Birthright Citizenship for Children of Illegal Aliens, an Irrational Public Policy

Lino A. Graglia*

It is difficult to imagine a more irrational and self-defeating legal system than one that makes unauthorized entry to this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry a grant of American citizenship. How can such a legal system have come to be and be permitted to continue? The answer, its defenders will tell you, is "the Constitution." Justice Robert Jackson's famous reply to this argument was that the Constitution is not a "suicide pact."

The basis of the constitutional claim of birthright citizenship is the Citizenship Clause of the Fourteenth Amendment, which states: "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." Not everyone born in the United States is automatically a citizen; only those "subject to the jurisdiction" of the United States.

How should this jurisdiction requirement be interpreted? Like any writing, or at least any law, it should be interpreted to mean what it was intended to mean by those who adopted it, the ratifiers of the Fourteenth Amendment in 1868. They could not have meant to grant birthright citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868, because there were no restrictions on immigration. The purpose of the Fourteenth Amendment was to constitutionalize the 1866 Civil rights Act which begins with the statement from which the Citizenship Clause of the Fourteenth Amendment is derived: "All persons born in the United States *and not subject to any foreign power* are hereby declared to be citizens of the

* A. W. Walker Centennial Chair in Law, University of Texas School of Law

United States." The phrase "and not subject to any foreign power" seems clearly to exclude children of resident aliens, legal as well as illegal. The Fourteenth Amendment Citizenship Clause substituted the phrase "and subject to the jurisdiction thereof," but there is no indication of an intent to change the original meaning.

Senators Lyman Trumbull of Illinois and Jacob Howard of Ohio, the principal authors of the citizenship clauses in both the 1866 Act and the Fourteenth Amendment, both stated that "[s]ubject to the jurisdiction of the United States" means "[n]ot owing allegiance to anybody else." This would seem clearly to exclude birthright citizenship for the children of legal resident aliens and, *a fortiori*, of illegal aliens. It appears, therefore, that the Constitution, far from requiring the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant.

The Supreme Court has never ruled directly on the question, but it has spoken to similar issues. In the 1873 *Slaughter-House Cases*, it stated, in dicta, that "the phrase 'subject to the jurisdiction thereof' was intended to exclude from [birthright citizenship] children of ministers, consuls and *citizens or subjects of foreign States*, born within the United States." More important, in 1884 in *Elk v. Wilkins*, the Court held that a child born to members of an Indian tribe did not have birthright citizenship, because although born in the United States, it was not born "subject to the jurisdiction thereof." "[N]o one," the Court said, can become a citizen of a nation without its consent." There cannot be a more total or forceful denial of consent to a person's citizenship than to make that person's presence in the nation illegal.

A possible impediment to this conclusion is the Court's 1898 decision in *United States v Wong Kim Ark,* holding that the Citizenship Clause granted birthright citizenship to children

born in the United States of legal resident aliens. Two dissenting justices argued correctly that "the rule making locality of birth the criterion of citizenship" is based on ancient English common law and did not survive the American Revolution. Every European country, including Great Britain has now rejected that rule.

Whatever the merits (or lack of merit) of *Wong Kim Ark* as to the children of legal resident aliens, it does not settle the question of birthright citizenship as to children of *illegal* resident aliens or of children born of legally admitted aliens who have overstayed their visa. Although there is no Supreme Court decision on that question, it has been referred to in some dicta, most importantly in *Plyler v. Doe*, a 1982 five to four decision, in which the Court in a footnote interpreted *Wong Kim Ark* as holding that "no plausible distinction … can be made between legal and illegal resident aliens." That statement cannot settle the matter, however, because it is not only pure dictum but is based on a mistaken understanding of *Wong Kim Ark.*

The Federal Government's apparent assumption that the children of illegal aliens have birthright citizenship as a constitutional right is, therefore, clearly subject to challenge. A recent scholarly study of the issue concluded that "[t]he framers of the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship," and that Congress has the authority to reject that rule.

Judge Richard Posner agrees: "Congress," he said, "should rethink … awarding citizenship to everyone born in the United States … including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children." "We should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children." He concluded, that "Congress

would not be flouting the Constitution if it amended the *Immigration and Nationality Act* to put an end to the nonsense."

In my opinion, a law ending birthright citizenship for the children of illegal aliens should and likely would survive constitutional challenge. The Constitution should not be interpreted to require an absurdity.

TEXAS REVIEW
of
LAW & POLITICS

VOL. 14, NO. 1 FALL 2009 PAGES 1-14

BIRTHRIGHT CITIZENSHIP FOR CHILDREN OF ILLEGAL ALIENS: AN IRRATIONAL PUBLIC POLICY

Lino A. Graglia

Reprinted from
Texas Review of Law & Politics
Volume 14, Number 1, Fall 2009

BIRTHRIGHT CITIZENSHIP FOR CHILDREN OF ILLEGAL ALIENS: AN IRRATIONAL PUBLIC POLICY

LINO A. GRAGLIA*

* A. Dalton Cross Professor of Law, University of Texas School of Law.

I. INTRODUCTION

One of the most serious problems the country faces today, in the opinion of most Americans, is the problem of illegal immigration.[1] The usual estimate is that nearly twelve million illegal aliens,[2] mostly from Mexico,[3] are now in the United States. This problem is so serious that it has driven the nation to the extreme solution of beginning construction of a fence or wall along the 2,000 miles of our southern border at the cost of billions of dollars.[4] Popular opposition to illegal immigration is so strong that both major-party presidential candidates in the recent election found it necessary to affirm their opposition.[5]

At the same time, there is the apparent paradox that American law, as currently understood, provides an enormous inducement to illegal immigration: namely, an automatic grant of American citizenship to the children of illegal immigrants born in this country. As a result, it has been estimated that over two-thirds of all births in Los Angeles public hospitals,[6] more

1. *See, e.g.*, The Federation for American Immigration Reform (FAIR), Immigration Facts, Public Opinion Polls on Immigration, http://www.fairus.org/site/PageNavigator/facts/public_opinion/ (last visited Dec. 16, 2009) (listing a variety of poll statistics on U.S. voters' opinions about immigration).

2. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW at i (2008), http://pewhispanic.org/files/reports/94.pdf.

3. JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS: BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 4 (2005), http://pewhispanic.org/files/reports/46.pdf (stating that 59% of illegal immigrants are from Mexico).

4. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL REQUESTERS: SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 3 (2009), http://www.gao.gov/new.items/d09896.pdf.

5. *See, e.g.*, *Where Clinton, Obama, and McCain Stand on Immigration*, U.S. NEWS & WORLD REP., Mar. 17, 2008, http://www.usnews.com/articles/news/campaign-2008/2008/03/17/where-clinton-obama-and-mccain-stand-on-immigration.html (last visited Dec. 16, 2009) (discussing the candidates' different views and agreements on different issues related to immigration).

6. *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: J. Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the Comm. on the Judiciary*, 104th Cong. 22 (1995) [hereinafter *1995 Joint Hearing*] (statement of Rep. Elton Gallegly) (pointing out that an estimated 250,000 citizens were children of illegal alien mothers in Los Angeles County and that for "the State of California, the estimated welfare and health costs" of such children is "estimated to be over $500 million annually," not counting the "largest cost of all . . . providing a public education.").

than one-half of all births in Los Angeles,[7] and nearly 10% of all births in the nation in recent years were to illegal immigrant mothers.[8] Many of these mothers frankly admitted that the reason they entered illegally was to give birth to an American citizen.[9]

A parent can hardly do more for a child than make him or her an American citizen, entitled to all the advantages of the American welfare state.[10] Nor need doing so even be entirely altruistic. Illegal alien parents with an American-citizen child remain subject to deportation, but that deportation becomes less likely. They will be able to appeal to an immigration judge, an administrative court, and ultimately a federal court to argue that deportation would subject the American-citizen child to "extreme hardship," a recognized ground for suspension of deportation, as it would potentially deprive the child of the benefits of his or her American citizenship.[11]

Perhaps even more importantly if the deported parents opt to take the American-citizen child with them, the child can return to this country for permanent residence at any time. The child can then, upon becoming an adult, serve as what is known in immigration law as an "anchor child," the basis for a claim that his or her parents be admitted and granted permanent resident status. The parents will then ordinarily be admitted without regard to quota limitations.[12]

Illegal immigrant parents also benefit, of course, from the welfare and other benefits to which their citizen child is entitled. One court has held, for example, that the benefits that were due under the Aid to Families with Dependent Children Act to a birthright citizen living in a family with illegal aliens had to include the needs of the illegal alien mother and siblings.[13]

---

7. *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 2 (2005) [hereinafter *2005 Hearing*] (statement of Rep. Lamar Smith).

8. *Id.* at 1 (statement of Rep. John Hostettler).

9. *1995 Joint Hearing*, *supra* note 6, at 35.

10. *See id.* at 25 (statement of Rep. Brian P. Bilbray) ("[O]ver 96,000 babies of illegal aliens were born in California in 1992. These children then qualify for benefits including Medicaid, AFDC, WIC, and SSI.").

11. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 110–11 (Yale Univ. Press 1985).

12. *Id.* at 111.

13. Darces v. Woods, 679 P.2d 458, 465 (Cal. 1984).

Nearly half of illegal-immigrant households are couples with children,[14] 73% of which have an American-citizen child.[15]

The apparent arbitrariness of birthright citizenship came to public attention recently in the case of Yaser Esam Hamdi. In 2001, Hamdi was captured as a fighter for the Taliban in a battle with United States-supported forces in Afghanistan.[16] He was held as an enemy combatant in military prisons in Afghanistan and then transferred to the United States Naval Base in Guantanamo Bay, Cuba.[17] It was subsequently discovered that Hamdi was born in Louisiana in 1980 to citizens of Saudi Arabia who were residing in the United States on a temporary visa.[18] Shortly after his birth, he returned with his parents to Saudi Arabia and never returned to this country. On the assumption that he was an American citizen,[19] he was released from Guantanamo and transferred to a naval brig in Norfolk, Virginia.[20] From there, he was able to wage a legal battle that ultimately reached the United States Supreme Court, which held that he had a habeas corpus right to challenge his detention.[21]

It is difficult to imagine a more irrational and self-defeating legal system than one which makes unauthorized entry into this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry. How can such a legal system have come to be and be permitted to continue? The answer, its defenders no doubt will tell you, is the Constitution, the last resort for defenders of untenable positions.[22] Justice Robert Jackson's famous reply to this argument was that the Constitution is not a "suicide pact."[23]

---

14. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 5 (2009), http://pewhispanic.org/files/reports/107.pdf.

15. *Id.* at i.

16. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

17. *Id.*

18. *Id.*; Howard Sutherland, *Citizen Hamdi: The Case Against Birthright Citizenship*, THE AM. CONSERVATIVE, Sept. 27, 2004, http://www.amconmag.com/article/2004/sep/27/00021/ (last visited Dec. 6, 2009).

19. *Hamdi*, 542 U.S. at 510; *But see Id.* at 554 (Scalia, J., dissenting) (referring to Hamdi as only a "presumed American citizen.").

20. *See 2005 Hearing*, *supra* note 7, at 59–61 (statement of John C. Eastman).

21. *Hamdi*, 542 U.S. at 533–34.

22. For example, in a television debate on school busing for racial integration some years ago, I asked Arthur Fleming, then Chairman of the United States Civil Rights Commission, why he favored forced busing to increase school racial integration when it was clear that because of 'white flight' it actually resulted in less integration. "Because," he said, "it is necessary . . . to enforce and implement the Constitution," which in his

II. CONSTITUTIONAL AND STATUTORY DEFINITIONS OF CITIZENSHIP

The basis of the constitutional claim of birthright citizenship is the Citizenship Clause, the first sentence of the first section of the Fourteenth Amendment, which states: "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."[24] Not everyone, therefore, born in the United States is automatically a citizen, but only those "subject to the jurisdiction" of the United States. The basic question becomes what that phrase—the jurisdiction requirement—is properly understood to mean. The Immigration and Nationality Act repeats the Citizenship Clause, making it a provision of statutory law, but not clarifying its meaning.[25] Regulations issued by the Department of Homeland Security and the Department of Justice Executive Office for Immigration Review provide: "[a] person born in the United States to a foreign diplomatic officer accredited to the United States, as a matter of international law, is not subject to the jurisdiction of the United States. That person is not a United States citizen under the Fourteenth Amendment to the Constitution."[26] The apparent assumption is that this is the only limitation on birthright citizenship created by the jurisdiction requirement. No statute, regulation, or other official document, however, explicitly addresses the question of birthright citizenship for children born here of resident illegal aliens.

How, then, should the jurisdiction requirement of the Citizenship Clause be interpreted in regard to that question? Like any writing, or at least any law, it should be interpreted to mean what it was intended or understood to mean by those who adopted it—the ratifiers of the Fourteenth Amendment. They could not have considered the question of granting birthright

---

opinion, apparently, made the irrationality of the requirement irrelevant. Debate at Dunbar High School, Washington, D.C. (1976), https:/redaudio.cc.utexas.edu;8080/asxgen/law/depts./media/Reels/Graglia1976.wmv (last visited Dec. 16, 2009).

23. Terminiello v. City of Chi., 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

24. U.S. Const. amend. XIV, § 1.

25. 8 U.S.C. § 1401(a) (2009).

26. 8 C.F.R. § 101.3(a) (1) (2009).

citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868, when the amendment was ratified, because there were no restrictions on immigration.[27] It is hard to believe, moreover, that if they had considered it, they would have intended to provide that violators of United States immigration law be given the award of American citizenship for their children born in the United States.

The intended purpose of the Fourteenth Amendment and the Citizenship Clause is not in doubt. In 1856, in the infamous case of *Dred Scott v. Sanford*,[28] the Supreme Court held that blacks, even free blacks, were not citizens of the United States and that a state could not make them citizens. It also held that Congress could not prohibit the extension of slavery to the territories, thereby invalidating the Missouri Compromise.[29] Instead of settling the slavery question, as the Court foolishly thought it was doing, this decision precipitated the Civil War. The Thirteenth Amendment, adopted in 1865, prohibited slavery and involuntary servitude and granted Congress the power to enforce the prohibition by "appropriate legislation."[30] Following emancipation, the Southern states adopted laws, known as "black codes," that limited the basic civil rights of their black residents in many respects.[31] Congress responded by enacting our first civil rights legislation, the Civil Rights Act of 1866.[32] The purpose of the Act was: first, to overrule *Dred Scott* by defining national and state citizenship so as to include blacks and, second, to guarantee those black citizens the same basic civil rights as white citizens.

Congress found authority to enact the 1866 Act in its power to enforce the Thirteenth Amendment.[33] President Andrew Johnson vetoed the act on the ground, among others, that it exceeded Congress's Thirteenth Amendment power.[34] Congress, in the control of the Radical Republicans and with representatives of the South excluded, easily overruled the veto,

27. SCHUCK & SMITH, *supra* note 11, at 95.

28. 60 U.S. 393 (1856).

29. *Id.*

30. U.S. Const. amend. XIII, § 2.

31. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 425 (Thomson/West 2nd ed. 2005).

32. Civil Rights Act of 1866, 14 Stat. 27 (1866) (repealed 1866).

33. FARBER & SHERRY, *supra* note 31, at 426.

34. *Id.*

but then proposed the Fourteenth Amendment to remove all doubt as to the Act's validity.[35] The Fourteenth Amendment constitutionalized the 1866 Act in two senses: first, it made clear that Congress was authorized to enact it; and second, it made the Act in effect part of the Constitution, protecting it from repeal by a later Congress.

The 1866 Act begins with a statement from which the Citizenship Clause of the Fourteenth Amendment is derived: "[A]ll 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 . . ."[36] The phrase "and not subject to any foreign power" seems clearly to exclude children of resident aliens, legal as well as illegal. The Fourteenth Amendment Citizenship Clause substituted the phrase "and subject to the jurisdiction thereof," but there is no indication of intent to change the original meaning.

In the 39th Congress, which enacted the 1866 Civil Rights Act and proposed the Fourteenth Amendment, the question arose of how to avoid granting birthright citizenship to members of Indian tribes living on reservations.[37] The issue was whether an explicit exclusion of Indians should be written into the Citizenship Clause as it was in the above-quoted first sentence of the 1866 Act.[38] It was decided that this was not necessary, because, although Indians were at least partly subject to the jurisdiction of the United States, they owed allegiance to their tribes, not to the United States.[39]

Senators Lyman Trumbull of Illinois and Jacob Howard of Ohio were the principal authors of the citizenship clauses in both the 1866 Act and the Fourteenth Amendment.[40] Senator Trumbull stated that "subject to the jurisdiction of the United States" meant subject to its "complete" jurisdiction, which means "[n]ot owing allegiance to anybody else."[41] Senator Howard agreed that "jurisdiction" meant a full and complete jurisdiction,

35. *Id.* at 423–54.

36. 14 Stat. 27, ch. 31, § 1 (emphasis added).

37. *See* JOHN C. EASTMAN, HERITAGE FOUNDATION, FROM FEUDALISM TO CONSENT: RETHINKING BIRTHRIGHT CITIZENSHIP 2 (2006), http://www.heritage.org/Research/LegalIssues/upload/95590_1.pdf.

38. *Id.*

39. *Id.*

40. *Id.*

41. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

the same "in extent and quality as applies to every citizen of the United States now."[42] Children born to Indian parents with tribal allegiances were therefore necessarily excluded from birthright citizenship, and explicit exclusion was unnecessary.[43] This reasoning would seem also to exclude birthright citizenship for the children of legal resident aliens and, *a fortiori*, of illegal aliens.[44] It appears, therefore, that the Constitution, far from clearly compelling the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant.

III. JUDICIAL INTERPRETATIONS OF CITIZENSHIP

Our constitutional law, however, comes not from the Constitution, but from the Supreme Court. As Charles Evans Hughes, later Chief Justice of the United States, once famously put it, "We are under a Constitution, but the Constitution is what the judges say it is."[45] The question, therefore, is less what the Constitution means than what the Supreme Court is likely to say it means. The answer to that question, as to all litigated constitutional questions, depends almost entirely on the policy preferences of the Justices making the decision. The Supreme Court has never ruled directly on the question of birthright citizenship for the children of resident illegal aliens, but it has spoken to similar issues.

In 1873 in the *Slaughter-House Cases*,[46] the first case to come before the Court involving the then newly enacted Fourteenth Amendment, the Court stated, in dicta, that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from [birthright citizenship] children of ministers, consuls, and

42. *Id.* at 2895.

43. *Id.*; SCHUCK & SMITH, *supra* note 11, at 81–82.

44. Earlier, however, in response to a question, Senator Trumbull stated, inconsistently, that citizenship would be granted to the American-born children of Chinese and other legal resident aliens. Schuck and Smith point out that this statement was based on "the expectation that its actual effect would be trivial. On several occasions during the debates, Congress was assured that the number of children of alien parents who would qualify for birthright citizenship under the clause would be *de minimis* and thus of no real concern. This *de minimis* argument could not be credibly made with regard to the Indians, as several senators made clear." SCHUCK & SMITH, *supra* note 11, at 77–79.

45. JOSEPH F. MENEZ & JOHN R. VILE, SUMMARIES OF LEADING CASES ON THE CONSTITUTION 1 (Rowman & Littlefield Publishers, Inc. 2004).

46. 83 U.S. 36 (1873).

citizens or subjects of foreign States born within the United States."[47] Much more important, in 1884 in *Elk v. Wilkins*,[48] the Court adopted the view of Senators Trumbull and Howard that a child born to members of an Indian tribe did not have birthright citizenship. Such a child was born in the United States, but not born "subject to the jurisdiction thereof," because that requires that the child be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[49]

It made no difference that the plaintiff "had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States,"[50] because it did not appear that "the United States accepted his surrender."[51] He could not change his status as an Indian by his "own will without the action or assent of the United States."[52] "To be a citizen of the United States is a political privilege that no one, not born to, can assume without its consent in some form."[53] "[N]o one can become a citizen of a nation without its consent."[54] The decision seemed to establish that American citizenship is not an ascriptive (depending on place of birth), but is a consensual relation, requiring the consent of the United States as well as the individual. This would clearly settle the question of birthright citizenship for children of illegal aliens. There cannot be a more total or forceful denial of consent to a person's citizenship than to make the source of that person's presence in the nation illegal.

The only impediment to this conclusion is the Court's next decision, *United States v. Wong Kim Ark*,[55] in which a divided Court took the opposite approach. The Court explicitly adopted, contrary to *Elk v. Wilkins*, the ascriptive view of the English common law, according to which a person born within the King's realm was necessarily a subject of the King, with only

47. *Id.* at 73 (emphasis added).
48. 112 U.S. 94 (1884).
49. *Id.* at 102.
50. *Id.* at 94.
51. *Id.* at 99.
52. *Id.* at 100.
53. *Id.* at 109.
54. *Id.* at 103.
55. 169 U.S. 649 (1898).

the children of ambassadors and occupying enemy aliens excepted. Thus, the Court held, the Citizenship Clause grants birthright citizenship to children born in the United States of legal resident aliens.

It would seem that the Court was mistaken in interpreting the Citizenship Clause on the basis of the common law ascriptive view, which arose in the feudal context of the position of subjects in a monarchy. That view was based on the assumption that the King's relation to his subjects was as that of father to children, to whom the subject owed perpetual allegiance, which precluded the possibility of expatriation or denaturalization.[56] The American Revolution, however, by definition, rejected the notion of perpetual allegiance.

Two dissenting justices in *Wong Kim Ark* argued that "the rule making locality of birth the criterion of citizenship . . . no more survived the American Revolution than the same rule survived the French Revolution."[57] The dissenters also pointed out, that both the naturalization law of the time and a treaty with China precluded Chinese persons from becoming naturalized citizens.[58] It did not seem credible that by merely giving birth here, a parent could grant the child a citizenship that by both law and treaty Congress and China meant to prohibit.

Whatever the merits of *Wong Kim Ark* as to the children of legal resident aliens and however broad some of its language, it does not authoritatively settle the question of birthright citizenship for children of *illegal* resident aliens. In fact, the Court's adoption of the English common law rule for citizenship could be said to argue *against* birthright citizenship for the children of illegal aliens. Even that rule, the Court noted, denied birthright citizenship to "children of alien enemies, born during and within their hostile occupation" of a country.[59] The Court recognized that even a rule based on soil and physical presence could not rationally be applied to grant birthright citizenship to persons whose presence in a country was not only without the government's consent but in violation of its law.

56. *See* SCHUCK & SMITH, *supra* note 11, at 2 ("[B]irthright citizenship is something of a bastard concept in American ideology . . . [it] originated as a distinctively feudal status intimately linked to medieval notions of sovereignty, legal personality, and allegiance.").

57. 169 U.S. at 710.

58. *Id.* at 730.

59. *Id.* at 655.

This also would seem to preclude the grant of birthright citizenship to the children of illegal aliens. The same, it should be added, is true of children born of legally admitted aliens who have overstayed their visa period or otherwise violated its restrictions.

Although there is no Supreme Court decision on the issue of birthright citizenship for children of illegal aliens, it is referred to in the dicta in a few cases. The most important is *Plyler v. Doe*,[60] a 1982 five-to-four decision, in which the Court reached the remarkable conclusion that Texas is constitutionally required to grant free public education to the children of illegal aliens.[61] The opinion of the Court was by Justice William J. Brennan Jr., perhaps the most liberal-activist Justice in the history of the Court and the source of most of the Court's remarkable innovations in the last half of the twentieth century. The decision, like the grant of birthright citizenship to children of illegal aliens, makes a mockery of our immigration laws, but Justice Brennan never let law, fact, or logic stand in the way of a decision he wanted to reach.[62] He agreed with President Barack Obama that the function of the court was to decide challenging cases on the basis of "empathy."[63]

In a footnote, Justice Brennan interpreted *Wong Kim Ark*[64] as holding that "no plausible distinction . . . can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."[65] That statement cannot settle the matter, however, because it is not only a pure dictum—a gratuitous statement unnecessary to the decision of the case—but also based on the mistaken premise that *Wong Kim Ark* decided the case of illegal aliens.[66]

The Immigration and Naturalization Service's assumption that the children of illegal aliens have birthright citizenship as a

60. 457 U.S. 202 (1982).

61. *Id.*

62. *See* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 68–74, 178–85 (Cornell Univ. Press 1976).

63. Then-Senator Obama explained that he voted against confirmation of Chief Justice John Roberts due to his belief that judges should decide "truly difficult" cases on the basis of "the depth and breadth of one's empathy." Jess Bravin, *Barack Obama: The Present Is Prologue*, WALL ST. J., Oct. 7, 2008, at A22, *available at* http://online.wsj.com/article/SB122333844642409819.html?mod=article-outset-box.

64. 169 U.S. at 649.

65. *Plyler*, 457 U.S. at 211 n.10.

66. *Wong Kim Ark*, 169 U.S. at 649.

constitutional right is, therefore, clearly subject to challenge and is increasingly being challenged. For example, it was prominently challenged in a 1995 book, CITIZENSHIP WITHOUT CONSENT by Yale law professor Peter Schuck and political science professor Roger Smith.[67] "[B]irthright citizenship's historical and philosophical origins," they argued, "make it strikingly anomalous as a key constitutive element of a liberal political system."[68] "[T]he framers of the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship."[69] "The question of the citizenship status of the native-born children of illegal aliens never arose for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter."[70] There simply were no restrictions on immigration until the late nineteenth century.[71] Before that time, "birthright citizenship could plausibly be understood as one ingredient of an integrated national strategy to encourage immigration,"[72] but "'[c]ontrol of our borders', not encouragement of immigration, now dominates contemporary policy discussions."[73] Schuck and Smith conclude that Congress has the power "to define the contours of birthright citizenship . . ."[74] "If Congress should conclude that the prospective denial of birthright citizenship to the children of illegal aliens" is good policy, then "the Constitution should not be interpreted in a way that impedes that effort."[75]

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is perhaps the most cited and most influential federal judge not on the Supreme Court.[76] Arguably, he is the nation's leading public intellectual. In a concurring opinion written in 2003, he argued that "Congress should rethink . . . awarding citizenship to everyone born in the United

67. SCHUCK & SMITH, *supra* note 11.

68. *Id.* at 90.

69. *Id.* at 96.

70. *Id.* at 95.

71. *See* Jonathan H. Wardle, Note, *The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery*, 58 VAND. L. REV. 1963, 1966 (2005) (stating that Congress enacted virtually no immigration restrictions until 1875).

72. *Id.* at 92.

73. *Id.* at 93.

74. *Id.* at 121.

75. *Id.* at 99.

76. *See, e.g.*, Douglas G. Baird, *The Young Astronomers*, 74 U. CHI. L. REV. 1641, 1641 (2007) (stating that Richard Posner is one of "two dominant judge-scholars in the American legal tradition.").

States (with a few very minor exceptions . . .) . . . (citation omitted) including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children."[77] He quoted an article that concludes, "The situation we have today is absurd . . . For example, there is a huge and growing industry in Asia that arranges tourist visas for pregnant women so they can fly to the United States and give birth to an American."[78] "We should not," Judge Posner argued, "be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children."[79] Citing and agreeing with Professors Schuck and Smith, he concluded that "Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense."[80]

IV. CONCLUSION

There have been several proposals in Congress in recent years to end birthright citizenship for children of illegal aliens by statute or constitutional amendment,[81] but none has ever come out of the House Judiciary Committee. Such a statute would probably be challenged as unconstitutional—as are most similar statutes—and the result may depend, as is usual today in controversial cases, on how Justice Anthony Kennedy votes, which is hard to predict.[82]

Constitutional restrictions on policy choices should not be favored in a democratic society. New restrictions should not be created and existing ones should not be expanded. It should not be controversial to assert—although, unfortunately, it is—that a policy choice by elected representatives should not be disallowed by judges as unconstitutional unless it clearly is—"clearly" because in a democracy the view of elected legislators should prevail over the view of judges in cases of doubt. By that

77. Oforji v. Ashcroft, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring opinion).

78. *Id.* (citing John McCaslin, *Inside the Beltway: Rotund Tourists*, WASH. TIMES, Aug. 27, 2002, at A7).

79. *Id.*

80. *Id.*

81. *E.g.*, *2005 Hearing*, *supra* note 7; *1995 Joint Hearing*, *supra* note 6.

82. As the swing vote on the Court, Justice Kennedy has the decisive vote on which laws go into effect.

test, a law ending birthright citizenship for a child of an illegal alien would easily survive. Indeed, its survival should require no more than recognition by the Supreme Court that the Constitution should not be interpreted to require an absurdity.