



CONSTITUTIONAL CITIZENSHIP

A LEGISLATIVE HISTORY

By Garrett Epps

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ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

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ABOUT THE IMMIGRATION POLICY CENTER

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Introduction

Attacks against the Citizenship Clause of the 14th Amendment have picked up in recent months, with legislators at both the national and state levels introducing bills that would deny U.S. citizenship or “state citizenship” to the children born to unauthorized immigrants in the U.S.

There are two strands of attacks on birthright citizenship. One strand arises out of simple nativist anger at the impact of immigrants, legal or otherwise, on society. The other argues that the current interpretation of the Citizenship Clause as covering the children of “illegal” immigrants is inconsistent with the “original intent” of the Framers of the 14th Amendment. Originalism is often used as a method to clarify unclear portions of constitutional text or to fill contextual gaps in the document. This is not, however, how originalism is being used in the context to the Citizenship Clause. Here, originalists use clever arguments and partial quotations to eradicate the actual text of the Amendment. In essence, they claim the Framers did not really mean what they said.

Originalists from this latter category have attempted to show that the Framers of the 14th Amendment never intended to bestow birthright citizenship on the children born in the U.S. to illegal immigrant and certain legal immigrant parents. However, their claim to establish the “clear intent” of the Framers and ratifiers of the 14th Amendment fails on several fronts. Their argument: 1) misapprehends the contemporaneous intellectual background of the Clause; 2) mischaracterizes the relationship between the Civil Rights Act and the Clause; 3) distorts the tenor of the legislative debates around the Clause itself; 4) offers an implausible reading of the constitutional policy embodied in the Amendment as a whole; and 5) fails to understand that, historically, the Framers of the Amendment faced a situation with regard to immigration policy that was in fact remarkably similar to our current one.

In other words, the proponents of a restrictive “intent” of the Clause have failed to carry their burden of proof.

I do not claim to have divined the “original intent” of the Framers of the 14th Amendment about the situation of the undocumented, which was one that was not precisely present in the law in 1866, the year of the framing. We simply cannot know how members of the 39th Congress would have responded. We can, however, investigate some things. First, and most readily accessible, is what the Framers said as they debated the clauses of the 14th amendment. Second is the intellectual and political background upon which they drew in the writing of the Amendment. Finally, we can understand the overall situation that gave rise to the Amendment – what recent events had occurred and what overall social concerns they sparked.

After much examination, the history of the Amendment’s framing lends no support to the idea that native-born American children should be divided into citizen and non-citizen classes depending on the immigration status of their parents. Most importantly, following the Civil War, the Framers of the 14th Amendment could not have intended to re-create a new hereditary and subordinate caste of native-born noncitizens.

Applying 19th Century Ideas to 19th Century Laws

Two Theories of Citizenship

To garner the “original intent” of the framers of the 14th amendment, the originalists often look to legal arguments made at the time of the Revolution and Framing of the Constitution, rather than by legal experts who were writing at the time of the Civil war. Originalists have presented two conceptions of citizenship – ascriptive and consensual. In this analysis, ascriptive citizenship (citizenship by birth) is questionable because it involves no act of consent by the new citizen or her parents. This concept is seen as medieval in origin and as contravening the trend of contemporary political theory about citizenship. Advocates of abolishing or modifying birthright citizenship note also that many contemporary nations do not provide it, suggesting by implication that the Clause is an antiquated remnant of a former time without relevance to present demographic issues.

Consensual citizenship, on the other hand, is based in the scholarship of the Enlightenment, most prominently John Locke (generally agreed to be a significant influence on the thinking of the Framers of the 1787 Constitution), who called into question the justice and validity of the ascriptive principle, suggesting instead that true allegiance and citizenship could be based only on reciprocal consent. For Locke, “[a] child...could not be a government’s subject because subjectship must be based on the tacit or explicit consent of an individual who has reached the age of rational discretion,” according to scholars Peter Schuck and Rogers Smith, who support a restrictive reading of the Clause.¹ They, like the “originalists” in the current debate, conclude that the “subject to the jurisdiction” language of the Citizenship Clause embodies a restrictive, consensual definition of citizenship. They contend that the 14th Amendment’s “central political ideas were not ascription and allegiance but consent and individual rights.”²

Citizenship and the Abolitionists

But the 14th Amendment was drafted in the 19th century, not at the time of the Revolution. By the time of the 14th Amendment, political thinkers had moved beyond the ideas of Locke and were concerned with the contemporary dilemmas including the inclusion of slaves, former slaves, and their children in the U.S. polity. Originalists are in error when they insist on interpreting a 19th century enactment exclusively in terms of 18th century ideas.

Both American legal history and the intellectual history of the antislavery movement produced a rich body of material reformulating the idea of American citizenship – one that makes an inclusive reading of the Clause much more plausible and a restrictive one anomalous.

A comprehensive survey of antebellum citizenship law concludes that birthright citizenship was the legal norm in American law during the first half of the 19th century. Birthright citizenship was an unquestioned principle of American law until the slavery controversy drove pro-slavery jurists to construct an alternative model of citizenship that could exclude American-born black people on the ground that the polity did not “consent” to their membership. Many American lawyers and lawmakers would have seen the Citizenship Clause as merely a declaration of what the law already was, as well as a rejection of the exclusion of black people.

According to Jacobus tenBroek, one of the pioneers of modern 14th Amendment scholarship, “in some ways doctrinally and perhaps historically the most significant contribution made by the abolitionists in the constitutional development of the United States was their conception of paramount national citizenship.”³ This paramount notion took the idea of citizenship firmly out of the hands of the states.

An American citizen, whether “natural born” or naturalized, was a citizen of the U.S.; citizenship arose out of the nation, under the Constitution, rather than as a derivative boon arising out of state citizenship. The paramount idea was also strikingly inclusive. It regarded birth itself as sufficient for citizenship, and saw membership in the American family as a child’s right, quite independent of the qualities of his or her parents. Persons of African descent born in the U.S. were in fact citizens even though their parents, brought here as slaves, were not eligible for naturalization; the fact of birth in the U.S. was enough.

A proper consideration of 19th century political thought—the thought that formed the real background of the framing of the Citizenship Clause—furnishes strong evidence that the restrictive thesis, based on Locke and other Enlightenment thinkers, is at best implausible. Readily available evidence suggests that the thinkers who guided the Framing saw birthright citizenship as the norm, with two exceptions, the first being children of diplomats and the second (as we will see below) being children of Indians living under tribal government. This position was not ambivalent, ill-thought-out, or crudely based on medieval norms. It represented the fruit of the most advanced progressive social thought available to Americans in the year 1866.

Separating the Civil Rights Act and the 14th Amendment

The 39th Congress dealt with the issue of birth and citizenship in two different bills, first in the Civil Rights Act of 1866 and second in the 14th Amendment. Originalists tend to conflate the legislative debate around the Civil Rights Act and that of the 14th amendment, but it is important to resist the temptation to treat these two measures and the debates over them as if they were one and the same. The two measures were very different.

The Civil Rights Act

The Act was a conservative measure, designed to conciliate President Johnson and gain his signature. The Act was designed to put the responsibility for enforcing civil rights in the hands of the federal courts. President Johnson vetoed the Act anyway, and Congress re-passed the bill over the President’s veto.

Senator Lyman Trumbull was the drafter of the Civil Rights Act; he played no role in the drafting of the Amendment. The Civil Rights Act proclaimed that “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”. It is the Civil Rights Act language that the proponents of a restrictive reading of the Clause regard as indicating the 14th Amendment framers’ intent to limit birthright citizenship to children whose parents had no other citizenship status elsewhere in the world.

However, the narrow reading of the Civil Rights Act language is not supported by the legislative history, and the restrictive intent originalists attribute to the language does not hold water for the Act itself, much less for the 14th Amendment. A colloquy between Trumbull and Senator Edgar Cowan of PA sheds a considerably different light on the provision. Cowan asked whether the language would include the “children of Chinese and Gypsies born in the country?” And Trumbull responded, “undoubtedly.”

The language of the Civil Rights Act is significant, but does not directly demonstrate anything about the clear intent of the 14th Amendment. The Act is a statute, enacted under the authority of some combination of the Naturalization Clause and the 13th Amendment. The 14th Amendment is a change to the Constitution, creating entirely new rights and providing government with new powers.

The Citizenship Clause

The 14th Amendment was drafted not by Trumbull and the Judiciary Committee but by the considerably more radical Joint Committee of Fifteen on Reconstruction. The committee was seeking to wrest control of Reconstruction from President Johnson. Because it was offering a constitutional amendment, the committee did not worry about the limits of congressional power. In fact, the amendment was designed to augment that. And the committee made no concessions to the President's conservative views in order to avoid a veto since the President has no veto over proposed constitutional amendments. For all these reasons, it seems at best reductive to assume that the citizenship language in both the Act and the Amendment had identical meanings and intentions. It has different wording; it emerged from a different political situation; it was adopted under different procedures and had different authors; and it was proposed by different committees. Its meaning must stand on its own.

The draft 14th Amendment was introduced in the House of Representatives in May 1866, and adopted by the House without any citizenship language. Since the House did not address citizenship, the only debate that can shed light on its intent is that which took place on the Senate floor during the process of adoption and amendment of the citizenship language.

Senator Jacob Howard of Michigan was the Senate floor manager of the draft amendment. Originally he introduced the House measure, which did not have any citizenship language. Senator Ben Wade of Ohio, however, moved to include birthright citizenship; after a secret Senate caucus, Howard introduced new language agreed to by the caucus to meet Wade's concerns: "[A]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." Howard explained the meaning of the new language as:

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, 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 person.

Immigration restrictionists today falsely claim that Howard was the author of the Clause and that his statement provides the final resolution on the issue. They take a part of this statement out of context and point to it – "this will not, of course, include persons born in the United States who are foreigners" - - as proof that birthright citizenship was not to include the children of immigrants, particularly illegal immigrants.

However, when the statement is read in its entirety, it is clear that Sen. Howard was talking about a specific subset of foreigners. Children of accredited foreign diplomatic personnel, even if born on U.S. soil, are not birthright citizens. Because of diplomatic immunity, these children are not "subject to the jurisdiction" of the United States. Like their parents, children of diplomats are not subject to arrest or civil suit, even if they commit crimes or torts on U.S. soil. That was the law in 1866, and it is the law today, and that is what Howard was referring to.

American Indians and “subject to the jurisdiction thereof”

There was one other group of people excluded by the “subject to the jurisdiction” language: Native Americans living under tribal governments. For Trumbull, “subject to the jurisdiction thereof” excluded specific Native Americans -- not all native people, but those who remained on reservations and were “subject to the jurisdiction” of their tribal governments. By law, they could not be sued in federal or state courts, or arrested and held by local authorities. Disputes with these Natives were handled as government-to-government matters.

Tribal Indians were a large population resident within U.S. territory. Over-expansive draftsmanship of the Citizenship Clause would have had the unintended effect of making all of them U.S. citizens, voiding numerous treaties and presenting federal courts and law enforcement officials with all-but-insuperable problems of adjudication and enforcement. It is not surprising that the Framers of the 14th Amendment would include language omitting them from the declaratory language of the Clause.

Gypsies as the “Illegal Immigrants” of 1866

Some argue that there was nothing like an “illegal alien” at the time of the Framing, and thus the Framers could not have intended to include the children of illegal aliens in the citizenship clause. Immigration restrictionists are concerned that “illegal aliens” in their presence and their conduct constitute a threat to the American system of law. They have come here without permission (or have remained after temporary permission has expired); they live here in defiance not only of entry restrictions but in evasion of domestic laws. They constitute a population that has deliberately chosen not to become part of the American system and that thus threatens the very American idea of assimilation.

The “gypsies” in the U.S. were the closest thing the U.S. had at that time to “illegal” immigrants—a shadow population that was considered to be living in defiance of American law. Senator Cowan referred to them as interlopers “who recognize no authority in [Pennsylvania’s] government; who have a distinct, independent government of their own—an imperium in imperio; who pay no taxes, who never perform military service; who do nothing, in fact, which becomes the citizen.”⁴ Sen. John Conness of California, a proponent of the Amendment who was himself an immigrant from Ireland, responded categorically that these criticism of “gypsy” parents had no bearing on their childrens’ citizenship. The Clause, he said, was “a simple declaration” that these children “shall be regarded as citizens of the United States, entitled to civil rights, to the right of equal defense, to the right of equal punishment for crime with other citizens; and that such a provision should be deprecated by any person having our claiming to have a high humanity passes all my understanding and comprehension.”⁵

It is thus ahistorical to suggest that the Framers did not foresee the legal and social characteristics of what we today call “illegal” or “undocumented” immigrants. They did; and they rather categorically stated that these characteristics—ineligibility for citizenship, unacceptability as members of the body politic, isolation from American culture and systematic evasion of American law—would not constitute exceptions to the Amendment’s grant of birthright citizenship. The proponents of the amendment gave an unqualified affirmation of the citizenship of American-born gypsy children.

The Chinese as the “Temporary Immigrants” of 1866

Similarly, some question whether the children of certain legal immigrants were intended to benefit from birthright citizenship because their parents may not fall under the jurisdiction of the U.S. or may owe allegiance to any foreign government. The case of Chinese immigrants is instructive.

Chinese immigrants were present in the U.S. legally, and were citizens of another nation. Chinese-born people resident in the U.S. were ineligible to naturalize as citizens because, under the Naturalization Act of 1790, naturalized citizenship was limited to “free white person[s].” Thus, every immigrant from China was by definition not only an alien but a “subject” of the Chinese empire and thus owed allegiance to a foreign state. They were the subject of an explicit and pointed refusal by the polity to grant its consent to their membership in the body politic. Nonetheless, the sponsors of the 14th Amendment, when asked in clear terms about this case, were unwavering in their insistence that the Citizenship Clause was to cover their children.

Immigration was Not a Divisive Issue at the Time of the Framing of the 14th Amendment

Some originalists contend that the Framers could not have possibly imagined the reality of American immigration in the 21st century and could not have anticipated the question of birthright citizenship for the children of undocumented immigrants. Each generation imagines that its problems are different from those of all who have come before. But that is a cast of mind, not a historical conclusion. America in 1866 was a nation as profoundly transformed by immigration as it is in 2010. Issues of language, culture, religion, social mores and other aspects of the American identity were as salient then as they are now.

We would be making a profound historical error to imagine that the generation that framed the Clause was unaware that migration was a transformative and often destabilizing force in American society. During the Civil War years alone, the U.S. population increased by four million people –most of them immigrants. That represented eleven percent of the population in 1866. Foreign-born soldiers accounted for 20% of the Union Army’s total strength during the war. In 1850, the percentage of the U.S. population that was foreign born was 9.7%. By 1860 it was 13.2%. In other words, Americans in 1866, particularly those in the North, were at least as aware of immigration as we are today, when the issue is central to the domestic policy debate.

In short, the idea that the Framers lived in a simpler world, that they could not have intended their handiwork to apply to a chaotic, multicultural America, does not pass the most superficial historical scrutiny.

Penalizing the Children for the Guilt of their Parents

Some argue that children of illegal immigrants did not at the time of Framing, do not now, and should not fall within the meaning of “subject to the jurisdiction” because children carry at birth the taint of their parents’ criminality: “The parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law,” write authors Peter Schuck and Roger M. Smith. “They [the parents] are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership.”⁶

It may be true that the U.S. has tried to exclude the parents from the community by discouraging their entry. But the children have committed no crime at birth; have violated no law; have not transgressed the implied promise of a visa. To punish babies, much less to proscribe and entirely outlaw them, because of the perceived sins of their parents is alien to our moral and ethical tradition. Guilt is not hereditary; it is individual. We do not impose legal disabilities on the children of felons, for example, no matter how heinous their parents' actions. The conscience revolts at the idea, and the Constitution itself rejects ancestral guilt as a basis for policy.

The 14th Amendment is Precisely That—an Amendment. It is Intended to Make a Change, Not Continue the Status Quo

Does it seem likely that the anti-slavery thinkers who devised the Citizenship Clause as a means of overruling Dred Scott intended at the same time to create a new class of persons who had no rights a citizen is bound to respect? A contextual history of the framing of the 14th Amendment suggests that it was intended as a wide-ranging and fundamental change in the 1787 Constitution, not as a minor technical change leaving core concepts unchanged.

The Framers of the 14th Amendment, and the generation of political thinkers from which they sprang, regarded the 1787 Constitution as profoundly flawed. They were willing to undertake the desperate political struggle required for an amendment because they perceived that the original Constitution had failed catastrophically. That catastrophic failure, moreover, was directly related to the issue of inclusion and exclusion in the body politic. By giving the slave states disproportionate power in the federal government, they believed, the Constitution had created and empowered a complex political-social institution that the antebellum generation called the Slave Power.

A major tool of the Slave Power had been state control over citizenship, and insistence that human equality had no role to play in American life. Economic, social and political life depended upon the existence of a large, permanently subordinated class of noncitizens who could be exploited to produce wealth. The Citizenship Clause took this option away not only from the local elites but from the nation as a whole. Citizenship was to be extended to all—not out of grace, but as a means of protecting the nation from those who would reinvent the Slave Power.

The authors of the Citizenship Clause had seen Southern slavery eat away at the very idea of democratic government, until it nearly destroyed the United States. They set the 14th Amendment, and its citizenship language, in the American sky as a reminder that inequality by birth was the doorway to dishonor.

Thus, there is an alarming irony in the proposition that the U.S. should alter its constitutional system to create a large internal population of native-born noncitizens, a hereditary subordinate caste of persons who are subjected to American law but do not belong to American society.

If the children of "illegal aliens" are "illegal" themselves, then we have taken a giant step toward recreating slavery in all but name. If citizenship is the hereditary gift of the nation rather than the inheritance of its people, we are drifting back toward the discredited doctrine of Dred Scott. And if state governments arrogate to themselves the power to decide which groups within their borders "merit" citizenship, the central promise of the Amendment -- paramount national citizenship -- has been eviscerated.

The idea that the Framers intended to allow the creation of a new hereditary and subordinate caste of laborers should stir the profoundest skepticism.

Conclusion

It should be the goal of scholarship to dispel, not deepen, conceptual darkness. The work of many “originalist” scholars has added significantly to our understanding of the Constitution’s meaning and history. However, originalism must be careful not to substitute anachronistic, result-oriented ideas for a systematic interpretation of text, structure, and history.

The text of the Citizenship Clause is clear, and no vote of Congress or any state legislature should be allowed to undermine it. The clamor for hereditary inequality comes from people eager to repeat the mistakes of the American past, and by doing so, to betray the American future.

Endnotes

¹ Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*. New Haven: Yale University Press, 1985. p. 25.

² *Ibid.* p. 73.

³ Jacobus tenBroek, *Equal Under Law*. Collier Books: 1965. p. 94.

⁴ Cong. Globe, 39th Congress, 1st session 2890-91 (1866) (remarks of Sen. Cowan).

⁵ Cong. Globe, 39th Congress, 1st Sess., p. 2892 (May 30, 1866) (remarks of Sen. John Conness).

⁶ Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*. New Haven: Yale University Press, 1985. p. 95.