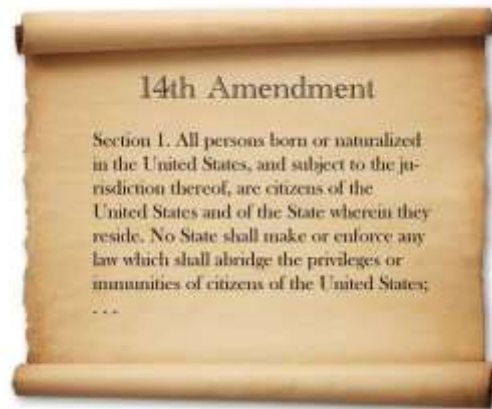


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TRUMP IS FORCING THE BIRTHRIGHT CITIZENSHIP ISSUE – AND THAT’S A GOOD THING!

By Steve Bakke  November 6, 2018



The issue of “birthright citizenship” goes back 150 years to the post-Civil War “reconstruction period.” It’s a complex issue, but nevertheless we laymen are asked to develop our own opinions about it. This is my attempt to sort out this issue and reach some sort of conclusion.

One of President Trump’s first declared intentions after announcing his candidacy in 2015 was to eliminate “birthright citizenship.” The current practice, and the debate itself, arise from the first sentence in Section One of the 14th Amendment. It’s referred to as the “Citizenship Clause” and reads as follows:

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 wording seems fairly straightforward, but as with everything in our world, it’s not that simple. The Supreme Court hasn’t directly addressed the issue of birthright citizenship as it applies to illegal immigrants, in particular as it relates to the “jurisdiction” requirement. Many legal experts lean on the tradition of having a “conventional understanding” that birthright citizenship is legitimate, even without benefit of legal precedent.

What was intended when the 14th Amendment was created? Congress wasn’t addressing immigration policy, rather, it was all about giving constitutionally legitimate citizenship to freed slaves and their children. That complicates this analysis. But if you block out all of the other bickering, and read the Citizenship Clause only within the context of granting citizenship to freed slaves and their children, the sentence makes much more sense.

Most relevant court decisions regarding this Amendment have dealt with narrowly defined issues having nothing to do with children of illegal immigrants. For example, one Supreme Court decision dealt with “children of ministers, consuls, and citizens or subjects of foreign States.” Another decision dealt specifically with children born to lawful permanent residents who were non-citizens.

Legal scholars come down on both sides of this issue. Many believe “subject to the jurisdiction” means merely being subject to our laws while in our country. However, others agree with Senator Lyman Turnbull, R-Ill, one of the Amendment’s authors back in 1868. He’s credited with stating that “subject to the jurisdiction” meant that an individual does not owe allegiance to any other country. But, how should that be interpreted relative to children of illegal immigrants? That’s a tough question.

A decision that seems relevant for this analysis is one which resulted in denying citizenship to a Native American because he “owed immediate allegiance to” his tribe and not the U.S. For Native Americans, mere presence in the U.S. when born wasn’t considered enough by the court. Again, interesting, seemingly relevant, but certainly not conclusive for deciding how this should apply to illegal immigrants. American Indians didn’t become citizens until the Indian Citizenship Act of 1924.

Most experts doubt that an attempt to do away with “Birthright” will survive review by the Supreme Court. However, a successful challenge would be no more of a reach than was the original Roe v. Wade decision. And while Trump’s imminent attempt to reverse “Birthright” by executive order may be somewhat ambitious, it’s really no more of an overreach than was Obama’s DACA executive order which Obama himself described as unconstitutional.

A rejection of “Birthright” is at least “inferable” from the “jurisdiction” statement in the Citizenship Clause. In Roe v. Wade, some experts on both sides believe no such inference can be made from the language of the Constitution. The Roe decision seems to have been “created from whole cloth” somehow using a “right to privacy” argument from the 14th Amendment’s Due Process Clause. The “Birthright” issue is less litigated and entrenched, or at least that’s the impression I’m left with.

If I’m right that no real precedent exists for “Birthright,” let’s get questions answered now and remove the mystery. Trump’s forcing of the issue is a good thing, whatever the outcome. In this environment of contentious immigration debate, it would be good to at least get this question answered by a definitive Supreme Court ruling.

I agree the challenge of eliminating “birthright” will have a difficult road to success, but I believe they have excellent arguments on their side. Let’s see what develops.