

**Testimony of J. Richard Cohen,
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Before the
Subcommittee on Immigration and Border Security
Committee on the Judiciary
United States House of Representatives
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My name is Richard Cohen. I am an attorney and the president of the Southern Poverty Law Center. I have appeared in many state and federal courts, including the Supreme Court of the United States, and have testified on two prior occasions before congressional judiciary committees. I am honored to have been asked to testify today on the issue of birthright citizenship, and I hope that my testimony will be helpful to the subcommittee.

Founded in 1971 in Montgomery, Alabama, the birthplace of the modern civil rights movement, the Southern Poverty Law Center was founded to make the promise of the Fourteenth Amendment and the civil rights acts passed in the 1960s a reality in the Deep South. Since that time, we have represented tens of thousands of persons in cases ranging from racial desegregation to gender discrimination, from prison reform to children's rights, and from economic justice to LGBT equality.

In 2004, we established a project to address the needs of recent immigrants to our country. Since then, we have litigated numerous cases on behalf of exploited guest workers,¹ cases challenging harsh state laws designed to push undocumented persons to deport themselves,² and cases involving the parental rights of immigrants. We also have had the privilege of representing children who owe their citizenship to the Citizenship Clause of the Fourteenth Amendment.

Wendy Ruiz was one such child. She was born and raised in Florida and graduated from a Florida high school. When she pursued her own American dream, Florida's public universities demanded that she pay higher tuition rates because her parents were undocumented.

Fortunately, Wendy was protected by one of the bedrock principles of our Constitution – the principle of citizenship by birth that is as old as this nation.³ In 2012, the U.S. District Court for

¹ See, e.g., Andy Grimm, *Indian Workers in Labor Trafficking Lawsuit Win \$14 Million in New Orleans Federal Court*, NOLA.com, Times-Picayune (Feb. 18, 2015, 4:32 PM), http://www.nola.com/crime/index.ssf/2015/02/federal_jury_in_new_orleans_aw.html.

² See, e.g., *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236 (11th Cir. 2012) (finding that a provision of Alabama's H.B. 56 substantially burdened a constitutional right of undocumented children).

³ In 1830, the Supreme Court wrote that if a person "was born [in the independent United States], he was born an American citizen, whether his parents were at the time of his birth British subjects or American citizens. Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. 99 (1830).

the Southern District of Florida recognized the rights of Wendy and other children of undocumented parents, holding that demanding higher tuition was against “a fundamental principle of American jurisprudence,” that children should not be punished for the actions of their parents. *Ruiz v. Robinson*, 892 F.Supp.2d 1321, 1330 (S.D. Fl. 2012). The court went on to explain that “[o]bviously no child is responsible for his birth and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent.” (citing *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).

The “fundamental principle of American jurisprudence” to which the court in *Ruiz* referred finds expression in the Bible, *see e.g.*, Ezekiel 18:20, and, perhaps more importantly, for purposes of today’s hearing, in the Fourteenth Amendment.

Passed in the aftermath of a war that claimed more than 600,000 lives, the Fourteenth Amendment provides that “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 Amendment was intended, of course, to overrule the infamous *Dred Scott* decision and to ensure that former slaves born in this country would not be relegated to second-class citizenship. But the congressional debate surrounding the Citizenship Clause makes it absolutely clear that its reach was never intended to be limited solely to those persons previously held in servitude.

On May 29, 1866, amid debate in the Senate, Senator Jacob Howard of Michigan introduced an amendment clarifying that birthright citizenship would apply to everyone born within the United States with the exception of the children of foreign diplomats. Howard said that his amendment was “simply declaratory of what I regard as the law of the land already.” This point was made clear during Senate debate over whether birthright citizenship would apply to children of all races and ethnicities. Cong. Globe, 39th Cong. 1st Session, 2890-92.

Just thirty years later, the Supreme Court interpreted the Citizenship Clause in a case involving the son of Chinese immigrants. Wong Kim Ark was born in San Francisco and had spent his entire life in the United States. When he was about 17, he traveled to China for a visit before returning home to San Francisco. When he returned to the United States after a second visit four years later, he was denied entry on the basis that he was allegedly not a citizen. Even though Congress had prohibited individuals of Chinese descent from becoming citizens, the Supreme Court held that the Fourteenth Amendment granted citizenship to all who were born in this country:

The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. The fourteenth amendment . . . has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.

United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

Nearly a century later, the Supreme Court relied on *Wong Kim Ark*'s interpretation of the Citizenship Clause in holding that, under the Equal Protection Clause, undocumented children are entitled to a public education. *Plyler v. Doe*, 457 U.S. 202 (1982). Although the majority in *Plyler* was a narrow one, the Court was unanimous in its conclusion that undocumented children in Texas were "within its jurisdiction" for purposes of the Equal Protection Clause of the Fourteenth Amendment. *Compare* 457 U.S. at 210-15 (opinion of the Court) *with id.* at 243 (dissent). In its analysis, the Court found that the meaning of the phrase "person within its jurisdiction" in the Equal Protection Clause is the same as "subject to the jurisdiction thereof" in the Citizenship Clause. Both, the Court said, are meant in a geographic sense, applying to anyone within the physical boundaries of the country. The Court quoted *Wong Kim Ark*'s finding that it was "impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the States of the Union are not 'subject to the jurisdiction' of the United States." *Plyler v. Doe*, 457 U.S. at 211 n. 10 (quoting *Wong Kim Ark*, 169 U.S. at 687).

Various legal scholars have made interesting arguments offering a different interpretation of the birthright citizenship clause.⁴ But, to their credit, they have acknowledged that their arguments would require us to reject the understanding of the Citizenship Clause that has prevailed for more than 100 years.⁵ Given that the Fourteenth Amendment was intended to put the issue of birthright citizenship beyond the reach of congressional legislation,⁶ it would be quite anomalous at this late date to attempt to diminish or change the meaning of birthright citizenship other than by a constitutional amendment.

Amending the Constitution is a serious matter, one that requires great caution. Since the adoption of the Bill of Rights in conjunction with the Constitution's original ratification, our Constitution has been amended only 23 times in over 200 years. Before we take the momentous step of amending it again in order to limit birthright citizenship, we should carefully consider the reasons why the citizenship clause was originally enshrined in our Constitution.

From the beginning, our society has grappled with efforts to exclude certain categories of people from American citizenry. During the 1866 debate, Senator Edgar Cowan of Pennsylvania raged

⁴ See, e.g., Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*, (New Haven: Yale University Press 1985); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 Tex. Rev. L. & Pol. 1 (2009); John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, Legal Memorandum (The Heritage Foundation), Mar. 30, 2006, available at <http://www.heritage.org/research/reports/2006/03/from-feudalism-to-consent-rethinking-birthright-citizenship>.

⁵ See Peter H. Schuck, *Birthright of a Nation*, N.Y. Times, Aug. 14, 2010, at A19 ([T]he Fourteenth Amendment has "traditionally been interpreted to give automatic citizenship to anyone born on American soil, even to the children of illegal immigrants."); Graglia, *Birthright Citizenship*, at 2 ("American law, as currently understood, provides an enormous inducement to illegal immigration: namely an automatic grant of American citizenship to the children of illegal immigrants born in this country."); Eastman, *From Feudalism* ("It is today routinely believed that under the Citizenship Clause of the Fourteenth Amendment, mere birth on U.S. soil is sufficient to obtain U.S. citizenship.").

⁶ See *Wong Kim Ark*, 169 U.S. at 703 ("The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. . . . The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.").

against the idea of children of Chinese immigrants and Gypsies becoming citizens by virtue of being born here, warning of a “flood of immigration of the Mongol race,” an “inva[sion] by a flood of Australians or people from Borneo, man-eaters or cannibals,” and Gypsies who “live nowhere, settle as trespassers wherever they go, and whose sole merit is a universal swindle.” Senator Cowan urged his colleagues to restrict citizenship to people who resembled him, saying that “[i]f I desire the exercise of my rights I ought to go to my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions, and not thrust myself in upon a society of other men entirely different in all respects from myself.” Cong. Globe, 39th Cong. 1st Session, 2890-91.

Senator John Conness of California rose in defense of the Amendment. He conceded that “it may be very good capital in an electioneering campaign to declaim against the Chinese.” But he described Chinese immigrants as an “industrious people ... now passing from mining into other branches of industry and labor” including in “kitchens of hotels ... as farm hands in the fields ... [and] in building the Pacific railroad.” Their children and those of Gypsies born in this country should be “regarded as citizens of the United States,” he said. No person “claiming to have a high humanity,” he argued, could take a contrary position. Cong. Globe, 39th Cong. 1st Session, 2892.

When the Supreme Court addressed birthright citizenship in *Wong Kim Ark*, the decision came during a period of tremendous backlash to Chinese immigration. Just 16 years earlier, President Arthur had signed the Chinese Exclusion Act, stopping the flow of Chinese laborers into the United States. It was the first such law to prevent a specific ethnic group from entering the country. Two major California papers expressed concern over the Supreme Court’s decision. The *San Francisco Chronicle* warned that it “may have a wider effect upon the question of citizenship than the public supposes” because, the paper warned, “it is to be feared” that the birthright citizenship guarantee “may apply to Indians as well as Chinese.”⁷ A Los Angeles paper doubted the longevity of the decision, warning that it would only have an effect “if it remains the authoritative interpretation of the fourteenth amendment” and predicted that “[i]t is apparent that this decision will not be freely accepted as the last word on the subject.”⁸

As *Wong Kim Ark* reflects, there has been tension in our country’s history between the egalitarian principle underlying the Constitution’s birthright citizenship clause and our nation’s immigration policy. The former is animated by egalitarian ideas; the latter, all too often, has been animated by distinctions based on race and ethnicity. See Pres. Lyndon B. Johnson, Remarks at Signing of Immigration Bill, Liberty Island, N.Y. (Oct. 3, 1965) (“immigration policy of the United States has been distorted by the harsh injustice of the national origins quota system”). Today, we are witnessing another backlash to our nation’s changing demographics and are engaged in serious debates about our immigration policy. Regardless of one’s position

⁷ *Questions of Citizenship*, S.F. Chron., March 30, 1898, available at http://upload.wikimedia.org/wikipedia/commons/0/08/Wong_Kim_Ark_editorial_San_Francisco_Chronicle_1898-03-30.png.

⁸ Enoch Knight, *Citizen Wong Kim Ark*, The Herald, July 24, 1898, 17, available at <http://chroniclingamerica.loc.gov/lccn/sn85042461/1898-07-24/ed-1/seq-17/#date1=1897&index=0&rows=20&words=ARK+KIM+WONG&searchType=basic&sequence=0&state=California&date2=1899&proxtext=%22Wong+Kim+Ark%22&y=8&x=19&dateFilterType=yearRange&page=1>.

on immigration policy questions, the sanctity of the birthright citizenship clause should not be disturbed. Any other course would risk creating a new class of second-class citizens.

This past fall, Wendy Ruiz, our client in the Florida tuition case I mentioned earlier in my testimony, spoke at the Dexter Avenue King Memorial Baptist Church, the church from which Dr. King and his allies launched the modern civil rights movement, the Second American Revolution. She told a deeply American story, one about her family's struggles and her commitment to get an education to help others in her community. It is simply inconceivable to me that our country would deny the blessings of citizenship to the Wendy Ruizes of the world.

Thank you.