



Written by [Joe Wolverton, II, J.D.](#) on August 31, 2015

## Birthright Citizenship: Constitution Above Controversy

Every Republican presidential candidate has weighed in on the issue of birthright citizenship, a concept formerly known as “anchor babies.”

As reported by [The New American](#), Donald Trump sparked this latest birthright brushfire when he released his campaign’s immigration plan that called for an end to the policy of recognizing as citizens children born to illegal immigrants. “This remains the biggest magnet for illegal immigration,” Trump wrote. “By a 2:1 margin, voters say it’s the wrong policy, including [Democratic Senate Minority Leader] Harry Reid, who said ‘no sane country’ would give automatic citizenship to the children of illegal immigrants.”



On August 28 during an appearance on the Hugh Hewitt radio show, GOP contender and former governor of Arkansas Mike Huckabee said he would support a law eliminating the granting of citizenship to the children of foreigners present without permission in the United States.

When asked by Hewitt if he would support such a law, Huckabee responded:

I think when you see even advertisements in China, advertising essentially “birth tourism,” where people are able to purchase packages so they fly to the U.S., have their baby in the U.S. so it has dual citizenship, and these aren’t people who are impoverished, looking for a Medicaid payment. These are very wealthy people who are coming here so their child will in essence be put a foot down and say, “I have American citizenship,” dual citizenship, American and Chinese. And I just don’t see how we can sit back and say that that is perfectly OK.

It seems that Huckabee was for birthright citizenship before he was against it, however, as he once famously preached that “you do not punish a child for something the parent did.”

On the heels of Trump’s release of his immigration plan, fellow Republican presidential hopeful (and son of immigrants) Senator Marco Rubio said he would oppose legislation ending birthright citizenship. “I’m open to doing things that prevent people who deliberately come to the U.S. for purposes of taking advantage of the 14th Amendment, but I’m not in favor of repealing it,” Rubio told reporters in Iowa.

Dr. Ben Carson made no bones about his feeling on the subject. He proposed a way to oppose birthright citizenship and still prevent the separating of families. “We can keep families together,” the former surgeon said. “If they came here and did that, we can still keep them together by packaging them up and sending them back.”

Rick Santorum waded into the anchor baby bathwater, too. “The people who brought these children here did so breaking the law with a full understanding,” Santorum said at the National Press Club. “Of course I feel bad, we all feel bad; we all hope people aren’t in a situation where they have to break the



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law to make a better life for their family, but that doesn't obviate the fact that they have broken the law and that there are consequences for breaking the law," he added.

Although he has contributed little to this latest constitutional conflagration, in 2011, Senator Rand Paul (R-Ky.) joined with Senator David Vitter (R-La.) in calling for a constitutional amendment specifically excluding the children of illegal immigrants from the protections of the 14th Amendment.

It's incorrect to assume that "the 14th Amendment confers birthright citizenship to the children of illegal aliens, either by its language or intent," the lawmakers said in a statement announcing the effort. "This resolution makes clear that under the 14th Amendment a person born in the United States to illegal aliens does not automatically gain citizenship."

While some may see the senator's effort as worthwhile, a more careful consideration of the relevant constitutional provisions reveals that the birthright citizenship debate is yet another red herring thrown by statists to distract Americans from the underlying principles and to compel them to seek settlement of the issue by the Supreme Court, completely ignoring the states' role in our federal system.

With due regard to those who consider the term "anchor babies" to be offensive, the following analysis should shed considerable light on the label and the controversy.

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." (Emphasis added.)

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



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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.

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 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.



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