OF BIRTHRIGHT CITIZENSHIP, ‘ANCHOR BABIES’ RHETORIC, AND PUBLIC POLICY

Mariusz Ozminkowski
ABSTRACT

Although other parts of the 14th Amendment are some of the most litigated areas of the constitution, the citizenship clause has not been seriously challenged. It has been always seen as granting the right to an automatic citizenship for all born in the United States. And yet, from time to time politicians, commentators, and a few legal scholars, question the traditional interpretation of the clause when applied to illegal immigrants. The question is whether such challenges are simply prompted by the new anti-immigration rhetoric of presidential primaries or there are good reasons to seriously reexamine the meaning of the citizenship clause. This paper presents a brief legal and historical analysis of the citizenship clause and argues that the traditional reading as granting an automatic citizenship to all who were born here is correct and beyond dispute. Further, the paper suggests that any problem with illegal immigration or abuses of the system should not be dismissed, but must be separated from any legal conclusions. It is clear that illegal immigration is only minimally related to the citizenship clause. Thus, any remedies must come through public policy.

“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.” These words, the citizenship clause of the 14th Amendment, have been always seen as granting the right to an automatic citizenship for all born in the United States. As one author wrote, “If you’re born in U.S. territory, you are a U.S. citizen, no other questions asked.” (Spiro 2008: 9). Although other parts of the 14th Amendment are some of the most litigated parts of the constitution, the citizenship clause has not been seriously challenged. Surely, one of the reasons is that from the very beginning of the United States, a long time before the 14th Amendment, the republic followed an old English tradition of jus soli, the principle that all born within the boundaries of the country are automatically citizens of the country. One shameful exception was made for
African Americans with the Supreme Court stamp in the infamous Dred Scott case of 1857. The 14th Amendment was adopted to remedy that situation, expand the tradition of jus soli to all, and enshrine the right in the Constitution.

And yet, although there were no serious legal challenges to the citizenship clause, from time to time politicians, commentators, and a few legal scholars, question the traditional interpretation of the clause when applied to illegal immigrants. Some of the more recent challenges come on the wave of presidential debates and campaigns prompted by the fury of Donald Trump’s presidential run. Of course, a great deal of what we hear is an angry reaction to problems with illegal immigration and what is seen as the abuses of the right to citizenship by birth. As the argument goes, the illegal immigrants should not be here in the first place, but instead of being sent back they get the reward of citizenship for their children. Although most of the illegal immigration would have happened regardless of the citizenship laws, many claim that the birthright citizenship is a major incentive and fuels illegal immigration further. For many others, even more infuriating are the cases of women from Mexico and as far away as China, who enter the United States temporarily for no other reason but to give birth to their children and acquire citizenship for them, for the infamous “anchor babies.”

Although there is no reason to minimize the magnitude of illegal immigration, it is not clear how much the citizenship rights contribute to the problem. It can be assumed that in difficult times in their own countries, the immigrants will keep coming to the United States regardless of the citizenship. Further, a better control of illegal immigration is possible through public policy, without any need for changes or reinterpretation of the 14th Amendment. And yet, so many think that reinterpreting or changing the citizenship clause of the 14th Amendment will
miraculously solve the problem of illegal immigration. It is very unfortunate that an interpretation of the Constitution became a litmus test for one’s policy preferences and attitudes towards illegal immigration. And although the most vitriol now comes from the Right, the other side is not entirely innocent either. Arguing that the 14th Amendment treats all births on the American soil equally, whether from citizens, legal or illegal immigrants, does not mean supporting illegal immigration and the practice of taking advantage of the “birthright.” But arguing the opposite does not mean being intolerant, hating illegal immigrants, or just being un-American. Thus, the first step in further discussion must be to eliminate all unnecessary policy and ideological influences. Although constitutional barriers in solving some social problems in the country could be frustrating, the interpretation should not depend on the problem. Yes, problems can trigger a new debate and lead to new ways of seeing the Constitution, but if the interpretation is clear, the problem won’t change it.

What are the objections from the opponents of the traditional understanding of the citizenship clause? The main argument rests on the meaning of the word ‘jurisdiction.’ As one author argues, the clause mandates citizenship to those who meet both of the constitutional prerequisites: (1) birth (or naturalization) in the United States and (2) being subject to the jurisdiction of the United States. (Eastman 2006). Therefore, being born on the territory of the United States is not sufficient. The newborn must be also subject to the jurisdiction of the United States. But the question is: is it not the same being here and being subject to the jurisdiction? Senator Jacob Howard, one of the authors of the 14th Amendment, in a speech introducing the Amendment, but before the first sentence was added, discussed the meaning of citizenship and said the following, “A citizen of the United States is held by the courts to be a person who was
born within the limits of the United States and subject to their laws.” And further, “They became such in virtue of national law, or rather of natural law which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country.” Senator Howard equates “within jurisdiction” with “being subjects or citizens.” (Brest et al 2006). That is the common understanding of the word jurisdiction.

Thus, the moment one crosses the boundary of the United States, the person is subject to the authority of the United States. Whether the person accepts the authority or tries to avoid it, as illegal immigrants often do, is not the issue. The avoidance of legal authority of the police enforcement, immigration services, and the courts would actually reinforce the point that illegal immigrants are more aware (and afraid) of the jurisdiction of the United States than legal residents who often don’t pay much attention to it. As I have mentioned earlier, the broad understanding of the word jurisdiction is consistent with the English common law tradition. In the Calvin’s Case of 1608 the judges held that all persons born within any territory under the rule of the King of England are subjects of the King. Thus, it is not that they have to be under King’s complete jurisdiction before their birth, but they become a subject of the sovereign into whose protection they were born. That was generally the same tradition in the colonies and later the United States.

The opponents of this broad understanding of the word ‘jurisdiction’ reach to other words of Senator Howard, who during the debate over the amendment stated 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, who belong to the families of ambassadors or
foreign ministers accredited to the Government of the United States, but will include every other
class of persons.” The dispute is whether he meant foreigners and aliens in relation to
ambassadors and foreign ministers or any foreigner or alien. However, regardless of his
intentions, the sentence cannot be taken out of the context of the entire debate by the senators
involved in drafting the amendment. A number of objections were raised during the debate,
including the question about children of the Chinese immigrants in California and the question of
Native Americans, but it can be concluded that at the end, and to dismay to some of the senators,
the majority agreed that the Amendment would grant citizenship to all. The only exemption on
which almost all Senators agreed was that concerning Native Americans, but that happened only
because they were treated as being quasi foreign nations within the boundaries of the United
States and were not subject to the same laws (even when leaving reservations). As Senator
Lyman Trumbull stated, “it would be a violation of our treaty obligations … to extend our laws
over these Indian tribes.” The same could be said about foreign diplomats and others in similar
circumstances.

The opponents are not convinced. They claim that the 14th Amendment was derived from
the language of the 1866 Civil Rights Act, thus the Act provides the key to the meaning of the
14th Amendment. But the language of the Act differ from the language of the Amendment.
Well, if I had a dinner yesterday and I asked for a steak with baked potatoes but today I’m asking
just for a steak, there is no reason for the waiter to deliver my order based on last night
preferences. If the authors of the citizenship clause wanted the language of the Act to become
the language of the Amendment, they should have done so. They did not. The 1866 Civil Rights
Act states: "All persons born in the United States, and not subject to any foreign power,
excluding Indians not taxed, are hereby declared to be citizens of the United States, “but the citizenship clause specifically omits “and not subject to any foreign power.” Why would they do that? In one of his articles professor Eastman argues that the writing of the authors of the 14th Amendment is exact, careful, and follows principles of legal writing. But then he is rather dismissive of some of the inconsistencies, basically suggesting that “that’s not what they meant.”

Well, we cannot have it both ways. Either the authors meant what they said or they cannot be trusted with the clarity of their statements. One cannot pick one or the other whenever convenient.

But let’s assume for a moment that what Senator Howard meant was ‘any foreigner or alien’ and that his interpretation was accepted and supported by all who voted for the Amendment. If so, he would bring the entire citizenship clause to an absurd. At that time there was no illegal immigration, therefore Senator Howard could not have meant foreigner or alien as someone who is illegally in the United States. The words would have to mean any foreigner and any alien, thus a person not native to the United States, a person born in a foreign country. Thus, according to this line of reasoning, children of foreigners would be excluded from citizenship by birth. Why then even mention the birth requirement if the main requirement is having parents (or one parent) who is a citizen of the United States. If that was the intent, then the citizenship clause should read “all persons born in the United States to U.S. citizens are citizens of the United States.” Or, at least, the text of the Civil Rights Act of 1866 should be placed there. Neither happened.

At the time of the adoption of the 14th Amendment, the foreign born population in the United States was about 14%. Any child born from parents in that group would not be eligible
for citizenship by birth. That would mean more restrictive policies of citizenship. It would be rather strange for the authors of the 14th Amendment to expand citizenship rights to African Americans while limiting them for children of millions of white immigrants from Germany or England. And again, even if that was the intent, at no time after the adoption of the 14th Amendment, there was any attempt to interpret the clause that way. Just two years later Congress passed The Naturalization Act of 1870, thus had an opportunity to ‘correct’ the law under the 14th Amendment. If a million or so American born persons of foreign parents were not eligible for citizenship by birth, they would have to acquire citizenship by naturalization, but the Act did not make any provision for them.

The naturalization was reserved for foreign born persons residing in the United States and wishing to acquire American citizenship. There was no change in that regard from the first Naturalization Act, in 1790, which permitted free white persons to be naturalized after two years of residence in the United States. Five years later Congress extended the requirement of residence and added the requirement of a preliminary declaration of intention and renunciation of former allegiance. All subsequent changes were concerning the length of residency, the court jurisdiction (state versus federal) and, unfortunately, included the color requirement. But the birthright citizenship was never questioned. The debate over the Act was vigorous and contentious. At stake was mostly the control over foreign born naturalized citizens and their right to vote, but there was no challenge to the principle of citizenship by birth. Senator Howard, still a Senator from Michigan had a chance to correct that or at least express his concerns, but he never did. Nobody else did. Even if Senator Howard believed that foreigners’ children born in
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the United States should be excluded from the right to an automatic citizenship, which is not clear anyway, nobody else did (Wang Xi 1995).

In the subsequent Supreme Court cases, the citizenship clause and the term jurisdiction were consistently interpreted that way. In the 1898 case of United States v. Wong Kim Ark, the court ruled that Wong Kim Ark was a United States citizen by the fact that he was born in the United States. The fact that his parents were Chinese and aliens did not have any bearing on the case. The only question was whether or not they belong to any of the excluded groups that would not be subjects to the United States jurisdiction, namely diplomats. The court concluded that the parents of Wong Kim Ark “were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.” Thus, they were subject to the American jurisdiction. Thus, their son born in the United States was entitled to American citizenship.

In more recent cases, for example Plyler v. Doe (1982) or Hamdi v. Rumsfeld (2004), the Supreme Court continued its agreement with the original understanding of the Citizenship Clause. In the first case, Justice Brennan wrote that “every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.” (457 U.S. 202, 1982). As James Ho emphasized in his analysis of the case, “The Four dissenting justices … expressed no quarrel with his [Brennan] threshold determination that “the Fourteenth Amendment applies to aliens who, after their illegal entry into this country, are indeed physically ‘within the jurisdiction’ of a state.” (Ho 2006).

It was not my intention to conclude and close the entire legal debate on five or six pages. Yes, I believe that the traditional reading of the Citizenship Clause as granting an automatic
citizenship to all who were born here is correct and I’m convinced that my argument is strong enough to prove it (though I realize that a full argument would require much more careful analysis). But I also wanted to point to the unnecessary mixing of constitutional law with politics, ideology, and angry rhetoric. Hearing the anger and the hate from some politicians and all these “know-all” radio and television commentators is nothing new. The loudest and often the most ignorant are the most visible. Unfortunately, even those who otherwise have some sense and are not as stupid as they look use the same tactics of exaggeration to make themselves heard. Of course, it is actually very nice to engage in a constitutional argument. It helps an average person to understand the law, the controversies, and it should make him or her appreciate how difficult often is to interpret the Constitution. However, it seems that the loudest voices don’t argue the Constitution, but their own policy preferences.

When I teach the First Amendment laws, time and time again I encounter arguments against many Supreme Court rulings in the area as promoting hate, pornography, racism, and vulgarity. The argument often goes like “But surely the Founders would not support burning the flag…” I’m sure they would not, but that’s not the point. As Justice Oliver Wendell Holmes said, “The principle of free thought is not free thought for those who agree with us but freedom for the thought we hate.” And there is something similar with all other laws. One could argue that the Founders would not approve of the easy access to firearms, but that’s not how most conservatives read the 2nd Amendment today. And one could argue that the authors of the 14th Amendment would be offended by the practice of what is known pejoratively as “anchor babies,” but that’s not how liberals see it. In both cases, and many others, the laws as written a
long time ago lead to consequences that surely were not intended. But they remain the laws whether we like them or not. At least as long as we don’t amend them.

The American Constitution and the tradition of judicial review are, as the saying goes, the blessing and the curse of the American system. They provide strong protection for the individual rights, but sometimes they prevent needed reforms that should be left for the legislatures, as perhaps these in gun control or illegal immigration areas. But being angry at the Constitution and calling each other names won’t solve the problem. Perhaps we should consider trying a better policymaking a bit harder.
References


