‘Subject to the Jurisdiction Thereof’

Clause in the Fourteenth Amendment holds key to birthright citizenship

by William Buchanan

American law has long granted American citizenship to anyone born on American soil regardless of the status of the parents. The children of citizens and legal immigrants are citizens beyond a doubt. However, extending citizenship to children born to illegal aliens or to non-immigrants raises a lot of serious questions. We believe that legislation to deny such citizenship is both constitutional and necessary.

The ability to distinguish between citizens and non-citizens is a fundamental attribute of sovereignty and of nationhood. In recognition of this, our Constitution, in Article I, Section 8, grants to Congress the power “to establish a uniform rule of naturalization….”

Section 1 of the Fourteenth Amendment to our Constitution further states: “All persons born or naturalized in the United States *and subject to the jurisdiction thereof* are citizens of the United States….” This section overturned the Dred Scott decision and declared that former slaves and their progeny were American citizens. That the Congress and the States intended more than this is open to question. Just what did the framers of the Fourteenth Amendment mean by “subject to the jurisdiction thereof”?

Jurisdiction Further Defined

First of all there is **Criminal Jurisdiction**. All persons except accredited diplomats are subject to the criminal jurisdiction of the country in which they reside. This is a universal concept that has nothing to do with citizenship. Moreover, no jurisdiction has less to do with new-borns — they do not commit criminal acts! It is safe to say that this was not the kind of jurisdiction the Congress and States had in mind when they ratified the Fourteenth Amendment.

Diplomatic Jurisdiction is an accepted international custom, recognized in English and American common law, and confirmed by the Supreme Court, that children born to diplomats are citizens of the country their parents represent. No constitutional amendment was necessary to make that distinction. Nevertheless, the Vienna Convention on Diplomatic Relations (23 UST 3229) empowers the President to declare a diplomat *persona non grata* (Article 9).

Moreover, Article 31, while establishing the diplomat’s “immunity from the criminal jurisdiction of the receiving State,” does not exempt the diplomat from its “civil and administrative jurisdiction” in the case of private ownership of real property, or private actions as an “executor, administrator, heir or legatee,” or in a “professional or commercial activity.” That’s a lot of “jurisdiction thereof” but surely not the kind the framers of the 14th were thinking of.

As to **American Indian Jurisdiction**: how exceeding fine the Supreme Court can grind this issue is illustrated in an historic case brought by a Native American [*Elk v. Wilkins*, 112 U.S. 94 (1884)]. John Elk was born in a part of the 1803 Louisiana Purchase that came to be called Nebraska — born subject to U.S. *military* jurisdiction. Nebraska, “settled” in 1823, accorded territorial status in 1854, and granted statehood in 1867, limited the vote to adult male citizens who were *bona fide* residents of the state for six months. Elk had renounced his tribal membership and by 1880 had lived in Omaha for over a year and claimed the right to vote in Nebraska since he was a U.S. citizen by birth based on the Fourteenth Amendment.

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However, in a precedent, powerfully argued and never overturned, the Court ruled that despite his birth in the geographical area of the U.S., Elk was born to parents who owed their allegiance to a tribe of "Indians not taxed" and could only become a U.S. citizen by means of naturalization. Naturalization, the Court further noted, meant not only formal renunciation of his old allegiance but "acceptance by the United States of that renunciation…." In effect they ruled that the citizenship of a child at birth depended on the status of the parents. Though Elk's parents were never illegal aliens (try deporting an American Indian), their allegiance to their tribe meant that their child was not born a U.S. citizen.

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As to **Legal Immigrant Jurisdiction**, a legal immigrant to the United States, unlike a born or naturalized citizen, is "still subject to the jurisdiction" of the country of his or her birth in that he or she can be drafted to military service there and is entitled to benefits and privileges there that might be denied to an American citizen there — the right to vote, own property, attend public schools, obtain welfare, etc. But what of his or her child born in the United States?

This brings us to **Child of Legal Immigrant Jurisdiction**. Wong Kim Ark was born in California in 1873 to legal Chinese immigrant parents. But following a visit to China, he was denied re-entry into the U.S. because, it was asserted, he was not a citizen. In a 6-2 decision [*U.S. v. Kim Wong Ark,* 169 U.S. 649 (1898)], the Supreme Court declared him a U.S. citizen since he was "born…in the U.S. and subject to the jurisdiction thereof." They based this decision on English common law, past American practice, and, obviously, the Fourteenth Amendment.

American common law is descended from English common law and derives many of its precedents from it. But this emulation is not a slavish one. The argument in *Wong*, peculiarly, tied Section 1 of the Fourteenth Amendment to that segment of English common law which was based on the subject's allegiance to the king! Such citizenship, based on the place of birth, was designed to impose obligations to the king upon a child-subject. The involuntary nature of this remnant of feudalism is profoundly at odds with the American tradition of voluntary memberships and would seem to be among those aspects of English common law that we would have jettisoned — as the British themselves did in 1983.

Child of Illegal Immigrants Jurisdiction. But let us accept the Court's decision in *Wong* and turn to the question of whether the children of *illegal* immigrants are entitled to citizenship — for the government has extended this decision to confer citizenship on the children of illegal immigrants and on the children of holders of non-immigrant visas (foreign students, temporary workers, tourists, etc.).

In 1868, when the Fourteenth Amendment was ratified (and in 1873, when Mr. Wong was born) there was hardly such a thing as an *illegal* immigrant and non-immigrants were limited to diplomats, newsmen, and a few tourists and businessmen. At that time there were less than 40 million Americans, the frontier was still "open," there was no border patrol, and welfare was mostly a limited province of the private sector. The framers of the Fourteenth Amendment surely did not imagine, let alone contemplate, a situation where hordes of aliens would deliberately violate our borders and laws precisely in order to obtain benefits that might accrue from the birth of a U.S. citizen child.

By 1898, however, the concept of *illegal* immigrant was well understood and the Court was careful to note that Wong Kim Ark was a child of *legal* immigrants. They refer to the fact that the parents enjoyed a "permanent domicile and residence" (pp.652,653,705), that the parents were "domiciled residents" (p.651), and that the parents were "domiciled in the U.S." (p.696). The dictionary meaning of the word "domicile" is "permanent *legal* residence." One can have many residences but only one domicile. Is it conceivable than an illegal immigrant here could have a permanent legal residence here?

With 5,000 miles of land borders and many more

miles of coastline, abundant immigrant and non-immigrant visas, modern communications and air travel, a policy designating children of illegal aliens and legal non-immigrants as citizens provides a loophole that endangers our very sovereignty. In 1992, an estimated 96,000 babies were born to illegal alien women in California at an initial cost to Californians of $230 million. As things stand now, giving birth to a U.S. citizen only takes a moment or two on any patch of U.S. soil — a future generation could wake up to discover that every parent on Earth had managed to find a way to give birth in the U.S.!

The plain meaning of the Constitution can be extended to related situations not contemplated by the framers — the Fourth Amendment protection against unreasonable search and seizure, for example, has been extended to cover wiretaps. But can the meaning of an amendment be extended without limit? Did the framers of the Fourteenth Amendment really mean to say: "Alien! Break our laws and we will reward you."? Did they intend to threaten our sovereignty? Did they regard the Constitution as merely a cleverly-drawn contract for self-destruction? Surely not!

We believe that the scope of the Fourteenth Amendment and of the Supreme Court decision in *U.S. v. Wong Kim Ark* does not extend to the children of illegal aliens or legal non-immigrant visa holders, and we call on the Congress to pass legislation which states:

> *Any person born to parents neither of whom is a citizen or a national or a lawful permanent resident of the United States but either of whom is a citizen or national of that other country, shall be considered as born subject to the jurisdiction of that other country and not subject to the jurisdiction of the United States as described in Section I of the Fourteenth Amendment of the Constitution and is not a citizen of the United States or of any State by reason of birth in the United States.*

Now comes the hard part! There will have to be some procedures for confirming the status of the baby. Hospital workers and separatists will object to this — they care for people, not Americans. The U.S. government might offer to pay the hospital bills for the delivery and care of illegal alien babies — the feds, after all, are responsible for the problem and many cash-strapped hospitals may respond to this. Indeed, there will have to be provision for the care of illegal alien babies that are born deformed or with serious genetic or other diseases.

We may have to urge parents to establish their status prior to hospitalization. The INS may have to assist in the identification process. A dual state and federal Birth Certification and Social Security Number process is another possibility. For babies found to be ineligible for citizen status, a special birth certificate would include a nationality block in which would be entered the nationality of the mother or the father. If the parents were found to be stateless, the child might be entitled to the same status we then assign to the parents. In any case, we should study the methods used by other countries.

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So far as **Constitutionality** — it has been argued that only a constitutional amendment is sufficient to change current practice. Obviously, we think legislation will be sufficient. Moreover, the constitutional amendment is unlikely to pass — the American people just don't know the issue. Should legislation be overturned as unconstitutional, however, the publicity such a case would generate might make the constitutional approach feasible. Legislation is the obvious place to start.

There will be protests by the "open border" set. There will be cries of "1-800-Big Mommy" and nonsense claims that having a child will now require government approval. But as Chief Justice Melville Fuller noted in his dissenting opinion in *Wong*: "[American citizenship} is a precious heritage as well as inestimable acquisition." Millions have died or been maimed to defend the values we hold dear and the lives we live as U.S. citizens. Awarding American citizenship automatically to the children of aliens who break our laws or are just passing through, cheapens it beyond all recognition. **TSC**