The Substantive Criteria Underlying Birthright Citizenship

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D. Carolina Núñez, Beyond Blood and Borders: Finding Meaning in Birthright Citizenship, 78 **Brooklyn L. Rev.** 835 (2013).

The Fourteenth Amendment of the United States Constitution grants birthright citizenship to all individuals born within the territory of the United States, with an exception for the children of diplomats. Consequently, the children of unauthorized migrants born in the United States are United States citizens. A number of individuals, including members of Congress, contend that birthright citizenship serves as an incentive for unauthorized migration. As recently as January 3, 2013, the House of Representatives considered a bill that would limit constitutional birthright citizenship to the children of U.S. citizens, lawful permanent residents, and noncitizens serving in the armed forces. Carolina Núñez's article makes an important contribution to this debate, and to the academic literature on citizenship and membership more broadly, because it offers substantive criteria for determining who should have birthright citizenship in the United States and because it analyzes a variety of proxies for measuring these substantive criteria.

Through an examination of post-American-Revolution cases and the congressional debates for the Fourteenth Amendment, Núñez identifies three substantive factors that have been critical in making membership decisions: mutuality of obligation, community ties, and community preservation. Núñez introduces three models of membership utilized in U.S. law (the territorial model, the status-based model, and the post-territorial model) and assesses each model's ability to effectively measure the substantive criteria. She concludes that the use of "inaccurate proxies are unavoidable" when assigning birthright citizenship, but that the territorial model offers the most accurate proxy. (P. 857.)

After the Revolution, courts had to determine "[w]hat made a former British subject a citizen" as well as when British subjects became U.S. citizens. Rather than using rigid rules to make these determinations, the courts utilized a totality-of-the-circumstances approach in which loyalty to the United States and community ties were important factors. Allegiance gave rise to a state obligation to protect the loyal individual. Integration into the community was evaluated based on where individuals were raised and where they decided to live.

Núñez argues that the congressional debates regarding the Fourteenth Amendment reinforced the importance of these substantive factors in making birthright citizenship decisions. During the debates Congress discussed whether the children of Gypsies, Chinese immigrants, and Native Americans would obtain territorial birthright citizenship. While the arguments against extending birthright citizenship to these groups had racist overtones, Núñez adeptly identifies the specific conduct that was used as the basis for excluding these groups. Those against birthright citizenship cited concerns about loyalty, willingness to submit to U.S. sovereignty, and limited ties to American communities. The Fourteenth Amendment did not exclude the children of Gypsies and Chinese immigrants. Núñez attributes this fact to Congress concluding that these children would be loyal, that they and their families played an important economic role in American communities, and that exclusion would create a subclass within American society whereas inclusion "would create a just, egalitarian society." (P. 870.) A different

outcome, however, was reached for Native Americans—primarily because Native Americans were considered members of separate and distinct nations and were viewed as not having any allegiance or obligations to the United States.

Based on her conclusion that mutuality of obligation, community ties, and community preservation are the substantive criteria upon which membership decisions should be made, Núñez evaluates the ability of the territorial and status models to accurately identify desirable members. The territorial model uses the border to assign membership. Those within the border are members and those outside of the border are not. This is contrasted with the status-based model in which rights are assigned based on an individual's status. Finally, the post-territorial model seeks to measure the desired substantive criteria directly rather than using proxies.

Núñez concludes that implementing the post-territorial model and conducting an individualized assessment of every person born in the United States "would be impractical." (P. 875.) Thus, proxies are necessary. Núñez argues that the territorial model better assesses mutuality of obligation, community ties, and community preservation than the status-based model. Because legal obligations in the United States are based on presence rather than status, Núñez easily concludes that mutuality of obligation is better measured by territorial presence than by parental status. Birth in the United States is also more predictive of the development of community ties because it generally gives rise to long-term residence and connection to community institutions. Finally, Núñez contends that denying the children of unauthorized migrants birthright citizenship would "distribute membership rights on different terms to individuals who are effectively identical in all substantive respects," which is unjust. (P. 880.)

Núñez's analysis of the post-Revolutionary citizenship cases convincingly offers a set of substantive criteria for membership in the American polity. Her discussion of the initial refusal of birthright citizenship to Native Americans suggests that cultural assimilation has also been a substantive requirement for birthright citizenship. Native Americans were denied constitutional birthright citizenship not only because they were deemed members of independent sovereign nations but also because they were viewed as "uncivilized" and thus lacking community ties.

Núñez's article provides a very useful starting point for thinking about the substantive criteria for birthright citizenship in the United States. Her analysis also offers important insights about American identity and the ways in which certain community ties may be privileged over others when deciding who is sufficiently connected to be deemed an American at birth.

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