Anti-Immigration Logic: Solution or Catastrophe?

by Sergio Zegarra

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The 14th Amendment, ratified to the U.S. Constitution in 1868 during the period known as the First Reconstruction, is enshrined in U.S. history as the cornerstone of “American civil rights, ensuring due process and equal protection under the law to all persons” (Ho, Wydra, Ward, et. al. 1). Of equal importance to the Equal Protection Clause is the Citizenship Clause, which affirms that “‘all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and State wherein they reside.” Despite the protections that both Clauses have afforded citizens and non-citizens alike for nearly 150 years, the 2009 Birthright Citizenship Act seeks to repeal birthright citizenship by amending the Constitution again, this time not to address the rights of formerly enslaved Africans but to advance a brutally anti-immigration policy that threatens one of our most deeply cherished and most widely admired principles: the equal rights of all persons under the law.

The birthright language in the Citizenship Clause of the 14th Amendment reversed the Supreme Court’s decision in the 1857 Dred Scott case, “which held that persons of African descent could never become U.S. citizens” (Van Hook 1). In fact, the Union states fought the Civil War at least in part to repudiate the Dred Scott v Sandford decision and to “secure, in the Constitution, citizenship for all persons born on U.S. soil regardless of race, color, or ancestry” (Ho, Wydra, Ward, et. al. 16). Following the period known as Reconstruction (1865-1877), the white elite regained power in the South and attacked minority groups—mostly African Americans—by enacting state and local Jim Crow laws that mandated de jure racial segregation in public institutions and facilities, creating extraordinary economic and social disadvantages for African American citizens. These “separate but equal” laws were declared constitutional in the 1896 Supreme Court case of Plessy v Ferguson. But Justice John Marshall Harlan’s dissenting opinion that “there is no caste in the United States” held sway with the American people throughout the period historians call the Second Reconstruction, the mass movement that...
erupted following World War II to eliminate segregation and discrimination, a period popularly known as the Civil Rights Era.

The beginning of the Second Reconstruction was marked by the Supreme Court decision in *Brown vs. Board of Education* (1954), which ruled that the separate but equal doctrine was unconstitutional and violated the Equal Protection Clause of the 14th Amendment. In “The Immigrant as Pariah,” legal theorist Owen Fiss explains that the Second Reconstruction introduced two fundamental principles regarding the interpretation of the Equal Protection Clause: the “antidiscrimination principle” and the “antisubjugation principle” (4). The “antidiscrimination principle” regards the Equal Protection Clause as a limitation on the government’s power to classify or segregate individuals, as by Jim Crow laws. The “antisubjugation principle” regards the Equal Protection Clause as a prohibition on laws that “perpetuate” the subordinated status of disadvantaged groups (Fiss 5). Fiss explains that in response to the problems of “social stratification” associated with racial caste structures, the 1982 decision in *Plyler v Doe* prohibited the states from turning unauthorized immigrants and their children into an outcast “subclass of illiterates,” or to use Fiss’s term, “pariahs” (5). In his response to Fiss’s essay, “A Third Reconstruction?” Rogers. M. Smith identifies Congress’s passage of the 1996 Welfare Reform Act as the end of the Second Reconstruction because it imposes caste on immigrants (3). However, as recently as 1998, neither immigration theorist expected that passage of a revisionist citizenship policy could threaten the “antisubjugation principle,” or more importantly, become a further reason to call for a Third Reconstruction.

Despite the clear intent of the First and Second Reconstruction to protect U.S. citizenship based on birthplace and guaranteed civil rights, hard-line restrictionists are today attacking the 14th Amendment’s Citizenship Clause, arguing that it has been interpreted to give undeserved citizenship to the children of unauthorized immigrants. Restrictionists classify the U.S-born children of undocumented immigrants by the derogatory term, “anchor babies.” The term refers to the possibility that when these children turn 21 years old, their citizenship will provide “anchors” for their parents to claim legal U.S. residency. Due to increasing frustration over the purported “twelve million” illegal immigrants in America (e.g., see Ohlemacher), “anchor babies” have become a targeted group for restrictionists, who attribute America’s economic and homeland security problems to current immigration policies. They offered a solution to the nation’s illegal immigration problem by proposing the Birthright Citizenship Act of 2009, which would end birthright benefits to the children of undocumented immigrants and become “a means of reducing illegal immigration” (Van Hook 1). The movement against birthright citizenship has split current Congressional debate between immigration activists, who denounce the creation of a “pariah” group, and anti-immigration activists, who denounce birthright citizenship for encouraging unauthorized immigration and delaying economic growth.

While Congress debates, law scholars are most concerned about the “meaning and intent of the 14th Amendment’s Citizenship Clause, and, in particular, whether the US-born children of non-citizen immigrants are ‘subject to the jurisdiction’ of the United States” (Van Hook 1). For these scholars, the 2009 proposal to repeal or modify the Birthright Citizenship Clause raises questions about constitutional interpretation and fears about the reconstruction of “legally inferior” minority groups. In keeping with Fiss’s structural approach to the 14th Amendment, Jennifer Van Hook of the Migration Policy Institute notes that it is important to acknowledge the potential creation of a future U.S.-born “self-perpetuating class of unauthorized immigrants” (8). She argues that repealing the 14th Amendment’s Citizenship Clause would create ambiguous citizenship terminology that would reverse social progress by
creating a social structure that perpetuates the subjugation of the U.S.-born children of unauthorized immigrants. Moreover, Van Hook asserts that immigration policy that relies on denying citizenship to persons of “illegal descent” will fail to resolve our current immigration problems.

There are three basic principles by which citizenship has been defined in the United States: citizenship by descent (*jus sanguinis*), citizenship by birth within a territory (*jus soli*), and citizenship by naturalization. Under the *jus sanguinis* principle “the citizenship of the child’s parents determines whether or not the child is a citizen” (Ho, Wydra, Ward, et. al. 4). The *jus soli* principle affirms that “any person within the country’s territory is a citizen, regardless the citizenship of the parents” (Ibid.), with the exception of children born to foreign diplomats. Hence, the U.S.-born children of unauthorized immigrants are exempt from the naturalization process by which “U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress and the Immigration and Nationality Act” (“Citizenship”).

Anti-immigration activists argue that the current naturalization process “self-defeats” the legal system by allowing U.S.-born children to sponsor their undocumented parents for permanent resident status, thereby “anchoring” their parents in U.S. citizenship (Graglia 3). Restrictionist law scholar Lino Graglia claimed in 2009 that the birthright citizenship of “anchor children” provides “the greatest possible inducement to illegal entry” (4). Critics of birthright citizenship also charge that the unauthorized alien parents of a U.S.-born child are “less likely” to “remain subject to deportation, as it would deprive the child of the benefits of his or her American citizenship” (Graglia 3). In other words, anti-immigration activists regard birthright citizenship as a perverse incentive that rewards illegal entry by providing easy access to citizenship and anti-deportation benefits.

Unfortunately, U.S. Citizen and Immigration Services (USCIS) oversee naturalization laws that are extremely complex with respect to derivate citizenship and generally limited in their application to undocumented immigrants. In fact, according to the American Civil Liberties Union (ACLU), as of January 2008 most immigrants are ineligible apply for citizenship until they have resided in the U.S. with a lawful permanent resident status for five years, passed background checks, shown that they have paid their taxes, displayed “good moral character” and “knowledge of U.S. history and civics,” and demonstrated the ability “to understand, speak, and write English” (“Immigration” 3). Furthermore, even when a so-called “anchor child” turns 21 years old, he still cannot sponsor his parents without proof of “enough income to support the parent(s) and himself [sic] at no less than 125% of the poverty level” (Scott 1). Add the weight of costly fines to these rules, and the naturalization process becomes a discouraging, unattainable option for most immigrants. But the assumption that having a baby constitutes automatic impunity from deportation laws for undocumented parents is a half-truth. The U.S. gives deportation pardons to only 4,000 illegal immigrants each year, a disproportionately small number compared with the estimated 340,000 non-citizen offspring born in the U.S. each year (Passel and Taylor 1). It’s the high number of their offspring that gives anti-immigration activists an opportunity to scapegoat “anchor children” for demands on welfare aid that they are constitutionally entitled to under the 14th Amendment.

Conservative state legislatures are determined to address the country’s economic debt—arguably accrued from paying for two wars for almost two decades—by limiting welfare for “anchor babies.” Protected by the due process clause of the 14th Amendment, the children of unauthorized immigrants instantly qualify to receive welfare aid. Yet, Madeliene Cosman, a restrictionist and medical attorney at the City University of
New York, implies in an article entitled “Illegal Aliens and American Medicine” (2005) that unauthorized immigrant parents abuse the generosity of welfare aid that the U.S. gives their children. In describing an undocumented family, the Silverios of Stockton, California, she writes:

Anchor babies are valuable. A disabled anchor baby is more valuable than a healthy one. The two Silverio anchor babies generate $1,000 per month in public welfare funding. Flor gets $600 per month for asthma. Healthy Christian gets $400. Cristobal and Felipa last year earned $18,000 picking fruit. Flor and Cristian were paid $12,000 for being anchor babies. This illegal alien family income tops $30,000.” (Cosman 7)

Anti-immigration activists such as Cosman insist that unauthorized immigrant parents exploit their U.S.-born children’s citizenship to drain U.S. social services. Cosman directs most of her argument against giving welfare aid to such children; however, according to a 1997 report from the National Research Council (NRC) of the National Academy of Sciences, “immigrants generate public revenue that exceeds their public costs over time—approximately $80,000 more in taxes than they receive in federal and local benefits over their lifetimes” (“Immigration” 3). Furthermore, since passage of the 1996 Federal Welfare Reform Act, undocumented immigrant families with low income have been ineligible to receive payments from federally funded public benefit programs. Cosman’s claim that unauthorized immigrants create a negative impact on our economy by abusing public benefits may have some validity, but her suggestion that undocumented immigrant parents purposely seek to benefit from their children’s sickness or disability is callous at best, and potentially catastrophic for such families if taken seriously by lawmakers.

In response to the high cost of welfare benefits owed to U.S.-born children of undocumented parents, Cosman proposes “rescinding American citizenship and its generous social and medical benefits on babies born to criminals” (9). She claims that undocumented immigrants are “illegal” people, “criminals” who come here to pursue the American dream, when in fact they are disallowed from receiving federally-funded social benefits. Cosman tells us that the Silverio family, which also includes three other undocumented children, are “hard-laboring fruit pickers with family values” (7), people “with strong backs” who work hard in undesirable jobs that pay low wages (2), but her main point is that undocumented immigrants pose a dangerous “threat to American medicine” by bringing contagious diseases. These children of the underclass identify America as their homeland, but they have become pariahs due to their illegal condition. But we have the right to expect thoughtful constitutional scholars—Cosman is a Ph.D. medievalist—to understand that classifying so-called “anchor babies” as a separate citizen group for whatever real or imagined reason is a gross violation of the “anti-discrimination principle” that underlies the Citizenship Clause. Anti-immigration activists may believe that denying social welfare and health benefits will deter unauthorized immigrants from coming to the U.S., but having children born on U.S. soil is by no means the main incentive for people to leave their homes to immigrate here.

Journalist Louis Jacobson, in his discussion of the primary motivations people have for migrating to America, cites Princeton University Sociologist Douglas Massey’s report based on numerous interviews with legal and illegal immigrants:

No one ever mentioned having kids in the U.S….. I’ve been surveying Mexican immigrants to the U.S. for 30 years as part of the Mexican Migration Project…. We do ask about their migratory behavior, which we link to social and economic conditions on both sides of the border. What our work shows is that migrants come in response to the labor demand in the U.S. and are motivated by economic problems at home. (3)
According to Jacobson, unauthorized immigration—especially from Mexico, Central America, and South America—fluctuates with the availability of low-wage employment in the U.S. People migrate to work, usually in industries like agriculture that fail to attract native-born citizen workers in sufficient numbers because they offer low wages, poor working conditions, and few or none of the social and economic benefits that most Americans feel entitled to receive from their jobs. Authorized immigrants are granted visas to work temporary skilled jobs, giving them the opportunity to stay in the U.S. legally or to go back to their motherlands. We can reduce economic immigration only when and if unemployed citizens step up to take the essential jobs that undocumented workers are now doing; until then, it is unfair to assume that undocumented immigration is slowing job recovery. We already impose distinctly different limitations on job opportunities for legal and non-legal immigrants—and so, on their chances for social mobility and economic class—in current immigration policy. But rather than face these incontrovertible facts, a growing number of anti-immigration activists working outside and within Congress insist that a significant number of persons entering the U.S. do so to “drop and leave” with their U.S.-born babies. Graham, who is pressing hard to repeal birthright citizenship, completely misconstrues the issue. Instead of making a cause celebre out of “anchor babies,” Graham should have acknowledged the corrupting business of “birth tourism,” which involves legal immigrants or tourists with visas who travel to “baby care centers” that charge more than $14,000 for tourists to give birth in the U.S. so their children would be citizens” (Khimm 1). Once the child “drops,” the tourist mothers “leave” with their U.S.-citizen babies. U.S.-born “baby tourists” have little in common with the U.S.-born children of unauthorized immigrants who are the primary targets of restrictionist politicians like Graham.

In July 2010, Washington Post staff writer Keith Richburg reported that “most parents who come to the U.S. through birth tourism say they do not intend to live in the United States themselves” (2). Rather, they pay large amounts of money to give their children the opportunity of a future in the United States later in life. By contrast, unauthorized immigrant parents’ pariah status assures they can’t pay high fees, and it may either stop them from departing the country or set them up to find themselves detained for deportation. Undocumented immigrants’ offspring usually become actively engaged members of American society who identify with American culture and participate in its political and social institutions (Jacobson 3). In comparison, “tourist babies” born in America immediately return to their parents’ home country. These U.S.-born babies (“baby tourists”) grow up to identity with the cultures of foreign nations and adopt different social and political principles, yet, as adults, they are permitted by the U.S. Constitution to return and receive U.S. citizenship entitlements. But the irony of this state of affairs is lost on anti-immigration activists, who have demonstrated no
interest in terminating the citizenship incentive of “birth tourism.” The Birthright Citizenship Act of 2009, introduced by Georgia Republican Representative Nathan Deal (elected Governor in 2010), would grant citizenship to U.S.-born children only if one of the parents is, (1) a citizen of the United States, (2) an “alien” with permanent (legal) residence status in the United States, or (3) an “alien” active in the armed forces (Huhn 3). Conceived in these terms, the proposed Act would eliminate citizenship rights for the children of undocumented immigrants, but leave the legality of “birth tourism” intact.

Since the days of the First Reconstruction, citizenship in the U.S. has been determined under *jus soli* rule, or birth within a U.S. territory. The legislation proposed by the Republicans would determine birth under the *jus sanguinis* rule — birth by descent. The effect of the *jus sanguinis* doctrine, as in grandfather clauses that restricted African Americans from exercising their voting rights, would be to restrict citizenship rights and create “pariah groups.” In fact, to revoke *jus soli* citizenship based on the status of a child’s ancestry is absolutely contrary to the spirit and purpose of the Citizenship Clause and subverts the authority of the 14th Amendment. The ultimate intent of the 14th Amendment, as phrased by the framers of the Reconstruction, is to grant citizenship to “all [persons] born in the United States … and subject to its jurisdiction.”

Constitutional scholars disagree in their interpretation of the Birthright Citizenship Clause and some question whether the ambiguous phrase “subject to the jurisdiction thereof” applies to U.S.-born children of unauthorized immigrants. In his defense of repealing birthright citizenship, Lino Graglia of the School of Law at the University of Texas at Austin claims that the Citizenship Clause is commonly understood to automatically grant citizenship to undocumented immigrants’ children. But James Ho, a constitutional scholar and former Solicitor General of Texas, notes that to be “subject to the jurisdiction” of the U.S. is simply to be subject to the authority of the U.S. government” (8). Moreover, scholars disagree about the derivation of the Citizenship Clause. Graglia argues that it derives from the 1866 Civil Rights Act, proposed by Republican Senator Lyman Trumbull of Illinois, which states that “All persons born in the United States and not subject to any foreign power are hereby declared to be citizens of the United States” (7). Graglia explains that “the phrase ‘not subject to any foreign power’ seems clearly to exclude children of resident aliens, legal as well as illegal; therefore the Citizenship Clause, also written by Trumbull, changed the phrase ‘and subject to the jurisdiction thereof,’ but there is no indication of intent to change the original meaning” (7).

Conversely, James Ho claims that “proponents and opponents of birthright citizenship consistently interpreted the Civil Rights Act just as they did the Fourteenth Amendment, to cover the children of aliens” (10). To support his argument, Ho notes that “in one exchange Republican Senator Cowan asked, ‘whether the act will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?’ Trumbull replied, ‘Undoubtedly, the child of an Asiatic is just as much a citizen as the child of a European’” (11). Ho’s evidence of original intent confirms that the Citizenship Clause applies to the children of immigrants. However, Ho and his colleagues agree with Graglia that the writers of the Citizenship Clause may not have considered extending birthright citizenship specifically to the children of undocumented aliens, since “Congress did not generally restrict migration until well after the adoption of the Fourteenth Amendment” (Ho, Wydra, Ward, et. al. 12). As it is worded, the Citizenship Clause may not positively affirm that birthright citizenship applies to the children of unauthorized immigrants, but its intent regarding non-legal and legal immigration has been subsequently reinforced by judicial precedent.

In order to reinforce the *jus soli* rule in the Citizenship Clause, the Supreme Court in United
Sates v Wong Kim Ark (1898) “affirmed that the 14th Amendment applied to children born in the United States of non-citizen parents” (Van Hook 1). Wong Kim Ark was born in the United States, but his parents were citizens of China. In 1882, the U.S. Congress enacted the first of the Chinese Exclusion Acts, which prohibited persons of the Chinese ethnicity from coming into the United States or becoming naturalized U.S. citizens; therefore, Ark’s parents were forced to return to China and were not eligible to become citizens under federal law. After traveling to China for a short visit, “the government attempted to prevent Wong Kim Ark from returning to the United States, and Ark appealed to the Supreme Court, claiming that under the 14th Amendment he was a citizen of the United States” (Huhn 1). But the U.S. government argued that he was not a citizen, “notwithstanding his U.S. birth, through an aggressive reading of the Chinese Exclusion Acts” (Ho, Wydra, Ward, et. al. 12). The Supreme Court decided in favor of Ark, ruling that “The Fourteenth Amendment affirms the ancient fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens…” (Ibid.). The Supreme Court’s decision defined the jus soli principle as the determinant of U.S. citizenship. Yet today’s anti-immigration activists argue that Wong Kim Ark did “not authoritatively settle the question of birthright citizenship for children of illegal resident aliens” because Wong’s parents were legal residents of the United States at the time of his birth (Graglia 10).

Any notion that Won Kim Ark did not explicitly apply to children of non-citizens was laid to rest, however, in 1982 in Plyler v Doe. In a famous five-to-four decision, Justice William J. Brennan ruled that “no state shall deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court held that Texas cannot deny public education to undocumented children because “illegal aliens are ‘subject to the jurisdiction’ of the U.S., no less than legal aliens and U.S. citizens (Ho, Wydra, Ward, et. al. 13). In writing for the majority, Justice Brennan explained, that according to the Wong Kim Ark ruling, the 14th Amendment’s phrases “subject to the jurisdiction thereof” and “within its jurisdiction” are essentially equivalent, and that both refer to physical presence; hence, undocumented immigrants residing in the U.S. are “within the jurisdiction” of the Equal Protection Clause. In his conclusion, Brennan “invoked the Court’s analysis in Wong Kim Ark noting that ‘no plausible distinction with respect of the Fourteenth Amendment applies to aliens who, after their illegal entry into this country, are indeed physically ‘within the jurisdiction’ of a state’” (ibid.). The decision in Plyler v Doe verifies that if the Birthright Citizenship Act of 2009 were enacted by Congress, the Supreme Court would have to abide by the law and declare the Act unconstitutional. It would, in other words, necessarily acknowledge that repealing birthright citizenship by tampering with the 14th Amendment would grievously wound America’s principle of equal rights under the law, and constitute an insult not only to the socially progressively accomplishments of First, but also to the Second, Reconstruction. This proposed policy
would not reduce current illegal immigration, but it would violate the “antisubjugation principle” by establishing a “self-perpetuating” underclass of U.S.-born children without citizenship.

While proponents of the 2009 Birthright Citizenship Act believe that ending birthright citizenship will effectively stop unauthorized immigration, a 2010 demographic report from the Migration Policy Institute led by Jennifer Van Hook shows that the passage of the 2009 Birthright Citizenship Act would actually increase the population of unauthorized immigrants living in the United States from “11 million today to 16 million in 2050” (1), “based on the assumption that unauthorized immigrants will continue to behave as they do now; they and their descendants will continue to have children and die at the same rates as they do today” (7). That MPI report projects that by “2050 there would be 4.7 million unauthorized immigrants who had been born in the United States, 1 million of whom would have two US-born parents (Van Hook 1). In other words, the passage of the 2009 Birthright Citizenship Act would create what Owen Fiss calls a “pariah class” of U.S.-born unauthorized immigrants “who would be excluded from social membership for generations” (Van Hook 8). Eric K. Ward of Chicago’s Center for New Community predicts the social outcome of destabilizing American citizenship by sanctioning a proliferation of pariahs:

The result would be a class of stateless peoples—those with no legal U.S. residency or hope of legal residency, yet with no real ties to any other nation. Such people would be forced to work in underground economies and live in unstable, clandestine conditions, a situation that encourages crime and discourages becoming part of the broader American culture. (28)

Further, the institution of hereditary disadvantage based on the non-legal status of one’s ancestors “would be unprecedented in US laws” (Hook 8). The creation of an unauthorized class of U.S.-born pariahs would violate judicial precedent followed since the Second Reconstruction, reject the legal tradition of the Equal Protection Clause, and encourage (further) segregation among other U.S.-born social groups; it could, in fact, result in the creation of an explicitly racist, nativist American society that threatens minority rights and reverses social progress by creating multiple pariah groups. Such a fractured society would constitute a threat to the original intent of the Constitution by withdrawing its protection of the inalienable rights that the founding fathers so deeply emphasized. At best, the social stratification of U.S.-born persons would inevitably call for a Third Reconstruction.

Fiss concludes his article, “A Third Reconstruction?” by saying that it is our task “to address the great issues of the day and discover and then explain what justice requires” (3). In answer to his call, I have here outlined the history and anticipated the consequences of legislating citizenship policy based on the “illegal descent” of one’s ancestors. The available evidence leads to the conclusion that not only would such a policy fail to deter economic immigration while continuing to encourage “birth tourism,” but it would create a civil rights catastrophe of the first order.

If Congress wishes to answer Fiss’s call and usher in the Third Reconstruction, they should simply enact the 2009 Birthright Citizenship Act and try to enforce it. The Supreme Court could then challenge it, inevitably declaring it unconstitutional after judicial review. If it is still disposed toward creating an outcast caste of Americans, Congress could then attempt to rewrite the law to conform to the Court’s interpretation of the Constitution; or, its conservative members could start working with the states to amend the Constitution. Amending the Constitution requires a two-thirds majority vote in both Houses of Congress to propose the amendment, then ratification by three-fourths of the State legislatures to make it law, all of which is a long, difficult process, especially when it does not enjoy bipartisan support.

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Ironically, the “drop and leave” myth generated by restrictionists could become their tragic downfall if they proceed with their attempt to alter the citizenship guidelines established by the Constitution. If restrictionists succeed in turning the 2009 Birthright Citizenship Act into the law of the land, we must ask how the Supreme Court will react when the children of tourists and of temporary legal immigrants are denied birthright citizenship. Will the Court’s decision support the kind of regressive judicial decision represented by Dred Scott, or the progressive judicial decision in Won Kim Ark? Justice requires that we—citizens, State legislatures, Congress, and Supreme Court—refuse immigration policies that threaten to destabilize U.S. citizenship on regressive and unconstitutional terms.

Works Cited


