

HR-73 — Protecting America's Sovereignty

Birthright citizenship — a limited right

by William Buchanan

Section 301 of the Immigration and Nationality Act (INA) grants American citizenship to anyone born on American soil regardless of the status of the parents. To remedy this, Rep. Brian Bilbray (R-CA) has introduced HR 73, The Citizenship Reform Act of 1999. This bill would deny automatic U.S. citizenship to children born here to illegal aliens and legal non-immigrants (tourists, students, temporary workers, etc.). It would reserve this precious gift for children with at least one parent who is a U.S. citizen, national, or legal immigrant. This bill is constitutional and it is necessary to protect America's sovereignty.

Why HR 73 is Constitutional

Section 1 of the Fourteenth Amendment to our Constitution states: "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States..." Proponents of the current law claim this phrase is the indestructible foundation for our policy of unlimited birthright citizenship.

America is in the citizenship business in a big way. It has offered this gift by every known means — election, naturalization, treaty, descent (*jus sanguinus*), and birthright — while moving continuously toward a concept of citizenship by consent. Among these, birthright citizenship is a graft from the most unlikely roots.

Combining the crowns of both England and Scotland upon one head (James I, in 1603) was legally problematic since each country maintained a separate parliament. A brilliant attorney, Sir Edward Coke, "resolved" this

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conundrum. An element of his solution — subjectship — proved tenacious. Children born upon land ruled by the king, entered into a compact with him: They were his "subjects" and owed their lives to his protection and therefore *owed allegiance to him for life (jus soli)*.

Filtered by John Locke, Jean Jacques Rousseau, and the American experience, the 'subject' became a 'citizen' and allegiance (now voluntary) was transferred to the community. Along the way, the compact with the king became the social contract and *jus soli* developed into birthright citizenship. Prior to the Civil War, however, only certain whites could gather under that umbrella. The question is: how far did the 14th Amendment go to broaden this coverage?

What Did the Amendment's Framer's Mean?

The citizenship clause of the 14th Amendment was not included in the original House version. It was introduced as an amendment to the amendment by its Senate sponsor, Sen. Jacob Howard, who asserted that the amendment "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States..." (U.S. Congress, 39th Congress, *Congressional Globe*, p.2890). Why was this amendment proposed?

The Republicans, who dominated the 39th Congress, were keenly aware that while the 13th Amendment had ended the enslavement of black Americans, it did not necessarily make them citizens. In 1857, in the famous Dred Scott case, the Supreme Court had gone out of its way to declare (by a 7-2 vote) that the Constitution denied American citizenship to blacks, whether free or slave. Republicans believed this was morally wrong, but also feared that if only whites could vote in the South, they would return only Democrats.

Section 1 of the Amendment would overturn Dred Scott and declare that former slaves and their progeny were American citizens (and eligible to vote). Few in the

Congress intended more than this. Indeed, much of the debate on this section centered around senators' fears that courts would rule the amendment also applied to American Indians whom they regarded as hostile "savages."

An apprehensive Sen. James Doolittle, for example, pointed out that "All the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military." Sen. George Williams remarked: "I would not agree to this proposed constitutional amendment if I supposed it made Indians ... citizens of the United States."

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The highly-respected Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, sought to reassure them: "... 'subject to the jurisdiction thereof,'" he said, means "subject to the *complete* jurisdiction thereof." The "wild Indians of the plains" and those living on reservations within states, did not qualify.

Sen. Howard agreed: "...the word 'jurisdiction,' as here employed, ought to be construed so as to imply a *full and complete* jurisdiction on the part of the United States."

Sen. Trumbull went on to make a second point. "They [American Indians] are not subject to our jurisdiction in the sense of owing *allegiance solely* to the United States."

In the minds of Senators debating the 14th Amendment, it appears that questions of jurisdiction and allegiance apply to the parents. Only if the parents qualify as their children granted birthright citizenship. And the reason is fairly obvious: a king may *impose* allegiance upon an infant "subject," but an infant is incapable of *giving* allegiance.

More to our point, illegal alien and non-immigrant parents are not subject to the complete jurisdiction of the United States, do not owe her their sole allegiance, and

therefore cannot qualify their children as citizens under the 14th Amendment.

American Indian Jurisdiction?

John Elk was born in that part of the Louisiana Purchase that came to be called Nebraska. Granted statehood in 1867, Nebraska 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. He claimed the right to vote in Nebraska, arguing that he was a U.S. citizen by birthright based on the 14th Amendment.

The Supreme Court rejected Elk's claim (*Elk v. Wilkins* 112 U.S. 94 [1884]). Echoing the Senate debate, the Court found: "The evident meaning of ['subject to the jurisdiction thereof'] is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."

The Court went on: "Indians born within the territorial limits of the United States ... although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government..."

The Court, in so many words, agreed that the status of the parents determines the citizenship of the child. To qualify children for birthright citizenship, based on the 14th Amendment, parents must owe "*direct and immediate allegiance*" to the U.S. and be "*completely subject*" to its jurisdiction.

Had Mr. Elk been born, say, in Boston, Massachusetts, of American Indian parents who were no longer affiliated with any tribe, he would probably have been a U.S. citizen by birth.

There is a certain purity about this decision because it explores only the reach of the 14th Amendment. "Indians not taxed" were specifically excluded from coverage under the 1866 Civil Rights Act — the *statute law* that preceded Sec. 301 of the INA.

Legal Immigrant Jurisdiction?

A legal immigrant to the United States, unlike a citizen, is still "subject to the jurisdiction" of the country of his or her birth. He or she can be drafted for military

service there and is entitled to benefits and privileges there that might be denied to an American citizen. These might include the right to vote, own property, attend public schools, obtain welfare, etc. So it is fair to say that they do not owe “*direct and immediate allegiance*” to the U.S. and are not “*completely subject*” to its jurisdiction. So what is the citizenship status of the legal immigrant’s child born in the U.S.?

Wong Kim Ark was born in California in 1873 to legal immigrant Chinese parents. Returning from a visit to China in 1895, Mr. Wong was denied entry because, it was claimed, he was not a U.S. citizen.

In rejecting this argument and declaring Mr. Wong to be a citizen (*U.S. v. Wong Kim Ark* 169 U.S. 649 [1898]), the Supreme Court had to wrestle with several issues.

First, constitutional law begins the day ratification is complete. Hundreds of thousands of Americans had been born here to immigrants in the 30 years since ratification. Many had voted, paid taxes, and/or served in the military assuming they were American citizens. A ruling against Mr. Wong might prove to be extremely disruptive, as well as, unfair.

Second, attorneys for the U.S. reminded the Court of the precedent set in *Elk*. They argued that “Wong Kim Ark, although born in the ... United States of America, is not ... a citizen thereof, the mother and father of the said Wong Kim Ark being Chinese persons and subjects of the Emperor of China...”

To get around these obstacles, the Court searched for a *definition of citizen*. Finding the common law expression “natural born” in the Constitution, the justices concluded that citizenship must be based on English common law (*jus soli*). This is controversial because, as we have noted, the common law prescribed for subjects, not citizens. Moreover, all the signers of the Constitution had once been natural-born subjects of the British king and born in permanent allegiance to him! By waging revolution, they had cast off their birthright pledges in favor of a society based increasingly on consent.

The Court then constructed an allegiance for the parents based on *domicil(e)*, a word which they employed 21 times in arriving at this conclusion: “...a child born in the United States, of parents of Chinese descent, who at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil(e) and residence in the United States, and are there carrying on

business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States.”

The Random House College Dictionary defines “domicile” in law as “a permanent *legal* residence.” Gifts’ Law Dictionary says a “person can have many transient residences ... but only one legal domicile.”

Once again, in a ruling based strictly on the 14th Amendment, the status of the parents was held to be crucial in determining the citizenship of the child. The hopes of the advocates of unlimited birthright citizenship notwithstanding, *Wong Kim Ark* says nothing about the children of illegal and non-immigrant aliens. And it is inconceivable that illegal alien parents could have a legal domicile in the U. S.

Why HR 73 is Necessary

In addition to being constitutional for these several reasons, HR 73 is necessary to help preserve and protect the nation.

Geography

With 5,000 miles of border and many more miles of coastline, modern communications and air travel, and over 20 million non-immigrant visas issued yearly, a policy of bestowing citizenship on the children of illegal aliens and legal non-immigrants provides a loophole that endangers our very sovereignty.

Numbers

An estimated 200,000 babies are born in the U.S. each year to illegal alien mothers — 100,000 in California alone, Nobody knows how many more are born to foreign visitors, temporary workers, and students. Giving birth to a U.S. citizen only takes a moment or two on any patch of U.S. soil. It’s now quite possible for millions of aliens to give birth in the U.S. every year.

The Duel of the Duals

This discussion occurs against the background of the “Citizenship USA” scandals and changes in the attitudes of many govern-ments. To cite only the most egregious example, the Mexican government recently accorded dual nationality to its citizens who naturalize in the U.S.

In the past, Mexican citizens who immigrated to America were looked upon with contempt by Mexico for abandoning the mother country. Now, in their greatly increased numbers, recent immigrants to America are seen by Mexico as potential advocates for its territorial claims, as a source of political influence, or at least as

facilitators of a more effective “safety valve.” In offering dual nationality, Mexico seeks to retain the allegiance of its citizens who become U.S. citizens — in spite of the oath of allegiance they take to America — and to discourage their assimilation.

Many other countries offer dual nationality or even dual citizenship to their émigrés who naturalize here. Still others simply don’t recognize the right of their citizens to give up their citizenship. There is always a political dimension to such considerations. These developments raise questions about the meaning of American citizenship and identity. They have magnified the importance of defining just who is, and who can be, an American citizen.

Problems We Would Incur

Enforcing HR 73 would require procedures for confirming the status of newborns. We might have to urge parents-to-be to establish their status prior to giving birth. The INS might have to assist in the process. A dual state/federal Birth Certification and Social Security Number process is a possibility. In any case, we should study other countries’ methods.

Problems We Would Avoid

If birthright citizenship is hard to manage, administering justice when the mother is illegal and the child is a citizen requires decisions from judges, welfare departments, and INS officials that would make Solomon cringe. Who gets the welfare check? Do we assign the child to a relative? Do we keep the child here and deport the mother? And then there is the very substantial drain on revenues to be considered.

Another Constitutional Amendment?

The Fourteenth Amendment gives Congress “the power to enforce” this amendment “by appropriate legislation” (Section 5). Obviously, we believe if the framers of the Fourteenth Amendment came back today,

they would point to HR 73 as an appropriate legislated definition of birthright citizenship. Some argue, nevertheless, that only a constitutional amendment is sufficient to change current practice.

However, a constitutional amendment could not pass at this time. The American people just don’t know the issue. In the unlikely event that HR 73 would be overturned as unconstitutional, the publicity such a case would generate might make amendment politically feasible. HR 73 is the logical place to start.

Conclusion

The cases of Wong Kim Ark and John Elk show that the 14th Amendment guarantees automatic birthright citizenship to children born here to U.S. citizens and legal immigrants. The extension of this grant to the children of illegal immigrants and legal non-immigrants (tourists, students, temporary workers, etc.), on the other hand, is based on section 301 of the INA which HR 73 seeks to amend.

The framers of the 14th Amendment did not mean to say: “Alien! Break our laws, and we will reward you!” They did care about American sovereignty. To argue otherwise, you would have to believe that the Congress and the states, after fighting a bloody and corrosive civil war to *save* the union, would then wish to amend the Preamble to the Constitution: “in order to form a less perfect Union, invite domestic Discord, promote Welfare dependency, secure the Curses of Division, and set our Posterity adrift.”

Millions of Americans have given life or limb to defend the values we hold dear and the lives we live as citizens of America. Awarding American citizenship automatically to the children of aliens who break our laws or are just passing through, cheapens it beyond all recognition.

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