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MIRC Issue Brief:

What is Birthright Citizenship?

There has been recent public discussion about “birthright citizenship” and its place in the U.S. Constitution and an anti-birthright citizenship amendment has been introduced in the Michigan House of representatives.ⁱ The following is a brief examination of the history of birthright citizenship in the United States and the 14th Amendment, which codified and guaranteed this traditional right.

Birthright Citizenship has historic roots in Great Britain.

Like many of America’s laws, the principle of birthright citizenship originated in English Common Law. English Common Law followed the doctrine of *jus soli*, or “right of the soil”. *Jus soli* grants citizenship to *all* persons born in the territory (or “soil”) of the state.

In England, this principle applied to all persons, except the children of foreign ambassadors or foreign enemies, born within the King’s realm.ⁱⁱ This principle extended to the American colonies before independence.ⁱⁱⁱ Thus, all persons born within the Colonies of North America were natural-born British subjects.^{iv} After independence, the United States continued to follow this tradition, guaranteeing birthright citizenship to all persons born within our borders, until it was challenged by people who wanted to exclude the descendents of slaves from U.S. citizenship.^v

The 14th Amendment guaranteed Birthright Citizenship to people of all races.

The codification of the principle of birthright citizenship within the U.S. Constitution arose after the United States Supreme Court’s infamous *Dred Scott* decision, which denied birthright citizenship to the descendents of slaves.^{vi} In response to this, Congress sought a *permanent* solution that guaranteed this historic right for the future, and protected it from possible attack by future majorities hostile to particular groups.^{vii} This was how Section 1 of the 14th Amendment came to be. It 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.**”

While the sentence is written in clear language, some are puzzled by the phrase “subject to the jurisdiction thereof.” However, a careful examination of the Congressional debates surrounding this clause, makes clear that “subject to the jurisdiction thereof” simply means “subject to the laws of” or “subject to the authority of.”^{viii}

Common sense tells us that the mere fact that Congress included the phrase “subject to the jurisdiction thereof” necessarily means they intended to exclude some group of people from birthright citizenship who were *not* subject to the jurisdiction of the United States. Again, looking back at Congress’ intent, it is clear that they intended to exclude the children of foreign diplomats and the children of foreign enemy soldiers.^{ix}

The Supreme Court reaffirmed the 14th Amendment.

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Any doubt about the interpretation of the 14th Amendment was put to rest after the Supreme Court of the United States decided *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In this case, the Court rejected the Government's arguments that an American-born man with Chinese parents was not a U.S. citizen by birth. The Government sought to limit this section of the 14th Amendment to apply *only* to the descendants of former slaves. However, the Court held Mr. Kim Ark was a citizen by birth regardless of the nationality or citizenship status of his parents.^x

Children of Unauthorized Immigrants are also guaranteed Birthright Citizenship.

There have been several recent attempts to challenge or reinterpret the 14th Amendment as it applies to the children of unauthorized immigrants.^{xi} Proponents of this legislation believe that eliminating the guarantee of citizenship for these persons will eliminate a major “pull factor” for immigrants who enter the United States without authorization.^{xii} Research has indicated that migration tends to be an economic decision and not one based on immigration legal strategy.^{xiii} Regardless, the 14th Amendment continues to provide for birthright citizenship regardless of the race, religion, nationality, intentions, amount of public services used, or general unpopularity of one's parents.

Congress had no intent to exclude the children of unlawfully present parents from the guarantee of birthright citizenship because at the time the 14th Amendment was passed, there was no such thing as “illegal immigration.” Furthermore, the Supreme Court addressed whether unauthorized aliens were subject to the jurisdiction of the United States in *Plyler v. Doe*, and held that there is no distinction between jurisdiction of the U.S. Government over legal permanent resident aliens and aliens whose entry was unauthorized.^{xiv}

Can Birthright Citizenship be eliminated by state statute or state legislative reinterpretation?

Birthright citizenship is *absolutely* guaranteed by the U.S. Constitution to all persons born within the United States, except the children of diplomats or enemy soldiers. The only thing that can alter a right explicitly protected by the Constitution is a Constitutional Amendment.

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ⁱ HR 0030 (2011).

ⁱⁱ See *United States v. Wong Kim Ark*, 169 U.S. 649, 656 (1898); citing *Udny v. Udny*, L.R. 1 H.L. Sc. 441, 457-60 (1869).

ⁱⁱⁱ See *Wong Kim Ark* at 658; citing *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 120 (1833).

^{iv} *Id.*

^v See *Wong Kim Ark* at 661; citing *McCreery v. Somerville*, 9 Wheat. 354, 356 (1824).

^{vi} *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

^{vii} James C. Ho, “Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment”, *Made in America: Myths & Facts about Birthright Citizenship*, Immigration Policy Center, available at: <http://www.immigrationpolicy.org/just-facts/defending-fourteenth-amendment-resource-page> (accessed January 8, 2011).

^{viii} *Id.*

^{ix} *Id.*

^x *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). This decision also addressed jurisdiction issue with respect to the citizenship of “Indians not taxed” but that issue was subsequently resolved in favor of Native American citizenship and cannot be fully addressed in this brief document.

^{xi} Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, New York Times (Jan. 5, 2011).

^{xii} *State Lawmakers Convened in D.C. to Deliver Historic, Nationwide Correction to the 14th Amendment Misapplication*, State Legislators for Legal Immigration (SLLI) [statelegislatorsforlegalimmigration.com](http://www.statelegislatorsforlegalimmigration.com), available at: <http://www.repmetcalfe.com/NewsItem.aspx?NewsID=10194> (accessed on January 9, 2011).

^{xiii} James C. Ho, “Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment”

^{xiv} *Plyler v. Doe*, 457 U.S. 202 (1982).