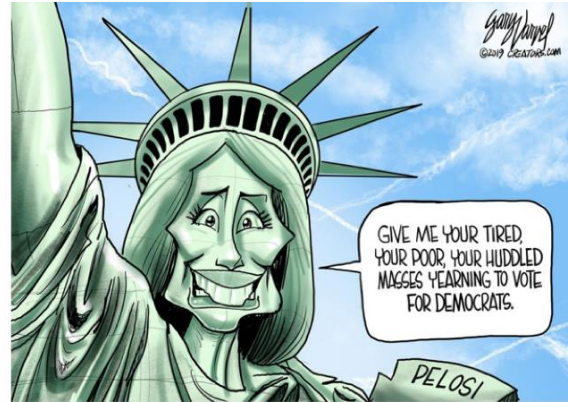


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## Birthright Citizenship: On the road to the Supreme Court

By Steve Bakke  August 4, 2025



*“All persons born or naturalized in the United States, and **subject to the jurisdiction thereof**, are citizens of the United States.....”* – the “Citizenship Clause” of the 14<sup>th</sup> Amendment, Section 1 to the U.S. Constitution.

During his first day as our 47<sup>th</sup> President, Donald Trump issued an Executive Order ending birthright citizenship for children born in the U.S. but without either parent being a citizen or lawful permanent resident. The myriad of lawsuits resulted in this issue being headed to the Supreme Court in its next session.

Following the Civil War, the Citizenship Clause reversed the 1857 “Dred Scott decision” which denied citizenship to people of African descent, even freed slaves. There was no reference to immigration policy.

Nevertheless, that clause has become the basis for “Birthright Citizenship.” Except for limited exceptions, this means any child born in the U.S. is automatically a citizen, even if born to undocumented immigrants. Did Congress intend to create citizenship benefits for children of families violating our laws by being in the U.S.?

In 1982, Supreme Court Justice Brennan created confusion and reinforced support for the amendment’s current interpretation. In a footnote to his *Plyler v. Doe* opinion, he wrote that “no plausible distinction with respect to 14th Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.” Is that true? Has the issue already been clearly decided as he implies?

In 1866, Michigan Senator Jacob Howard, a 14th Amendment author, commented on the Citizenship Clause: “This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to families of ambassadors or foreign ministers.” These words imply a general intention to exclude families of inhabitants not established as U.S. residents whether legally here or not.

Another Amendment author, Illinois Senator Lyman Trumbull, went on the record explaining that “subject to the jurisdiction thereof” means “not owing allegiance to anybody else,” i.e. another country. A valid question remains: “Does ‘jurisdiction’ require complete political jurisdiction?” Senator Trumbull certainly thought so. Or does the Amendment provide room for “partial allegiance.”

The Amendment's wording was derived from the 1866 Civil Rights Act which used the phrase "not subject to any foreign power." I haven't found any discussion claiming the Amendment intended to change the interpretation of those words in order to provide broader context.

Supreme Court decisions and other rulings related to the Amendment shed light on how this clause should be interpreted. In 1885, the State Department ruled that a man born in the U.S. wasn't a U.S. citizen because his parents were temporarily in the U.S. and returned to their homeland. In 1890 the Justice Department denied citizenship to an American-born daughter of a woman who didn't qualify for lawful admission to the U.S. Should decisions like those influence this debate?

Defenders of Birthright Citizenship, as it's currently applied for undocumented immigrant families, often rely on the 1898 decision *U.S. v. Wong Kim Ark* for support. Pursuant to the 1882 Exclusion Act, Chinese immigrants couldn't acquire citizenship. The U.S. born Ark had been denied reentry after visiting China because he was a child of Chinese immigrants. Ark's parents were permanent, legal, documented residents. He was therefore granted citizenship. The question of "illegality" didn't apply. It simply ruled that the 1882 Act didn't apply to U.S. born offspring of Chinese immigrants. The 1882 Act was eventually repealed.

There are valid arguments about whether the current interpretation is good policy. And common sense seems to favor the challenge regarding illegal immigrants. However, those arguments won't prevail against valid legal precedence. Repeating my theme, "Has the question of whether citizenship should be granted to American-born offspring of undocumented immigrants ever been specifically ruled on?" For various reasons, this contest is too close to call for many experts, even for some of whom favor the current interpretation.

Arguments presented to the Supreme Court and the logic behind the eventual decision will be interesting to follow. A decision in favor of the Administration won't be the action of a rogue Court. Rather, it would be the logical result of evidence presented indicating that the decades-old policy has been incorrectly applied.