Losing Control of the Nation's Future

Part Two: Birthright Citizenship and Illegal Aliens

by Charles Wood

Every year, hundreds of thousands of children are born in the United States to illegal-alien mothers. Most likely, there are over 1,000 born every day. Under current law, each one of them becomes a U.S. citizen at birth. Under the prevailing interpretation of the Citizenship Clause of the Fourteenth Amendment, a change would require a constitutional amendment. It is likely that this interpretation is wrong and a change may be made by statute. But one way or the other, change is imperative because current law causes serious harm to the national interest.

I. BIRTHRIGHT CITIZENSHIP FOR THE CHILDREN OF ILLEGAL ALIENS CAUSES SERIOUS HARM

Loss of control over the nation's future

Any nation, if it is to continue in the form desired by a majority of its existing citizens, must be able to select which aliens will be allowed to live within its territory – and which of them will be granted full membership in its political community, with the right to vote and thereby gain a share of control over the nation's future.

Automatically granting citizenship to the children of persons who are in the United States against the will of the majority of Americans undermines this process. It takes away a part of the decision-making power from the American people, and transfers it to illegal aliens.

Over time, the current rule will make it possible for what would otherwise be citizen majorities in particular areas to be outvoted by new majorities consisting in significant part of persons whose membership in the political community is derived from this rule, and thus is not based on the consent of the American people. Because of the uneven distribution of illegal aliens, such effects are much greater in certain areas of the country, such as Southern California, where large numbers of citizen-children are now adults – with the right to vote and to petition for the immigration of certain family members *without limit,* and each of these can in time naturalize and become voters.

Increased number of citizens without traditional American values

Because the parents are illegal and concerned about being apprehended, their children are less likely to participate in the wider community, learn English, and otherwise assimilate fully. If they are not fully Americanized before they reach voting age, their votes are less likely to be based on traditional American values and priorities, and more likely to favor policies opposed by a majority of other Americans.

Increased number of dual citizens

Because most illegal-alien parents are nationals of countries that grant automatic citizenship to their citizens' children wherever born, the number of new U.S. citizens with dual citizenship and dual loyalty is

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substantially higher now than if current law were amended. And the primary loyalty of a citizen-child of illegal aliens may not be to the United States.

Dilution of the rights and privileges of current citizens

A wide range of "zero-sum" rights and privileges based on citizenship or legal residence is obtained by the new citizens without the consent of preexisting citizens, whose own such rights and privileges are diluted. Examples include not only voting power and political representation, but rights to petition for immigrants, public benefits such as government employment and services, and affirmative-action "entitlements."

Incentive for illegal immigration

A substantial fraction of illegal-alien mothers giving birth in this country come here so that their child is born a U.S. citizen. *See, e.g.,* Judith T. Fullerton et al., Access to Prenatal Care for Hispanic Women of San Diego County, CPS Report, California Policy Seminar (now California Policy Research Center), University of California, Berkeley (Aug. 1993) *and* Rex Dalton, Born in the USA – Births to Illegal Immigrants on the Rise, *San Diego Union-Trib*., Feb. 20, 1994, at A1.

Greater difficulty deporting the parents

If illegal aliens have a U.S.-citizen child, the political, if not the legal, difficulty of deporting the parents and siblings is significantly increased.

Higher welfare costs

Each of the large number of children born in the United States every year to illegal aliens instantly qualifies for all of the benefits citizenship provides, including welfare and other social services. Over 40 percent of such children born in 1993 in San Diego County immediately began receiving welfare. See L. Rea & R. Parker, *Illegal Immigration in San Diego County: An Analysis of Costs and Revenues, State of California, State Senate Office of Publication,* viii–ix, 146–150 (1993).

Higher levels of immigration

Many, probably most, of the hundreds of thousands of such children who are born *each year* petition for the immigration of relatives at some time in their life. Often it is under immigrant categories not subject to numerical limits and thus causes a real increase in total immigration. And when the immigration is in categories subject to limits, it harms law-abiding prospective immigrants abroad who would otherwise receive the visa numbers.

II. COUNTER-ARGUMENT, WITH REBUTTAL

Increase in illegal aliens; reduced assimilation

Defenders of the current rule argue that the proposed change would increase the number of illegal aliens. They point out that the number of U.S.-born children who would be illegal aliens after the change is likely to be greater than the number of aliens who would decide that illegal immigration was no longer worthwhile. As a result, it is argued, the problems associated with the presence of a large number of illegal aliens – such as failure to report crimes or public health problems, or to testify in legal proceedings – would likely increase. Defenders also assert that the change would interfere with the process by which the children of illegal aliens assimilate into American society.

Rebuttal – Most of these problems already exist in connection with such children. It is the immigration status of the adults in the family that is the source of most of those problems, and that status does not change when a new child, one who is a citizen, joins the family. Therefore, if current law is amended – so their new U.S.-born children are not citizens – such problems would continue, but likely not get significantly worse.

With regard to the assimilation delay, that too would probably not significantly change if current law were amended, at least in the short run. More fundamentally, the limited assimilation of illegal-alien families is *as it should be.* It is not desirable for them to fully and permanently join American society.

The national interest would be best served if the entire family returned to their homeland. And this result could actually be brought about if an adequate effort were made to enforce current laws against hiring illegal aliens and providing them most forms of welfare, and if penalties for violating immigration law were increased.

But even if Congress and the President cannot, or will not, make such an effort, the current birthright-citizenship rule should still be changed – and the U.S.-born children of illegal aliens treated the same as their foreign-born siblings living here. It would be better for America to accept any problems caused by an increase in the number of such aliens than to endure the serious

and increasing harm the current rule causes.

Unfairness

A second counter-argument is that it would be unfair to "punish" U.S.-born children for the immigration-law violations of their parents.

Rebuttal – It is neither unfair nor a punishment to refuse to allow illegal aliens to create new U.S. citizens against the will of the American people.

The group whose interests it is the primary obligation of U.S. government officials to promote is the majority of U.S. citizens. Officials fail to fulfill that obligation when they continue a process that is reducing the political control that the current citizen-majority has over their nation's future, and that is causing them so much other harm.

In addition, this claim of unfairness is inconsistent with most of the country's immigration-control policies – which can result in the deportation of a U.S.-born child's equally innocent foreign-born siblings who similarly are young and have been in the United States most of their lives. Why is their moral claim to stay in this country weaker than that of the U.S.-born? And why does the presence in the U.S. of either of these groups of children give them a greater moral claim to a life here than millions of equally innocent children abroad? Indeed, the moral claim of the children abroad could be seen as greater – because they most likely have not had the benefit of *any* time in the United States, and because their circumstances are frequently much worse than those under which the U.S.-born children of illegal aliens would live if returned to their parents' home country.

III. CURRENT BIRTHRIGHT-CITIZENSHIP LAW MAY BE CHANGED BY STATUTE

The prevailing view is that the Constitution requires that the U.S.-born children of illegal aliens be recognized as U.S. citizens at birth—and therefore an amendment would be required to change current law. In my view, this is incorrect. The Constitution neither requires nor forbids the current rule. The controlling language in the first sentence of the Fourteenth Amendment (the Citizenship Clause) states that "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." (Emphasis added.)

The "subject to" language about jurisdiction is ambiguous. Does it refer only to *formal* legal authority to bring the person before a court for violations of the law? Or rather to a combination of formal authority and some degree of *actual power* to exercise the authority, power to bring the person to justice?

Framers of the Citizenship Clause understood it to codify traditional common-law principles – under which citizenship derives from birth "within the allegiance."

Members of Congress who wrote the Citizenship Clause believed that they were putting into the Constitution the then-existing common law, with a clarification of its application to two minorities in special circumstances, blacks and Indians.

The leading Supreme Court case interpreting the Citizenship Clause, and the common law it was intended to constitutionalize, is *United States v. Wong Kim Ark.* (1898). The Court held that the U.S.-born child of a legal immigrant from China was a U.S. citizen at birth, and described the English common law that underlies the American rules in this area. It described the general rule and also certain so-called "exceptions":

(1) First, the general rule – To be born a British subject, a person had to be born *"within the allegiance."* This meant born on British soil under circumstances in which there was a *duty of allegiance, including obedience,* on the part of the person born, and a *reciprocal duty of the sovereign to provide protection.* Each was considered a "compensation for the other." To be born within the allegiance, a person had to be born under the *"protection and control"* of the Crown.

(2) The common law contained at least two "exceptions": (A), a person whose parent was a foreign diplomat or on a foreign public ship, and (B), a person whose parent was a member of a foreign military force occupying the territory where the birth took place. Actually, these "exceptions" were not really exceptions, but rather applications of the general rule to specific factual circumstances, since the requirements of birth "within the allegiance" were not satisfied in either case – neither the duty of obedience nor the duty of protection.

The *Wong Kim Ark* Court implied that some aliens outside the common-law "exceptions" might also not qualify for birthright citizenship. It stated that "[s]uch allegiance and protection … were predicable of aliens *in amity* so long as they were within the kingdom"

[Emphasis added.] – meaning that allegiance and protection are among the attributes of the legal relationship between aliens "in amity" and the sovereign while such aliens are within the sovereign's territory. "Amity" is defined by Webster's 1828 dictionary as "friendship, in a general sense, between individuals, societies or nations; harmony; good understanding…"

The *Wong Kim Ark* Court's reference to "aliens in amity" came from *Calvin's Case* (1608), described by the Court as the "leading case" on the "fundamental principle of the common law with regard to English nationality." A commentator recently stated that

> "[Sir Edward] Coke's report of *Calvin's Case* was one of the most important English common-law decisions adopted by courts in the early history of the United States. Rules of citizenship derived from *Calvin's Case* became the basis of the American common-law rule of birthright citizenship, a rule that was later embodied in the Fourteenth Amendment." (Polly J. Price, 9 *Yale Review of Law & the Humanities*, 73,74, 1997)

Coke (1552–1634) seems to have understood the phrase in a way that would exclude more than hostile enemy soldiers, more even than the subjects of foreign sovereigns with whom the English monarch was at war. Although it could not have been Coke's intention to exclude from the meaning of "aliens in amity" any alien who was in England in violation of its immigration law (there were no such laws), he did make statements with an apparently similar meaning.

Coke explained that an alien was either a friend (*amicus*) or an enemy (*inimicus*), and could be a friend only if there was a "league" between the alien's sovereign and England's. If a league existed, the alien was a friend (*amicus*) and could enter England without "license" of the English sovereign. The implication is that if aliens requiring a "license" came into England without one, they would be regarded as not "in amity." Thus, their children born in England would not be born "within the allegiance."

Children of illegal aliens are not born "within the allegiance."

The essential elements of common-law birthright citizenship are not present for the U.S.-born child of an illegal-alien mother. It makes no sense to say that an illegal alien has a duty of *allegiance,* including *full obedience,* to the United States – because the duty cannot ever be fulfilled. A person cannot at the same time be both an illegal alien and obedient to the U.S.

The disobedience of an illegal alien is fundamentally different from that of other lawbreakers, whether citizen or lawful alien. Except during the limited periods of time when the latter are engaged in committing particular criminal acts, they are in obedience to law. But the illegal-alien mother is disobeying the United States and its law by her very presence in the country and does so at every moment she is here. At no time does she, or can she, fulfill, even for an instant, the duty of obedience which is an essential component of allegiance.

In addition, the child is not born "under the protection and control" of the U.S. Government. The mother does not receive full protection – not even that given to nonresident aliens if they are in a lawful status. For example, the protection provided to an illegal alien omits the most basic element – enforcement of the right to be at liberty on the sovereign's territory, free to act at will within the law. With respect to the government's control – that too is, of course, absent.

Finally, illegal aliens are not "in amity" with the United States. They are on U.S. territory against the will of the American people, in a continuous state of disobedience to U.S. law, and despite the efforts of the U.S. Government to apprehend them.

Thus, if the Citizenship Clause is interpreted as a codification of the common law, it is reasonable to argue that there is no constitutional requirement that the U.S.-born children of illegal aliens be granted U.S. citizenship.

The actual language of the Citizenship Clause is consistent with such an interpretation because the "subject to" clause requires actual power (not merely formal authority) to bring to justice.

The importance of the *degree* of U.S. jurisdiction was emphasized repeatedly by the congressional sponsors of the Fourteenth Amendment. In their view, birthright citizenship required the U.S.-born child to be completely subject to the jurisdiction of the United States. This meaning was necessary if one of the intended results of the Amendment was to be achieved – the exclusion of Indians still living in a tribe. They were seen as primarily subject to the jurisdiction of the tribe in their daily activity within the United States.

Senator Jacob Howard, floor manager of the

Fourteenth Amendment, referred to "the same jurisdiction in extent and quality as applies to every citizen of the United States now."

Senator George Williams, a member of the Joint Committee on Reconstruction, said something suggesting that the language requires more than formal jurisdiction:

> All persons living within a judicial district may be said, in one sense to be subject to the jurisdiction of the court in that district, but they are not in every sense subject to the jurisdiction of the court *until they are brought, by proper process, within the reach of the power of the court*. I understand the words here … to mean fully and completely subject to the jurisdiction of the United States. [Emphasis added.]

Such a view is consistent with some formulations of the common-law concept of birth "within the allegiance" – which have stated that the person must be born under "the protection *and control"* of the sovereign. (Emphasis added.)

The common-law-based rationale for denying birthright citizenship to the children of parents who are not fully subject to the *formal* jurisdiction of the United States applies also to parents who are formally subject (they have no formal immunity), but cannot be "brought within the reach of the power of the court" (in the words of Senator Williams).

The rationale is this: if an individual has no duty of obedience (or the duty does not exist in any meaningful sense, because full obedience is impossible because of the nature of the individual's status under the law), if the individual is *not answerable* for disobedience within the sovereign's territory, then the reciprocal duty of the sovereign to provide protection is not in effect – and thus essential elements of allegiance are not present: neither a duty of obedience by a subject, nor control and a duty of protection by a sovereign.

Therefore, the jurisdiction over an individual which is required in the Citizenship Clause may include the sovereign's having more than some minimum degree of power to bring the individual to justice for violating the law.

This interpretation is consistent with the meaning of the words "subject to." Webster's 1828 Dictionary defines "subject" in its adjective form as: "being under the power and dominion of another…" This definition refers to an actual (not merely theoretical) control relationship between a controlling party and a party controlled.

Finally, it would be reasonable for Congress to conclude that illegal aliens are not "subject to" the jurisdiction of the government in a manner similar to citizens and lawful aliens, and that the federal government's actual power to bring illegal aliens to justice is insufficient to satisfy the constitutional standard. It seems indisputable that, in general, such power is less than the government's power with respect to other violators of the law. The ongoing violation committed by illegal aliens – presence in the United States without legal authority (for which they may be deprived of their liberty and then deported) – is *not visible* in the way unlawful actions are, although the violation continues for every instant illegal aliens are in the country. When it is only their unlawful *status* (not their *actions*) that distinguishes them from the law-abiding persons around them, the probability of their being apprehended and brought to justice is not equivalent to that for other lawbreakers.

IV. COUNTER-ARGUMENT, WITH REBUTTAL

Required jurisdiction is purely formal.

The most frequent counter-argument is that "subject to the jurisdiction thereof" means *formally* liable to prosecution for violating U.S. law. It means that the government has the *legal authority* to prosecute, not necessarily the actual *power* to do so. In this view, any person present in the United States is subject to its jurisdiction – whether citizen or alien (resident or visitor) – unless the person has formal immunity, the kind of immunity a diplomat has.

Proponents have cited *Wong Kim Ark* and several earlier cases for the proposition that the common law conferred citizenship upon all persons born within the territory of the United States, unless one of the traditional exceptions applied.

Rebuttal – None of the cases that proponents cite involved an illegal-alien parent, and hence none of the holdings of these cases cover the citizenship of their U.S.-born children.

Most of the cases were decided before enactment of the first federal immigration statute that made the presence in the United States of certain aliens unlawful. As a result, unqualified statements made in such cases – referring, for example, to "all persons" or "every person" born in the United States – could not have been understood to cover them. In *Wong Kim Ark* the

alien parents were in lawful status. Therefore, statements in the Court's opinion asserting that the U.S.-born children of all aliens are citizens at birth, unless one of the common-law exceptions applies, are not authoritative or binding.

The framers of the Citizenship Clause did not choose language that expressly excludes specific groups. Instead, they chose *abstract general language* which they believed excluded Indians still living in tribes, as well as the persons covered by the traditional common-law "exceptions," but which may reasonably be read to exclude other groups also.

Jurisdiction requirement is the same as in Equal Protection Clause.

The second major counter-argument is based on the fact that the Equal Protection Clause contains a jurisdictional requirement with similar language. Its proponents argue that persons "within [a state's] jurisdiction" for purposes of the Equal Protection Clause must be "subject to the jurisdiction" of the United States for purposes of the Citizenship Clause. Therefore, they argue, because illegal aliens are covered in the Equal Protection Clause, they must be covered by the jurisdiction language of the Citizenship Clause. Proponents cite a footnote from the majority opinion in the Supreme Court case of *Plyler v. Doe* (1982) in which Justice Brennan quoted, with approval, a statement to that effect in the *Wong Kim Ark* opinion.

Rebuttal – Wong Kim Ark did not concern illegal aliens, so the quoted statement, as applied to illegal aliens, was not part of the holding in the case. Justice Brennan provided no other support for his view beyond citing a 1912 treatise-writer, whose assertion, as described by Brennan, about the common-law birthright citizenship rule's "historical emphasis on geographic territoriality, bounded, if at all, by principles of sovereignty and allegiance" is quite misleading. The "if at all" phrase questions the significance of what has been a central element of the common law in this area – "birth within the allegiance." Finally, the view Justice Brennan expressed in the *Plyler* footnote was not a part of the Court's holding in the case. The holding did not depend on the Citizenship Clause's jurisdiction language being as comprehensive as that in the Equal Protection Clause. For all these reasons, Brennan's *Plyler* statements on this issue are neither binding nor convincing.

There are, moreover, good reasons for believing that persons covered by one clause are not necessarily covered by the other. Birthright citizenship is like a "zero-sum game." Additional citizens dilute the political power, and other rights and privileges, of preexisting citizens. This is not the case with equal protection. The possession by illegal aliens of the fundamental right to equal protection of the laws does not adversely affect the equal-protection right of citizens and lawful aliens. Furthermore, the common-law histories of the two clauses are entirely different.

V. CONCLUSION

The current birthright-citizenship rule is harmful in many ways, but its most harmful and dangerous impact is to reduce the political power of current citizen-majorities. If the current rule is maintained, and illegal immigration continues to grow and spread to new areas – especially if it is combined with the current practice of counting illegal aliens in the census for apportionment – the decline in such political power will be increasingly likely to make a significant difference in legislative votes at the national and state levels, and in electoral votes for President.

This process threatens the ability of the majority of Americans today to ensure that political control at every level of government will always remain with them and their descendants – plus those persons, and only those persons, to whom they have given their consent to join the American political community.

At stake is whether or not the current majority of Americans will have the democratic right to control the nation's future – including, most fundamentally, whether the composition of the American people will be determined solely by them or instead will continue to be influenced to a significant degree by individuals whose very presence in this country is against the will of most Americans and against the law enacted by their representatives.

Every week, thousands more children of illegal aliens are born in this country, and each is now granted citizenship. The political impact of such individuals increases greatly when they reach voting age and when they begin to petition for the legal immigration of their spouse and their blood relatives, each of whom can naturalize, and hence vote, and each of whom can petition for additional immigrants, who may also become citizens and voters.

The needed change can likely be accomplished by statute. But if not, then a constitutional amendment should be pursued until ratification is achieved. ■