

Citizenship by Birth

United States vs. Wong Kim Ark, decided in 1898, Mr. Justice Gray delivering the opinion of the Court, made abundantly clear that citizenship by birth is the norm. Wong Kim Ark alleged that he was a citizen of the United States born in San Francisco in 1873. His parents were of Chinese descent and subjects of the Emperor of China, but domiciled residence was in San Francisco. The Court granted the Writ of Habeas Corpus, releasing Wong Kim Ark from custody as an alien and in essence declaring him to be a citizen of the United States since he was born in our great land. The Court took 46 pages to explain its point of view that the Fourteenth Amendment to the United States Constitution means what it 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 provision was a codification of the principles and history of English law ancient in origin. English law, noted the Court, is that: "The principle embraced all persons born within the King's allegiance and subject to his protection." In Latin, the maxim is *protectio trahit subjectionem, et subjectionem protectionem*. There are exceptions such as when the parents of the child fall under the jurisdiction of the sovereign due to war or are the children of ambassadors. So fundamental is the principle of citizenship by birth that it harks back to *Calvin's Case* or the *Case of the Postnati* decided in 1608 after hearing in the Exchequer Chamber before the Lord Chancellor of all the Judges of England, and reported by Lord Coke and by Lord Ellesmere.

One will search in vein for any qualification of the principle of citizenship by birth based upon whether the parents are "legally" within the country. Such a qualification seems to be irrelevant unless the parents are under the jurisdiction of the King or the Sovereign as aliens involved in war against the Sovereign or the children of ambassadors.

Mr. Justice Gray sums up English law on the precept of citizenship by birth as existing for at least three centuries. There are those who argue that the word "jurisdiction" within the Fourteenth Amendment would disqualify by birth citizenship where the parents are illegally in the United States. That is not what jurisdiction means. The Court in *US vs. Wong Kim Ark*, is unmistakably clear that "jurisdiction" merely relates to the domain controlled by the Sovereign. For example, a child born to aliens in Guam would fall under the "jurisdiction" of the United States since Guam is one of our territories. Mr. Justice Thompson in *Inglis vs. Sailors' Snug Harbor*, (1830) 3 Pet. 99, stated: "It is universally admitted, both in the English courts and in those of our own country, that all persons born with in the Colonies of North America whilst subject to the Crown of Great Britain, were natural-born British subjects." Cited at *US vs. Wong Kim Ark*, 461.

The *Wong Kim Ark* opinion makes interesting read for history buffs but it gives no comfort to those who think the Fourteenth Amendment can be rewritten by legislation or by presidential decree. What happens when the born in America alien, now a US

citizen, grows up and wants to have his alien parents become citizens of the United States? That is governed by immigration laws in the United States.

In my own family, some relatives of my mother's who escaped the Holocaust then fell under the brutal tyranny of Stalin in the Soviet Union. My grandmother on my mother's side was born in Poland, but my mother was born in the United States. Thanks to the immigration laws which existed and the work of HIAS, the Hebrew Immigration Age Society, those Russian relatives were able to come to the United States and become United States citizens.

The states have followed the same rule as England and the United States government. Supreme Court of North Carolina noted that before the Revolution, "all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, are native-born British subjects." At 663.

The United States Supreme Court also noted that the rule of the common law pertaining to citizenship by birth is "without any regard of reference to political condition or allegiance of their parents..." at Pg. 30-31, with the exception of ambassadors. The United States Supreme Court even went so far as to rely upon a statute passed in the reign of Edward III, in the Roles of Parliament of 17 Edw. III, (1343).

My Dad used to quote Agamemnon: "He who lives by the sword shall die by the sword." If it is wrong to interpret the Second Amendment to permit gun control, then it certainly would be inappropriate to fool with the Fourteenth Amendment where its history is clear.

We should have an honest debate about amending those portions of our United States Constitution which may be antiquated. We have amended the Constitution over two dozen times. At one time we banned the sale of liquor and then we changed our minds and permitted the sale of liquor. We gave women the right to vote. When times necessitated change, there was no hesitation to making those alterations. The Fourteenth Amendment itself was an amendment passed in the wake of the Civil War.

Should the Second Amendment be amended since at the time it was written citizens used flint locks and relied upon a militia? Today we have assault weapons and an organized National Guard. Is there any issue which the Second Amendment even speaks to anymore? The words "the right to bear arms" are not isolated but fit within the context of their time. The United States Supreme Court currently has rewritten the Second Amendment to afford protections that most of the Founders would never have imagined. Likewise, if there is a popular desire to amend the Fourteenth Amendment so as to eliminate citizenship by birth for those whose parents are in the United States illegally, then we need to have a robust debate on the topic.

Attempts to rewrite the United States Constitution and its many amendments through legislation or Supreme Court fiat is likely to lead us down a dangerous road. At one time the Soviet Union had a marvelous founding constitution. The problem was

that the Constitution of the Soviet Union was not followed or was rewritten by laws that imposed the iron fist of the Communist rulers.

Let us remember that we have waged many wars, including losing 50,000 people in Vietnam, where the war declaration provision of the United States Constitution was ignored. We now have legislation that permits Congress to authorize military action which is clearly, in the view of many, an end run around the United States Constitution. Conservatives and Liberals alike have expressed great dismay over the extent to which we are blind to the United States Constitution when it comes to matters that we find uncomfortable or inconvenient.

Is it time to talk about a new Constitutional Convention or some serious amendments to the United States Constitution?

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