *INS v. Rios-Pineda* (1985), a unanimous court agreed that a child born to an undocumented immigrant was in fact a citizen of the United States.

But just because the effort to repeal birthright citizenship by statute is unconstitutional doesn't mean that folks won't try. Stay tuned: *Dred Scott II* could be coming soon to a federal court near you.

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