

Changing Birthright Citizenship Doesn't Need a New Constitution

BY PEGGY SANDS ORCHOWSKI, PH.D

It seems like a no-brainer. After all, it is written in the first sentence of the 14th Amendment of the U.S. Constitution that anyone born in the United States is a citizen. How could anyone refute that? And everyone knows that it is almost impossible to change the Constitution. It can take years, often decades to do so.

So how can Donald Trump and almost all the U.S. Republican presidential candidates say that they will end, probably in the next year or two, birthrights citizenship for babies born in the United States to illegal immigrants and to tourists? Are they just spinning and completely out of touch with reality?

Actually, they're not. There is perhaps no other issue in immigration that is so misunderstood, misquoted, and misexplained by just about everyone in the media than birthrights citizenship.

To understand the possible options for changing it outside of a constitutional proposal or convention, you need to read and understand every word in that first sentence of the 14th Amendment:

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.

And subject to the jurisdiction. These five most significant words are particularly important because it signals that in order to get birthrights citizenship, *two* requirements have to be met: not just be born in the U.S., but also be “subject to its jurisdiction.” That generally means, subject to U.S. laws. *All* its laws. Including immigration laws. And their enforcement.

Why was that phrase written? If the framers of the amendment had wanted to just say “anyone born in the U.S. is a citizen,” why didn't they? Why add that

phrase, especially as federal immigration law did not exist in 1868?

Was it written to give a federal right of citizenship to babies born to non-citizen immigrants? Not really. Federal immigration entry regulations and management weren't even codified until 1882. There were no national immigration visas; no legal, temporary, and illegal immigration statuses; no immigration bureaucracy; no national immigration laws. The first section of the 1789 Constitution gives the federal government the “right of naturalization.” But operationally, the states, not the feds, decided who was welcome, who wasn't, and who would get citizenship (ironic, no?).

Today, the question has become: do people who have no legal permit nor any right to reside and work in the United States, no authorization, visas, nor legal documents—are they considered legally to be “subject to the jurisdiction” and therefore have citizen birthrights for their U.S.-born children? It's a complicated question.

The truth is that immigration itself is not a civil right, nor even a human right. Clearly there is no civil right for any immigrant to enter and reside in the country illegally. Illegal immigrants actually can claim very few of the civil rights that legal immigrants have; in the legal sense, all immigrants are not equal because those with different immigration status have different rights.

To complicate matters further, increasingly well-meaning, enthusiastic advocates for illegal immigrants aggressively refuse to enforce and even waive laws that may lead to the arrest, detention, and deportation of illegal, undocumented, and unauthorized immigrants—even of those who commit multiple misdemeanors and felonies including violent felonies. Increasingly, illegal immigrants are getting “sanctuary” and waivers from numerous laws that, on the other hand, all legal immigrants and citizens absolutely have to obey or face punishment. It can be argued then that illegal immigrants in over 200 cities and in many states and of certain categories are so protected from law enforcement that it must be questioned if indeed they really are subject to U.S. jurisdiction. If not, then clearly they are not eligible for birthrights citizenship. ■

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