

The Breakfast Club

Constitutional Minute for 3 May 2022

The 14th Amendment and Birthright Citizenship

Note: this topic was suggested by a York County Poquoson member.

I talked recently about the 14th Amendment and how the Supreme Court used its Due Process Clause to “incorporate” the Bill of Rights and thus require the states to protect the rights (most of them at least) being up until that point only protected by the federal government.ⁱ I think inventing the “Incorporation Doctrine” out of whole cloth, as the Court did, was a perfect example of Judicial Activism since there is no evidence whatsoever that the framers of the First Congress, which added the first ten amendments, intended the states to be enjoined by them, and there is conflicting evidence that the authors of the 14th Amendment intended it to be used in the way the Supreme Court ultimately did.

The 14th Amendment was drafted after it became clear that the southern states were not about to give the freed slaves their full rights as citizens. One problem lay in the fact that there was no such thing as national citizenship. There were no national passports, no way to establish oneself as a citizen of anything but your state. And state citizenship was a real thing, most Americans say themselves first and foremost as citizens of their state. Robert E. Lee famously said he could not wage war against “his country” (meaning Virginia) and thus had to resign his commission in the U.S. Army.

I’ll mention (once again) only briefly that there were problems with the ratification of the 14th Amendment. The southern states refused to ratify it, so Congress made it clear that unless they did so they could look forward to perpetual military rule: “ratification at the point of a bayonet” because the meme. Several northern states, seeing what was happening, revoked their own ratifications of the 14th, bringing the total number of ratifications needed below the threshold. Congress decided to ignore the revocations. If the 14th Amendment was not properly ratified, the Incorporation Doctrine and other policies based on the 14th are undermined.

The part of the 14th Amendment we will examine today is the first sentence in Section 1:

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.

There is no doubt that children born in this country to parents legally entitled to live here are covered by this clause, with the exception of the children born of diplomats assigned to serve in this country. For them, just as it is for the children of U.S. diplomats born in other countries, they often have the opportunity, depending on the country, to choose dual-citizenship. But the choice is seldom automatic; it must usually be applied for.

But what about the children of parents in this country illegally? “Anchor babies,” as they are called. Pregnant women, usually extremely late in their term, will illegally enter the country in hopes that their

child, sometimes born within hours or days of slipping across the border, will be entitled to U.S. citizenship and all the benefits citizenship entails.

The political Left insists this is a correct interpretation of the amendment's first section. Are they right?

For the remainder of this essay, I rely heavily on the work of my friend Rob Natelson, author of [The Original Constitution, What it Actually Said and Meant](#). His essay, *An Objective Guide to Birthright Citizenship*, was originally published on the [Tenth Amendment Center](#) and in [The American Thinker](#).

In the clause we are examining, you'll note the words: "*and subject to the jurisdiction thereof.*" This clause qualifies the clause preceding it and cannot be ignored. People qualifying for birthright citizenship in the U.S. must be subject to U.S. jurisdiction at the time of birth. Do the babies of illegal immigrants qualify?

To quote Natelson: "Anyone who tells you this is an easy question is not telling you the truth. It is an extraordinarily difficult question.

What makes it difficult is not merely the politically and racially-charged atmosphere surrounding it. What makes it difficult are problems common to interpreting the Fourteenth Amendment. The rest of the Constitution has many clauses that may seem obscure initially, yet become clear in the light of contemporaneous law and history. But the Fourteenth Amendment is filled with endless fodder for dispute.

This is partly because we know less than we should about the Amendment's ratification by the state legislatures. It is partly because Amendment's congressional drafters were not very competent. They sometimes were ignorant of existing constitutional law. They invented terms without defining them. And they ascribed meanings to terms different from established legal meanings. The phrase 'subject to the jurisdiction' is a good example. We have only a few clues as to its intended meaning."

What I like about Rob Natelson is that he presents the arguments pertaining to a particular issue, pro and con, and, if both sides make cogent points, he let's the reader decide.

The Supreme Court has dealt with this issue, at least tangentially, on three occasions: [Elk v. Wilkins](#) (1884), [United States v. Wong Kim Ark](#) (1898), and [Plyler v. Doe](#) (1982). I think the arguments in these cases, although conflicting in part, point to "jurisdiction" being related to "allegiance" rather than an obligation of law. If this is the case, the children of illegal aliens, since their parents still owe allegiance to their mother country, do not qualify for citizenship. "Allegiance" is not simply an act of will as it might seem, it is a status only changed by naturalization.

But Rob also points out that by and large, today states and communities have accepted the children of illegal immigrants as being citizens and have granted them at least some of the privileges of citizenship. Until the Court decides definitively otherwise, it appears we are stuck with this interpretation for the foreseeable future.

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ⁱ The states were obviously protecting the rights mentioned in their state constitution, but some state constitutions mentioned certain rights while others did not.