

Constitutional Citizenship: A Legislative History



[1]By [Garrett Epps](#) [2]

Attacks against the Citizenship Clause of the 14th Amendment have picked up in recent months, with legislators at both the national and state levels introducing bills that would deny U.S. citizenship or “state citizenship” to the children born to unauthorized immigrants in the U.S.

There are two strands of attacks on birthright citizenship. One strand arises out of simple nativist anger at the impact of immigrants, legal or otherwise, on society. The other argues that the current interpretation of the Citizenship Clause as covering the children of “illegal” immigrants is inconsistent with the “original intent” of the Framers of the 14th Amendment. Originalism is often used as a method to clarify unclear portions of constitutional text or to fill contextual gaps in the document. This is not, however, how originalism is being used in the context to the Citizenship Clause. Here, originalists use clever arguments and partial quotations to eradicate the actual text of the Amendment. In essence, they claim the Framers did not really mean what they said.

Originalists from this latter category have attempted to show that the Framers of the 14th Amendment never intended to bestow birthright citizenship on the children born in the U.S. to illegal immigrant and certain legal immigrant parents. However, their claim to establish the “clear intent” of the Framers and ratifiers of the 14th Amendment fails on several fronts. Their argument: 1) misapprehends the contemporaneous intellectual background of the Clause; 2) mischaracterizes the relationship between the Civil Rights Act and the Clause; 3) distorts the tenor of the legislative debates around the Clause itself; 4) offers an implausible reading of the constitutional policy embodied in the Amendment as a whole; and 5) fails to understand that, historically, the Framers of the Amendment faced a situation with regard to immigration policy that was in fact remarkably similar to our current one.

In other words, the proponents of a restrictive “intent” of the Clause have failed to carry their burden of proof.

I do not claim to have divined the “original intent” of the Framers of the 14th Amendment about the situation of the undocumented, which was one that was not precisely present in the law in 1866, the year of the framing. We simply cannot know how members of the 39th Congress would have responded. We can, however, investigate some things. First, and most readily accessible, is what the Framers said as they debated the clauses of the 14th amendment. Second is the intellectual and political background upon which they drew in the writing of the Amendment. Finally, we can understand the overall situation that gave rise to the Amendment - what recent events had occurred and what overall social concerns they sparked.

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After much examination, the history of the Amendment's framing lends no support to the idea that native-born American children should be divided into citizen and non-citizen classes depending on the immigration status of their parents. Most importantly, following the Civil War, the Framers of the 14th Amendment could not have intended to re-create a new hereditary and subordinate caste of native-born noncitizens.

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