

## REPORT

### I. Introduction

This resolution responds and relates to recent well-publicized proposals to limit or alter the right to citizenship of certain persons born in the United States. The grant of citizenship based upon birth in the United States is sometimes referred to as “birthright citizenship” or “jus soli.” These proposals seek to undermine well-established precedent and alter the legal interpretation and application of the Citizenship Clause of the Fourteenth Amendment to the United States Constitution in order to deny citizenship to infants born in the United States where one or both of the parents are undocumented. U.S. Const. Amend. XIV, § 1 cl.1. Undocumented immigrants are immigrants without formal legal permission to reside in the United States, generally either as a result of entering the country without permission (also known as “entry without inspection”) or remaining in the country after permission to remain has expired (also known as “visa overstay”). 8 C.F.R. § 1.1 (2010).

The ABA Commission on Hispanic Legal Rights and Responsibilities, established in 2010, having conducted several regional hearings to collect testimony, believes that efforts to restrict the right of citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution are a significant threat to the civil rights of Latinas and Latinos in the United States, including their right to participate fully in the United States legal system. During the hearing process, the Commission received extensive testimony on the ongoing efforts to curtail and eliminate rights of Latinas and Latinos regardless of citizenship and immigration status.<sup>1</sup> The testimony further described the immediate challenges to the integrity of our legal system and to our democracy, as Latinas and Latinos receive different and adverse treatment because of their ethnicity, national origin and race. Moreover, the Commission has received testimony and reviewed data on Latinas and Latinos’ limited access to legal services. The potential for additional obstacles to legal services as a consequence of these citizenship limitation efforts is real and increases the risk of civil rights violations.<sup>2</sup> Given the serious and multifaceted access to justice issues currently facing the Latino community, the Commission considers it imperative that the ABA continue its support for the legal protections provided in the Fourteenth Amendment, in particular the Citizenship Clause. U.S. Const. Amend. XIV, § 1 cl.1.

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<sup>1</sup> Testimony before the Commission identified concerns that the targeting of undocumented Latino immigrants in rhetoric and policy spreads beyond the immigrant community, adversely affecting even those groups with unquestioned United States citizenship by birth, such as Puerto Ricans, the second largest Latino subgroup in the United States, all of whom receive citizenship upon birth whether born on the island of Puerto Rico (a United States territory) or in the mainland United States. In response to these significant concerns, the proposed resolution explicitly includes territories, as a part of longstanding practice and policy under the Citizenship Clause.

<sup>2</sup> American Bar Association Commission on Hispanic Legal Rights and Responsibilities has held public hearings throughout the country. Specifically, in Chicago, IL November 12, 2010; San Francisco, CA, January 12, 2011; New York, NY, March 25, 2011; Miami, FL, May 20, 2011; Austin, TX, June 29, 2011 and Los Angeles, CA, July 12, 2011.

## II. Historical Background on the Citizenship Clause

The Fourteenth Amendment to the United States Constitution is one of three amendments proposed following the conclusion of the Civil War and ratified during the first five years following the end of the war. U.S. Const. Amend XIV. The Thirteenth Amendment bars slavery or involuntary servitude. U.S. Const. Amend XVIII. The Fifteenth Amendment guarantees the right to vote. U.S. Const. Amend XV. The Fourteenth Amendment, ratified in 1868, is the longest of the three amendments, and addresses a number of individual rights. U.S. Const. Amend XIV. The most well-known of these rights are expressed in the Due Process Clause, the Equal Protection Clause, and the Privileges and Immunities Clause, all of which appear in section 1 of the Fourteenth Amendment. U.S. Const. Amend XIV, § 1. Section 1 of the Fourteenth Amendment begins with the Citizenship Clause, 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.”*Id.* Current efforts to alter the longstanding interpretation and application of the Citizenship Clause are premised on disputing the meaning of the phrase “subject to the jurisdiction thereof.”

The United States Supreme Court’s infamous decision in *Scott v. Sandford* (sometimes anachronistically referred to as the *Dred Scott* case), often cited as one of the factors precipitating the Civil War, was likely a main reason the Citizenship Clause was included in the Fourteenth Amendment. *Scott v. Sandford*, 60 U.S. 393, (1856). *See United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898). (Clause’s “main purpose doubtless was” to grant the citizenship denied in *Scott*). Chief Justice Roger Taney’s decision in *Scott* denied United States citizenship to freed African American slaves and concluded that any rights based on State citizenship did not transfer to another state to which a freed slave traveled or moved. *Scott*, 60 U.S. 393, 405 (1856) (“He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State.”) The Fourteenth Amendment Citizenship Clause both guaranteed that United States citizenship would be uniformly granted regardless of race or ethnicity, and ensured that any state citizenship rights would be transferable and rest solely on residence. In effect, the Clause deprives state citizenship of much of its legal import in favor of a uniform national citizenship.

In 1898, the Supreme Court interpreted the phrase “subject to the jurisdiction thereof” in a case involving a native-born Chinese American whose parents resided in the United States but were barred from naturalization because of their national origin.<sup>3</sup> *Wong Kim Ark*, 169 U.S. 649 (1898). The Court held that *Wong Kim Ark* was a United States citizen by virtue of the Citizenship Clause even though his parents “at the time of his birth [were] subjects of the emperor of China.” *Wong Kim Ark*, 169 U.S. at 653. Justice Horace Gray’s opinion exhaustively reviews the common law understanding of “jus soli” at the time of the Fourteenth Amendment and its predecessor, the Civil Rights Act of 1866; reviews the legislative history of the Amendment; and reviews extensively the court precedent on the issue of citizenship. *Id.*

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<sup>3</sup> It is important to note that in the latter half of the nineteenth century, when both the Fourteenth Amendment was ratified and *Wong Kim Ark* was decided, United States immigration controls were rudimentary and distinct from today’s extensive regulation. As a result, there was no such phenomenon as undocumented immigration. The closest analogy to undocumented immigrants at the time would be those resident but excluded by law from citizenship, such as the parents in *Wong Kim Ark*.

Ultimately, he concluded that the phrase “subject to the jurisdiction thereof” only precludes citizenship by birth for “children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory”.<sup>4</sup> *Wong Kim Ark*, 169 U.S. at 693. Thus, the Citizenship Clause has since been interpreted as only excepting children born to diplomatic personnel and children born to an occupying force during any foreign occupation.<sup>5</sup>

### III. Recent Federal and State Legislative Proposals

#### A. Proposed Constitutional Amendment

In late January, Senators David Vitter of Louisiana and Rand Paul of Kentucky introduced congressional legislation to propose an amendment to the Constitution to change the right of citizenship under the Fourteenth Amendment. S.J. Res. 2, 112<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2011). The proposed amendment would require naturalization for those born in the United States unless at least one parent is a citizen, a lawful permanent resident, or an immigrant in active military service. While proposing a constitutional amendment is the correct legal pathway to change the well-established practice under the Citizenship Clause, the proposed amendment would create a large class of stateless persons, children born and raised in the United States but without the rights or obligations of citizenship, and also without strong ties to any other nation. The impact of creating such a constitutionally sanctioned underclass would be a return to an earlier pre-Civil War constitutional era. This would have dangerous and unknown implications for our nation, domestically and internationally, in the twenty-first century.

#### B. Federal and State Proposals to Deny Citizenship

In 2011, elected officials launched a number of efforts to directly restrict the citizenship of native-born children of undocumented parents through legislation rather than constitutional amendment. In January, Representative Steve King of Iowa introduced legislation in the House of Representatives (“Birthright Citizenship Act of 2011”) to enact an amendment of the Immigration and Nationality Act to restrict citizenship under the Citizenship Clause to a child at least one of whose parents is a citizen, lawful permanent resident, or on active duty in the armed forces. H.R. 140, 112<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2011).<sup>6</sup> It is unclear what effect, if any, the courts would give such a prospective re-interpretation of a constitutional provision. Nonetheless, the proposal would immediately throw into confusion the citizenship of numerous infants born across the

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<sup>4</sup> Gray added the “single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes,” *Wong Kim Ark*, 169 U.S. at 693, as a result of the only previous Supreme Court case addressing the Citizenship Clause, *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>5</sup> Some who seek to alter the Citizenship Clause’s interpretation might assert that widespread undocumented immigration constitutes a “hostile occupation.” Cf. *California v. United States*, 104 F.3d 1086, 1091 (9<sup>th</sup> Cir. 1997) (rejecting suit contending that federal failure to control undocumented immigration constitutes a violation of Constitution’s Invasion Clause, which relates to armed invasion); *New Jersey v. United States*, 91 F.3d 463, 468 (3<sup>rd</sup> Cir. 1996) (same); *Padavan v. United States*, 82 F.3d 23, 28 (2<sup>nd</sup> Cir. 1996) (same). It is therefore important to note that this exception is premised on the theory that during occupation, the foreign government holds sway over the geographic territory, even if temporarily.

<sup>6</sup> On April 5, Senator Vitter introduced legislation that parallels the King bill in the Senate. S. 723, 112<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2011).

country, and probably lead many localities to begin to implement new and costly procedures in issuing birth certificates.

Also in January, “State Legislators for Legal Immigration (SLLI)”, a coalition of immigration restrictionist legislators from 40 states, announced their plan to seek to alter the application of the Citizenship Clause through state legislative action. At a press conference at the National Press Club, SLLI announced two approaches. First, they rolled out proposed state legislation that would resurrect the notion of State citizenship and restrict State citizenship along the lines of the King bill described above. State Rep. Daryl Metcalfe, State Legislators for Legal Immigration, *State Lawmakers Convened in D.C. to Deliver Historic, Nationwide Correction of 14<sup>th</sup> Amendment Misapplication* (Jan. 5, 2011), <http://www.statelegislatorsforlegalimmigration.com/NewsItem.aspx?NewsID=10195>. This proposed legislation would be of no apparent practical impact, but would seek to undermine the Citizenship Clause. Second, SLLI proposed an interstate compact strategy under which states would agree to “make a distinction in the birth certificates” of native-born persons and assert that the Fourteenth Amendment ought to be denied to children born to parents who owe “allegiance to any foreign sovereignty.”<sup>7</sup> The interstate compact would be subject to consent of Congress under Article I, Section 10 of the Constitution. U.S. Const. Art.I, § 10. The effect of this approach would be to seek a change along the lines of the King bill without having to secure the approval of the President or a veto override.

The intent of the King bill and of the two-pronged SLLI proposal is to seek to overturn the Supreme Court precedent in *Wong Kim Ark* without a Supreme Court decision or a duly ratified Constitutional amendment. Overturning a century-old precedent or securing a Constitutional amendment each are extremely arduous tasks in all circumstances. Thus, these alternative approaches, if successful here, pose a broader threat to Separation of Powers by providing a pathway for the legislative branch alone (through the interstate compact approach) or the legislative and executive branch (through the legislative approach) to change a constitutional interpretation by the Supreme Court. The revival of State citizenship through state legislation also undermines the principles of federalism and the uniform rule of national citizenship.

### C. Proposals to Undermine Citizenship by Birth

In recent years, there have been other proposals for state or local legislation to undermine the right to citizenship of infants born in the United States to parents who are undocumented. Birthright Citizenship Act, S. 723, 112<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2011); City of Hazleton Illegal Immigration Relief Act Ordinance, Hazleton, PA, July 2006.<sup>8</sup> These proposals have included, for example, the idea of issuing two kinds of birth certificates based on parental immigration status – an idea embedded in the interstate compact proposals described above – and the idea of imposing hefty fees and a report to immigration authorities on any undocumented mother who seeks to

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<sup>7</sup> *Id.*

<sup>8</sup> Among the municipalities introducing ordinances and legislation after the passage of the Hazleton ordinance are Avon Park, FL; Palm Bay, FL; Riverside, NJ; Shenandoah, PA; Cherokee County, GA; Valley Park, MO; Farmers Branch, TX; Phoenix, AZ, prince William County, VA; Cobb County, GA; and Carpentersville, Illinois. Additionally at least a half a dozen other cities nationwide have expressed their intention to propose local immigration-related ordinances.

obtain a birth certificate for a newborn child. The effect of these proposals would not be to deny citizenship by birth *per se*, but to create different classes of citizen by issuing separate birth certificates or by making it difficult or impossible for some to obtain proof of citizenship by birth. Similarly, the current atmosphere of increased attempts at state and local regulation of immigration may lead some local registrars and other state and local officials to act on their own to restrict access to birth certificates and other proof of citizenship by birth. All such efforts are likely to have a particular disparate effect on Latinas and Latinos, many of whom are perceived, regardless of actual status, to be undocumented.

#### IV. Conclusion

Language, history, court precedent, and longstanding nationwide practice regarding the Citizenship Clause of the Fourteenth Amendment all support the continued recognition of the automatic United States citizenship of all persons born in the United States, except those born to foreign diplomatic personnel. Current efforts, including those which attempt to circumvent the constitutional amendment process, seek to severely undermine the Citizenship Clause. The proposed resolution highlights the ABA's strong support for continuing the nation's post-Civil War practice in this area and opposition to efforts to undermine the Citizenship Clause through state or federal legislative action.

Respectfully submitted,

Cesar L. Alvarez, Chair  
ABA Commission on Hispanic Legal Rights and Responsibilities  
August 2011

**GENERAL INFORMATION FORM****Submitting Entity:**

ABA Commission on Hispanic Legal Rights & Responsibilities

**Submitted By:**

Cesar Alvarez, Chair

ABA Commission on Hispanic Legal Rights & Responsibilities

**1. Summary of Resolution(s).**

This resolution responds to recent well-publicized proposed legislation before the U.S. Congress, which seeks to limit or alter the right to citizenship of certain persons born in the United States. The ABA Commission on Hispanic Legal Rights and Responsibilities, having conducted several regional hearings to collect testimony, believes that efforts to restrict the right of citizenship under the Citizenship Clause of the Fourteenth Amendment are a significant threat to the right of Latinas and Latinos in the United States to participate in the United States legal system. During the hearing process, the Commission received extensive testimony on the ongoing efforts to curtail and eliminate the rights of Latinas and Latinos regardless of citizenship and immigration status. The testimony further described the immediate challenges to the integrity of our legal system and our democracy as Hispanics receive different and adverse treatment because of their ethnicity, national origin and race. The potential for additional obstacles to legal services, as a consequence of the proposed citizenship limitations is real and increases the risk of civil rights violations. Given the serious and multifaceted access to justice issues currently facing the Hispanic community, the Commission considers it imperative that the ABA continue its support of the legal protections provided in the Fourteenth Amendment, in particular the Citizenship Clause of the U.S. Constitution.

**2. Approval by Submitting Entity.**

This Resolution was approved by the members of the Commission on Hispanic Legal Rights & Responsibilities on June 13, 2011

**3. Has this or a similar resolution been submitted to the House or Board previously?**

No.

**4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?**

The ABA has a longstanding history of furthering the rule of law, eliminating bias and respect for the U.S. Constitution.

**5. What urgency exists which requires action at this meeting of the House?**

Given the serious and multifaceted access to justice issues currently facing the Hispanic community, the Commission considers it imperative that the ABA continue its support of the legal protections provided by the Fourteenth Amendment, in particular the Citizenship Clause of the U.S. Constitution.

**6. Status of Legislation. (If applicable)**

Senators Vitter and Paul have introduced S.J. Res. 2 (112th Cong., 1st Sess. 2011), which would repeal Section 1 of the 14th Amendment.

House Representatives King, Gingery, Miller and Woodall introduced H.R. 140 (112th Cong. 1st Sess. 2011), which would repeal Section 1 of the 14th Amendment.

**7. Cost to the Association. (Both direct and indirect costs)**

None

**8. Disclosure of Interest. (If applicable)**

Senator Iris Martinez, Illinois State Senate  
Janet Murguia, President & CEO, National Council of La Raza  
Margaret Moran, President, League of United Latin American Citizens  
Anthony Romero, Executive Director, American Civil Liberties Union  
Thomas Saenz, President & General Counsel, Mexican American Legal Defense & Education Fund  
Diana Sen, President, Hispanic National Bar Association

**9. Referrals.**

The Resolution with Report with will be referred to the following entities, as well as Sections and Divisions:

Commission on Immigration  
Standing Committee on Legal Aid & Indigent Defendants  
Commission on Domestic Violence  
Commission on Homelessness and Poverty  
Commission on Law and Aging  
Commission on Mental and Physical Disability Law  
Commission on Women in the Profession  
Center for Racial and Ethnic Diversity  
Council for Racial and Ethnic Diversity in the Educational Pipeline  
Coalition of Racial and Ethnic Justice  
Commission on Sexual Orientation and Gender Identity  
Commission on Youth at Risk

Other referrals:

Section of Litigation

Section of Individual Rights & Responsibilities

Young Lawyers Division

Senior Lawyers Division

Judicial Division

**10. Contact Name and Address Information. (Prior to the meeting)**

Aracely Muñoz Petrich

Director, ABA Commission on Hispanic Legal Rights & Responsibilities

321 N. Clark, Chicago, IL 60654

(312) 988-5638

[Aracely.munozpetrich@americanbar.org](mailto:Aracely.munozpetrich@americanbar.org)

**11. Contact Name and Address Information. (Who will present the report to the House?)**

Cesar Alvarez, Chair

Commission on Hispanic Legal Rights & Responsibilities

333 Avenue of the Americas (333 S.E. 2nd Avenue)

Miami, FL 33131

(305) 579-7710

[cadirect@gtlaw.com](mailto:cadirect@gtlaw.com)

Thomas A. Saenz, Commissioner

Commission on Hispanic Legal Rights & Responsibilities

634 S. Springs Street

Los Angeles, CA 90014

T 213.629.2512

[tsaenz@maldef.org](mailto:tsaenz@maldef.org)

## **EXECUTIVE SUMMARY**

### **1. Summary of the Resolution**

Urge Congress to reject any resolution proposing an amendment to the United States Constitution that would alter, in any way, the grant of United States citizenship under the Fourteenth Amendment to any persons born in the United States or Puerto Rico based upon the citizenship or immigration status of one or both parents at the time of the person's birth.

### **2. Summary of the Issue that the Resolution Addresses**

This resolution responds to recent well-publicized proposed legislation before the U.S. Congress, which seeks to limit or alter the right to citizenship of certain persons born in the United States. The ABA Commission on Hispanic Legal Rights and Responsibilities, having conducted several regional hearings to collect testimony, believes that efforts to restrict the right of citizenship under the Citizenship Clause of the Fourteenth Amendment are a significant threat to the right of Latinas and Latinos in the United States to participate in the United States legal system. During the hearing process, the Commission received extensive testimony on the ongoing efforts to curtail and eliminate the rights of Latinas and Latinos regardless of citizenship and immigration status. The testimony further described the immediate challenges to the integrity of our legal system and our democracy as Hispanics receive different and adverse treatment because of their ethnicity, national origin and race. The potential for additional obstacles to legal services, as a consequence of the proposed citizenship limitations is real and increases the risk of civil rights violations. Given the serious and multifaceted access to justice issues currently facing the Hispanic community, the Commission considers it imperative that the ABA continue its support of the legal protections provided in the Fourteenth Amendment, in particular the Citizenship Clause of the U.S. Constitution.

### **3. Please Explain How the Proposed Policy Position will address the issue**

To accomplish these objectives the Resolution encourages the American Bar Association to lobby Congress to reject any resolution proposing an amendment to the United States Constitution that would alter, in any way, the grant of United States citizenship under the Fourteenth Amendment to any persons born in the United States or Puerto Rico based upon the citizenship or immigration status of one or both parents at the time of the person's birth.

### **4. Summary of Minority Views**

The Commission is not currently aware of any objections to this resolution.