



## Automatic Citizenship

A recent article published at Politico.com asked, “What makes an American?” That question and the implications arising from the many answers being proffered to it have attracted the attention of pundits and politicians since the passage earlier in the year of S.B. 1070 by the Arizona legislature.



This controversial measure mandates the enforcement by local and state police of existing federal immigration statutes within the boundaries of the Grand Canyon State.

In the days since the key provisions of S.B. 1070 were enjoined from enforcement by a federal judge, the halls of Congress have resounded with calls from several key GOP senators for congressional hearings into the 14th Amendment’s supposed grant of citizenship to children born in the United States whose parents are illegal aliens. The subject of the inelegantly nicknamed “anchor babies” is seen as a crucial battle in the wider war against the invasion of the United States by millions of illegal aliens.

The anchor in “anchor babies” refers to the purported ability of children born in the United States to illegal immigrant parents to sponsor those parents in their request for permanent residency here. According to the argument, as citizens of the United States, those children have the right to sponsor the immigration efforts of family members seeking legal immigration status.

The lawful ability of American citizens to serve as sponsors to would-be immigrants is not in question. What is in question, however, is whether children born within the sovereign borders of the United States should be endowed with the full panoply of privileges and immunities of which citizens are possessed. This is the crux of the current controversy.

As the number of senators seeking congressional clarity on the issue contracts and expands daily according to the direction that the winds of electoral politics blow, a recent Rasmussen poll indicated that 67 percent of respondents believe that citizenship should not be automatically conferred upon American-born children of illegals.

On the other hand, there is a significant bloc of support for the unchallenged endowment of citizenship upon the estimated 340,000 anchor babies born in America in 2008. Past, and likely future, Republican presidential nominee Mike Huckabee was for birthright citizenship before he was against it. Lately, he has spoken against the granting of birthright citizenship, although he once famously preached that “you do not punish a child for something the parent did.”



## The Amendment

With the prickly politics of illegal immigration making such curious bedfellows, the quest for an answer to the question of who is and is not a citizen continues by referring to the Constitution, in particular the 14th Amendment.

The juicy marrow in the bone of contention that is the legal status of illegal immigrants' children is the so-called "citizenship clause" of the 14th Amendment, which reads: "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."

The interpretation of that very clause was the question before the Supreme Court in 1898 in the case of *U.S. v. Wong Kim Ark*. In that case, Ark was the child of Chinese immigrants who themselves were subject to the Chinese Exclusion Act then in force (that law prohibited Chinese nationals from immigrating to the United States and from seeking naturalization). Lawyers representing Ark argued that the language of the 14th Amendment granted automatic and irrevocable citizenship to Ark, as he did not fall within any of the exceptions carved out in the amendment.

Lawyers for the United States, on the other hand, disagreed that the 14th Amendment grants automatic citizenship to children based on the accident of the location of their birth — a legal concept known as *jus soli*.

The court held in *Wong Kim Ark* that, under the 14th Amendment, a child born in the United States of immigrant parents who at the time of the child's birth are subjects of a foreign power, but who are living permanently in the United States and are carrying on business in the United States, and are not employed in any diplomatic or official capacity, and are not members of foreign forces in hostile occupation of United States territory, becomes a citizen of the United States at the time of birth.

It is relevant to note that Ark's parents were legally present non-citizen residents of the United States — they were not *illegal* aliens.

The precedent established by the Supreme Court in *Wong Kim Ark* was challenged most recently by the case of *Plyler v. Doe*. In that case, the Supreme Court distinguished the facts of *Wong Kim* from those of *Plyler* as it concerned the rights of undocumented alien children — that is to say, children who are brought into this country illegally by parents immigrating without proper permission.

In *Plyler*, the Court held that the 14th Amendment's phrases "subject to the jurisdiction thereof" and "within its jurisdiction" were essentially equivalent and that both referred primarily to physical presence. It held that illegal immigrants residing in a state are "within the jurisdiction" of that state, and added in a footnote that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful." As the strength of Supreme Court decisions and the finality of them in matters of constitutional interpretation go, a single justice's footnote dictum makes for a very feeble foundation upon which to construct the support of such a precious right as American citizenship.

The principal argument advanced by those who oppose the instant and irrevocable bestowal of citizenship upon the children of those illegally living or working in the United States is that the U.S. Constitution does not grant citizenship at birth to a child simply because he was born within the borders of the United States. Those advocating this interpretation of the 14th Amendment insist that it is the allegiance (complete jurisdiction) of the child's parents at the time of birth that governs the issue of the child's citizenship, not his geographical location at the time of birth.



Written by [Joe Wolverton, II, J.D.](#) on August 31, 2010

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In light of the Supreme Court's holding in *Wong Kim Ark* and its progeny, the locus of the accurate constitutional limits of the 14th Amendment switches to the Constitution itself and the legislative history of the enactment of the relevant clause. In large measure, the analysis will center on the existence of constitutional authority for the grant of citizenship to the hundreds of thousands of anchor babies born annually to the millions of illegal aliens.

### **The Original Meaning**

The first prong of the inquiry is the meaning of the key phrase, "subject to the jurisdiction thereof" as used in the text of the 14th Amendment. The clause in its context reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside."

As any first-year law student can testify, the word "jurisdiction" has several equally justifiable applications. For example, there is personal jurisdiction, which refers to a court's power over an individual person or piece of property. If a court does not have personal jurisdiction over a defendant or property, then the court cannot bind the defendant to an obligation or adjudicate any rights over the property. Another aspect of jurisdiction relates to the court's power over the subject matter of a case at bar. So-called subject-matter jurisdiction is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter.

Not surprisingly, many if not most of the legislators serving in the Congress at the time of the passage of the 14th Amendment were lawyers, and as such would have been familiar with the distinct definitions of the word "jurisdiction" and with the appropriate use thereof. Furthermore, as attorneys, these representatives would have been accustomed to a precision of language, particularly when the concise usage of a word would impact a subject as valuable as citizenship in the Republic.

What, then, was the sense of jurisdiction the authors of the citizenship clause sought to convey when they penned the phrase in dispute? Fortunately for all genuinely interested parties, the record of the Senate deliberations on the 14th Amendment is available for review (in fact, the very pages are published online).

The principal architect of the citizenship clause was Michigan Senator Jacob Merritt Howard, a Republican representing Detroit. Howard was one of the charter members of the modern Republican Party. In fact, he helped formulate the platform of the GOP that was announced at its first convention held in Jackson, Michigan, in 1854.

Senator Howard, who began his congressional career as a member of the Whig party, allied himself with President Lincoln's coterie of supporters and played a vital leadership role on the Joint Committee on Reconstruction. As such, Howard crafted much of the language that was eventually ratified as part of the 14th Amendment.

During the vituperative debates that embroiled the Senate in those historic days following the Civil War, Senator Howard insisted that the qualifying phrase "subject to the jurisdiction thereof" be inserted into Section 1 of the 14th Amendment being considered by his colleagues. In the speech with which he proposed the alteration, Howard declared:

This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, [or] who belong to



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the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.

How could a person “born in the United States” be simultaneously a citizen and a “foreigner” or “alien” if the mere fact of nativity settled the question of citizenship?

The Senator’s explanatory introduction crystallizes the intent of the man who wrote the citizenship clause. His statement suggests strongly that the legislators who supported the 14th Amendment never intended to swaddle all babies born within the geographic boundaries of the United States within the snug and secure blanket of citizenship. The doctrine of jus soli was not contemplated by the Congress and is inconsistent with the record of debates preceding the passage of the 14th Amendment’s citizenship clause.

We need not, however, rely solely on the authority of Senator Howard for support of this averment. Howard’s understanding of the existing “law of the land” was reinforced by several of his fellow senators, including Lyman Trumbull, the co-author of the 13th Amendment (the other of the two “Reconstruction Amendments”).

Trumbull, in commenting on the intended application of the restrictive “subject to the jurisdiction thereof” language appended to the citizenship clause, asked, “What do we mean by ‘complete jurisdiction thereof?’ Not owing allegiance to anybody else. That is what it means.” That is about as direct a statement as one could hope for in such matters.

For good measure, Senator Howard seconded Trumbull’s opinion: “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.... That is to say, the same jurisdiction in fullest extent and quality as applies to every citizen of the United States now.”

Any reading of the plain language of the statute coupled with the pertinent legislative commentary reveals that a child born to persons illegally present in the United States cannot be thought to benefit from the boon of citizenship when their parents are by very definition aliens to the “extent and quality” of that most desirable status. Can the fountain of liberty send forth the sweet water of citizenship at the same place as the bitter water of unlawful entry?

The explications of the legislators from whose pens flowed the “citizenship clause” and whose voices sounded in approval thereof serve to disarm the proponents of citizenship for anchor babies. The Supreme Court haughtily has disregarded the declared intent of the framers of the 14th Amendment and misconstrued the keystone “subject to the jurisdiction thereof” clause, thereby creating a right and a class of citizens by judicial fiat. The notion of the Constitution as a document of specified and limited enumerated powers is foreign to the Court and has been for over a century.

Rather than to the serendipity of birthplace alone, citizenship rightly defined depends upon the undivided and lawful allegiance of the child’s parents. May a child legally inherit property from his parents that his parents do not own? While that child indisputably may work and attain that property by his own effort, his parents may not bequeath such to him, for it is not lawfully within their power to dispose.

For the last word we turn to a man whose opinion is widely considered the first word on the Constitution: James Madison:

When we are considering the advantages that may result from an easy mode of naturalization, we



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ought also to consider the cautions necessary to guard against abuse. It is no doubt very desirable that we should hold out as many inducements as possible for the worthy part of mankind to come and settle amongst us, and throw their fortunes into a common lot with ours. But why is this desirable? Not merely to swell the catalogue of people. No, sir; it is to increase the wealth and strength of the community; and those who acquire the rights of citizenship, without adding to the strength or wealth of the community are not the people we are in want of.

The question remains, will our elected representatives and the justices of the Supreme Court uphold their sacred oaths to preserve, protect, and defend the Constitution against all enemies, foreign and domestic, or will they continue to permit the hostile trespasses beyond the clearly marked and historically recognized boundaries of American citizenship?



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