Written by **R. Cort Kirkwood** on January 31, 2011

# Arizona Attacks Birthright Citizenship

Two Arizona lawmakers have begun the battle against birthright citizenship. State Rep. Joe Kavanaugh (left) and Sen. Ron Gould, Republicans who supported Arizona's law that permits police to question persons about their immigration status in the course of an otherwise lawful contact, have introduced four bills in the state legislature that dney birthright citizenship to the children of illegal aliens.

"Anchor babies," as they are called, are major factor in exploding state budgets, vis-à-vis the education and welfare benefits they receive. Indeed, immigrants Mexicans cross the border to have babies in American hospitals solely because they know dropping the baby here confers citizenship.

Kavanaugh, Gould and 27 other elected officials, whose state has one of the highest populations of illegals, want to end birthright citizenship.

"The result of that is [anchor babies] immediately acquire the right to full benefits, everything from welfare to cheese, which increases the costs to the states," Kavanagh said. "And beyond that, it's irresponsible and foolish to bestow citizenship based upon one's GPS location at birth."

Lawmakers in other states, including Indiana and Pennsylvania, have proposed similar measures, and Sens. David Vitter (R-La.) and Rand Paul, (R-Ky.) are fighting against anchor citizenship on the federal level. Their bill would deny birthright citizenship "unless at least one parent is a legal citizen, legal immigrant, active member of the Armed Forces or a naturalized legal citizen."

The bills in Arizona would tightly regulate citizenship and birth certificates, the *Arizona Republic* reports:

> House Bill 2561 and Senate Bill 1309 defines an Arizona citizen as someone "lawfully domiciled" in Arizona who is born in the U.S. and is "subject to the jurisdiction thereof." It defines individuals who are subject to the jurisdiction of the U.S. as children who have at least one parent who is a U.S. citizen, a U.S. national or a legal permanent U.S. resident.
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> House Bill 2562 and Senate Bill 1308 would require Arizona to create separate birth certificates for children who are deemed to be Arizona citizens under House Bill 2561 and those who are not. It also seeks permission from Congress to form compacts with other states doing the same thing.

The Arizonans hope they can force federal courts to decide the matter, which is governed by the 14th Amendment to the federal Constitution. "The court needs to rule on this so we can figure out how to treat these kids," Gould says.

Opponents say the bill will be found unconstitutional.

**The 14th Amendment**

The basis for birthright citizenship is the 14th Amendment to the federal Constitution, which says "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."

The nettle legalists must grab is "subject of the jurisdiction thereof." The question is whether the children of illegals are subject to the jurisdiction of the United States and are citizens because they are born here, or whether they remain citizens of the countries from which their parents came.

Kavanuagh, Vitter and Paul say the children of illegals are not citizens. Opponents say they are. One of them is law professor Kevin Johnson.

According to The Associated Press,

Kevin Johnson, a law professor at the University of California at Davis who specializes in immigration law, said the 14th Amendment is a settled area of law.

"I don't see how a state can curtail something guaranteed by the U.S. Constitution. It's very unlikely that that any effort to curtail birthright citizenship can prevail in the courts," Johnson said.

Johnson may be right about what the court will do. But that doesn't mean the court will be right.

**Graglia's View**

Writing in the Texas Review of Law and Politics, law professor Lino Graglia has argued that no matter how one looks at the 14th, anchor babies are not citizens.

Graglia discusses three cases, one of which those on Kavanaugh's side use to argue that anchor babies are not citizens. But he also demolishes the case that Kavanaugh's opponents will likely use to argue against his bill.

The 14th Amendment, he writes, codified the Civil Rights Act of 1866, which conferred citizenship and the full panoply of constitutional protections upon blacks.

> 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 …"
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> 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.

The question facing Congress was what this meant for Indians. According to Graglia, the words "subject to the jurisdiction thereof" meant that Indians could not be citizens.

> 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. 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." Senator Howard agreed that "jurisdiction" meant a full and complete jurisdiction, the same "in extent and quality as applies to every citizen of the United States now."

> Children born to Indian parents with tribal allegiances were therefore necessarily excluded from birthright citizenship, and explicit exclusion was unnecessary. This reasoning would seem also 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 clearly compelling the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant.

In the famous *Slaughterhouse Cases*, the court ruled that "the phrase 'subject to its jurisdiction' was intended to exclude from [birthright citizenship] children of ministers, consuls, and citizens or subjects of foreign States born within the United States."

Thus, in 1884's *Elk vs. Wilkins*, the court ruled that Indian children were not citizens of the United States. The court ruled that citizenship "is a political privilege that no one, not born to, can assume without its consent in some form." As well, it ruled, "no one can become a citizen of a nation without its consent."

Concludes Graglia: "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."

The court then ruled on the *United States vs. Wong Kim Ark*. Graglia explains in some detail why this case does not support the argument that anchor babies are citizens. Graglia argues that the court adopted "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 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."

But the Court was mistaken, Graglia wrote, because the standard it adopted was based upon the "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."

Graglia goes on:

> 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."
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> 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.

The problem for those who cite Wong as the ticket to citizenship for anchor babies is this: Wong was a legal resident alien.

> 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. 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.

Thus, Graglia concludes, the court's ruling in Wong would not grant birthright citizen to the children of illegals or legal resident aliens who overstay their visas or trespass its restrictions. After all, when a legal resident alien overstays a visa, he immediately becomes an illegal alien. His children, then, are not entitled to citizenship.

**Empathy, Not The Law, May Win**

In other words, if Johnson is right, and the 14th Amendment is settled law on the question of birthright citizenship, then "anchor babies" are not citizens.

That may not mean much. Our justices, Graglia notes in discussing the court's decision in 1982 to grant illegal alien children the right to a public education, now use "empathy" to decide cases. Indeed, with that "wise Latina," Sonia Sotomayor, sitting on the bench, we can expect decisions not based upon the law but upon personal predilection.

It was Sotomayor, after all, who said, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

Given that most white males have not "lived [the] life" of anchor babies or their parents or even most immigrants, one doesn't need a law degree from Yale to reckon how Sotomayor will decide.

That will leave it to the rest of the high court to settle the matter in favor of Americans, not those who jump the border illegally.