ENDING "BIRTHRIGHT CITIZENSHIP"

Purportedly, as a result of public outcry over illegal immigration, there is a movement in the United States to end the so-called "Birthright Citizenship" afforded by the Fourteenth Amendment to the Constitution of the United States.

South Carolina Senator Lindsay Graham indicated to *Fox News*, "I may introduce a constitutional amendment that changes the rules if you have a child here. Birthright citizenship I think is a mistake … We should change our Constitution and say if you come here illegally and you have a child, that child's automatically not a citizen." In a somewhat more muted approach, Arizona Senator Jon Kyl indicated on an interview with *CBS Meet the Press* that, "The question is, if both parents are here illegally, should there be a reward for their illegal behavior? My colleague Lindsey Graham from South Carolina suggested that we pursue that. And what I suggested to him was that we should hold some hearings and hear first from the constitutional experts to at least tell us what the state of the law on that proposition is." Similarly, Senate Minority Leader Mitch McConnell of Kentucky, in an interview with *The Hill*, said, "I think we ought to take a look at it (the Fourteenth Amendment) — hold hearings, listen to the experts on it. I haven't made a final decision about it, but that's something that we clearly need to look at."

Pursuant to Article V, the Constitution can be amended in only two ways; either two-thirds of both the House of Representatives and the Senate must pass a proposed constitutional Amendment or the respective legislatures of two-thirds of the States must call a "constitutional convention" proposing such and Amendment. Then either three-fourths of the legislatures of the respective States or three-fourths of the "constitutional conventions" thereof must ratify the proposed Amendment (U.S. Const., art. V). Ratification through constitutional convention has never been achieved.

Indeed, amending the Constitution of the United States is exceedingly rare. Since its ratification in 1789, the U.S. Constitution has been amended only twenty-seven times. The first ten Amendments, ratified by the states on 15 December 1791, are collectively referred to as "The Bill of Rights." The Eighteenth Amendment – "Prohibition" – was repealed by the Twenty-First Amendment. The Thirteenth Amendment prohibits slavery. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments extend voting rights. The Twenty-Second Amendment places a term limit on the office of President of the United States. The Twenty-Fourth Amendment eliminates "poll taxes" and the last Amendment, the Twenty-Seventh, addresses compensation of Senators and members of the House of Representatives.

The Fourteenth Amendment to the Constitution of the United States reads, "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." (U.S. Const., Amend. XIV, §1). Proponents of ending "Birthright Citizenship" through repeal of the Fourteenth Amendment often argue that the parents of children born to "aliens" – both undocumented and those present in the United States lawfully – are not "subject to the

jurisdiction" of the United States and, therefore, their children born in the U.S. are not U.S. citizens.

Such a contention seemingly defies logic. Black's Law Dictionary defines "jurisdiction" as "[a] government's general power to exercise authority." "Aliens", both undocumented and those lawfully present, are clearly under the U.S. government's "general power to exercise authority." If they were not under the jurisdiction of the United States "illegal aliens" would not, therefore, be "illegal." How then can one argue that the children of "aliens" – legal and otherwise – are not U.S. citizens because they themselves are not "subject to the jurisdiction" of the United States? The only classes of people that have been deemed not subject to the jurisdiction of the United States while physically present therein are; foreign diplomats, enemy combatants, and Native Americans not subject to taxation.

Congress specifically adopted the "Citizenship Clause" of the Fourteenth Amendment in order to constitutionally overrule the decision of the Supreme Court of the United States in the infamous *Dred Scott* case. In *Dred Scott*, the Court specifically denied "Birthright Citizenship" to the descendents of slaves (Scott v. Sanford, 60 U.S. 393 (1857)). In response, Congress proposed and the States ratified the Fourteenth Amendment.

The "Birthright Citizenship" of the Fourteenth Amendment was not a novel creation. "Birthright Citizenship" simply codifies the longstanding English Common Law *jus soli* tradition. That is, citizenship determined by place of birth. Though many native-born U.S. citizens may also be so *jus sanguinis* – "through the blood" of their parents – in order to be classified as a U.S. citizen by virtue of the citizenship of one's parents, application must be made to United States Citizenship and Immigration Services for a Certificate of Citizenship (*See e.g.,* 8 United States Code §§1103, 1401, and 8 Code of Federal Regulations §301).

In 1898, the Supreme Court of the United States specifically held that a child born in the United States to "alien" parents is a U.S. citizen under the Fourteenth Amendment (*United States v. Wong Kim Ark*, 169 U.S. 649, 652–53 (1898)). In *Wong Kim Ark*, the Court stated, "To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States."

Another tack taken by opponents of the Fourteenth Amendment is to end "Birthright Citizenship" by statute. Legislation previously introduced by retired Georgia Congressman Nathan Deal has gained a proponent in California Representative Gary Miller. Texas Congressman Lamar Smith, the top Republican on the House Judiciary Committee, is among the ninety-three cosponsors of the measure. Such attempts to alter the Fourteenth Amendments through legislation are of questionable constitutional veracity at best but do have very solid and knowledgeable proponents (*See* Oforji v. Ashcroft, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring).

Others advocate sending *back* the children born in the U.S. to legal and unauthorized "aliens". Unfortunately for such advocates there is no *back* to which to send them. They were born here.

In the end, we can only wait and see how efforts to end "Birthright Citizenship" evolve but it remains puzzling how denying citizenship to infants in the country in which they were born will do anything to effect the flow of immigrants – legal and otherwise – to the United States.