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Citizenship and the Babies of Non-Citizens

by Dan Stein
and John Bauer

Three questions must be answered in order to determine whether children born on U.S. soil to illegal aliens should be granted automatic U.S. citizenship.

(1) We must analyze the intended meaning of the Fourteenth Amendment clause, "subject to the jurisdiction thereof."

(2) We must ask whether the government should continue to bestow automatic citizenship on children born on U.S. soil if born to illegal aliens.

(3) We must ask whether Congress has the legitimate power to legislatively alter the current interpretation of "subject to the jurisdiction" without resorting to a constitutional amendment.

These questions are

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complex, and we cannot possibly provide an exhaustive analysis in these few pages.¹ However, it is our hope that our views will challenge those of others, and will counter-balance the common assumption that the status quo of granting automatic citizenship to children of illegal aliens has an indisputably correct legal mandate.

Introduction

The Fourteenth Amendment of the U.S. Constitution declares 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."² Mirroring this language, section 1401 of Title 8 of the U.S. Code reads, in part: "The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof...." The government currently interprets these clauses as granting full U.S. citizenship to children born to illegal aliens on U.S. soil. However, this view is rooted in a particular interpretation of "subject to the jurisdiction" — an interpretation that is open to debate.

The phrase "subject to the jurisdiction thereof" dates back to the close of the Civil War,

when Congress sought to establish a uniform national rule for naturalization to defeat the political currents that might prevail in any one state. In particular, the language was designed to prevent states from depriving freed slaves and their descendants of U.S. citizenship. But the drafters of the Fourteenth Amendment could not have predicted the impact this language would have on immigration regulation in the modern era of burgeoning populations.

So, from a noble cause comes an unintended modern dilemma. In a world of approximately six billion persons, where more than sixteen million visitors, travelers, and illegal immigrants enter and leave the United States each year,³ should the U.S. government continue to bestow automatic citizenship on children born in this country to alien parents residing here illegally? Professors Peter Schuck and Rogers Smith explored these ideas in their book, *Citizenship Without Consent: Illegal Aliens In The American Polity*.⁴ They concluded that the drafters of the Fourteenth Amendment did not intend to eliminate the notion of consent from our understanding of citizenship.⁵ Consequently, they argued, it would be permissible for

Congress to legislatively exclude from automatic citizenship the children of illegal aliens, as it has the children of diplomats.⁶ We agree with these conclusions. As we will show, the language of the Fourteenth Amendment does not dictate bestowing citizenship on children born to illegal aliens in the United States. Moreover, the Supreme Court has never expressly affirmed this policy,⁷ and Congress does exclude some children born to noncitizens on U.S. soil from citizenship — those of foreign diplomats.⁸

Given that this issue of citizenship has not been directly addressed by the Court or by the Constitution, the question becomes: Does Congress have the power to legislatively narrow its interpretation of the Fourteenth Amendment to postulate that the children of illegal aliens do not acquire U.S. nationality, or would such a change require a constitutional amendment? In order to resolve this issue, it is helpful to trace the legislative and judicial development of citizenship and naturalization laws through our country's history.

Legislative History

During the colonial era, British common law and parliamentary enactments dictated the rules of crown loyalty and allegiance. In the famous 1608 decision of *Calvin's Case*, Lord Edward Coke declared that one "cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance [sic] and obedience of the King."⁹ (It was probably one

of the only times he ever sided with the King.) This definition implies a mutuality of consent: the subject owed a duty of loyalty and obedience to the King, and the King owed a duty of protection to the subject.¹⁰ Colonial legislatures abided by these rules and established similar ones as prerequisites to participation in colonial political life.¹¹

Lord Coke also explicitly addressed the issue of aliens

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temporarily present in England: "[W]henver an alien that is in amity cometh into England ... he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligenge [sic]..."¹² Under Coke's reasoning, "aliens in amity" with the King could pass subjectship to the child, because temporary obedience to the throne is "yet strong enough to make a natural subject."¹³ Coke also noted, however, that under common law, one who is born within the lands of the sovereign, but not subject to the jurisdiction of the sovereignty — as the child of a diplomat, as part of a hostile

invading army, or perhaps as a person present without permission — is not recognized as a citizen of that nation.¹⁴ Applying this reasoning to the question under discussion, we can reasonably conclude that although an alien illegally present in the United States may not be hostile per se, she cannot be viewed as an "alien in amity." There is no consent, no mutuality of obligation, no submission to the loyalty and obedience of the sovereignty — in short, no legal relationship between the alien and the sovereign. Without a legal relationship between an alien parent and the host country, it would be illogical to find or imply the existence of such a relationship between the parent's offspring and the host country.

After the Revolutionary War, U.S. citizenship was offered to those in the liberated colonies who sided with the revolutionaries. In 1783, the Paris Peace Treaty established an adherence test, requiring that "those who adhered to England remained British subjects, and those who adhered to the cause of separation, liberty, and independence were to be considered citizens of the United States."¹⁵ Thus, from this country's inception, allegiance and citizenship were linked in a way that implied a mutuality of obligation between citizen and state.

The Articles of Confederation (1781-89) provided that each state would retain exclusive jurisdiction to determine the requirements for U.S. citizenship.¹⁶ Thus, states were

largely free to fashion their own citizenship and naturalization laws. Not only did Congress relinquish control over immigration and naturalization, but the Constitution also provided scant guidance to the states. While it authorized Congress to “establish a uniform Rule of Naturalization,” it provided no indication of what the content of a legitimate federal rule would be. Moreover, the Constitution discusses migration in only one section,¹⁷ where it allows the states continued powers to admit persons and import slaves without federal interference until 1808 (after which Congress could — but was not required to — restrain such importation).

Despite this lack of federal involvement, in 1790 Congress did pass the first federal naturalization statute, which established a uniform residency rule of two years for all “free white persons.”¹⁸ This statute maintained the mutuality of consent structure from earlier times by providing that only the children of native born or naturalized citizens were considered citizens at birth. Furthermore, while children born to U.S. citizens overseas would be U.S. citizens, the right of citizenship could not descend to persons whose fathers had “never been resident in the United States.”¹⁹ Statutes enacted between 1790 and the Civil War varied the length of time required for naturalization, but little else.²⁰ All required that someone in the ancestral line had been formally accepted as a U.S. citizen.

Until the post-Civil War

amendments, states effectively controlled their own naturalization and residency requirements through property and health, safety, and welfare laws.²¹ States also had the all-important say in defining who could be a natural-born state citizen. Prior to the Civil War, power over immigration received minimal federal attention because the primary national imperatives were to populate the continent and strengthen the nation. The only major federal immigration statute was the short-lived Aliens Act of 1798,²² which was repealed only five years later.

The Reconstruction Congress sought to remedy the problems created by leaving basic citizenship issues in the hands of the states. The Civil Rights Act of 1866 and the Fourteenth Amendment, ratified in 1868, created formal definitions of citizenship for native-born persons. The Civil Rights Act provided that “[a]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed” were to be considered U.S. citizens.²³ The Fourteenth Amendment altered the definition slightly (substituting “subject to the jurisdiction [of the United States],” for “not subject to any foreign power”), but firmly established the rule that states do not have the power to ban any class of persons from U.S. citizenship.

In establishing this first complete articulation of native-born citizenship, did the drafters of the Fourteenth Amendment intend to eliminate the mutuality

of consent in citizenship grants or defeat the operation of intersecting federal immigration laws? How is the phrase “subject to the jurisdiction” to be interpreted while simultaneously giving due regard to the dictates of federal immigration laws? If an alien under diplomatic immunity has been defined by Congress as not subject to U.S. jurisdiction, why would an illegal alien be so subject? Was the Fourteenth Amendment designed to eliminate any requirement that an alien be lawfully in the country at the time she gives birth to the child? Did it eliminate the need for government consent to the presence of the alien in its sovereign territory?

We argue that the concepts of consent and mutual obligation are essential to the interpretation of the phrase “subject to the jurisdiction thereof.” Common law understandings of citizenship relied upon mutual consent between the citizen and the sovereign. The duties of the sovereign to provide protection for the populace against a variety of evils were predicated upon the willingness of the citizen to pledge loyalty and to undertake political obligations to the state. As noted above, at no time in legislative history has the U.S. government expressed its intent to abandon the notion of consent as an essential aspect of citizenship.

Judicial History

For issues as large and important as immigration and naturalization, judicial guidance has been sadly lacking. What

guidance the courts have provided has been unclear at best and contradictory at worst. The first major judicial interpretation of the Fourteenth Amendment's "subject to the jurisdiction" clause bears out this failure. Justice Miller, in delivering the opinion in the *Slaughter-House Cases*, affirmed the avowed purpose of the Fourteenth Amendment to confer citizenship upon African Americans and to expressly overturn the *Dred Scott* ruling.²⁴

He noted that the phrase "subject to the jurisdiction thereof" was "intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."²⁵ The *Slaughter-House Cases* thus excluded not only foreign diplomats from those subject to U.S. jurisdiction, but also aliens generally. The Court restated this view in the 1874 case *Minor v. Happersett*, noting that the Constitution confers citizenship either through birth within the United States or through naturalization: "[I]t was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also."²⁶ The Court also specifically noted a distinction between the children of citizens and the children of aliens "or foreigners."²⁷ These opinions demonstrate the Court's unwillingness to disturb the federal alien-naturalization framework that had governed since the inception of the Union.

Following *Minor*, the Court elaborated on the definition of

the term "citizen" in *United States v. Cruikshank*.²⁸ The Court described citizens as persons who "have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights."²⁹ Unlike other persons, a citizen is one who has actively submitted to the jurisdiction of the United States. Under this definition, temporary

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submission by an alien lacks the permanence and promise of allegiance inherent in a complete surrender to jurisdiction. Read together, *Cruikshank* and *Minor* illustrate the Court's willingness to allow the exclusion of children born to alien parents on U.S. soil from the operation of the Fourteenth Amendment's citizenship clause. Those who submitted only temporarily to the jurisdiction and protection of the U.S. government were not included within the parameters of this conception of citizenship, and the Citizenship Clause did not cover their children.

Another early case to discuss the meaning of "subject to the jurisdiction thereof," *Elk v.*

Wilkins,³⁰ concerned a Native American born within U.S. federal territory under the jurisdiction of his tribe. After leaving his tribe for society at large, John Elk claimed he had been born within the United States, "had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States."³¹ He posited the immediate right to be recognized as a U.S. citizen. The court disagreed.

Justice Gray's majority opinion interpreted "subject to the jurisdiction" to mean complete subjection to U.S. political jurisdiction, which requires "direct and immediate allegiance" to the country.³² The Court reasoned that, absent evidence that his parents had submitted themselves to U.S. jurisdiction, Elk's birth on tribal lands precluded his complete subjection to the jurisdiction of the United States. The Court also held that Elk could not become a citizen without the formal consent of the United States: "To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form."³³ Mutuality of consent was thus deemed an essential element of citizenship. Since Elk did not acquire citizenship at birth, the Court found that his only means of attaining it would be the formal processes dictated by treaty or naturalization law.

In *United States v. Wong Kim Ark*,³⁴ the Supreme Court addressed the question of whether lawfully resident aliens,

themselves ineligible for citizenship, could pass U.S. citizenship on to their children. Wong Kim Ark was born in San Francisco while his parents were lawfully domiciled there. Under the Chinese Exclusion Acts of the 1880s, his parents were ineligible for U.S. citizenship. The Court upheld Wong Kim Ark's citizenship and held generally that the children of non-diplomatic alien parents lawfully resident within the United States become U.S. citizens at birth.

The Court interpreted the Fourteenth Amendment to bestow automatic citizenship upon children born within the allegiance and protection of the United States, "including all children here born of resident aliens."³⁵ The Court also recognized the common law exceptions to the automatic birthright rule, which denied citizenship to children born of diplomats, hostile invaders, and parents swearing allegiance to an Indian tribe. The Court based its decision to grant Wong Kim Ark citizenship upon two findings: His parents had submitted themselves to the jurisdiction of the United States, and the United States had *willingly* accepted and consented to their residence in the country. The Court ruled that since Wong Kim Ark's parents legally resided in the United States and operated a business here, they were effectively "within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."³⁶ Thus, the United States consented to their lawful presence on its soil, and

the Fourteenth Amendment's conferral of citizenship extended to Wong Kim Ark.

Wong Kim Ark's parents were lawfully resident aliens, and thus, for our purposes we can assume generally that children of lawfully resident aliens are considered subject to the jurisdiction of the United States when they are born. But what about those whose parents have never presented themselves for admission to the United States, or to whose presence the United States has never formally consented? Since *Wong Kim Ark*, the Supreme Court has offered little guidance on this question. But today, with the children of illegal aliens accounting for more than sixty-five percent of the births in Los Angeles public hospitals,³⁷ and with an estimated illegal alien population in the United States of over five million,³⁸ the question takes on increasingly significant political dimensions.

Conclusion

The key to resolving the applicability of the Fourteenth Amendment's Citizenship Clause to children born on U.S. soil to illegal alien parents lies in the ability and willingness of Congress to define the meaning of "subject to the jurisdiction" in Title 8 of the U.S. Code. Relying on the original purposes of the Amendment and its historical interpretation, Congress could legislatively define or classify the children of illegal aliens, as not subject to U.S. jurisdiction. Where so recognized by the law of the mother's nation of origin,

children would take the nationality of the mother until they were eligible to apply for U.S. citizenship, upon completion of permanent lawful residency for a prescribed number of years. The minor child would also become a U.S. citizen if the mother herself later naturalized. Because the Supreme Court has not addressed this issue directly, it would be entirely appropriate and desirable for Congress to first test the constitutionality of such a legislative definition before resorting to a constitutional amendment.

Currently, there are several bills pending in Congress that proffer such a definition. The Citizenship Reform Act of 1995³⁹ would deny citizenship to children whose parents are not citizens or permanent resident aliens. Another bill would restrict citizenship to children with at least one parent who is a citizen or legal resident.⁴⁰ Yet another would limit citizenship to those with a citizen or legal resident mother.⁴¹ Enacting these bills into law would be consistent with both legislative and judicial history. Moreover, with our country's population explosion and our limited resources already tremendously strained, restricting the conferral of U.S. citizenship would be practically, financially, and politically desirable. □