STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL

SUBMITTED TO THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES

HEARING ON "BIRTHRIGHT CITIZENSHIP: IS IT THE RIGHT POLICY FOR AMERICA?"

APRIL 29, 2015

Contact:
Beth Werlin, Director of Policy
bwerlin@immcouncil.org
Phone: 202/507-7522

1331 G Street, NW, Suite 200
Washington, DC 20005
Fax: 202/742-5619

The American Immigration Council is a non-profit organization which for over 25 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society.

Under current law, persons born in the United States are automatically citizens. We write to share our research and policy analysis explaining why any attempts to restrict "birthright citizenship" would be unconstitutional, unnecessary, impractical, counterproductive, and contrary to American values.

Three American Immigration Council fact sheets summarize these points:

- *Ending Birthright Citizenship: Unconstitutional, Impractical, Expensive, Complicated and Would Not Stop Illegal Immigration* (June 15, 2010) (Exhibit A),[1]
- *Eliminating Birthright Citizenship Would Not Solve the Problem of Unauthorized Immigration* (Jan. 4, 2011) (Exhibit B),[2] and
- *Papers Please: Eliminating Birthright Citizenship Would Affect Everyone* (Jan. 4, 2011) (Exhibit C).[3]

In addition, the following American Immigration Council reports provide more in depth analysis on the issue of birthright citizenship:

- *Made in America: Myths & Facts About Birthright Citizenship* (September 2009), by James Ho, Margaret Stock, Eric Ward, and Elizabeth Wydra (Exhibit D),[4] and
- *Constitutional Citizenship: A Legislative History*, by Garrett Epps (March 2011) (Exhibit E).[5]

Collectively, these materials establish the following:

- It is doubtful that birthright citizenship legislation would be constitutional.[6] The Supreme Court has upheld birthright citizenship several times, based on the U.S. Constitution.[7]

- There is no evidence that undocumented immigrants come to the U.S. just to give birth. "Anchor babies" are a myth, and stories about "birth tourism" point to small numbers of foreigners who come to the U.S. *legally* to give birth to their children.[8] It would make little sense to restrict birthright citizenship and make legal changes that would impact every single American just to punish a few individuals.

- Everyone would be affected if birthright citizenship was eliminated. If birthright citizenship was eliminated, ***all*** American parents—not just immigrants—would have to determine the citizenship of their children, through arduous and expensive processes.[9] Americans could be denied citizenship because of a mistake.

- Denying birthright citizenship would ***increase*** the size of the undocumented population, not reduce undocumented immigration.[10] For example, a 2010 Migration Policy Institute study found that if citizenship were denied to every child with at least one unauthorized parent, the unauthorized population in the U.S. would reach 24 million by 2050.[11]

- Eliminating birthright citizenship is a distraction that moves us away from fixing the real problems with our broken immigration system. The American public wants real solutions, not proposals that look tough on immigrants but are ineffective and harmful.

* * *

We urge Congress to work to fix our broken immigration system and provide individuals, families and communities across America a functional system that meets our needs and reflects our proud history as a nation of immigrants.

[1] Immigration Policy Center, *Ending Birthright Citizenship: Unconstitutional, Impractical, Expensive, Complicated and Would Not Stop Illegal Immigration* (June 15, 2010), available at http://immigrationpolicy.org/sites/default/files/docs/Ending_Birthright_Citizenship_061510_0.pdf.

[2] Immigration Policy Center, *Eliminating Birthright Citizenship Would Not Solve the Problem of Unauthorized Immigration* (Jan. 4, 2011), available at http://www.immigrationpolicy.org/sites/default/files/docs/Eliminating_Birthright_Citizenship_Would_Not_Solve_the_Problem_010411.pdf.

[3] Immigration Policy Center, *Papers Please: Eliminating Birthright Citizenship Would Affect Everyone* (Jan. 4, 2011), available at http://www.immigrationpolicy.org/sites/default/files/docs/Birthright_Citizenship_Effects_Everyone_010411.pdf.

[4] James Ho, Margaret Stock, Eric Ward, and Elizabeth Wydra, *Made in America: Myths & Facts About Birthright Citizenship* (September 2009), available at http://immigrationpolicy.org/sites/default/files/docs/Birthright%20Citizenship%20091509.pdf.

[5] Garrett Epps, *Constitutional Citizenship: A Legislative History* (March 2011), available at http://www.immigrationpolicy.org/sites/default/files/docs/Epps_-_Constitutional_Citizenship_032811.pdf

[6] Ex. A, at 1-2; Ex. D, at 6-24, Ex. E.

[7] *United States v. Wong Kim Ark*, 169 U.S. 649, 652-53 (1898); Ex. D, at 12.

[8] Ex. B, at 1.

[9] Ex. C, at 2; Ex. D, at 29-34.

[10] Ex. B, at 1.

[11] Michael Fix and Jennifer Van Hook, Migration Policy Institute, The Demographic Impacts of Repealing Birthright Citizenship (September 2010), available at http://www.migrationpolicy.org/research/demographic-impacts-repealing-birthright-citizenship.

ATTACHMENT A

IMMIGRATION POLICY CENTER
AMERICAN IMMIGRATION COUNCIL

June 15, 2010

ENDING BIRTHRIGHT CITIZENSHIP

Unconstitutional, Impractical, Expensive, Complicated and Would Not Stop Illegal Immigration

Anti-immigrant groups and legislators have persisted in their attempts to restrict or repeal birthright citizenship in State Houses and the U.S. Congress. Several bills have been introduced that would deny U.S. citizenship to children whose parents are in the U.S. illegally or on temporary visas. The Fourteenth Amendment to the Constitution - the cornerstone of American civil rights - affirms that, with very few exceptions, all persons born in the U.S. are U.S. citizens, regardless of the immigration status of their parents. Following the Civil War and the emancipation of the slaves, the Fourteenth Amendment restated the longstanding principle of birthright citizenship, which had been temporarily erased by the Supreme Court's "Dred Scott" decision which denied birthright citizenship to the U.S.-born children of slaves. The Supreme Court has consistently upheld birthright citizenship over the years. The following fact sheet is adapted from the Immigration Policy Center's *Made in America: Myths and Facts About Birthright Citizenship*.

What is birthright citizenship?

- Birthright citizenship, or the principle of *jus soli*, means that any person born within the territory of the U.S is a citizen, regardless of the citizenship of one's parents. There are some exceptions, such as for the children of foreign diplomats and invading armies.

- Birthright citizenship is enshrined in the Fourteenth Amendment to the Constitution which states 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 legislative history clearly shows that Congress clearly intended to bestow birthright citizenship on the U.S.-born children of immigrants. While some debated the *wisdom* of the amendment and opposed extending birthright citizenship to the children of immigrants of other races, no Senator disputed the *meaning* of the amendment with respect to immigrant children.

- The Fourteenth Amendment restated the principle of *jus soli*, which had been established by four centuries of Anglo-American jurisprudence. Birthright citizenship was temporarily erased by the Supreme Court for U.S.-born children whose parents were slaves of African descent – the infamous "Dred Scott" decision of 1857.

The Supreme Court has upheld birthright citizenship several times.

- In 1898, the meaning of the citizenship clause was conclusively determined in *Wong Kim Ark*, when the Supreme Court rejected arguments that the son of a Chinese national – who was forbidden under the Chinese Exclusion Act from ever becoming U.S. citizens – should

be deprived of citizenship because of his parents' status. Subsequent decisions have upheld this standard.

- The Supreme Court has also held in *Plyler v. Doe* that undocumented children are "innocent" because they "can affect neither their parents' conduct nor their own status"

Birthright citizenship is under attack by some people.

- Some Members of Congress have introduced bills to eliminate birthright citizenship for the children of immigrants who are in the U.S. illegally or on temporary visas. The "Birthright Citizenship Act" (HR 1868), introduced by Rep. Nathan Deal (R-GA) has 91 cosponsors. A bill by Rep. Elton Gallegly (R-CA) would restrict birthright citizenship to the children "of a mother who is a citizen or legal permanent resident of the United States."

- Some state legislators have introduced birthright citizenship bills, with the intention of advancing a national debate on the issue and pushing a legal challenge to the Supreme Court.

Eliminating birthright citizenship would impose a significant burden on all Americans who would no longer have an easy and inexpensive way to prove their citizenship.

- If simply being born in the U.S. and having a U.S. birth certificate were not proof of citizenship, Americans would have to navigate complex laws to prove their citizenship. Other than a birth certificate, most Americans do not have government documents that establish U.S. citizenship.

- Some Americans would have to prove they derive U.S. citizenship through one or both of their parents – a process that can be difficult for even experienced immigration attorneys. In some cases, whether one's parents were married or unmarried at the time of one's birth makes a difference in determining citizenship. In some cases the gender of the U.S. citizen parent can affect the determination.

- All American parents—not just immigrants—would have to prove the citizenship of their children through a cumbersome process.

Eliminating birthright citizenship would not solve the problem of unauthorized immigration.

- Since children born to undocumented immigrants would presumably be undocumented, the size of the undocumented populations would actually increase as a result of the new policy. While some children could acquire the citizenship of their parents, others would be left with no citizenship or nationality, leaving them stateless.

Eliminating birthright citizenship is a distraction that moves us away from fixing the real problems with our broken immigration system.

- Immigrants come to the U.S. to work, to reunite with their families, or to flee persecution. Denying birthright citizenship will not discourage unauthorized immigrants from coming to the U.S., and it will not encourage those already here to leave.

- Comprehensive immigration reforms that solve the root causes of undocumented immigration are necessary to resolve our very real immigration problems.

ATTACHMENT B

IMMIGRATION POLICY CENTER
AMERICAN IMMIGRATION COUNCIL

January 4, 2011

Eliminating Birthright Citizenship
Would Not Solve the Problem of Unauthorized Immigration

There is no evidence that undocumented immigrants come to the U.S. just to give birth.

- Unauthorized immigrants come to the U.S. to work and to join family members. Immigrants tend to be of child-bearing age and have children while they are in the U.S. They do not come specifically to give birth.

- Stories about "birth tourism" point to small numbers of foreigners who come to the U.S. *legally* to give birth to their children. It would be ridiculous to change the U.S. Constitution and impact every single American just to punish a few individuals.

- "Anchor babies" are a myth.

    - U.S.-citizen children do not protect their parents from deportation. Every year the U.S. deports thousands of parents of U.S. citizens.

    - U.S.-born children cannot petition for legal status for their parents until they turn 21 years old. In most cases, if the petition is granted the parents would still have to leave the U.S. and then be barred from re-entering for at least 10 years. That's a total of 31 years. Undocumented immigrants do not come to the U.S. to give birth as part of a 31-year plan.

Eliminating birthright citizenship would INCREASE the undocumented population.

- Since children born to undocumented immigrants would presumably be undocumented, the size of the undocumented population would actually increase as a result of the new policy.

    - Depending on the details of the changes to birthright citizenship laws, the Migration Policy Institute estimates that the number of unauthorized children living in the U.S. would increase dramatically if birthright citizenship were repealed. For example, if citizenship were denied to every child with at least one unauthorized parent, the unauthorized population in the U.S. would reach 24 million by 2050.

Repealing birthright citizenship would create a new permanent underclass.

- While some children could acquire the citizenship of their parents, others would be left with no citizenship or nationality, leaving them stateless. Children may have no legal home country to turn to. They would be forced to live in the margins of the international community.

    - Repealing birthright citizenship would create an underclass of unauthorized immigrants who, through no fault of their own, would be forced to live in the margins of U.S. society, would not have access to health care and basic services, would be vulnerable to exploitation and abuse, and would be at constant risk of deportation.

Eliminating birthright citizenship is a distraction that moves us away from fixing the real problems with our broken immigration system.

- Immigrants come to the U.S. to work, to reunite with their families, or to flee persecution. Denying birthright citizenship will not discourage unauthorized immigrants from coming to the U.S., and it will not encourage those already here to leave.

- Are we really willing to change the Fourteenth Amendment of the Constitution rather than address the real problems with our broken immigration system? Rather, Congress should be addressing immigration issues head on by reforming our immigration laws in a way that fairly addresses the economic and labor needs of the country, unites American families, and ensures that immigrants have legal channels to enter and remain in the U.S.

ATTACHMENT C

IMMIGRATION POLICY CENTER
AMERICAN IMMIGRATION COUNCIL

January 4, 2011

Papers Please:
Eliminating Birthright Citizenship Would Affect Everyone

Attacks on birthright citizenship at the federal and state level are bound to take many forms—from outright repeal of the Fourteenth Amendment to refusal by states to issue birth certificates to children of undocumented immigrants. Whatever the tactic, attacks on birthright citizenship hurt everyone.

Eliminating birthright citizenship would impose a significant burden on all Americans, who would no longer have an easy and inexpensive way to prove their citizenship.

- **We have a simple, easy-to-use system.** Throughout its history, the U.S. has had a simple, straight-forward way to determine citizenship. Anyone who is born on U.S. soil (with very few exceptions) is a U.S. citizen. The Fourteenth Amendment affirmed that this definition of citizenship could not be denied based on race, nationality, or family history. Our birth certificates are proof of our citizenship. If birthright citizenship were eliminated, U.S. citizens could no longer use their birth certificates as proof of citizenship.

- **Everyone is affected.** If birthright citizenship was eliminated, **all** American parents—not just immigrants—would have to determine the citizenship of their children. For some parents, this would be relatively simple. For others, it would be extremely cumbersome.

- **Proving a child's citizenship can be difficult.** Establishing U.S. citizenship other than by birth in the U.S. is complex. Americans would have to prove that their children derive U.S. citizenship through one or both of their parents—a process that can be difficult for even experienced immigration attorneys. U.S. law with regard to derivative citizenship is extremely complex.

- **Derivative Citizenship laws are complex.** Proving a child's citizenship would be similar to the process used for children born abroad to military parents, missionaries, or employees of international companies. Whether or not a child born abroad is a U.S. citizen depends on the year the child was born, whether one or both of the parents were U.S. citizens, and whether the parents were married or unmarried at the time of one's birth. Some children would immediately acquire U.S. citizenship, but others might have to naturalize to become citizens.

- **Assessing citizenship is an arduous and expensive process.** Currently, the State Department and the Department of Homeland Security (DHS) charge a substantial fee to make derivative citizenship assessments. The current DHS fee is $460. Depending on

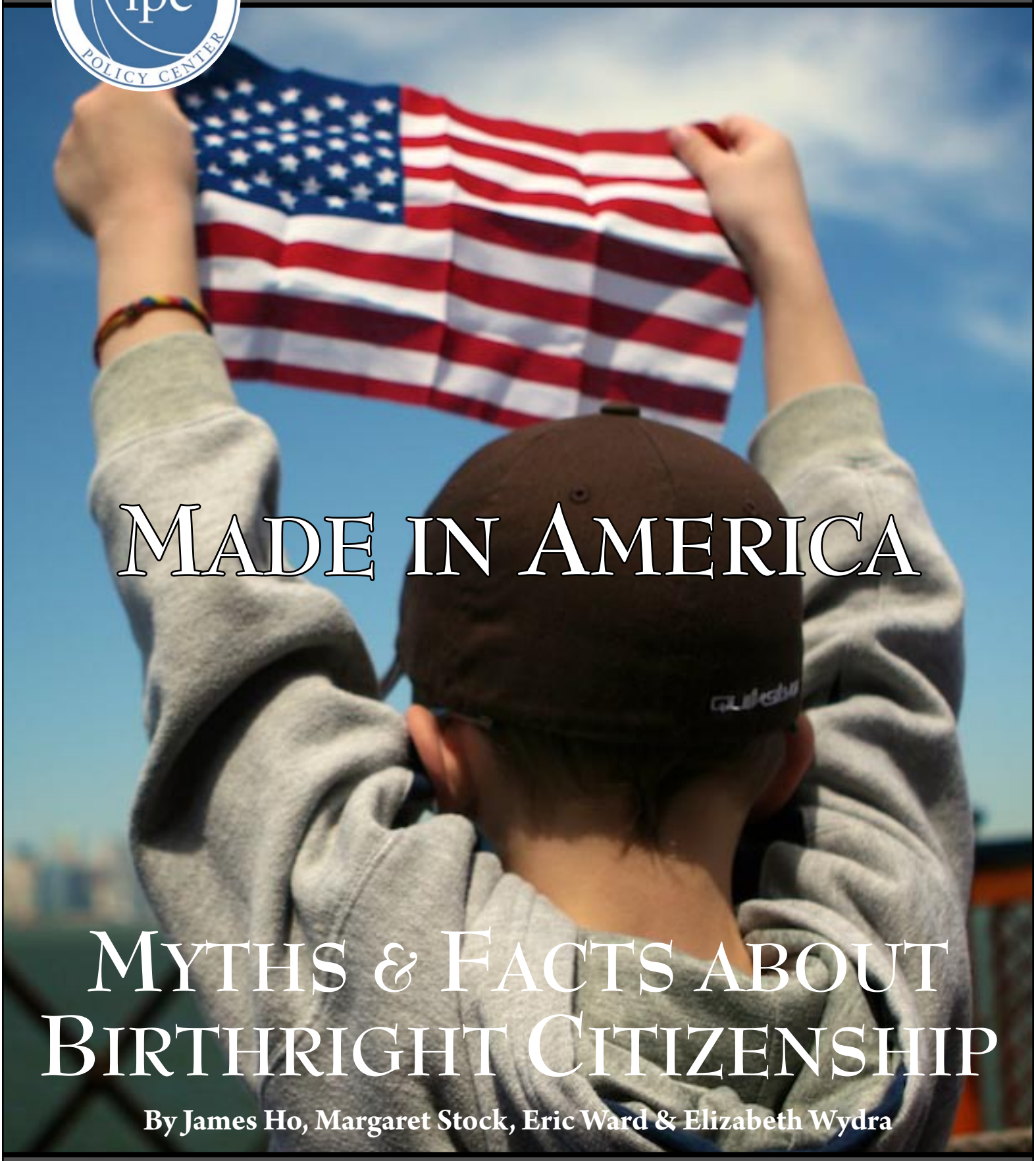
the case, the process can take weeks or even years, and can require the production of numerous documents, including old historical records.

- **Americans could be denied citizenship because of a mistake.** Government agents and others at the state and local level responsible for issuing birth certificates would not have expertise in complicated citizenship laws and in the complexities of determining the immigration status of the parents. Many Americans could be denied citizenship due to a mistake or misunderstanding of the law. The implications of erroneously being denied citizenship would be huge.

- **Big government "solutions" would be expensive.** The U.S. government would have to create a large new bureaucracy responsible for determining the citizenship of all children born in the U.S., and would have to create a national registry of citizens and some sort of identification document to be used as proof of citizenship. This would be expensive.

ATTACHMENT D

IMMIGRATION POLICY CENTER
PERSPECTIVES



Made in America

Myths & Facts about Birthright Citizenship

By James Ho, Margaret Stock, Eric Ward & Elizabeth Wydra

SEPTEMBER 2009

Photo from flickr.com. By Brian Wilson Photography.

MADE IN AMERICA:
MYTHS & FACTS ABOUT BIRTHRIGHT CITIZENSHIP

BY JAMES HO, MARGARET STOCK, ERIC WARD & ELIZABETH WYDRA

SEPTEMBER 2009

ABOUT PERSPECTIVES ON IMMIGRATION

The Immigration Policy Center's *Perspectives* are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

ABOUT THE AUTHORS

James C. Ho is currently Solicitor General for the state of Texas. Previously he worked at the Dallas office of Gibson, Dunn & Crutcher LLP. He has previously served as chief counsel of the U.S. Senate Judiciary Subcommittees on the Constitution and Immigration under the chairmanship of Senator John Cornyn (R-TX) and as a law clerk to Justice Clarence Thomas.

Margaret D. Stock is an attorney in Anchorage, Alaska; a Lieutenant Colonel in the Military Police Corps, U.S. Army Reserve; and an Associate Professor (Drilling Individual Mobilization Augmentee) assigned to the Dept. of Social Sciences, U.S. Military Academy, West Point, New York.

Eric Ward is the National Field Director of the Center for New Community, a national civil rights organization based in Chicago, Illinois.

Elizabeth B. Wydra is Chief Counsel at the Constitutional Accountability Center, www.theusconstitution.org, a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history.

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Law Foundation. IPC's mission is to shape a rational national conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

Supported in part by a grant from the Foundation to Promote Open Society

TABLE OF CONTENTS

INTRODUCTION

The Fourteenth Amendment to the Constitution is enshrined in U.S. history as the cornerstone of American civil rights, ensuring due process and equal protection under the law to all persons. Equally important, however, is the Fourteenth Amendment's affirmation that all persons born or naturalized in the United States and subject to its jurisdiction are, in fact, U.S. citizens:

> *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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Most recently, pundits used the issue of birthright citizenship to challenge the legitimacy of both major parties' candidates in the 2008 presidential election. Senator John McCain was born in 1936 on a U.S. military base in the Panama Canal Zone, where his father—a U.S. Naval officer—was posted, causing some to question whether McCain is a natural-born citizen. President Barack Obama was born to a U.S.-citizen mother and an immigrant father in Hawaii in 1961, two years after Hawaii became the 50th U.S. state. Even months into his presidency, some conspiracy theorists still question President Obama's eligibility to serve.

But the question of who is entitled to U.S. citizenship is most often raised during debates over illegal immigration. While most of the debate turns on the question of who can become a citizen through legalization and naturalization, some groups argue that the way to end illegal immigration is to change the rules of the game by denying citizenship to the U.S.-born children of illegal immigrants.

Each year, bills are introduced in Congress to deny U.S. citizenship to the children of illegal immigrants and, in some cases, the children of immigrants who are in the country on temporary visas. On May 29, 2009, Rep. Nathan Deal (R-9th/GA) re-introduced his "Birthright Citizenship Act" (HR 1868), which would deny birthright citizenship to children born in the United States to illegal, and even temporary, immigrants. Recently, there have been proposals to abolish birthright citizenship in Texas and California by state lawmakers, who hope to advance a national debate on the issue and push a legal challenge to the Supreme Court.

Rarely, however, does the immigration advocacy community explore the impact of the birthright citizenship debate as it relates to the Fourteenth Amendment. Thus, the Immigration Policy Center invited respected scholars and authors to provide greater perspective on this perennial issue.

Before introducing the specific papers, a bit of background is in order.

There are two basic principles by which countries define citizenship. The first is *jus sanguinis*, or citizenship by descent, which means that an individual is a citizen based on his or her parentage. Under this principle, a person is not automatically a citizen by virtue of having been born within the country's territory. Rather, the citizenship of the child's parents determines whether or not the child is a citizen. Countries that adhere to the principle of citizenship by descent vary on issues such as whether citizenship is acquired through the father or the mother, whether one or both parents must be citizens, and the marital status of the parents. Switzerland, for example, follows the principle of *jus sanguinis* and does not confer citizenship on all persons born in the country. Second- and even third-generation immigrants may not be citizens of Switzerland by birth because birth in the territory does not matter. Similarly, being born in Germany does not automatically confer German citizenship. A child born in Germany to parents who are not German citizens will acquire German citizenship at birth only if one parent has lived in the country for at least eight years.

The second principle of citizenship is *jus soli*, or citizenship by birth. Any person born within the country's territory is a citizen, regardless of the citizenship of the parents. Countries may place limits on birthright citizenship, such as excluding the children of foreign diplomats. The United States, Canada, and some Latin American countries, among others, ascribe citizenship to all persons (with noted exceptions) born in their territory. Thus the children of legal and illegal immigrants born in the United States are U.S. citizens by virtue of the fact they are born on U.S. soil.

Of course, even countries with birthright citizenship policies have *jus sanguinis* policies for persons who are born outside of the country, but who may have a claim to citizenship. For example, children born to U.S. citizens residing abroad may be U.S. citizens at birth if both of the parents are citizens of the United States and at least one parent resided in the United States before the birth of the child, or if one parent is a citizen of the United States who resided in the United States for at least five years before the birth of the child.

The few examples provided above demonstrate how complex citizenship laws may be. However, one thing is clear: for nearly 150 years, the principle of birthright citizenship for all persons born within the United States has been a strong and clear element of American law and values.

In this series, the Immigration Policy Center explores the issue of birthright citizenship from several different angles:

James C. Ho, a noted constitutional scholar, examines the historical and legal genesis of birthright citizenship and the unsuccessful legal arguments put forward to abolish it.

Elizabeth Wydra of the Constitutional Accountability Center looks at the Reconstructionist context of the Citizenship Clause and shows that Congress clearly meant to provide birthright citizenship to all those born on U.S. soil, regardless of the immigration status of their parents. She argues that attempts to abolish birthright citizenship run counter to American values.

Eric Ward of the Center for New Community provides an African American perspective on birthright citizenship and the 14th Amendment, which was passed in the aftermath of the Civil War in response to continued discrimination against African Americans. Ward also examines the motives of the groups at the forefront of current efforts to abolish birthright citizenship and demonstrates their deeply rooted anti-immigrant beliefs and ties to nativist and racist traditions.

Finally, immigration attorney **Margaret Stock** provides very practical reasons to not tamper with birthright citizenship. The far-reaching consequences of such a change would place a burden on all Americans, who would have to document their claim to citizenship. Contrary to the argument of anti-immigrant groups that abolishing birthright citizenship is key to resolving the problem of illegal immigration, Stock recognizes that it would only increase the number of stateless individuals without legal status who reside within the United States.

Together, these four essays present a strong case for maintaining and celebrating our tradition of birthright citizenship—a tradition which is intimately tied to our heritage of civil rights.

Defining "American:"

Birthright Citizenship and the Original Understanding of the 14th Amendment*

*By James C. Ho***

In response to increasing frustration with illegal immigration, lawmakers and activists are hotly debating various proposals to combat incentives to enter the United States outside legal channels. Economic opportunity is the strongest attraction, of course. But another magnet, some contend, is a long-standing provision of U.S. law that confers citizenship upon persons born within our borders.[1]

There is increasing interest in repealing birthright citizenship for the children of aliens—especially undocumented persons. According to one recent poll, 49 percent of Americans believe that a child of an illegal alien should not be entitled to U.S. citizenship (41 percent disagree).[2] Legal scholars including Judge Richard Posner contend that birthright citizenship for the children of aliens may be repealed by statute.[3] Members of the current Congress have introduced legislation and held hearings,[4] following bipartisan efforts during the 1990s led by now-Senate Majority Leader Harry Reid and others.[5]

These proposals raise serious constitutional questions, however. Birthright citizenship is guaranteed by the Fourteenth Amendment. That birthright is protected no less for children of undocumented persons than for descendants of *Mayflower* passengers.

The Fourteenth Amendment begins: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Repeal proponents

---

* This article originally appeared in *The Green Bag*, Summer 2006, Volume 9, Number 4.

** James C. Ho is currently Solicitor General for the state of Texas. Previously he worked at the Dallas office of Gibson, Dunn & Crutcher LLP. He has previously served as chief counsel of the U.S. Senate Judiciary Subcommittees on the Constitution and Immigration under the chairmanship of Senator John Cornyn (R-TX) and as a law clerk to Justice Clarence Thomas.

[1] 8 U.S.C. § 1401.

[2] www.rasmussenreports.com/2005/Immigration%20November%207.htm.

[3] *Oforji v. Ashcroft*, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring); John C. Eastman and Edwin Meese III, Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence, *Hamdi v. Rumsfeld*, No. 03–6696 (Eastman/Meese Brief) (see also www.fed-soc.org/pdf/birthright.pdf; www.heritage.org/Research/LegalIssues/lm18.cfm); Charles Wood, "Losing Control of America's Future," 22 *Harv. J.L. and Pub. Pol'y* 465, 503–22 (1999); Peter Schuck and Rogers Smith, *Citizenship Without Consent* (1985).

[4] E.g., H.R. 698; H.R. 3700, § 201; H.R. 3938, § 701;" Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty": Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary, 109th Cong. (2005) ("2005 House Hearing"). In March, Senator Tom Coburn circulated an amendment in committee to repeal birthright citizenship (a vote was never taken), while Senator Charles Schumer, a proponent of birthright citizenship, asked now- Justice Samuel A. Alito for his views during his confirmation hearings.

[5] E.g., S. 1351, 103rd Cong., § 1001 (1993); 139 Cong. Rec. 21709–12 (1993) (Sen. Reid); H.R. 3862, 103rd Cong., § 401 (1994); "Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents": Joint Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. (1995); Citizenship Reform Act of 1997; and "Voter Eligibility Verification Act": Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 105th Cong. (1997).

contend that this language does not apply to the children of aliens – whether legal or illegal (with the possible exception of lawful permanent residents) – because such persons are not "subject to [U.S.] jurisdiction." But text, history, judicial precedent, and Executive Branch interpretation confirm that the Citizenship Clause reaches most U.S.-born children of aliens, including illegal aliens.

One might argue that the Constitution's emphasis on place of birth is antiquated. The requirement that only natural-born citizens may serve as President or Vice President has been condemned on similar grounds.[6] But a constitutional amendment is the only way to expand eligibility for the Presidency, and it is likewise the only way to restrict birthright citizenship.[7]

We begin, of course, with the text of the Citizenship Clause.
To be "subject to the jurisdiction" of the U.S. is simply to be subject to the authority of the U.S. government.[8] The phrase thus covers the vast majority of persons within our borders who are required to obey U.S. laws. And obedience, of course, does not turn on immigration status, national allegiance, or past compliance. All must obey.

Common usage confirms this understanding. When we speak of a business that is subject to the jurisdiction of a regulatory agency, it must follow the laws of that agency, whether it likes it or not.[9] When we speak of an individual who is subject to the jurisdiction of a court, he must follow the judgments and orders of that court, whether he likes it or not.[10] As Justice Scalia noted just a year ago, when a statute renders a particular class of persons "subject to the jurisdiction of the United States," Congress "has made clear its intent to extend its laws" to them.[11]

Of course, when we speak of a person who is subject to our jurisdiction, we do not limit ourselves to only those who have sworn allegiance to the U.S. Howard Stern need not swear allegiance to the FCC to be bound by Commission orders. Nor is being "subject to the jurisdiction" of the U.S. limited to those who have always complied with U.S. law. Criminals cannot immunize themselves from prosecution by violating Title 18. Likewise, aliens cannot immunize themselves from U.S. law by entering our country in violation of Title 8. Indeed, illegal aliens are such *because* they are subject to U.S. law.

---

[6] E.g., James C. Ho, "President Schwarzenegger – Or At Least Hughes?," 7 *Green Bag* 2d 108 (2004).
[7] Constitutional amendments repealing birthright citizenship have been proposed. H.J. Res. 41, 109th Cong. (2005); H.J. Res. 64, 104th Cong. (1995). See also Michael Sandler, "Toward a More Perfect Definition of 'Citizen,'" *CQ Weekly*, Feb. 13, 2006, at 388 (quoting Rep. Mark Foley, who supports repeal by constitutional amendment: "My view is the 14th Amendment was rather certain in its application … . Legislatively, I still am not comfortable with [the statutory approach]. I think a court could strike it down.").
[8] E.g., *Black's Law Dictionary* defines "jurisdiction" as "[a] government's general power to exercise authority."
[9] *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) (respecting recreational boats "subject to [the] jurisdiction" of the Coast Guard); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 544 (2001) (respecting electronic communications media "subject to the jurisdiction of the FCC").
[10] *Rumsfeld v. Padilla*, 542 U.S. 426, 445 (2004) (respecting government officials "subject to [the] habeas jurisdiction" of a particular court).
[11] *Spector v. Norwegian Cruise Line Ltd*., 125 S. Ct. 2169, 2194–95 (2005) (Scalia, J., dissenting). The statement was joined by Chief Justice Rehnquist and Justice O'Connor, and no justice took issue with it.

Accordingly, the text of the Citizenship Clause plainly guarantees birthright citizenship to the U.S.-born children of all persons subject to U.S. sovereign authority and laws. The clause thus covers the vast majority of lawful and unlawful aliens. Of course, the jurisdictional requirement of the Citizenship Clause must do something – and it does. It excludes those persons who, for some reason, are immune from, and thus not required to obey, U.S. law. Most notably, foreign diplomats and enemy soldiers – as agents of a foreign sovereign – are not subject to U.S. law, notwithstanding their presence within U.S. territory. Foreign diplomats enjoy diplomatic immunity,[12] while lawful enemy combatants enjoy combatant immunity.[13] Accordingly, children born to them are not entitled to birthright citizenship under the Fourteenth Amendment.

This conclusion is confirmed by history.

The Citizenship Clause was no legal innovation. It simply restored the longstanding English common law doctrine of *jus soli*, or citizenship by place of birth.[14] Although the doctrine was initially embraced in early American jurisprudence,[15] the U.S. Supreme Court abrogated *jus soli* in its infamous *Dred Scott* decision, denying birthright citizenship to the descendents of slaves.[16] Congress approved the Citizenship Clause to overrule *Dred Scott* and elevate *jus soli* to the status of constitutional law.[17]

When the House of Representatives first approved the measure that would eventually become the Fourteenth Amendment, it did not contain language guaranteeing citizenship.[18] On May 29, 1866, six days after the Senate began its deliberations, Senator Jacob Howard (R-MI) proposed language pertaining to citizenship. Following extended debate the next day, the Senate adopted Howard's language.[19] Both chambers subsequently approved the constitutional amendment without further discussion of birthright citizenship,[20] so the May 30, 1866 Senate debate offers the best insight into Congressional intent.

Senator Howard's brief introduction of his amendment confirmed its plain meaning:

> Mr. HOWARD. … This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. *This will not, of course, include persons born in the United States who are foreigners, aliens, who belong*

[12] *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1329–31 (11th Cir. 1984).
[13] *United States v. Lindh,* 212 F. Supp. 2d 541, 553–58 (E.D. Va. 2002).
[14] *Calvin v. Smith*, 77 Eng. Rep. 377 (K.B. 1608).
[15] *Inglis v. Trustees of the Sailor's Snug Harbor*, 28 U.S. 99, 164 (1830) (Story, J.) ("[n]othing is better settled at the common law" than *jus soli*); *Lynch v. Clarke*, 1 Sandford Ch. 583, 646 (N.Y. 1844); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (*1608), 9 *Yale J. L. & Humanities* 73, 138–40 (1997).
16 *Scott v. Sanford*, 60 U.S. 393 (1857).
[16] *Scott v. Sanford,* 60 U.S. 393 (1857).
[17] *Saenz v. Roe*, 526 U.S. 489, 502 n.15 (1999); In re Look Tin Sing, 21 F. 905, 909–10 (C.C. D. Cal. 1884).
[18] *Cong. Globe*, 39th Cong., 1st Sess. 2545 (1866).
[19] Id. at 2869, 2890–97.
[20] Id. at 3042, 3149.

> *to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons*."[21]

This understanding was universally adopted by other Senators. Howard's colleagues vigorously debated the *wisdom* of his amendment – indeed, some opposed it precisely *because* they opposed extending birthright citizenship to the children of aliens of different races. But no Senator disputed the *meaning* of the amendment with respect to alien children.

Senator Edgar Cowan (R-PA)—who would later vote against the entire constitutional amendment anyway—was the first to speak in opposition to extending birthright citizenship to the children of foreigners. Cowan declared that, "if [a state] were overrun by another and a different race, it would have the right to absolutely expel them." He feared that the Howard amendment would effectively deprive states of the authority to expel persons of different races—in particular, the Gypsies in his home state of Pennsylvania and the Chinese in California—by granting their children citizenship and thereby enabling foreign populations to overrun the country. Cowan objected especially to granting birthright citizenship to the children of aliens who "owe [the U.S.] no allegiance [and] who pretend to owe none," and to those who regularly commit "trespass" within the U.S.[22]

In response, proponents of the Howard amendment *endorsed* Cowan's interpretation. Senator John Conness (R-CA) responded specifically to Cowan's concerns about extending birthright citizenship to the children of Chinese immigrants:

> The proposition before us … relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. … I am in favor of doing so. … We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.

Conness acknowledged Cowan's dire predictions of foreign overpopulation, but explained that, although legally correct, Cowan's parade of horribles would not be realized, because most Chinese would not take advantage of such rights although entitled to them. He noted that most Chinese work and then return to their home country, rather than start families in the U.S. Conness thus concluded that, if Cowan "knew as much of the Chinese and their habits as he professes to do of the Gypsies, … he would not be alarmed."[23]

---

[21] Id. at 2890 (emphasis added).

[22] Space constraints, if nothing else, prevent me from quoting Cowan's racially charged remarks here in full, but see id. at 2890–91.

[23] Id. at 2891. Like Cowan, Conness also had bad things to say about the Chinese. Id. at 2891–92. But to his credit, Conness at least recognized their need for civil rights protections. Id. at 2892.

No Senator took issue with the consensus interpretation adopted by Howard, Cowan, and Conness. To be sure, one interpretive dispute did arise. Senators disagreed over whether the Howard amendment would extend birthright citizenship to the children of Indians. For although Indian tribes resided within U.S. territory, weren't they also sovereign entities not subject to the jurisdiction of Congress?

Some Senators clearly thought so. Howard urged that Indian tribes "always have been in our legislation and jurisprudence, as being *quasi* foreign nations" and thus could not be deemed subject to U.S. law. Senator Lyman Trumbull (D-IL) agreed, noting that "it would be a violation of our treaty obligations … to extend our laws over these Indian tribes with whom we have made treaties saying we would not do it." Trumbull insisted that Indian tribes "are not subject to our jurisdiction in the sense of owing allegiance solely to the United States," for "[i]t is only those persons who come completely within our jurisdiction, *who are subject to our laws*, that we think of making citizens."[24]

Senators Reverdy Johnson (D-MD) and Thomas Hendricks (D-IN) disagreed, contending that the U.S. could extend its laws to Indian tribes and had done so on occasion.[25] Senator James R. Doolittle (R-WI) proposed to put all doubt to rest by adding the words "excluding Indians not taxed" (borrowing from language in Article I) to the Howard amendment.[26] But although there was virtual consensus that birthright citizenship should not be extended to the children of Indian tribal members,[27] a majority of Senators saw no need for clarification. The Senate ultimately defeated Doolittle's amendment by a 10–30 vote, and then adopted the Howard text without recorded vote.[28]

Whatever the correct legal answer to the question of Indian tribes, it is clearly beside the point. The status of Indian tribes under U.S. law may have been ambiguous to members of the 39th Congress. But there is no doubt that foreign countries enjoy no such sovereign status within U.S. borders. And there is likewise no doubt that U.S. law applies to their nationals who enter U.S. territory.

Repeal proponents contend that history supports their position.
First, they quote Howard's introductory remarks to state that birthright citizenship "will not, of course, include … foreigners."[29] But that reads Howard's reference to "aliens, who belong to the families of ambassadors or foreign ministers" out of the sentence. It also renders completely meaningless the subsequent dialogue between Senators Cowan and Conness over the wisdom of extending birthright citizenship to the children of Chinese immigrants and Gypsies.

[24] Id. at 2890, 2895 (Sen. Howard); id. at 2893, 2894 (Sen. Trumbull) (emphasis added).
[25] Id. at 2893–94 (Sen. Johnson); id. at 2894–95 (Sen. Hendricks).
[26] Id. at 2890, 2892–93, 2897.
[27] Only Willard Saulsbury, Sr. (D-DE) expressed disagreement. Id. at 2897.
[28] Id. at 2897.
[29] Smith s Lungren; 2005 House Hearing at 3 (Rep. L. Smith); John C. Eastman, "Constitution's Citizenship Clause Misread," *Wall St. J.,* Dec. 7, 2005, at A19; John C. Eastman, "Citizens by Right, or by Consent?" *San Francisco Chron.,* Jan. 2, 2006, at B9.

Second, proponents claim that the Citizenship Clause protects only the children of persons who owe complete *allegiance* to the U.S. – namely, U.S. citizens. To support this contention, proponents cite stray references to "allegiance" by Senator Trumbull (a presumed authority in light of his Judiciary Committee chairmanship) and others, as well as the text of the 1866 Civil Rights Act.

But the text of the Citizenship Clause requires "jurisdiction," not "allegiance." Nor did Congress propose that "all persons born *to U.S. citizens* are citizens of the United States." To the contrary, Senator Cowan opposed the Citizenship Clause precisely because it would extend birthright citizenship to the children of

> people who … *owe* [*my state*] *no allegiance*; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own …; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen, and perform none of the duties which devolve upon him.[30]

Moreover, Cowan's unambiguous rejection of "allegiance" formed an essential part of the consensus understanding of the Howard text. By contrast, the stray references by Trumbull and others to "allegiance" were made during the debate over tribal sovereignty, not alienage generally. Indeed, Trumbull himself confirmed that the Howard text covers all persons "who are subject to our laws."[31]

The 1866 Civil Rights Act likewise offers no support. Enacted less than two months before the Senate adopted the Howard amendment, the Act guarantees birthright citizenship to "all persons born in the United States and *not subject to any foreign power*, excluding Indians not taxed."[32] Repeal proponents contend that all aliens are "subject to …a[] foreign power," and that this is relevant because the Fourteenth Amendment was ratified to ensure the Act's validity.

But in fact, proponents and opponents of birthright citizenship alike consistently interpreted the Act, just as they did the Fourteenth Amendment, to cover the children of aliens. In one exchange, Cowan, in a preview of his later opposition to the Howard text, "ask[ed] whether [the Act] will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?" Trumbull replied: "Undoubtedly. … [T]he child of an Asiatic is just as much a citizen as the child of a European."[33]

---

[30] *Cong. Globe*, 39th Cong., 1st Sess. 2891 (emphasis added).
[31] Id. at 2893. See also id. at 2895 (Sen. Hendricks) (if "[w]e can make [a person] obey our laws, … being liable to such obedience he is subject to the jurisdiction of the United States").
[32] 14 Stat. 27, § 1 (emphasis added).
[33] *Cong. Globe*, 39th Cong., 1st Sess. 498. Moreover, as John Eastman (a leading repeal proponent) has conceded, the Fourteenth Amendment's positively phrased text ("subject to … jurisdiction") "might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act" ("not subject to any foreign power"). 2005 House Hearing at 63; http://www.heritage.org/Research/LegalIssues/lm18.cf. Eastman cites the legislative history of the Fourteenth Amendment to eliminate the gap – suggesting that the Act does little work for repeal proponents.

Finally, repeal proponents point out that our nation was founded upon the doctrine of consent of the governed, not the feudal principle of perpetual allegiance to the sovereign.[34] But that insight explains only why U.S. citizens enjoy the right of expatriation – that is, the right to renounce their citizenship – not whether U.S.-born persons are entitled to birthright citizenship.

History thus confirms that the Citizenship Clause applies to the children of aliens. To be sure, members of the 39th Congress may not specifically have contemplated extending birthright citizenship to the children of *illegal* aliens, for Congress did not generally restrict migration until well after adoption of the Fourteenth Amendment.[35]

But nothing in text or history suggests that the drafters intended to draw distinctions between different categories of aliens. To the contrary, text and history confirm that the Citizenship Clause reaches all persons who are subject to U.S. jurisdiction and laws, regardless of race or alienage.

The original understanding of the Citizenship Clause is further reinforced by judicial precedent.

In *United States v. Wong Kim Ark* (1898), the U.S. Supreme Court confirmed that a child born in the U.S., but to alien parents, is nevertheless entitled to birthright citizenship under the Fourteenth Amendment. Wong Kim Ark was born in San Francisco to alien Chinese parents who "were never employed in any diplomatic or official capacity under the emperor of China." After traveling to China on a temporary visit, he was denied permission to return to the U.S.; the government argued that he was not a citizen, notwithstanding his U.S. birth, through an aggressive reading of the Chinese Exclusion Acts.[36]

By a 6–2 vote, the Court rejected the government's argument:

> 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, *including all children here born of resident aliens*, with the exceptions or qualifications (as old as the rule itself) of 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, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. … To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of *citizens or subjects of other countries*, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other

[34] Edward J. Erler, "From Subjects to Citizens: The Social Compact Origins of American Citizenship," in The American Founding and the Social Compact 163–97 (2003).
[35] *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972) ("Until 1875 alien migration to the United States was unrestricted.").
[36] 169 U.S. 649, 652–53.

> European parentage, who have always been considered and treated as citizens of the United States.[37]

This sweeping language reaches all aliens regardless of immigration status.[38] To be sure, the question of illegal aliens was not explicitly presented in *Wong Kim Ark*. But any doubt was put to rest in *Plyler v. Doe* (1982).

Plyler construed the Fourteenth Amendment's Equal Protection Clause, which requires every State to afford equal protection of the laws "to any person *within its jurisdiction*." By a 5–4 vote, the Court held that Texas cannot deny free public school education to undocumented children, when it provides such education to others. But although the Court splintered over the specific question of public education, *all nine justices agreed* that the Equal Protection Clause protects legal and illegal aliens alike. And all nine reached that conclusion precisely because illegal aliens are "subject to the jurisdiction" of the U.S., no less than legal aliens and U.S. citizens.

Writing for the majority, Justice Brennan explicitly rejected the contention that "persons who have entered the United States illegally are not 'within the jurisdiction' of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase 'within its jurisdiction.'" In reaching this conclusion, Brennan invoked the Citizenship Clause and the Court's analysis in *Wong Kim Ark*, noting that

> "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." … [*N*]*o plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.*[39]

The four dissenting justices – Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor – rejected Brennan's application of equal protection to the case at hand. But they pointedly expressed "no quarrel" with his threshold determination that "the Fourteenth Amendment applies to aliens who, *after their illegal entry into this country*, are indeed physically 'within the jurisdiction' of a state."[40]

The Court continues to abide by this understanding to this day. In *INS v. Rios-Pineda* (1985), Justice White noted for a unanimous Court that the "respondent wife [an illegal alien] had given birth to a child, who, born in the United States, was a citizen of this country."[41] And in

---

[37] Id. at 693–94 (emphasis added); see also id. at 682.

[38] *The Heritage Guide to the Constitution* 385 (2005) ("*Wong Kim Ark* is certainly broad enough to include the children born in the United States of illegal … immigrants").

[39] 457 U.S. 202, 211 s n.10 (1982) (quoting Wong Kim Ark, 169 U.S. at 693) (emphasis added); see also 457 U.S. at 215.

[40] Id. at 243 (emphasis added).

[41] 471 U.S. 444, 446. Cf. INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981) (upholding Attorney General's discretion not to suspend deportation for illegal aliens despite hardship for their U.S. citizen children); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950)

Hamdi v. Rumsfeld (2004), the plurality opinion noted that alleged Taliban fighter Yaser Hamdi was "[b]orn in Louisiana" and thus "is an American citizen," despite objections by various *amici* that, at the time of his birth, his parents were aliens in the U.S. on temporary work visas.[42]

Repeal proponents seek refuge in earlier judicial precedents.
As detailed by the two dissenting justices in *Wong Kim Ark*, the Court did suggest a contrary view in the *Slaughter-House Cases* (1872), as well as in *Elk v. Wilkins* (1884).

First, repeal proponents cite a single sentence in *Slaughter-House*, stating that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign States* born within the United States."[43] But that case did not actually implicate the Citizenship Clause, so this passage is pure dicta. Moreover, the Court immediately backed away from this assertion just two years later in *Minor v. Happersett*.[44] That same year, Justice Field (a *Slaughter-House* dissenter) adopted *jus soli* while riding circuit in *In re Look Tin Sing*, wholly disregarding the *Slaughter-House* dicta.[45] And the Court itself, in *Wong Kim Ark*, disparaged the *Slaughter-House* statement as "wholly aside from the question in judgment, and from the course of reasoning bearing upon that question," and "unsupported by any argument, or by any reference to authorities."[46]

Elk v. Wilkins fares no better. *Elk* involved Indians, not aliens, and it merely confirmed what we already knew from the 1866 Senate debate: that Indians are not constitutionally entitled to birthright citizenship. Repeal proponents hasten to point out that references to "allegiance" can be found in *Elk*, just as they can be found in the Senate debate. But again, these stray comments do not detract from the analysis. To the contrary, *Elk* specifically endorsed the view, later adopted in *Wong Kim Ark*, that foreign diplomats are uniquely excluded from the Citizenship Clause.[47] That is unsurprising, for both *Elk* and *Wong Kim Ark* were authored by the same justice: Horace Gray. Repeal proponents thus find themselves in the awkward position of endorsing Justice Gray's majority views in *Elk* but distancing themselves from Justice Gray's majority views in *Wong Kim Ark*. Such tension can be avoided simply by taking *Elk* at face value – and by accepting *Wong Kim Ark* as the law of the land.

("[T]he Court [has] held its processes available to 'an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here.'") (quoting *Yamatayo v. Fisher*, 189 U.S. 86, 101 (1903)).

[42] 542 U.S. 507, 510; Eastman/Meese Brief (cited in note 4). Repeal proponents hasten to note that, in dissent, Justices Scalia and Stevens referred to Hamdi as a "presumed" U.S. citizen. Id. at 554 (Scalia, J., dissenting); 2005 House Hearing at 61 (Prof. Eastman). But citizenship was likely "presumed" only because Hamdi might have renounced citizenship through his hostile conduct. 8 U.S.C. § 1481; *Afroyim v. Rusk*, 387 U.S. 253 (1967); In re Look Tin Sing, 21 F. at 906. In fact, Hamdi subsequently did renounce his citizenship, through a plea agreement that also reserved the possibility that he had renounced citizenship at an earlier time. http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html (paragraph 8). It is difficult in any event to believe that Justice Stevens, a member of the *Plyler* majority, agrees with repeal proponents.

[43] 83 U.S. 36, 73 (emphasis added). This statement is awkward; why bother singling out "ministers" and "consuls," if all "citizens or subjects of foreign States" are excluded? Compare note 29 and accompanying text.

[44] 88 U.S. 162, 167–68 (1874).

[45] 21 F. 905.

[46] 169 U.S. at 678.

[47] 112 U.S. 94, 101–2.

Conclusion

All three branches of our government—Congress, the courts, and the executive branch[48] — agree that the Citizenship Clause applies to the children of aliens and citizens alike.[49]

But that may not stop Congress from repealing birthright citizenship. Pro-immigrant members might allow birthright citizenship legislation to be included in a comprehensive immigration reform package—believing it will be struck down in court—in exchange for keeping other provisions they disfavor off the bill. Alternatively, opponents of a new temporary worker program might withdraw their opposition, if the children of temporary workers are denied birthright citizenship.[50] Stay tuned: *Dred Scott II* could be coming soon to a federal court near you.

[48] Legislation Denying Citizenship at Birth to Certain Children Born in the United States, 19 Op. O.L.C. 340 (1995); see also Citizenship of Children Born in the United States of Alien Parents, 10 Op. Att'y Gen. 328, 328–29 (1862) (analyzing pre-Fourteenth Amendment common law); Citizenship, 10 Op. Att'y Gen. 382, 396–97 (1862) (same). See generally www.ilw.com/articles/2006,0502-endelman.shtm (collecting authorities in footnotes 21 and 27).

[49] What about foreign governments? If "[n]early every industrialized country in the world requires at least one parent to be a citizen or legal immigrant before a child born there becomes a citizen," House Hearing at 3 (Rep. Smith), perhaps repeal proponents should demand that the Citizenship Clause be construed in light of foreign law and international consensus. Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) (noting various conservative foreign rulings not cited by the Court).

[50] Lynn Woolley, "Myths, Realities of the 14th Amendment," *Human Events Online*, Mar. 7, 2006, available at www.humaneventsonline.com/article.php?id=13010.

Debunking Modern Arguments Against Birthright Citizenship

By Elizabeth B. Wydra [*]

Since its ratification in 1868, the Fourteenth Amendment has guaranteed 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." Just a decade before this language was added to our Constitution, the Supreme Court held in *Dred Scott* that persons of African descent could not be U.S. citizens under the Constitution. Our nation fought a war at least in part to repudiate the terrible error of *Dred Scott* and to secure, in the Constitution, citizenship for all persons born on U.S. soil, regardless of race, color, or ancestry.

Against the backdrop of prejudice against newly freed slaves and various immigrant communities such as the Chinese and Gypsies, the Reconstruction framers recognized that the promise of equality and liberty in the original Constitution needed to be established permanently for people of all colors; accordingly, they chose to constitutionalize the conditions sufficient for automatic U.S. citizenship. Fixing the conditions of birthright citizenship in the Constitution—rather than leaving them up to constant revision or debate—befits the inherent dignity of citizenship, which should not be granted according to the politics or prejudices of the day.

Despite the clear intent of the Reconstruction framers to grant U.S. citizenship based on the objective measure of U.S. birth rather than subjective political or public opinion, for over a decade bills have been introduced in Congress to end automatic citizenship for persons born on U.S. soil to parents who are in the country illegally.[1] This effort has gained momentum from outside Congress: in recent years, a small handful of academics has joined the debate and called into question birthright citizenship,[2] and in the 2008 presidential campaign, several Republican candidates expressed their skepticism that the Constitution guarantees birthright citizenship.[3] Though the most prominent proponents of ending birthright citizenship have been conservative, the effort has been bipartisan: Democratic Senator—and now Majority

[*] Elizabeth B. Wydra is Chief Counsel at the Constitutional Accountability Center, www.theusconstitution.org, a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history.

[1] *E.g.*, H.R. 1868, 111th Cong. (2009); H.R. 6789, 110th Cong. (2008); H. Res. 46, 110th Cong. (2007); H.R. 1940, 110th Cong. (2007); H.R. 4192, 110th Cong. (2007); H.R. 3700, 109th Cong. (2005); H.R. 3938, 109th Cong. (2005); H.R. 698, 109th Cong. (2005); H.R. 7, 105th Cong. (1997); H.R. 346, 105th Cong. (1997); H.R. 1363, 104th Cong. (1995).

[2] *E.g.*, Peter Schuck and Rogers Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven, CN: Yale University Press, 1985); Charles Wood, "Losing Control of America's Future," *Harvard Journal of Law and Public Policy* 22, no. 2 (Spring 1999): 465.

[3] Joanna Klonsky, "The Candidates on Immigration," *Newsweek*, January 3, 2008 (noting that presidential candidates Ron Paul and Tom Tancredo supported ending birthright citizenship); Jim Stratton, "Thompson Angers State Hispanics," *The Orlando Sentinel*, September 29, 2007 (reporting that Fred Thompson publicly expressed support for rethinking birthright citizenship); ABC News blogs, "Romney Eyeing End to Birthright Citizenship," July 22, 2007 (explaining that Mitt Romney was looking into whether birthright citizenship could be ended legislatively or by constitutional amendment); "Huckabee Retreats on Birthright Citizenship," *Washington Times*, January 9, 2008 (noting that Mike Huckabee has at times expressed support for ending birthright citizenship).

Leader—Harry Reid introduced legislation that would deny birthright citizenship to children of mothers who are not U.S. citizens or lawful permanent residents.[4]

Putting aside whether ending birthright citizenship is a good idea as a policy matter—and scholars, notably Margaret Stock, make compelling arguments that ending birthright citizenship would have disastrous practical consequences—the threshold question is whether Congress may properly consider ending automatic citizenship for persons born in and subject to the jurisdiction of the United States at all. (Proponents of ending birthright citizenship seem to be unsure whether they need to amend the Constitution to achieve their goal, or if they may simply legislate around it.)

A close study of the text of the Citizenship Clause and Reconstruction history demonstrates that the Citizenship Clause provides birthright citizenship to all those born on U.S. soil, regardless of the immigration status of their parents. Perhaps more important, the principles motivating the framers of the Reconstruction Amendments, of which the Citizenship Clause is a part, suggest that we amend the Constitution to reject automatic citizenship at the peril of our core constitutional values. The current debate over the meaning of the Citizenship Clause also stands in stark contrast to the legislative debates occurring at the time Congress approved it. Perhaps the most remarkable feature of the legislative history of the Citizenship Clause is that both its proponents and opponents *agreed* that it recognizes and protects birthright citizenship for the children of aliens born on U.S. soil. The Reconstruction Congress did not debate the meaning of the Clause, but whether, based on their shared understanding of its meaning, the Clause embodied sound public policy by protecting birthright citizenship. For the most part, Congressional opponents of birthright citizenship argued vigorously against it because, in their view, it would grant citizenship to persons of a certain race, ethnicity, or status that the opponents deemed unworthy of citizenship. These views did not carry the day. Instead, Congress approved a constitutional amendment that used an objective measure—birth on U.S. soil—to grant citizenship automatically to all those who satisfied this condition.

To revoke birthright citizenship based on the status and national origin of a child's ancestors goes against the purpose of the Citizenship Clause and the text and context of the Fourteenth Amendment.

The Principles of the Fourteenth Amendment

The principles behind Reconstruction and the Fourteenth Amendment are particularly relevant to the current challenge to birthright citizenship. Given the intensity of our national debate over immigration, it comes as little surprise that the special targets of the attacks on birthright citizenship are children of undocumented immigrants. Some observers contend that birthright citizenship provides a strong incentive to those outside our borders to enter the country illegally in order to give birth on U.S. soil and thereby secure automatic citizenship for their child. These undocumented aliens, the argument continues, often hope the United States will

[4] S. 1351, 103d Cong. (1993); *see* James C. Ho, "Defining 'American': Birthright Citizenship and the Original Understanding of the 14th Amendment," *The Green Bag* 9, no. 4 (Summer 2006): 367-68 (discussing federal hearings and legislative proposals).

grant citizenship to them as well for the sake of the children. Those who argue this position maintain that Congress should pass legislation that prospectively denies citizenship to children of undocumented aliens.

At the time the Fourteenth Amendment was drafted, opinions on race and ethnicity were just as, if not more, passionately held and forcefully debated as opinions on immigration today. The *Dred Scott* decision—which was specifically overruled through the Citizenship Clause—demonstrates why the Reconstruction framers drafted the Clause to place the class of persons eligible for citizenship beyond debate. Dissenting from the majority's opinion that, under its view of the Constitution, "citizenship at that time was perfectly understood to be confined to the white race,"[5] Justice Benjamin Curtis noted the potential dangers if Congress were empowered to enact at will "what free persons, born within the several States, shall or shall not be citizens of the United States."[6] Curtis noted that if the Constitution did not fix limitations of discretion, Congress could "select classes of persons within the several States" who could alone be entitled to the privileges of citizenship, and, in so doing, turn the democratic republic into an oligarchy.

Even on the floor of the U.S. Senate, xenophobic and racist sentiments were freely expressed, and some senators sought to have these beliefs reflected in the citizenship laws. The framers of the Fourteenth Amendment wisely rejected these attempts, and created a Constitution that gave citizenship automatically to anyone, of any color or status, born within the United States. The provision of citizenship by birthright was constitutionalized to place the question of who should be a citizen beyond the mere consent of politicians and the sentiments of the day.[7] After cataloguing the discriminatory enactments of the former slaveholding states, it would have made no sense for the Reconstruction framers to have made the citizenship of freed slaves open to easy revocation if these states regained legislative power.[8] Indeed, Representative Giles W. Hotchkiss specifically raised this fear with respect to the Fourteenth Amendment, which was originally drafted simply to allow Congress to enforce the protections of the Constitution rather than to enumerate the specific rights and guarantees it eventually embodied. He noted the possibility that "rebel states" could gain power in the Congress and strip away the rights envisioned by the Reconstruction framers, unless these rights were "secured by a constitutional amendment that legislation cannot override."[9] The wisdom of the Reconstruction framers in placing the conditions of citizenship above majority action was confirmed when exclusionary immigration laws were passed just after the Fourteenth Amendment was ratified. Had the racial animus of the Chinese Exclusion Laws, passed in the

[5] 60 U.S. (19 How.) 393, 419 (1856).
[6] *Ibid.* at 577-78.
[7] *See* 1 Joseph Story, *Commentaries on the Constitution of the United States* (Thomas M. Cooley, ed., 4th ed., 1873): 653 (noting that the Fourteenth Amendment constitutionalized the conditions sufficient for citizenship because "the rights of a class of persons still suffering under a ban of prejudice could never be deemed entirely secure when at any moment it was within the power of an unfriendly majority in Congress to take them away by repealing the act which conferred them").
[8] *See Cong. Globe*, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).
[9] *Cong. Globe*, 39th Cong., 1st Sess. 1095 (1866).

1880s,[10] been incorporated into the text of the Citizenship Clause, the amendment would be a source of shame rather than an emblem of equality.

The current, inflammatory invocation of "anchor babies" by opponents of birthright citizenship further confirms the good judgment of the framers of the Fourteenth Amendment in placing the question of citizenship beyond "consent" of the majority. Indeed, claims of which immigrants were "worthier" of citizenship than others were present at the time the Citizenship Clause was enacted. In his veto message, President Johnson objected to the discrimination made between "worthy" foreigners, who must go through certain naturalization procedures because of their "foreign birth," and conferring citizenship on "all persons of African descent, born within the extended limits of the United States," who Johnson did not feel were as prepared for the duties of a citizen.[11] The drafters of the Fourteenth Amendment rejected such distinctions, and instead provided us with a Constitution that guarantees equality and grants citizenship to all persons born in the United States, regardless of color, creed, or origin. The text of the Citizenship Clause grants automatic citizenship to all persons born on U.S. soil so that minority groups do not need to win a popular vote to enjoy the privileges and immunities of U.S. citizenship—they simply have to be born here.

Current advocates of a "consent" model of citizenship—in which the federal government could withdraw its consent to birthright citizenship for certain categories of persons—overlook the motivating principles behind the Reconstruction Congress's desire to enact an objective rule and enshrine automatic citizenship by birth in the Constitution. The framers of the Fourteenth Amendment did not believe that it was a matter of "policy" to provide citizenship to persons born in the United States without regard to race or color, but rather a long-overdue fulfillment of the promise of inalienable freedom and liberty in the Declaration of Independence. Inalienable rights are not put to a vote, and thus the Fourteenth Amendment "conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship."[12]

Debunking Modern Arguments Against Birthright Citizenship

Despite the strength of the argument—rooted in text, history, and long-standing Supreme Court precedent—that birthright citizenship applies to U.S.-born children regardless of the parents' immigration status, there is a growing audience for an argument that Congress may deny birthright citizenship to the children of undocumented aliens through legislation. Over the years, several bills and ballot initiatives have been proposed to accomplish exactly that.[13]

---

[10] The first Chinese Exclusion Act, which, as the name suggests, singled out immigrants of Chinese origin, was passed in 1873. The anti-immigrant sentiment against the Chinese in the late nineteenth century is similar to the arguments made today against Latin American immigrants, both in terms of fears that the immigrant group would overtake the existing majority and perceived threats to labor (except for unwanted, menial jobs). *See* Charles J. McClain, Jr., "The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870," *California Law Review* 72 (1984): 529, 535 (illustrating that as more Chinese immigrants arrived in the United States, resentment against them began to build).

[11] *Cong. Globe*, 39th Cong., 1st Sess. 1679 (1866).

[12] *Wong Kim Ark*, 169 U.S. at 703.

[13] *E.g.*, James C. Ho, "Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature," *Texas Review of Law and Politics* 12, no. 1 (Fall 2007): 161 (citing examples).

Douglas Kmiec, a professor at Pepperdine University School of Law and informal advisor to then-Governor Mitt Romney, reportedly concluded that there is a "better than plausible argument" that Congress may legislatively eliminate or adjust the practice of birthright citizenship.[14]

The "Allegiance" Red Herring

The arguments for Congressional authority to limit birthright citizenship are all reliant upon an expansive interpretation of the term "subject to the jurisdiction" of the United States. For example, some opponents of birthright citizenship dispute that the Citizenship Clause embodies the *jus soli* definition of citizenship and instead argue that it confers citizenship only to children of those who give their complete allegiance to the United States. Under this view, because citizens of foreign countries still owe "allegiance" to a foreign sovereign, children born on U.S. soil to non-U.S.-citizen parents do not owe complete allegiance to the United States.

This argument is misleading and based on flawed premises. Even if "allegiance" were the defining characteristic of birthright citizenship, the Reconstruction framers understood allegiance to spring from the place of one's birth, not the citizenship status of one's parents. The 1866 debates established that a person "owes allegiance to the country of his birth, and that country owes him protection."[15] Similarly, one of the opinions from the *Dred Scott* decision, the backdrop against which the Citizenship Clause was drafted, acknowledged that "allegiance and citizenship spring from the place of birth."[16]

This understanding of allegiance deriving from one's place of birth underscores the Reconstruction framers' focus on the *child* born within the United States, not the status of his parents. The text of the Citizenship Clause thus refers to "*[a]ll persons born* … within the United States" and not "*all persons born of parents born* within the United States." The Reconstruction framers expressly recognized this distinction: Senator Trumbull remarked that "even the infant child of a foreigner born in this land is a citizen of the United States long before his father."[17] Some even acknowledged that birthright citizenship could encourage immigration, noting that the civil rights bill was "not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law."[18]

Case law from the period confirms this view. The case of *Lynch v. Clarke*, cited in the 1866 debates,[19] stated that "children born here are citizens without any regard to the political

[14] Teddy Davis, "Romney Weathers 'Illegal Worker' Allegations," ABC News, February 13, 2007.
[15] *Cong. Globe*, 39th Cong., 1st Sess. 570 (1866).
[16] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 586 (1856) (Curtis, J., dissenting). Justice Curtis explained his belief that, because the Constitution did not provide the federal government with the power to determine which native-born inhabitants were citizens, this power was retained by the States, which could enact their own citizenship rules with regard to persons born on that State's soil.
[17] *Cong. Globe*, 39th Cong., 1st Sess. 1757 (1866).
[18] *Cong. Globe*, 39th Cong., 1st Sess. 1833 (1866).
[19] *Cong. Globe*, 39th Cong., 1st Sess. 1832 (1866).

condition or allegiance of their parents."[20] The court held that "every person born within the dominions and allegiance of the United States, *whatever were the situation of his parents*, is a natural born citizen."[21] Ten years after the *Lynch* case, then-Secretary of State William Marcy wrote in a letter opinion that "every person born in the United States must be considered a citizen of the United States, notwithstanding one or both of his parents may have been alien at the time of his birth."[22] Thus, even if the relevant measure of citizenship were "allegiance" rather than birth within the territory of the United States, it does not work the way opponents of birthright citizenship want it to.

"Excepting Foreign Diplomats" Is Not the Same as "Excepting All Foreigners"

Opponents of birthright citizenship also cite a statement by Senator Howard, who introduced the language of the Citizenship Clause, that the amendment would "not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[23] But if Howard was intending to list several categories of excluded persons he could have said so. The language he used strongly suggests he was describing a single excluded class, families of diplomats.

This interpretation of the Reconstruction framers' views on the classes of persons excluded from birthright citizenship is clarified by a statement made just six days prior to Senator Howard's introduction of the Citizenship Clause. In an exchange on the Senate floor, Senator Benjamin Wade acknowledged a colleague's suggestion that some persons born on U.S. soil might not be automatically granted citizenship, stating "I know that is so in one instance, in the case of the children of foreign ministers who reside 'near' the United States, in the diplomatic language."[24] He went on to explain that children of foreign ministers were exempt not because of an "allegiance" or consent reason, but because there is a legal fiction that they do not actually reside on U.S. soil: "By a fiction of law such persons are not supposed to be residing here, and under that fiction of law their children would not be citizens of the United States."[25]

In light of the legislative history described above, it is highly unlikely that Senator Howard's comment regarding foreign diplomats means what opponents to birthright citizenship claim. A single comment plucked out of context should not be used to sweep aside text, history, and principles that point to the opposite conclusion.

The Misguided "Consent" Theory

Finally, in a modification of the "allegiance" argument, some opponents of birthright citizenship contend that the phrase "subject to the jurisdiction thereof" was originally understood, and is best read, as incorporating into the Fourteenth Amendment a theory of citizenship based on

[20] 1 Sand. Ch. R. 583 (N.Y. Ch. 1844).
[21] 1 Sand. Ch. R. at 663 (emphasis added).
[22] Letter from March 1854.
[23] *Cong. Globe*, 39th Cong., 1st Sess. 2545 (1866).
[24] *Cong. Globe*, 39th Cong., 1st Sess. 2769 (1866).
[25] *Ibid.*

mutual consent, which would exclude children of parents present in the United States illegally (because the United States has not "consented" to their presence). Not only does this consent theory require an impossibly distorted reading of the text of the Citizenship Clause, it is directly contrary to the principles of the Fourteenth Amendment.

"Subject to the jurisdiction of" the United States is not the same as "subject to the consent of" the United States Congress. Rather than implying governmental consent, the term "jurisdiction" generally refers to legal authority or control, and the phrase "subject to the jurisdiction thereof" most naturally refers to anyone within the territory of a sovereign and obliged to obey that authority. [26]

If the Reconstruction framers truly intended to allow Congress to grant or withdraw its consent to citizenship for certain children born on U.S. soil, the actual wording of the Fourteenth Amendment was an exceedingly odd way of rendering it. If those who drafted and ratified the amendment wanted to leave the matter within the control and consent of the national legislature, as opponents of birthright citizenship contend, it would have been far more sensible to draft and ratify an amendment that expressly authorized Congress to establish citizenship requirements for those born on U.S. soil, rather than expressly conferring citizenship on all persons born in the United States and subject to the jurisdiction thereof. Or, if the Citizenship Clause was intended to confer citizenship according to the citizenship status or "allegiance" of a child's parents, the Reconstruction framers could have focused on conditions to be met by the parents, instead of specifying conditions sufficient for a child to be granted citizenship automatically. But the drafters of the Citizenship Clause were not poor wordsmiths—to the contrary, the rule they devised is elegantly simple and intentionally fixed.

Perhaps most importantly, the idea that the conditions of citizenship could be modified by the "consent" of Congress, as advocated by those who believe Congress may legislate away birthright citizenship for children born to undocumented immigrants, would have been anathema to the Reconstruction framers. Rather than leaving it to the "caprice of Congress," the framers of the Fourteenth Amendment intended to establish "a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation." [27] The history of the Citizenship Clause demonstrates that the Reconstruction framers constitutionalized the conditions sufficient for citizenship precisely to enshrine automatic citizenship regardless of whether native-born children were members of a disfavored minority group or a welcomed band of ancestors.

---

[26] *E.g.*, *Webster's Encyclopedic Unabridged Dictionary* (1996): 1039 (defining "jurisdiction" as "the right, power, or authority to administer justice by hearing and determining controversies" and, more broadly, as "power; authority; control"). *See also Downes v. Bidwell*, 182 U.S. 244 (1901) (concluding that the phrase "subject to the jurisdiction" embraces U.S. territories); *United States v. Bevans*, 3 Wheat. 336, 386 (1818) (Marshall, C.J.) ("the jurisdiction of a State is coextensive with its territory."); Alan Tauber, "The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories," *Case Western Reserve Law Review* 57 (Fall 2006): 147, 160 (suggesting "subject to the jurisdiction" refers to areas under U.S. military control, particularly in view of the condition of the southern States after the end of the Civil War).

[27] *Cong. Globe*, 39th Cong., 1st Sess. 1095 (1866).

Not only do the arguments against birthright citizenship require utter disregard for the express provisions of the Constitution, they encourage us to abandon the precise reasons behind those enactments. The text, history, and principles of the Citizenship Clause make clear that we should not tinker with the genius of this constitutional design.

A New Nativism:

Anti-Immigration Politics and the Fourteenth Amendment

By Eric Ward[*]

The Fourteenth Amendment is the very basis of American citizenship. Created in the aftermath of the Civil War in response to continued discrimination against African Americans, it provides the first and only clear definition of citizenship in our Constitution. The Fourteenth Amendment is a subject of inestimable import to African Americans whose citizens' rights have been historically guaranteed by this amendment. For African Americans, the Fourteenth Amendment is a cornerstone for key civil rights laws such as the right to vote, equal access, and protection against job discrimination. Shockingly, this pillar of American citizenship is under attack by anti-immigration advocacy groups today. While such contemporary efforts to gut the Fourteenth Amendment are looked upon as political grandstanding, with virtually no possibility of gaining traction in law or in the public arena, African Americans ought to be more sober in their assessment of this growing assault upon civil right in the United States.

The following pages explain why attempts by immigration opponents to undermine the Fourteenth Amendment are unconstitutional and flirt dangerously with the undemocratic traditions of racism and xenophobia that Americans have fought so hard to dismantle. The paper begins with a brief history of the Fourteenth Amendment, discusses why anti-immigration advocates seek to dismantle a key provision of it, and explains the reasons why attempts to alter the Fourteenth Amendment should be firmly rejected. Whatever one's position on immigration policy reform, shaking the foundations of American citizenship is the wrong way to go about achieving it. Despite the complexity of the immigration controversy, preserving the Fourteenth Amendment must be an absolutely non-negotiable aspect of immigration reform in the United States.

A Brief History

The Fourteenth Amendment 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It was ratified in 1868 in response to the "Black Codes," laws that the former slave states passed to prevent the newly freed men and women from choosing their professions, owning or leasing land, accessing public accommodations, and voting. The Fourteenth Amendment abolished these Codes by asserting the equal rights of all U.S. citizens.

[*]Eric Ward is the National Field Director of the Center for New Community, a national civil rights organization based in Chicago, Illinois.

To do this, it clearly defines U.S. citizenship for the first time in the Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." This provision overturned the controversial 1857 *Dred Scott v. Sandford* Supreme Court decision, which stated that African Americans (free or slave) were *not* U.S. citizens and that they were "so far inferior that they had no rights which the white man was bound to respect."[1]

Enacted alongside the Thirteenth and Fifteenth amendments (ratified in 1865 and 1870, respectively), these three "Civil War Amendments," as they are sometimes called, were crucial in abolishing slavery, asserting equal citizenship rights, and resisting racial injustice. The Fourteenth Amendment, in particular, is a cornerstone of U.S. citizenship and civil rights. It lies at the heart of American freedom, guaranteeing equal standing and equal treatment under the law.

"Anchor babies" and the Fourteenth Amendment

Despite this proud history, anti-immigration organizations have launched an assault on the Fourteenth Amendment, seeking to alter one of its key clauses. These groups are demanding that the Fourteenth Amendment be amended to eliminate the clause establishing birthright citizenship, or calling for Congress to pass legislation that would effectively do the same thing. For example, in 2003 Representative Mark Foley (R-FL) introduced H.J. Res. 44, "The Citizen Reform Amendment," which would have amended the Constitution to eliminate birthright citizenship to babies born in the United States unless one parent is a U.S. citizen or permanent resident. As he has done in previous years, Representative Nathan Deal (R-GA) recently re-introduced his birthright citizenship bill (H.R. 1868) that proposes the same thing. (Constitutional law scholar Michael Houston calls such bills "essentially constitutional amendments under the guise of legislation," which he criticizes as a clear violation of separation of powers.)[2]

Anti-immigration groups enthusiastically support such bills as a means to eliminate what they term "anchor babies," a pejorative term for U.S.-born children of undocumented immigrants. The term "anchor baby" refers to the speculative possibility that when such children turn 21, they will sponsor their extended families for U.S. residency and thus become an "anchor" for the entire family to reside legally in the United States.[3] Anchor babies, critics charge, "act as an anchor that pulls the illegal alien mother and eventually a host of other relatives into permanent U.S. residency."[4] Anti-immigrant groups also claim that birthright citizenship

[1] *Dred Scott v. Sandford* 60 U.S. 393 (1856), 407; Eric Foner, "The Reconstruction Amendments: Official Documents as Social History," History Now: American History Online, December 2004; Jessica McElrath, "The Black Codes of 1965," About.com: African-American History, December 17, 2007.

[2] Michael Robert W. Houston, "Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants," *Vanderbilt Journal of Transnational Law* 33, no. 3 (May 2000): 727.

[3] Federation for American Immigration Reform, "Anchor Babies: Part of the Immigration-Related American Lexicon," April 2008.

[4] Fred Elbel, "The Original Intent of the 14th Amendment," June 26, 2009. Anti-immigration advocacy groups offer varying estimates of the actual number of "anchor babies" born each year in the United States, and thus each group has a distinct view on the actual size of "the problem." FAIR estimates that 425,000 babies are born to undocumented immigrants in the United States each year. NumbersUSA puts the number at 380,000 per annum. Joe Guzzardi of V-Dare suggests that as many as

provides a "perverse incentive" for foreign pregnant women to enter the United States illegally just prior to giving birth.[5] Apocalyptic predictions inevitably follow. For example, former chairman of the House Immigration Reform Committee and former 2008 Republican presidential candidate Tom Tancredo (R-CO) once stated, "If we do not control immigration, legal and illegal, we will eventually reach the point where it won't be what kind of nation we are, balkanized or united; we will have to face the fact that we are no longer a nation at all."[6]

Given the way these attacks on birthright citizenship threaten civil rights, it should perhaps be no surprise that they fit uncomfortably well with the long, tragic history of nativism and racial discrimination in this country. For example, in 1883 the United States passed the Chinese Exclusion Act, which aimed to prevent the immigration of Chinese laborers and prohibited Chinese nationals from obtaining citizenship. (This was a temporary measure repeatedly renewed until made permanent in 1904.)[7] The 1924 Immigration Act (better known as the National Origins Act) broadened this xenophobic exclusivity by setting immigration quotas according to national origin, capping immigration levels at two percent of a nationality's total population living in the U.S. in 1890—a year selected because it preceded the large-scale arrival of Eastern and Southern Europeans, populations which the act deliberately sought to restrict. It was not until the Immigration Act of 1965 (also known as the Hart-Cellar Act) that the United States eliminated quotas based upon national origin and replaced it with a system tying immigration to profession and skills possessed.[8] This legislation was enacted as a result of the civil rights movement's efforts to end racial and ethnic discrimination—and to fully apply the Fourteenth Amendment to all citizens. But even during the dark days of blatant discrimination, birthright citizenship was still considered to be the law of the land, even by immigration opponents.

Further, many of the most prominent opponents of birthright citizenship today have expressed racist and/or xenophobic sentiments, and several of them have unsettling ties to white supremacist organizations. While it would certainly be unfair and inaccurate to generalize all opponents of birthright citizenship as racist, racially prejudiced attitudes among the leadership of this movement are well documented. A few examples follow:

- The **Federation of American Immigration Reform**, one of the most influential opponents of birthright citizenship, was founded by John Tanton, who has made a number of anti-Latino comments over the years. For example, in a 1986 memo he warned of a "Latin onslaught" and lamented that the American Caucasian majority

---

500,000 "anchor babies" are born annually. Mothers Against Illegal Aliens puts the "anchor baby" total at 3.1 million. While anti-immigrant groups voice a strong concern that "anchor babies" will sponsor their extended families for legal residency, they do not offer any statistics to document this phenomenon.

[5] Rep. Nathan Deal (R-GA), quoted in David Crary, "Citizenship of U.S.-born immigrant children at issue," *Midland Reporter Telegram*, December 26, 2005.

[6] Quoted in Leonard Zeskind, "The New Nativism: The Alarming Overlap Between White Nationalists and Mainstream Anti-Immigrant Forces," *The American Prospect*, October 23, 2005.

[7] Rapidimmigration.com, "US Immigration History."

[8] Additionally, the Hart-Cellar Act gave preference to individuals with relatives already living in the country and offered separate quotas for refugees (David Koeller, "Immigration Act of 1965," The Web Chronology Project, September 11, 2003; Rapidimmigration.com, "US Immigration History").

would be forced to hand off their political power "to a group that is simply more fertile."[9]

- **Mothers Against Illegal Aliens** founder and president Michelle Dallacroce writes that "anchor babies" have "invaded our nation" and characterizes their very presence as a "hostile occupation" of the United States.[10]

- The **Council of Conservative Citizens** (formerly the pro-segregation White Citizens Council) denounces immigration using an explicitly racist language, writing, "We believe that the U.S. is a European Country and that Americans are part of a European People. We therefore oppose the massive immigration of non-European and non-Western people in the United States that threaten to transform our nation into a non-European majority in our lifetime" (Francis 2008). The C of CC also opposes all racially mixed activities.[11]

- **V-Dare**'s anti-immigration philosophy also has unabashedly racist roots. The group warns that unchecked immigration will make whites a minority within the United States. The organization's most prominent member, journalist and author Peter Brimelow, argues that the United States is a historically Caucasian country and has a right to remain this way.[12] V-Dare's website denounces "anchor babies" as "equivalent to, in football parlance, piling on," lamenting, "Not only do we get the illegal aliens, we also get their impossible-to-deport American citizen babies."[13]

What these examples illustrate is that the movement against birthright citizenship is not just an attack on the Fourteenth Amendment and the great body of civil rights legislation that rests upon it, but one that is led by many persons with a racist worldview and agenda. A very disturbing agenda informs their legal and political arguments regarding immigration reform. The parallel between this movement and segregationists' attacks on the Fourteenth Amendment in the twentieth century is clear.

Life without the Fourteenth Amendment

Tampering with the Fourteenth Amendment would violate our legal traditions, threaten hard-won civil rights victories, and destabilize the very meaning of American citizenship. It would grievously wound America's principle of equal treatment under the law. Attempts to amend, abolish, or similarly undermine the Fourteenth Amendment's provision regarding birthright citizenship should be rejected by lawmakers for at least five reasons:

1. It would be the first time since the infamous "three-fifths clause" that the Constitution has been written to restrict civil rights rather than expand them.

[9] "Memo to WITAN IV Attendees by John Tanton," *Intelligence Report* (Southern Poverty Law Center), Summer 2002.
[10] "The Nativists," *Intelligence Report* (Southern Poverty Law Center), Spring 2008.
[11] Samuel Francis, "Statement of Principles," Council of Conservative Citizens.
[12] "Keeping America White," *Intelligence Report* (Southern Poverty Law Center), Winter 2003.
[13] Joe Guzzardi, "500,000 Anchor Babies a Year?" V-Dare.com, March 25, 2005.

2. Altering this provision, especially through legislation, would encourage further subjecting of individuals' rights to the political process, opening a Pandora's Box that could significantly redefine the rights of current citizens. This would undermine the founders' intent in creating the Bill of Rights, which places fundamental rights beyond the boundaries of simple majority rule in order to protect them against a sometimes-fickle public opinion.

3. It would strengthen the hand of nativist and racist organizations.

4. It would create a two-tiered society consisting of those with full access to the political, economic, and social institutions of the nation and those permanently excluded from them. American-born children of undocumented immigrants, for example, would be unable to obtain a legal job, a driver's license, or financial aid for college.[14] The result would be a class of stateless peoples—those with no legal U.S. residency or hope of legal residency, yet with no real ties to any other nation.[15] Such people would be forced to work in underground economies and live in unstable, clandestine conditions, a situation that encourages crime and discourages becoming part of the broader American culture. It remains unclear what exactly would happen to such stateless persons if the United States were to catch and deport them, as no other country would be legally obliged to accept them.

5. Finally, there is no reason to believe that eliminating birthright citizenship would be effective in stopping or slowing illegal immigration; for there is little evidence that attaining citizenship is the main incentive for immigration to the United States. Most undocumented workers come to the United States in search of economic opportunity, with the intention of returning home.[16] "Anchor babies" are a fictitious problem that has little actual impact on immigration trends today.

Since the founding of the nation, American citizenship has been secured and extended to new groups through relentless activism and political struggle. Attempts to reverse this progressive course should be treated suspiciously. Altering the Fourteenth Amendment's citizenship clause would amount to redefining what it means to be an American by modifying the terms of citizenship—on unconstitutional and barely-concealed racial grounds. This in turn would open the door for further circumscriptions of citizens' rights. While people of good conscience may reasonably disagree over the nation's immigration policies, efforts to tamper with the Fourteenth Amendment in order to control immigration must be definitively rejected.

[14] Ricardo Vargas, "I'm No 'Anchor Baby,' I'm an American," New America Media, February 17, 2006.
[15] Warren Vieth, "GOP Faction Wants to Change 'Birthright Citizenship' Policy," *Los Angeles Times*, December 10, 2005.
[16] "Preserve Right of Citizenship at Birth," *DeMoines Register*, September 16, 2007.

Policy Arguments in Favor of Retaining America's Birthright Citizenship Law

By Margaret D. Stock[*]

The 2008 Presidential election campaign was unique in American history for a number of reasons, but one significant distinction has rarely been noted: it was the first campaign for President in which the U.S. citizenship of both leading candidates was challenged repeatedly. Throughout the campaign, both John McCain and Barack Obama faced lawsuits[1] in which the plaintiffs alleged that the candidates were not U.S. citizens at birth and were therefore disqualified for the office of President under the United States Constitution.[2] Each candidate spent time and resources defending against these accusations.

The Presidential candidates' experiences provide a snapshot of what may happen to many Americans if the current "birthright citizenship" rule set forth in the Fourteenth Amendment to the United States Constitution is changed. Absent the historic birthright citizenship rule, many persons who previously held undisputed U.S. citizenship would no longer be able to count on claiming that citizenship, or would be required to hire an experienced attorney, defend themselves against potential legal challenges, and overcome significant bureaucratic obstacles in order to prove their citizenship.[3] In the end, a change in the birthright citizenship rule would be a bad idea as a matter of policy. Rather than solving our nation's immigration problems, changing the birthright citizenship rule would make those problems worse. In addition, such a change would impose significant administrative and legal burdens on every American, while depriving the United States of the significant benefits gained from birthright citizens.

Few doubt the dysfunction of the current U.S. immigration system—a dysfunction that has resulted in the presence of millions of unauthorized immigrants. But some observers have suggested that a partial "solution" to the problem of illegal immigration is to reinterpret or amend the 14th Amendment to eliminate birthright citizenship.[4] Those who suggest this change argue that giving automatic U.S. citizenship to persons born within the geographic limits of the United States encourages foreigners to enter or remain in the country illegally. These

---

[*] Margaret D. Stock is an attorney in Anchorage, Alaska; a Lieutenant Colonel in the Military Police Corps, U.S. Army Reserve; and an Associate Professor (Drilling Individual Mobilization Augmentee) assigned to the Dept. of Social Sciences, U.S. Military Academy, West Point, New York. The opinions expressed in this article are the author's and do not necessarily represent the opinions of the U.S. Military Academy, the Dept. of the Army, the Dept. of Defense, or any other government agency.

[1] See, e.g., *Hollander v. McCain*, 566 F. Supp. 2d 63 (D. N.H. 2008); *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Penn. 2008).

[2] U.S. Const. art. II, § 1 ("No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President . . .").

[3] American immigration lawyers report a booming business today in helping U.S. citizens obtain documents and prove citizenship status to state and federal authorities so that they can obtain driver's licenses, Social Security benefits, and even employment.

[4] John C. Eastman, "Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11," testimony before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims (September 29, 2005).

observers refer pejoratively to "anchor babies"[5] (children born in the United States who are birthright citizens, but who have parents who are not already U.S. citizens or lawful permanent residents[6]). Presumably, these children serve to "anchor" their parents because, when the children turn 21, the parents can sometimes migrate legally based on their adult child's status as a citizen.[7] This "anchor," these observers say, should be eliminated. Yet such a change would be ill-advised from a policy perspective.

Legal scholars refer to the concept of birthright citizenship as *jus solis*, the law of the soil, and the United States has had some common law form of this rule since the dawn of the Republic, although the concept was only enshrined in the Constitution after the Civil War. Of course, there are other ways that one can become a U.S. citizen besides having the good fortune of being born here. One can also derive citizenship through one's parent or parents (*jus sanguinis*, or the law of blood), or obtain citizenship by applying for it through the naturalization process, usually after having first obtained "lawful permanent residence."[8] Thus, if birthright citizenship were eliminated, many people born in the United States would still be American citizens by inheritance or could perhaps become citizens by filing an application for naturalization. Others, however, would not be eligible for derivative citizenship and would have no status allowing them to apply for citizenship. They would remain "foreign denizens" who are resident here—at least until they somehow legalized their status, left, or were deported.

Unfortunately, U.S. law with regard to derivative citizenship is extremely complex. In fact, with the exception of the current birthright-citizenship presumption, all of U.S. immigration and nationality law is tremendously complicated, such that many people who are derivative U.S. citizens—and many of their lawyers—do not know it; or, if they know, have trouble getting documents proving that they are citizens. Naturalization is an option for some, but naturalization usually requires a person first to immigrate legally to the United States, and immigrating legally to the United States has in recent decades become a process of great difficulty and complexity that is unattainable by most people.

Eliminating the birthright citizenship rule would affect not only the citizenship of the children of unauthorized immigrants, but the citizenship of the children of more than three hundred million American citizens. After the elimination of birthright citizenship, all American parents would, going forward, have to prove the citizenship of their children through a cumbersome

---

[5] See, e.g., Frosty Wooldridge, "Anchor Babies Away: Enormous Cost of Jackpot Babies to Taxpayers," *Denver Examiner*, May 18, 2009.

[6] One such famous "anchor baby" is Republican Governor Bobby Jindal of Louisiana, whose mother was reportedly pregnant with him when she arrived in the U.S. on a student visa. See Bobby Jindal, transcript of speech given in response to the State of the Union Address. Governor Jindal was born in Louisiana and is therefore a presumed "birthright citizen" under the 14th Amendment. Under suggested "reinterpretations" of the 14th Amendment, however, he would not be a U.S. citizen, because his mother was in the country on a temporary visa when he was born.

[7] A United States citizen who is 21 years of age or older can sponsor his or her parents to immigrate to the United States. If the parents entered legally and are present in the United States at the time that their son or daughter petitions for them, the parents may "adjust status" in the United States. If the parents entered unlawfully, however, they must normally depart the United States and attempt to obtain an immigrant visa in an overseas consulate. Their departure can trigger a bar to returning that the mere fact of having a U.S.-citizen son or daughter does not overcome. See INA §212(a)(9)(B) & (C).

[8] See, e.g., INA §§310-319 (describing the naturalization process and requirements).

bureaucratic process. The United States has no national registry of its citizens, and most Americans today rely on the birthright citizenship rule to establish their citizenship. Documents evidencing birth in America are created by thousands of state and local governmental entities as well as the Department of Homeland Security and the Department of State. In Barack Obama's case, for example, his birthright citizenship is proved by means of a birth certificate issued by the State of Hawaii and showing his birth in Honolulu;[9] he subsequently obtained a U.S. passport.[10] Many Americans, however, do not routinely obtain any Federal governmental documents—such as a passport—confirming their citizenship status. A survey by the Brennan Center at New York University found that more than 13 million American adults cannot easily produce documentation proving their citizenship.[11] At least birthright citizenship can be proved by producing a valid U.S. birth certificate, something that most birthright citizens can obtain without too much expense or difficulty if they are forced to do so.

If birthright citizenship were eliminated, however, those born in the United States would lose their access to easy proof of citizenship. Instead, they would find it necessary to turn to the exceptionally complex U.S. rules for citizenship by blood (the majority would be unable to qualify for the immigrant visas necessary as a prerequisite for citizenship by naturalization). Yet the rules for derivative citizenship are so complicated that it can take an experienced immigration attorney more than an hour to determine whether someone is a U.S. citizen by derivation. The lawyer must inquire about grandparents as well as parents, about marriage dates and the birth dates of ancestors, about the place of birth, and about the time that one's parents or grandparents spent in the United States prior to one's birth. John McCain, for example, was not born within the United States, but in the unincorporated territory of Panama. In order to prove his U.S. citizenship, he has had to show much more than just his birth certificate.[12] In some cases, whether one's parents were married or unmarried at the time of one's birth makes a difference in determining U.S. citizenship. The determination can also be affected by whether one's U.S.-citizen parent was male or female. As a result of the U.S. Supreme Court's decision in *Nguyen v. INS*,[13] for example, the children of American men cannot claim U.S. citizenship as easily as the children of American women.

Over more than 200 years of U.S. history, Congress has been responsible for creating the *jus sanguinis* rules in America, and Congress has made them so complicated that determining whether someone is a U.S. citizen by blood is sometimes the equivalent of figuring out whether a patent application is valid. Should we rid ourselves of the birthright citizenship presumption, we will be replacing a simple rule for most people with one that will be tremendously complex, as our current *jus sanguinis* rule is.

---

[9] Factcheck.org, "Born in the USA," August 21, 2008 (updated November 2008).
[10] Associated Press, "Third Worker Pleads to Passport Snooping," January 27, 2009 (describing how a passport worker unlawfully looked at Barack Obama's U.S. passport file).
[11] Brennan Center for Justice, *Citizens Without Proof*, November 2006.
[12] See, e.g., Gabriel J. Chin, "Commentaries: Why John McCain Cannot Be President: Eleven Months and A Hundred Yards Short of Citizenship," *Michigan Law Review: First Impressions*, vol. 107, no. 1 (September 2008) (arguing that John McCain was not a U.S. citizen at birth, but derived citizenship through his parents and an act of Congress subsequent to his birth).
[13] 533 U.S. 53 (2001).

Under the birthright citizenship presumption in effect today, most Americans—but not all—have it much easier than the minority who are derivative citizens. The hundreds of thousands of Americans born every year overseas—the children of military personnel deployed abroad, missionaries, oil company employees, or Americans who choose to have their children in another country while visiting there—must undergo a complex individualized assessment of their status. The State Department and the Department of Homeland Security charge substantial fees to make derivative citizenship assessments (the current DHS fee is $460[14])—and, depending on the facts, the assessment can take weeks or even years, and require production of numerous documents, including very old historical records.

So what would it mean, as a practical matter, to eliminate birthright citizenship? Presumably, we would have to create a national registry of citizens. All persons born in the United States—at thousands of localities, hospitals, midwiferies—would have to have their citizenship adjudicated. An expert would have to do the adjudication—most probably a trained government immigration attorney—unless we allowed these complex adjudications to be made by random bureaucrats. Finding such attorneys is very difficult today, but would likely become even more difficult, in that immigration and citizenship law is a field that a government immigration spokesperson has accurately called "a mystery and a mastery of obfuscation."[15] Eliminating birthright citizenship would require the government to hire hundreds if not thousands of immigration attorneys or similarly skilled immigration examiners.

The elite of American society would not be affected much by the elimination of birthright citizenship. A change in the current system would cause little trouble for those who have the money to hire highly trained lawyers to handle their paperwork. The burden of proving citizenship would likely fall mostly on the less-favored elements in society. One of the little-known facts of U.S. immigration law is that the U.S. government frequently deports U.S. citizens by mistake.[16] Any experienced immigration lawyer has stories of U.S.-citizen clients who have been deported. These citizens are mostly the less-favored in our society—the poor, the uneducated, the mentally disturbed, and minorities. This trend would accelerate if we eliminated birthright citizenship.

One test of any public policy proposal is whether the benefits of the policy are likely to outweigh the costs. Here, there is no question that proponents of changing the current default rule have not made even a marginal case on policy grounds. They cite vague policy reasons for changing the law, such as the need to stop illegal immigration, make U.S. citizenship "more valuable," or stop what they term an "industry" of women coming to the United States to have babies. They also seem to assume, without benefit of any hard data, that the United States does not benefit from birthright citizenship. And yet there is ample evidence that hundreds of thousands of birthright citizens have made and continue to make tremendous contributions to

[14] Persons who seek a determination of derivative U.S. citizenship generally file Form N-600.

[15] Nurith C. Aizenman, "Md. Family Ensnared in Immigration Maze; After Changes in Law, Couple Faces Deportation," *Washington Post*, April 24, 2001 (quoting INS spokeswoman Karen Kraushaar).

[16] Suzanne Gamboa, Associated Press "Citizens Held As Illegal Immigrants," April 12, 2009 (describing numerous cases where U.S. citizens were detained or deported by immigration authorities).

American society every day, serving in our military and in public office (for example, Senator Pete Domenici is perhaps the most famous "anchor baby" in America).[17]

Opponents of birthright citizenship also assume—again without supporting data—that illegal immigration would lessen or even stop if birthright citizenship were eliminated. Although there may be some people who might be deterred from coming to the United States if birthright citizenship were eliminated, instead of reducing the number of illegal migrants within our borders, changing the current rule would automatically make even more people into illegal migrants. We know from European and Asian experiences with *jus sanguinis* rules that eliminating *jus solis* does not stop illegal immigration, but does increase the number of illegal aliens within a country, because fewer people are able to gain legal status.

While opponents of birthright citizenship assume without facts that their rule will do some good, we have compelling reasons to believe that bad things would occur if we eliminated birthright citizenship:

- We would be imposing a significant burden on all Americans, who would no longer have an easy and inexpensive way to prove their citizenship. The bureaucracies that increasingly demand and provide proof of U.S. citizenship would face an overwhelming burden.

- We would have thousands of children born every year in the United States with no citizenship in any country. To cite just one group, under proposed Congressional legislation to eliminate birthright citizenship,[18] the U.S.-born children of asylees and refugees would have no citizenship. They would be left without a country, creating an underclass of "exploitable denizens." This is what has happened in countries that do not have a *jus solis* rule. Changing our rule would contribute heavily to the current global population of stateless people. We as a nation, though, profess that people have a human right to have a country. Furthermore, such a change would be punishing children for something that their parents did or failed to do; another position many Americans would find problematic.

- Eliminating birthright citizenship would be un-American. Birthright citizenship is part of our unique American heritage and a rejection of the philosophy of the oft-condemned *Dred Scott* decision. The *Dred Scott* case sought to deny U.S. citizenship to a class of persons who had been born within the United States, and was rightly overturned—after the Civil War—by the Fourteenth Amendment. With the exception of the brief and bloody period between the *Dred Scott* decision and the ratification of the Fourteenth Amendment, birthright citizenship has been the rule since the dawn of the Republic. We should have a compellingly good reason to eliminate it—one better than frustration with the federal government's inability to enforce existing immigration laws.

[17] Rachel L. Swarns, "An Immigration Debate Framed By Family Ties," *New York Times*, April 4, 2006.
[18] H.R. 1868, the Birthright Citizenship Act of 2009.

The policy arguments in favor of retaining birthright citizenship are very strong. The policy arguments against it are weak. Even if we believe that it is possible to interpret the Fourteenth Amendment differently than we have been interpreting it for more than a hundred years, it is not clear why we would want to do so. Trading an easy and egalitarian birthright-citizenship rule for one that would cause hardship to millions of Americans is not a smart way to approach our complex immigration problems.

ATTACHMENT E

IMMIGRATION POLICY CENTER
AMERICAN IMMIGRATION COUNCIL

SPECIAL REPORT

CONSTITUTIONAL CITIZENSHIP

A LEGISLATIVE HISTORY

By Garrett Epps

MARCH 2011

CONSTITUTIONAL CITIZENSHIP

A LEGISLATIVE HISTORY

BY GARRETT EPPS

MARCH 2011

ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

ABOUT THE AUTHOR

Garrett Epps, a former reporter for *The Washington Post*, is a novelist and legal scholar. He lives in Washington, D.C., and teaches courses in constitutional law and creative writing for law students at the University of Baltimore. His two most recent books are *Peyote vs. the State: Religious Freedom on Trial* and *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America.* This article is adapted from an article published in the *American University Law Review*, Vol. 60, Number 2, December 2010. Available at: http://www.wcl.american.edu/journal/lawrev/60/epps.pdf?rd=1.

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

Introduction

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.

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.

Applying 19th Century Ideas to 19th Century Laws

Two Theories of Citizenship

To garner the "original intent" of the framers of the 14th amendment, the originalists often look to legal arguments made at the time of the Revolution and Framing of the Constitution, rather than by legal experts who were writing at the time of the Civil war. Originalists have presented two conceptions of citizenship – ascriptive and consensual. In this analysis, ascriptive citizenship (citizenship by birth) is questionable because it involves no act of consent by the new citizen or her parents. This concept is seen as medieval in origin and as contravening the trend of contemporary political theory about citizenship. Advocates of abolishing or modifying birthright citizenship note also that many contemporary nations do not provide it, suggesting by implication that the Clause is an antiquated remnant of a former time without relevance to present demographic issues.

Consensual citizenship, on the other hand, is based in the scholarship of the Enlightenment, most prominently John Locke (generally agreed to be a significant influence on the thinking of the Framers of the 1787 Constitution), who called into question the justice and validity of the ascriptive principle, suggesting instead that true allegiance and citizenship could be based only on reciprocal consent. For Locke, "[a] child…could not be a government's subject because subjectship must be based on the tacit or explicit consent of an individual who has reached the age of rational discretion," according to scholars Peter Schuck and Rogers Smith, who support a restrictive reading of the Clause.[1] They, like the "originalists" in the current debate, conclude that the "subject to the jurisdiction" language of the Citizenship Clause embodies a restrictive, consensual definition of citizenship. They contend that the 14th Amendment's "central political ideas were not ascription and allegiance but consent and individual rights."[2]

Citizenship and the Abolitionists

But the 14th Amendment was drafted in the 19th century, not at the time of the Revolution. By the time of the 14th Amendment, political thinkers had moved beyond the ideas of Locke and were concerned with the contemporary dilemmas including the inclusion of slaves, former slaves, and their children in the U.S. polity. Originalists are in error when they insist on interpreting a 19th century enactment exclusively in terms of 18th century ideas.

Both American legal history and the intellectual history of the antislavery movement produced a rich body of material reformulating the idea of American citizenship – one that makes an inclusive reading of the Clause much more plausible and a restrictive one anomalous.

A comprehensive survey of antebellum citizenship law concludes that birthright citizenship was the legal norm in American law during the first half of the 19th century. Birthright citizenship was an unquestioned principle of American law until the slavery controversy drove pro-slavery jurists to construct an alternative model of citizenship that could exclude American-born black people on the ground that the polity did not "consent" to their membership. Many American lawyers and lawmakers would have seen the Citizenship Clause as merely a declaration of what the law already was, as well as a rejection of the exclusion of black people.

According to Jacobus tenBroek, one of the pioneers of modern 14th Amendment scholarship, "in some ways doctrinally and perhaps historically the most significant contribution made by the abolitionists in the constitutional development of the United States was their conception of paramount national citizenship."3 This paramount notion took the idea of citizenship firmly out of the hands of the states.

An American citizen, whether "natural born" or naturalized, was a citizen of the U.S.; citizenship arose out of the nation, under the Constitution, rather than as a derivative boon arising out of state citizenship. The paramount idea was also strikingly inclusive. It regarded birth itself as sufficient for citizenship, and saw membership in the American family as a child's right, quite independent of the qualities of his or her parents. Persons of African descent born in the U.S. were in fact citizens even though their parents, brought here as slaves, were not eligible for naturalization; the fact of birth in the U.S. was enough.

A proper consideration of 19th century political thought—the thought that formed the real background of the framing of the Citizenship Clause—furnishes strong evidence that the restrictive thesis, based on Locke and other Enlightenment thinkers, is at best implausible. Readily available evidence suggests that the thinkers who guided the Framing saw birthright citizenship as the norm, with two exceptions, the first being children of diplomats and the second (as we will see below) being children of Indians living under tribal government. This position was not ambivalent, ill-thought-out, or crudely based on medieval norms. It represented the fruit of the most advanced progressive social thought available to Americans in the year 1866.

Separating the Civil Rights Act and the 14th Amendment

The 39th Congress dealt with the issue of birth and citizenship in two different bills, first in the Civil Rights Act of 1866 and second in the 14th Amendment. Originalists tend to conflate the legislative debate around the Civil Rights Act and that of the 14th amendment, but it is important to resist the temptation to treat these two measures and the debates over them as if they were one and the same. The two measures were very different.

The Civil Rights Act

The Act was a conservative measure, designed to conciliate President Johnson and gain his signature. The Act was designed to put the responsibility for enforcing civil rights in the hands of the federal courts. President Johnson vetoed the Act anyway, and Congress re-passed the bill over the President's veto.

Senator Lyman Trumbull was the drafter of the Civil Rights Act; he played no role in the drafting of the Amendment. The Civil Rights Act proclaimed that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States". It is the Civil Rights Act language that the proponents of a restrictive reading of the Clause regard as indicating the 14th Amendment framers' intent to limit birthright citizenship to children whose parents had no other citizenship status elsewhere in the world.

However, the narrow reading of the Civil Rights Act language is not supported by the legislative history, and the restrictive intent originalists attribute to the language does not hold water for the Act itself, much less for the 14th Amendment. A colloquy between Trumbull and Senator Edgar Cowan of PA sheds a considerably different light on the provision. Cowan asked whether the language would include the "children of Chinese and Gypsies born in the country?" And Trumbull responded, "undoubtedly."

The language of the Civil Rights Act is significant, but does not directly demonstrate anything about the clear intent of the 14th Amendment. The Act is a statute, enacted under the authority of some combination of the Naturalization Clause and the 13th Amendment. The 14th Amendment is a change to the Constitution, creating entirely new rights and providing government with new powers.

The Citizenship Clause

The 14th Amendment was drafted not by Trumbull and the Judiciary Committee but by the considerably more radical Joint Committee of Fifteen on Reconstruction. The committee was seeking to wrest control of Reconstruction from President Johnson. Because it was offering a constitutional amendment, the committee did not worry about the limits of congressional power. In fact, the amendment was designed to augment that. And the committee made no concessions to the President's conservative views in order to avoid a veto since the President has no veto over proposed constitutional amendments. For all these reasons, it seems at best reductive to assume that the citizenship language in both the Act and the Amendment had identical meanings and intentions. It has different wording; it emerged from a different political situation; it was adopted under different procedures and had different authors; and it was proposed by different committees. Its meaning must stand on its own.

The draft 14th Amendment was introduced in the House of Representatives in May 1866, and adopted by the House without any citizenship language. Since the House did not address citizenship, the only debate that can shed light on its intent is that which took place on the Senate floor during the process of adoption and amendment of the citizenship language.

Senator Jacob Howard of Michigan was the Senate floor manager of the draft amendment. Originally he introduced the House measure, which did not have any citizenship language. Senator Ben Wade of Ohio, however, moved to include birthright citizenship; after a secret Senate caucus, Howard introduced new language agreed to by the caucus to meet Wade's concerns: "[A]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." Howard explained the meaning of the new language as:

> Simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of person.

Immigration restrictionists today falsely claim that Howard was the author of the Clause and that his statement provides the final resolution on the issue. They take a part of this statement out of context and point to it – "this will not, of course, include persons born in the United States who are foreigners" -- as proof that birthright citizenship was not to include the children of immigrants, particularly illegal immigrants.

However, when the statement is read in its entirety, it is clear that Sen. Howard was talking about a specific subset of foreigners. Children of accredited foreign diplomatic personnel, even if born on U.S. soil, are not birthright citizens. Because of diplomatic immunity, these children are not "subject to the jurisdiction" of the United States. Like their parents, children of diplomats are not subject to arrest or civil suit, even if they commit crimes or torts on U.S. soil. That was the law in 1866, and it is the law today, and that is what Howard was referring to.

American Indians and "subject to the jurisdiction thereof"

There was one other group of people excluded by the "subject to the jurisdiction" language: Native Americans living under tribal governments. For Trumbull, "subject to the jurisdiction thereof" excluded specific Native Americans -- not all native people, but those who remained on reservations and were "subject to the jurisdiction" of their tribal governments. By law, they could not be sued in federal or state courts, or arrested and held by local authorities. Disputes with these Natives were handled as government-to-government matters.

Tribal Indians were a large population resident within U.S. territory. Over-expansive draftsmanship of the Citizenship Clause would have had the unintended effect of making all of them U.S. citizens, voiding numerous treaties and presenting federal courts and law enforcement officials with all-but-insuperable problems of adjudication and enforcement. It is not surprising that the Framers of the 14th Amendment would include language omitting them from the declaratory language of the Clause.

Gypsies as the "Illegal Immigrants" of 1866

Some argue that there was nothing like an "illegal alien" at the time of the Framing, and thus the Framers could not have intended to include the children of illegal aliens in the citizenship clause. Immigration restrictionists are concerned that "illegal aliens" in their presence and their conduct constitute a threat to the American system of law. They have come here without permission (or have remained after temporary permission has expired); they live here in defiance not only of entry restrictions but in evasion of domestic laws. They constitute a population that has deliberately chosen not to become part of the American system and that thus threatens the very American idea of assimilation.

The "gypsies" in the U.S. were the closest thing the U.S. had at that time to "illegal" immigrants—a shadow population that was considered to be living in defiance of American law. Senator Cowan referred to them as interlopers "who recognize no authority in [Pennsylvania's] government; who have a distinct, independent government of their own—an imperium in imperio; who pay no taxes, who never perform military service; who do nothing, in fact, which becomes the citizen."[4] Sen. John Conness of California, a proponent of the Amendment who was himself an immigrant from Ireland, responded categorically that these criticism of "gypsy" parents had no bearing on their childrens' citizenship. The Clause, he said, was "a simple declaration" that these children "shall be regarded as citizens of the United States, entitled to civil rights, to the right of equal defense, to the right of equal punishment for crime with other citizens; and that such a provision should be deprecated by any person having our claiming to have a high humanity passes all my understanding and comprehension."[5]

It is thus ahistorical to suggest that the Framers did not foresee the legal and social characteristics of what we today call "illegal" or "undocumented" immigrants. They did; and they rather categorically stated that these characteristics—ineligibility for citizenship, unacceptability as members of the body politic, isolation from American culture and systematic evasion of American law—would not constitute exceptions to the Amendment's grant of birthright citizenship. The proponents of the amendment gave an unqualified affirmation of the citizenship of American-born gypsy children.

The Chinese as the "Temporary Immigrants" of 1866

Similarly, some question whether the children of certain legal immigrants were intended to benefit from birthright citizenship because their parents may not fall under the jurisdiction of the U.S. or may owe allegiance to any foreign government. The case of Chinese immigrants is instructive.

Chinese immigrants were present in the U.S. legally, and were citizens of another nation. Chinese-born people resident in the U.S. were ineligible to naturalize as citizens because, under the Naturalization Act of 1790, naturalized citizenship was limited to "free white person[s]." Thus, every immigrant from China was by definition not only an alien but a "subject" of the Chinese empire and thus owed allegiance to a foreign state. They were the subject of an explicit and pointed refusal by the polity to grant its consent to their membership in the body politic. Nonetheless, the sponsors of the 14th Amendment, when asked in clear terms about this case, were unwavering in their insistence that the Citizenship Clause was to cover their children.

Immigration was Not a Divisive Issue at the Time of the Framing of the 14th Amendment

Some originalists contend that the Framers could not have possibly imagined the reality of American immigration in the 21st century and could not have anticipated the question of birthright citizenship for the children of undocumented immigrants. Each generation imagines that its problems are different from those of all who have come before. But that is a cast of mind, not a historical conclusion. America in 1866 was a nation as profoundly transformed by immigration as it is in 2010. Issues of language, culture, religion, social mores and other aspects of the American identity were as salient then as they are now.

We would be making a profound historical error to imagine that the generation that framed the Clause was unaware that migration was a transformative and often destabilizing force in American society. During the Civil War years alone, the U.S. population increased by four million people –most of them immigrants. That represented eleven percent of the population in 1866. Foreign-born soldiers accounted for 20% of the Union Army's total strength during the war. In 1850, the percentage of the U.S. population that was foreign born was 9.7%. By 1860 it was 13.2%. In other words, Americans in 1866, particularly those in the North, were at least as aware of immigration as we are today, when the issue is central to the domestic policy debate.

In short, the idea that the Framers lived in a simpler world, that they could not have intended their handiwork to apply to a chaotic, multicultural America, does not pass the most superficial historical scrutiny.

Penalizing the Children for the Guilt of their Parents

Some argue that children of illegal immigrants did not at the time of Framing, do not now, and should not fall within the meaning of "subject to the jurisdiction" because children carry at birth the taint of their parents' criminality: "The parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law," write authors Peter Schuck and Roger M. Smith. "They [the parents] are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership."[6]

It may be true that the U.S. has tried to exclude the parents from the community by discouraging their entry. But the children have committed no crime at birth; have violated no law; have not transgressed the implied promise of a visa. To punish babies, much less to proscribe and entirely outlaw them, because of the perceived sins of their parents is alien to our moral and ethical tradition. Guilt is not hereditary; it is individual. We do not impose legal disabilities on the children of felons, for example, no matter how heinous their parents' actions. The conscience revolts at the idea, and the Constitution itself rejects ancestral guilt as a basis for policy.

The 14th Amendment is Precisely That—an Amendment. It is Intended to Make a Change, Not Continue the Status Quo

Does it seem likely that the anti-slavery thinkers who devised the Citizenship Clause as a means of overruling Dred Scott intended at the same time to create a new class of persons who had no rights a citizen is bound to respect? A contextual history of the framing of the 14th Amendment suggests that it was intended as a wide-ranging and fundamental change in the 1787 Constitution, not as a minor technical change leaving core concepts unchanged.

The Framers of the 14th Amendment, and the generation of political thinkers from which they sprang, regarded the 1787 Constitution as profoundly flawed. They were willing to undertake the desperate political struggle required for an amendment because they perceived that the original Constitution had failed catastrophically. That catastrophic failure, moreover, was directly related to the issue of inclusion and exclusion in the body politic. By giving the slave states disproportionate power in the federal government, they believed, the Constitution had created and empowered a complex political-social institution that the antebellum generation called the Slave Power.

A major tool of the Slave Power had been state control over citizenship, and insistence that human equality had no role to play in American life. Economic, social and political life depended upon the existence of a large, permanently subordinated class of noncitizens who could be exploited to produce wealth. The Citizenship Clause took this option away not only from the local elites but from the nation as a whole. Citizenship was to be extended to all—not out of grace, but as a means of protecting the nation from those who would reinvent the Slave Power.

The authors of the Citizenship Clause had seen Southern slavery eat away at the very idea of democratic government, until it nearly destroyed the United States. They set the 14th Amendment, and its citizenship language, in the American sky as a reminder that inequality by birth was the doorway to dishonor.

Thus, there is an alarming irony in the proposition that the U.S. should alter its constitutional system to create a large internal population of native-born noncitizens, a hereditary subordinate caste of persons who are subjected to American law but do not belong to American society.

If the children of "illegal aliens" are "illegal" themselves, then we have taken a giant step toward recreating slavery in all but name. If citizenship is the hereditary gift of the nation rather than the inheritance of its people, we are drifting back toward the discredited doctrine of Dred Scott. And if state governments arrogate to themselves the power to decide which groups within their borders "merit" citizenship, the central promise of the Amendment -- paramount national citizenship -- has been eviscerated.

The idea that the Framers intended to allow the creation of a new hereditary and subordinate caste of laborers should stir the profoundest skepticism.

Conclusion

It should be the goal of scholarship to dispel, not deepen, conceptual darkness. The work of many "originalist" scholars has added significantly to our understanding of the Constitution's meaning and history. However, originalism must be careful not to substitute anachronistic, result-oriented ideas for a systematic interpretation of text, structure, and history.

The text of the Citizenship Clause is clear, and no vote of Congress or any state legislature should be allowed to undermine it. The clamor for hereditary inequality comes from people eager to repeat the mistakes of the American past, and by doing so, to betray the American future.

Endnotes

[1] Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*. New Haven: Yale University Press, 1985. p. 25.
[2] Ibid. p. 73.
[3] Jacobus tenBroek, *Equal Under Law*. Collier Books: 1965. p. 94.
[4] Cong. Globe, 39th Congress, 1st session 2890-91 (1866) (remarks of Sen. Cowan).
[5] Cong. Globe, 39th Congress, 1st Sess., p. 2892 (May 30, 1866) (remarks of Sen. John Conness).
[6] Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*. New Haven: Yale University Press, 1985. p. 95.