Written Testimony of the Community Relations Council

of the Jewish Federation of Silicon Valley

Diane Fisher, Director

For a Hearing on Birthright Citizenship: Is it the right Policy for America?

Submitted to the U.S. House Judiciary Committee, Subcommittee on Immigration and Border Security

April 29, 2015

The Community Relations Council of the Jewish Federation of Silicon Valley represents the organized Jewish community of Silicon Valley, specifically twelve institutions that represent the spectrum of religious and secular Jews, seniors and youth, and the ethnic diversity of the Jewish community. Our mission is to teach and apply Jewish values to work toward a more just society that includes a vibrant Jewish community. To achieve this goal we work closely with many ethnic, religious, government, school and nonprofit organizations.

Jewish people have a special appreciation for the meaning of citizenship, having experienced numerous persecutions throughout history which began with the denial of citizenship. In 2013, Spain offered citizenship to Sephardic Jews expelled more than five centuries ago during the Spanish Inquisition. A small number of Jews survived the Holocaust due to their American citizenship which afforded them the ability to return home to freedom. As a minority group we understand that citizenship both includes and excludes, and throughout history has excluded women, the poor and people whose heritage deviates from the majority.

We believe that birthright citizenship is a fundamental concept that implements our core American values of equality and fairness, and oppose efforts to amend or circumvent the Fourteenth Amendment to the Constitution. We are not an ethnic nation, created by jus sanguinis citizenship laws, rather we are bonded together by where we are and by the ideas we share. We understand the great public outrage that ensued following the Dred Scott decision that held that persons of African ancestry could not claim citizenship in the United States. We should not shy away from remembering how Chief Justice Taney argued that descendants of African slaves "had been regarded as beings of an inferior order… so far inferior that they had no rights which the white man was bound to respect."

Subsequent waves of immigration have challenged our core values, but we have continued to confirm them. The Chinese Exclusion Act of 1882 explicitly excluded Chinese people from citizenship, and Senator George Frisbie Hoar described this act as "nothing less than the legalization of racial discrimination." United States v. Wong Kim Ark, 1898, confirmed that the Fourteenth Amendment applied to children born in the United States of non-citizen parents—and that this constitutional right could not be limited in its effect by an act of Congress. The Supreme Court addressed the meaning of "subject to the jurisdiction therof", and concluded that it refers to being required to obey U.S. law.

It has been noted that European countries don't have birthright citizenship, as the U.S. and Canada do. We would argue that this distinction should be valued. We have learned from our struggles, through the Civil War and the Chinese Exclusion Act, and never wish to turn back to those darker times. When we see the anti-immigrant sentiments in many European countries today, we are even more determined to stay the American path, which has made us a richly diverse country, continually aspiring to increase our openness and welcome, and continually enriched by the results.

The Leadership Conference
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April 28, 2015

The Leadership Conference

The Honorable Harold W. "Trey" Gowdy III, Chairman
Subcommittee on Immigration and Border Security
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Zoe Lofgren, Ranking Member
Subcommittee on Immigration and Border Security
U.S. House of Representatives
Washington, D.C. 20510

Dear Chairman Gowdy and Ranking Member Lofgren:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national civil rights organizations, we write to express our profound disappointment in the Subcommittee for providing a forum to unnecessary and dangerous attacks on the 14th Amendment. While tomorrow's hearing is not about any particular legislation, it appears aimed at building support for legislation that would repeal the Citizenship Clause, one of the cornerstones of our nation's civil and human rights protections.

Eliminating the Citizenship Clause of the 14th Amendment would create two tiers of American society – a modern-day caste system – with potentially millions of natural-born Americans being treated as somehow less than entitled to the equal protection of the laws that our nation has struggled so hard to guarantee. The stated purpose of such an insidious proposal is to deter unauthorized immigration, but its effect would be to make existing problems with our immigration system even worse – and, as if that were not enough, would essentially punish babies for the actions of their parents.

For years, our coalition has urged Congress to repair our broken immigration system. We are astonished that instead of taking up bipartisan legislation that could pass both chambers of Congress and improve the lives of millions of immigrants and citizens alike, the Subcommittee is instead turning its attention to a relative handful of "birth tourists" and even providing a mouthpiece for wild-eyed conspiracy theories that have been floated about "terror babies."

The Constitution's Citizenship Clause was adopted to prevent exactly the sort of thing that is being contemplated in this hearing. The language of the 14th Amendment was meant to forever settle the question of what makes someone a U.S. citizen and a citizen of each state, making clear that there can never again be an underclass of Americans living among us.

As Justice John Marshall Harlan said in 1896, in what was a dissent from the infamous decision in *Plessy v. Ferguson*, but which later became accepted as obvious, our Constitution "neither knows nor tolerates classes among citizens." We urge you to keep those words in mind during this upcoming hearing.

The Leadership Conference

Thank you for your consideration of our views. If you have any questions, please contact Rob Randhava, Senior Counsel at The Leadership Conference on Civil and Human Rights, at (202) 466-3311.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
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WASHINGTON
LEGISLATIVE OFFICE

April 27, 2015

The Honorable Harold W. "Trey" Gowdy, III
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RE: House Committee on the Judiciary's Subcommittee on Immigration and Border Security Hearing on "Birthright Citizenship: Is It the Right Policy for America?"

Dear Chairman Gowdy and Ranking Member Lofgren:

On behalf of the American Civil Liberties Union ("ACLU"), we submit this letter to the House of Representatives Committee on the Judiciary Subcommittee on Immigration and Border Security hearing on April 29, 2015: "Birthright Citizenship: Is It the Right Policy for America?" To answer the question posed by this hearing, we emphatically answer a resounding, unequivocal YES. Constitutional citizenship was the right decision back in 1868 when the 14th Amendment was ratified, and it has proven to be the right course for the U.S. for the past 147 years.

For nearly a century the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

One of the Constitution's essential engines to ensure equality and fairness under the law has been the guarantee of citizenship to those born on U.S. soil, regardless of who their parents are, as embodied in the American Citizenship Clause of the 14th Amendment:

"*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*."[1]

This unequivocal text has protected all children born in the U.S. – regardless of their race or ethnicity or the status of their parents – for nearly 150 years. Now some Members of the House of Representatives, including five Members of the Judiciary Committee, seek to rewrite the 14th Amendment's constitutional guarantee of birth citizenship. Rep. Steve King (R-IA) has introduced the Birthright Citizenship Act of 2015 (H.R. 140) that seeks to gut the constitutional guarantee of citizenship enshrined in the 14th Amendment, by limiting constitutional citizenship to three categories of people only: children of U.S. citizens or nationals, children of permanent residents, and children of non-citizens in active-duty military service. The ACLU strongly opposes the Birthright Citizenship Act of 2015 and any proposals to subvert birth citizenship for the following reasons:

(1) *The Birthright Citizenship Act of 2015 violates the Constitution and radically seeks to overturn nearly 150 years of constitutional tradition and civil rights history*.

The Birthright Citizenship Act of 2015 directly violates the 14th Amendment guarantee that all people born in the U.S. and under its jurisdiction are citizens of the U.S. and of the state in which they reside, and are subject to equal protection under the law. The drafters of the 14th Amendment codified the principle of citizenship at birth and ensured that race, ethnicity, and ancestry could never again be used by politicians to decide who among those born in our country are worth of citizenship. With very limited exceptions,[2] all children born in the U.S. are automatically U.S. citizens.

The 14th Amendment conferred the rights of citizenship on all who were born in the U.S., including freed slaves. Ratified in the aftermath of the Civil War, the 14th Amendment was intended to negate the Supreme Court's infamous ruling in *Dred Scott* (1857), denying citizenship to freed slaves and their descendants. The Amendment was ratified in response to discriminatory laws passed by former Confederate states that prevented African Americans from voting, entering professions, owning or leasing land, accessing public accommodations, and serving on juries. The 14th Amendment was an affirmation that in the U.S., all children are born as equals, — no matter what their race, ethnicity, bloodline, or lineage may be.

The history of the congressional debates leading up to the 14th Amendment makes clear that the principle of constitutional citizenship has always been intended to protect *all* minority groups from invidious discrimination. Debates in the post-bellum period reveal that the members of Congress actively debated and deliberated over the treatment of U.S.-born children of "gypsies," who were considered unlawfully present, and decided that birth citizenship must be conferred to them. When asked whether the 1866 Civil Rights Act, which preceded the 14th Amendment, would "have the effect of naturalizing the children of Chinese and Gypsies born in this country," Sen. Lyman Trumbull, the bill's drafter replied: "Undoubtedly….[T]he child of an Asiatic is just as much a citizen as the child of a European."[3]

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1 U.S. CONST., amend. XIV, § 1.

2 Over 100 years ago the Supreme Court explained that this phrase simply meant that the children born to foreign diplomats or hostile forces are not automatically U.S. citizens. See *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898). The Court found that these few discrete exceptions to citizenship at birth were rooted in the Common Law dating back centuries, which provided that all children born in the territory of the sovereign were citizenships except for those born to foreign diplomats or hostile occupying forces.

3 CONG. GLOBE, 39th Cong., 1st Sess. 498 (1865).

The federal courts have long held that the 14th Amendment dictates that children born on U.S. soil are citizens *without regard to their parents' status*. When the Chinese Exclusion Act of 1882 denied citizenship through naturalization to Chinese laborers who were lawfully present, the Supreme Court ruled in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), that children born to these workers on U.S. soil were citizens at birth under the 14th Amendment. As the Supreme Court emphasized, the "Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory…including all children here born of resident aliens." *Id.*[4] The Court elaborated, "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 European parentage who have always been considered and treated as citizens of the United States."[5]

This principle of citizenship at birth has been the settled law of the land for over a century and was confirmed most recently in the 1982 Supreme Court decision, *Plyler v. Doe*, 457 U.S. 202 (1982), which affirmed that non-citizens, including undocumented immigrants, are subject to U.S. jurisdiction under the 14th Amendment.[6]

(2) *The Birthright Citizenship Act of 2015 seeks to erect a racial caste system that dates back to the pre-Civil War era.*

The Birthright Citizenship Act of 2015 would effectively create a racially identifiable subclass of predominantly minority children born in the U.S. yet denied their constitutional right to American citizenship. Race-based classifications are deeply repugnant to American values of fairness and equality, and are completely at odds with our country's history of inclusion and of expansion of civil and human rights.

While the co-sponsors of the Birthright Citizenship Act seek to rewind the clock to the pre-Civil War era, several state legislatures as recently as in 2011 have blocked attempts to amend birth citizenship. Recognizing these measures as radical and xenophobic, the legislatures of South Dakota,[7] Montana,[8] and Arizona[9] shot down these measures. These state legislatures, like the vast majority of Americans, believe in a land of equal opportunity where every child – regardless of race, ethnicity, or ancestry – is born with the same rights as every other U.S. citizens.

(3) *The Birthright Citizenship Act of 2015 is unconstitutional because the right to citizenship at birth cannot be repealed by legislation.*

The right to citizenship at birth is enshrined in the 14th Amendment and cannot be repealed without a constitutional amendment. Article V of the Constitution provides two ways to propose constitutional amendments: (1) amendments may be proposed either by the Congress, by two thirds votes of the House and the Senate; or (2) by a convention called by Congress in response to

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4 In *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)**,** the Supreme Court held that a baby born in California to Chinese parents -- subjects of China prohibited by law from becoming U.S. citizens -- was a citizen at birth under the 14th Amendment,.

5 *Id.* at 694.

6 *Plyler v. Doe*, 457 U.S. 202, 243 (1982).

7 South Dakota: House Bill 1199 (H.B. 1199, 86th Leg. Assem., Reg. Sess. (S.D. 2011)) failed in committee.

8 Montana: House Bill 392 (H.B. 392, 62nd Leg., Reg. Sess. (Mont. 2011)) failed in the state legislature, and then Governor Brian Schweitzer said that he would veto any unconstitutional bills, such as H.B. 392 (*See* Matt Gouras, *Gov. Schweitzer: Unconstitutional bills face veto*, ASSOCIATED PRESS, Feb. 3, 2011, *available at* http://www.businessweek.com/ap/financialnews/D9L8NTI00.htm.

9 Arizona: Senate Bill ("SB") 1308 (S.B. 1308, 50th Leg., 1st Sess. (Ariz. 2011)) and SB 1309 (S.B. 1309, 50th Leg., 1st Sess. (Ariz. 2011)) both were blocked by a strong showing of state legislators.

applications of two-thirds or more of states. Amendments must be ratified by three-quarters or more of the states. The Congress can choose to refer proposed amendments either to state legislatures or to special conventions called in the states to consider ratification.

No court has ever endorsed the notion that constitutional citizenship can be repealed or amended by legislation. The Birthright Citizenship Act of 2015 lacks legal foundation and is unconstitutional.

In conclusion, the ACLU will continue to challenge any proposal that erodes the constitutional guarantee of citizenship at birth. The 14th Amendment is sacrosanct and too important to be defined by the political and discriminatory prejudices of any Member of Congress. The ACLU urges the House Judiciary Committee to uphold the long-established constitutional guarantees of citizenship at birth and to reject any attempts to subvert such constitutionally protected rights.

For more information, please contact ACLU legislative counsel Joanne Lin (202/675-2317; jlin@aclu.org).

Sincerely,

Michael W. Macleod-Ball
Acting Director

Joanne Lin
Legislative Counsel

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FIRST FOCUS CAMPAIGN FOR CHILDREN
STATEMENT FOR THE RECORD

U.S. HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON IMMIGRATION AND BORDER CONTROL
HEARING:
"BIRTHRIGHT CITIZENSHIP: IS IT THE RIGHT POLICY FOR AMERICA?"

April 29, 2015

Chairman Gowdy, Ranking Member Lofgren, and Members of the Subcommittee on Immigration and Border Control, we thank you for the opportunity to submit this statement for the record on the merits of birthright citizenship for children born in the United States.

The First Focus Campaign for Children is a bipartisan advocacy organization dedicated to making children and families a priority in federal policy and budget decisions. As an organization working to promote the safety and well-being of all children in the United States, we strongly believe it is critical that our country preserve birthright citizenship for every child born in the United States. To make changes to the Fourteenth Amendment in order to restrict birthright citizenship hurts only one population: our nation's children.

Birthright citizenship has long been enshrined as a fundamental constitutional right, ensuring that every child born in our country receive the basic rights afforded to U.S. citizens. The first section of the Fourteenth Amendment explicitly 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." [i] Thus, denying children born in the United States citizenship would require redefining one the longest standing pillars of the U.S. Constitution.

We are also gravely concerned that limiting birthright citizenship would mark a harmful return to segregation. Congress' decision to ratify the Fourteenth Amendment in 1868 was a deliberate action in the wake of the Civil War to overturn the 1857 *Dred Scott v. Sandford* decision, which denied U.S. born children of African descent the rights and privileges of U.S. citizenship.[ii] Repealing birthright citizenship to children born on U.S. soil would undermine the historical context that established equality for all children in the United States, a cornerstone of our society over the course of the last century. To roll back our nation's progress on civil rights would be irresponsible and immoral, particularly when our country is undergoing a major demographic shift, with children of color projected to represent a majority of U.S. children by 2016.[iii] Children of color would be disproportionately impacted, particularly Latino children.[iv]

It is important to note that recent legislative proposals to restrict birthright citizenship would have ramifications for all children born in the U.S., including those born to U.S. citizens. Currently, the U.S. does not have a national registry of citizens, and a birth certificate is generally used as proof of citizenship. By no longer automatically conferring citizenship at birth, many U.S. citizen children would be forced to obtain alternative documentation to establish their U.S. citizenship. Research shows that low-income families and single-parent households would likely face the greatest challenges and delays in proving a child's citizenship.[v]

We also believe that any discussion of birthright citizenship must take into account the critical benefits of granting citizenship status to the youngest and most vulnerable members of our society. U.S. citizenship guarantees infants access to important safeguards that promote their long-term health and development. Lack of citizenship status could limit, delay, or eliminate access to health care, food assistance programs and other basic services in the critical early years of life. In fact, there would be a significant increase in the number of U.S.-born children without access to preventative care and other nutrition supports, putting these children at risk for a lifetime of health problems. Millions of children would be relegated to a second class of "stateless" residents at constant risk of exploitation or deportation, simultaneously able to attend U.S. schools while lacking other basic rights afforded to their peers. Furthermore, many of these children would not be able to claim citizenship in *any* country as their parent's country of origin may not confer citizenship status to children born outside their borders.[vi]

Finally, denying citizenship to innocent children will do nothing to remedy the immigration system. In fact, the unauthorized population living in the U.S. would actually *increase* rather than decrease, and it would be predominantly comprised of children.[vii] Rather than punish innocent babies and restrict children's basic rights, we urge Congress to work on advancing immigration reform as well as other policies that will promote the health, safety, and well-being of all our nation's children.

We thank you again for the opportunity to weigh in on this important matter. Should there be any questions regarding this statement, please contact Wendy Cervantes, Vice President of Immigration and Child Rights Policy at wendyc@firstfocus.org or (202) 657-0637.

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[i] U.S. Const. amend. XIV, § 1.
[ii] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[iii] The Annie E. Casey Foundation. (2014) *Race for Results*. Baltimore, MD. Retrieved from: http://www.aecf.org/m/resourcedoc/AECF-RaceforResults-2014.pdf
[iv] Van Hook, J., Fix, M. (2010). *The Demographic Impacts of Repealing Birthright Citizenship*. Washington, DC: Migration Policy Institute, 2010.
[v] Stock, M. (2009). "Policy Arguments in Favor of Retaining America's Birthright Citizenship Law." *Made in America: Myths and Facts About Birthright Citizenship*. Washington, DC: Immigration Policy Center.
[vi] *All Children Born Equal: Preserving Birthright citizenship for America's Children,* Cervantes. W., First Focus (November, 2010).
[vii] Van Hook, J., Fix, M. (2010). *The Demographic Impacts of Repealing Birthright Citizenship*. Washington, DC: Migration Policy Institute, 2010.

Written Testimony by

Arturo Vargas, Executive Director

National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund

Before the House Judiciary Committee, Subcommittee on Immigration and Border Security

on

Birthright Citizenship

Washington, DC

April 29, 2015

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Chairman Gowdy and Ranking Member Lofgren, and members of the Subcommittee:

On behalf of the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, I appreciate the opportunity to submit the present testimony in support of maintaining our Constitution's grant of citizenship to all who are born within the United States.

The NALEO Educational Fund is the nation's leading nonprofit organization that facilitates the full participation of Latinos in the American political process, from citizenship to public service. Our Board members and constituency encompass the nation's more than 6,000 Latino elected and appointed officials, and include Republicans, Democrats and Independents. Recognized nationally as a civic engagement pioneer and leader with more than 30 years of experience, the NALEO Educational Fund has guided hundreds of thousands of eligible lawful permanent residents (LPRs) through the naturalization process, and helped hundreds of thousands of Latino U.S. citizens register to vote and take part in elections.

The Citizenship Clause of the Fourteenth Amendment clearly 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." This historic testament to our nation's achievement in recognizing the full equality of all people was adopted in the wake of events including the Supreme Court's *Dred Scott* decision, and the then-new State of Texas's attempt to limit the right to vote only to whites. Since its adoption, the Fourteenth Amendment has played an integral role in striking down laws that have aimed to deny fundamental rights to African Americans, Latinos, Asian Americans and Native Americans born in the United States, including voting, owning or leasing land, and accessing public accommodations. It would be contrary to our values as a nation to retreat from this proud tradition of progress toward justice.

An attempt to amend the meaning of the Citizenship Clause would betray fundamental American principles, and undermine peace and prosperity within our borders as well. Preventing the children of undocumented and temporary legal immigrants from receiving citizenship would create a permanent underclass of Americans who share our culture, language, and aspirations, but are unable to contribute fully to our economy and democracy. Some of these members of our society would, through no fault of their own, suffer lifelong stigma and exclusion as stateless individuals. As a result, our nation would experience the serious and dangerous problems which have beset the nations that have pursued similar policies to restrict or end birthright citizenship – the presence of a significant segment of the population with immigrant origins who can never be fully integrated into American society.

Ending recognition of birthright citizenship would also impose significant financial and administrative burdens on our nation's families and on federal, state and local governments. Officials would be forced to expend significant resources creating and administering a new layer of bureaucracy which new parents would need to navigate to establish their children's rights to U.S. citizenship. Such a costly and unnecessary procedure would divert funds from more important government priorities, such as providing for public safety. In addition, this counter-productive proposal and un-American notion is a distraction from the crucial need to develop a framework for comprehensive immigration reform.

Just as the Supreme Court concluded in 1898 that the Fourteenth Amendment had been adopted in an embrace of non-discrimination, and that, "…in clear words and in manifest intent, [it] includes the children born, within the territory of the United States, of all other persons, of whatever race or color," *United States v. Wong Kim Ark*, 169 U.S. 649, 693, Congress must reject the historically racist and xenophobic motivations inspiring attempts to limit access to citizenship. Because many immigrants to the United States today are Latino, this proposal, if adopted, would send an unwelcome message to the Latino community that Members of Congress do not value our contributions to the security and success of the United States. Birthright citizenship reflects deeply-rooted American values that must be preserved.

Thank you for giving us the opportunity to express our strong opposition to any withdrawal of the Constitution's grant of birthright citizenship.

League of United Latin American Citizens

Written Testimony of the League of United Latin American Citizens

Margaret Moran
National President

For a Hearing on
Birthright Citizenship: Is it the right Policy for America

Submitted to the
U.S. House Judiciary Committee
Subcommittee on Immigration and Border Security

April 27, 2015

Chairman Gowdy, Ranking Member Lofgren, and members of the Subcommittee on Immigration and Border Security:

On behalf of the League of United Latin American Citizens (LULAC), the nation's oldest and largest Latino civil rights organization, I thank you for your willingness to accept public testimony to support the constitutionally affirmed concept of birthright citizenship under the Fourteenth Amendment to the U.S. Constitution.

Founded in 1929, the League of United Latin American Citizens works to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. LULAC's founding happened over 30 years after the Supreme Court's decisive ruling in ***United States v. Wong Kim Ark*** which helped establish key precedent in the interpretation of the citizenship clause of the Fourteenth Amendment to the Constitution

Despite those 30 years, LULAC was created at a time in our country's history when U.S. –born Hispanics, despite their contributions to American society, were denied basic civil and human rights. As our LULAC archives describe the events of those times - *Mexican Americans were not allowed to learn English. Thus, they were disenfranchised and unable to vote. Many were unable to pay voting taxes. Thus, their Anglo bosses paid this charge and told them who to vote for. Many Mexican American families worked in fields, farms, and ranches and their children never went to school. Many were denied jobs because they were perceived as lazy, poorly dressed, dirty, ill-educated, and thought to be thieves. American children had to attend segregated schools known as "Mexican Schools." In those days "Mexican Schools" were legal in the Southwest. These schools were in buildings with deplorable conditions.*

This was the discrimination that led many Mexican Americans to build strong, volunteer-based organizations like LULAC, back in 1929. Today, while Latinos have made significant strides and are on pace to continue to grow as the largest ethnic minority in the United States, our organization is incredibly disappointed with efforts to repeal and/or alter the citizenship clause of the 14th Amendment and set the clock back.

While the 14th Amendment to the U.S. Constitution clearly states that "all persons born or naturalized in the United States" are citizens, anti-immigrant members of Congress are politicizing that definition in an attempt to deny countless U.S.-born Latino children of immigrant parents their citizenship rights afforded to them by the Constitution. It is clear that efforts to undo the citizenship clause are deeply rooted in xenophobia and are a political ploy aimed at galvanizing the support of radical anti-immigrant voters.

Ending birthright citizenship is a terrible idea, and stripping citizenship from U.S. born children of immigrants is completely unacceptable. Just last week, some in the U.S. Senate sought to poison a debate on a human trafficking bill by pressing forward with anti-immigrant birthright citizenship amendments. Attempts to alter birthright citizenship to deny Latino children citizenship would send a message to our community that Latino immigrants are not valued by this Congress.

On behalf of the 135,000 members of LULAC, I urge you to oppose any efforts by those seeking to revoke and redefine citizenship. As the House moves forward with its legislative business, I hope that you keep the views of our organization in mind and stand up to any anti-immigrant and anti-Latino legislation that makes its way to the floor.

Born Under the Constitution:

Why Recent Attacks On Birthright Citizenship Are Unfounded

Issue Brief No. 5 • March 31, 2011

Elizabeth Wydra[1]

Introduction

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 v. Sandford* that persons of African descent could not be 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 origin.

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 permanently established for people of all colors; accordingly, the Reconstruction Framers chose to constitutionalize the conditions sufficient for automatic 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, opponents of citizenship at birth continue to fight this constitutional guarantee. On January 27, 2011, Senators Rand Paul (R-Ky.) and David Vitter (R-La.), introduced a proposal in Congress that would amend the Constitution so that U.S.-born children would be considered automatic citizens only if one parent is a U.S. citizen, one parent is a legal immigrant, or one parent is an active member of the Armed Forces. The same day, in the Arizona state legislature, Republican lawmakers introduced legislation seeking to challenge the right to U.S. citizenship for children born in the state whose parents are undocumented migrants or other non-citizens. The goal, according to Arizona Representative John Kavanagh, a primary supporter of the legislation, is "to trigger ... Supreme Court review of the phrase 'subject to the jurisdiction thereof' in the 14th amendment."

[1] This Issue Brief was first released by the American Constitution Society on March 31, 2011.

These two examples of proposed anti-citizenship legislation are by no means unique. Indeed, the Arizona anti-citizenship bill is based on model legislation crafted by a handful of state legislators from across the country, who call themselves "State Legislators for Legal Immigration" (SLLI). This model legislation attacks birthright citizenship in two ways: it would create two tiers of birth certificates, one of which states would produce only for babies born to U.S. citizens and legal residents; and it would attempt to skirt laws stipulating that the federal government defines U.S. citizenship by adding a second level of "state" citizenship. According to the National Conference of State Legislatures, Arizona is the sixth state to introduce legislation relating to birth records or birth certificates and the children of foreign-born parents.

Similarly, the proposed resolution from tea-party darlings Senators Paul and Vitter reflects longstanding—and highly unsuccessful—efforts in Congress to diminish the constitutional guarantee of citizenship at birth. Bills have been introduced in Congress each year for more than a decade to end automatic citizenship for children born in the United States to non-citizen parents.[2] Indeed, Iowa Representative Steve King (R-Tx.) introduced anti-citizenship legislation in the House on the first day of the 112th Congress. Because Representative King asserts that the 14th Amendment does not guarantee citizenship at birth for U.S.-born children of undocumented immigrants,[3] his proposed bill does not seek to amend the Constitution, but rather would merely amend section 301 of the Immigration and Nationality Act to "clarify" which classes of U.S.-born children are citizens of the United States at birth.[4] Many other prominent conservative legislators have recently called for hearings or other consideration of proposals to end the 14th Amendment's guarantee of automatic citizenship at birth, including the current Speaker of the House and Senate Minority Leader.

Academics and national politicians have added to the movement's momentum. In recent years, a small handful of academics have joined the debate and called into question birthright citizenship,[5] and, in the 2008 presidential campaign, several Republican candidates expressed their skepticism that the Constitution guarantees birthright citizenship.[6] Several of

[2] *E.g.*, H.R. 6789, 110th Cong. (2008); H.R. 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).

[3] Brian Montopoli, *Steve King: "Birthright Citizenship" Bill Could be Soon*, CBS NEWS, Nov. 22, 2010, t http://www.cbsnews.com/8301-503544_162-20023606-503544.html?tag=contentMain;contentBody.

[4] H.R. 140, 112th Cong. (2011).

[5] *E.g.*, Peter Schuck & Rogers Smith, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985); Charles Wood, *Losing Control of America's Future*, 22 HARV. J.L. & PUB. POL'Y 465 (1999).

[6] Stephen Dinan, *Huckabee Retreats on Birthright Citizenship*, WASH. TIMES, Jan. 9, 2008 (noting that Mike Huckabee has at times expressed support for ending birthright citizenship); Joanna Klonsky, *The Candidates on Immigration*, NEWSWEEK, Jan. 3, 2008 (noting that Republican presidential candidates Ron Paul, and Tom Tancredo support ending birthright citizenship); Jim Stratton, *Thompson Angers State Hispanics*, ORLANDO SENTINEL, Sept. 29, 2007 (reporting that Fred Thompson publicly expressed support for rethinking birthright citizenship); Political Radar, *Romney Eyeing End to Birthright Citizenship*, http://blogs.abcnews.com/politicalradar/2007/07/romney-still-lo.html (July 22, 2007, 16:17 EST) (explaining that Mitt Romney was looking into whether birthright citizenship could be ended legislatively or by constitutional amendment).

the current likely candidates for the 2012 Republican presidential nomination also oppose the constitutional guarantee of automatic citizenship at birth. Though the most prominent proponents of ending birthright citizenship have been conservative, the effort has at times been bipartisan: Democratic Senator—and now Majority Leader—Harry Reid introduced legislation that would deny birthright citizenship to children of mothers who are not U.S. citizens or lawful permanent residents, although he has since backtracked from that position.[7]

But the defenders of the Constitution's guarantee of automatic citizenship are also bipartisan. Former aides to President Ronald Reagan, both Presidents Bush, and Vice-President Dick Cheney have publicly condemned calls to end birthright citizenship. Even conservative commentator Lou Dobbs has refused to join the anti-citizenship activists.[8] This common ground between progressives and conservatives is a reflection of the fact that, regardless of how one feels about immigration policy, anyone who takes the Constitution's text and history seriously should respect the 14th Amendment's express guarantee of equal citizenship at birth.

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. To revoke birthright citizenship based on the status and national origin of a child's ancestors, as some anti-citizenship activists are suggesting, goes against the purpose of the Citizenship Clause and the text and context of the Fourteenth Amendment.

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. At the heart of the 14th Amendment is the fundamental belief that all people are born equal, and, if born in the United States, are born equal citizens regardless of color, creed or social status. It is no exaggeration to say that the 14th Amendment is the constitutional embodiment of the Declaration of Independence and lays the foundation for the American Dream. Because of the 14th Amendment, all American citizens are equal and equally American. Whether one's parents were rich or poor, saint or sinner, the 14th Amendment proclaims that ours is a nation where an American child will be judged by his or her own deeds.

I. The Text of the Fourteenth Amendment

The Reconstruction Framers' intent to grant citizenship to all those born on U.S. soil, regardless of race, origin, or status, was turned into the powerfully plain language of Section 1 of the Fourteenth Amendment: "All persons born or naturalized in the United States, and

[7] S. 1351, 103d Cong. (1993). *See also* James C. Ho*, Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367, 367-68 (2006) (discussing federal hearings and legislative proposals).

[8] Posting of Andrea Nill to The Wonk Room, http://wonkroom.thinkprogress.org/ (August 2, 2010, 17:57 EST).

subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

The text of the ratified Citizenship Clause embodies the *jus soli* rule of citizenship, under which citizenship is acquired by right of the soil (contrasted with *jus sanguinis*, according to which citizenship is granted according to bloodline).

Birthright citizenship is a form of "ascriptive" citizenship because one's political membership turns on an objective circumstance—place of birth. The text of the Fourteenth Amendment is not the only place in the Constitution that reflects the notion that citizenship can accrue from the circumstances of one's birth: Article II of the Constitution, provides that any "natural born citizen" who meets age and residency requirements is eligible to become President. Just as the Citizenship Clause sets forth birth on U.S soil as the condition for citizenship—not race or bloodline—Article II specifies that the relevant qualification for the presidency of the United States is birth-conferred citizenship, not any particular ancestry.

For more than a century, it has been the common understanding that the Constitution's treatment of citizenship follows the *jus soli* rule. Case law just after ratification of the Fourteenth Amendment interpreted the Citizenship Clause to confer automatic citizenship on persons born in the United States regardless of their parents' immigration status. In the 1886 case of *Look Tin Sing*, for example, the court held that a child of Chinese parents—who still retained their status as Chinese citizens, despite their presence in the United States—was a U.S. citizen under the Citizenship Clause because he was born on U.S. soil. As the court stated plainly, "It is enough that he was born here, whatever was the status of his parents."[9]

Similarly, the U.S. Supreme Court has consistently read the Citizenship Clause to grant citizenship automatically to almost everyone born on U.S. soil.[10] In the 1898 case of *United States v. Wong Kim Ark*, the Supreme Court carefully examined the history of citizenship generally and with respect to the Citizenship Clause. Based on this history and the text of the Fourteenth Amendment, the Court held that persons born within the United States, whose parents reside in the United States but remain citizens of a foreign country, are automatically U.S. citizens.[11] The only exception to birthright citizenship recognized by the Court derives from the phrase "subject to the jurisdiction thereof," which the Court reads to refer to the legal authority or control of the United States—a reading that excludes from automatic citizenship the children of foreign diplomats or hostile invaders, who are not subject to U.S. legal authority due to their diplomatic and combatant immunity.[12]

[9] *In re Look Tin Sing*, 21 F. 905, 910 (C.C.D. Cal. 1884).
[10] *E.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898) ("Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.").
[11] *Id.* at 655-93.
[12] *Id.* at 655-58.

More recently, the Supreme Court has continued to interpret the Constitution to provide automatic citizenship at birth for U.S.-born children, regardless of the immigration status of their parents. In 1982, the Court explained in *Plyler v. Doe*[13] that the 14th Amendment extends to anyone "who is subject to the laws of a state," including the U.S.-born children of undocumented immigrants. Similarly, in the 1985 case *INS v. Rios-Pineda*,[14] the court stated that a child born on U.S. soil to an undocumented immigrant was a U.S. citizen from birth.

Under the Supreme Court's longstanding reading, the "subject to the jurisdiction" language carves out from birthright citizenship only children of diplomats who are immune from prosecution under U.S. laws. Unquestionably, if undocumented immigrants or their children commit a crime in the U.S., they can be and are punished under U.S. law. Thus, they are subject to the jurisdiction of the United States.

This understanding of the Fourteenth Amendment has shaped our nation's practices regarding citizenship for over a century, and guarantees that citizenship is based on an objective circumstance rather than on membership in any ethnic group or race. This reading of the text comports with the plain language of the Citizenship Clause and squares with the Clause's legislative history.

II. The History of the Citizenship Clause

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 rather 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 these opponents deemed unworthy of citizenship. Fortunately, these views did not carry the day. Instead, Congress approved a constitutional amendment that used an objective measure—birth on U.S. soil—to automatically grant citizenship to all those who satisfied this condition.

A. Origins: The Civil Rights Act of 1866

The Reconstruction Framers' views of what granting citizenship to all children born "subject to the jurisdiction" of the United States would entail can be discerned not only from the debates over the Fourteenth Amendment, but also from the debates that same year over

[13] 457 U.S. 202 (1982).
[14] 471 U.S. 444 (1985).

the Civil Rights Act, which included a nearly identical citizenship provision.[15] These debates establish two points fatal to the claims against birthright citizenship: first, that the drafters of the Reconstruction Amendments understood citizenship to be conferred automatically by birth, and second, that any child born on U.S. soil was a citizen, regardless of whether his or her parents were aliens, citizens, or slaves brought illegally into the country.

The intent to include children of aliens within birthright citizenship is clear from the floor debates of 1866. Members of Congress specifically debated the impact automatic citizenship would have on various immigrant groups that had recently migrated to the United States in significant numbers, notably the Chinese population in California and the West, and the Gypsy or Roma communities in eastern states such as Pennsylvania. Much of the nineteenth century hostility toward Chinese and Gypsy immigrants is similar to the resentment and distrust leveled at immigrants today from Latin American countries: concern that immigrants would take away good jobs from U.S. citizens (while exhibiting a willingness to allow immigrants to take jobs perceived as undesirable);[16] fear of waves of immigrants "invading" or overtaking existing American communities;[17] and distrust of different cultures and languages.[18] These fears were expressed by some members of the Reconstruction Congress but were not allowed to influence the requirements for citizenship.

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[15] The citizenship language of the 1866 Civil Rights Act provided: "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." 14 Stat. 27 (1866).

[16] Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 358 (1995) (citations omitted):

> Anti-Chinese sentiment was largely economically motivated; this is reflected in the Exclusion Acts, which were directed specifically at Chinese laborers. In the mid-1800s, Chinese laborers and gold prospectors entered a California economy where Native Americans and African-Americans were already seen as threats to free white labor. . . . Chinese entrepreneurs in the American West had experienced great early success in the cigarmaking and shoemaking industries, but the downturn in the Western economy in the 1870s, combined with anti-Chinese agitation from white competitors, drove the Chinese out of these businesses. The laundry business remained open to the Chinese because the whites considered it "menial and undesirable".

[17] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866) (statement of Sen. Van Winkle) (stating that the citizenship language is "one of the gravest subjects submitted to the people of the United States, and it involves not only the negro race, but other inferior races that are now setting on our Pacific coast, and perhaps involves a future immigration to this country of which we have no conception."). *See generally* Walter Otto Weyrauch & Maureen Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 342 n.60 (1993) (noting that the United States adopted immigration policies in the 1880s to restrict the entrance of Gypsies).

[18] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan) (arguing that, if the door to citizenship be opened to the "barbarian races of Asia and or of Africa. . . . there is an end to republican government").

For example, early in the debates, an opponent to birthright citizenship—Senator Edgar Cowan, often cited by modern opponents of birthright citizenship—objected to the citizenship provision by asking whether "it will not have the effect of naturalizing the children of the Chinese and Gypsies born in this country."[19] Senator Trumbull stated that it would, "undoubtedly."[20] As Trumbull stated clearly in the face of Cowan's xenophobic remarks, "the child of an Asiatic is just as much a citizen as the child of a European."[21] Echoing Trumbull's definitive statement, Senator Morrill asked the Congress, "As a matter of law, does anybody deny here or anywhere that the native born is a citizen, and a citizen by birth alone?"[22] Morrill cited "the grand principle both of nature and nations, both of law and politics, that the native born is a citizen, and a citizen by virtue of his birth alone."[23] To erase any doubt, he went on to state that "birth by its inherent energy and force gives citizenship."[24]

President Johnson clearly shared this view of what Congress was attempting to achieve in the citizenship language of the Civil Rights Act—which was why he vetoed it. In his message informing Congress of his veto of the original civil rights bill, Johnson noted that the provision of the bill that "'all persons born in the United States, and not subject to any foreign power … are declared to be citizens of the United States' … comprehends the Chinese of the Pacific States … [and] the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood."[25] President Johnson understood the bill to provide that "[e]very individual of those races, born in the United States, is by the bill made a citizen of the United States."[26]

B. Enactment: The Fourteenth Amendment

The Reconstruction Framers were undeterred by President Johnson's opposition. Not only did they re-enact the Civil Rights Act over the President's veto, but just two months after Johnson specifically vetoed the Act's citizenship provision, Congress ensured the permanence of birthright citizenship by incorporating it into the Fourteenth Amendment. On May 29, 1866, during Congress's debates over the Fourteenth Amendment, Senator Jacob Howard of Michigan proposed adding language that would ultimately be ratified as the Citizenship Clause. He explained that his proposed addition would declare "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."[27]

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[19] CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).
[20] *Id.*
[21] *Id.*
[22] CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866).
[23] *Id.*
[24] *Id.* Senator Trumbull made similar statements, explaining that "birth entitles a person to citizenship, that every free-born person in this land, is, by virtue of being born here, a citizen of the United States." CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866).
[25] CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).
[26] *Id*.
[27] CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

Both opponents and supporters of the amendment shared the view that this language automatically granted citizenship to all persons born in the United States (except children of foreign ministers and invading armies).[28] In fact, opponents of the Fourteenth Amendment's Citizenship Clause objected to it precisely because they understood it to constitutionally protect birthright citizenship for children of aliens born on U.S. soil. For example, Senator Cowan expressed concern that the proposal would expand the number Chinese in California and Gypsies in his home state of Pennsylvania by granting birthright citizenship to their children, even (as he put it) the children of those who owe no allegiance to the United States and routinely commit "trespass" within the United States.[29]

Supporters of Howard's proposal did not respond by taking issue with Cowan's understanding, but instead by agreeing with it and defending it as a matter of sound policy. Senator John Conness of California declared:

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. [30]

The legislative history of the Citizenship Clause demonstrates that the drafters of the Clause—and their political opponents—knew that the provision would grant automatic citizenship to persons born on U.S. soil regardless of their parents' race, national origin, or status. Whether the members of the Reconstruction Congress understood the Citizenship Clause to be a welcomed turn toward equality—and voted for it—or a worrisome invitation to foreign migrants—and voted against it—both sides agreed on the enacted Clause's meaning.

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[28] In addition, while the view was not held unanimously, the prevailing sentiment was that the Citizenship Clause did not apply to American Indians. In 1870, a Senate Judiciary Committee report on the impact of the Fourteenth Amendment on Indian tribes concluded that Indians who retained tribal status were not subject to U.S. jurisdiction within the meaning of the Amendment's citizenship provisions. S. REP. NO. 41-268 (1870). In 1884, the Supreme Court held that persons born into Indian tribes were not citizens by birth under the Fourteenth Amendment because, while the tribes were "within the territorial limits of the United States," they were "distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 99 (1884). Justice Harlan dissented, arguing that the majority's result was not what the Fourteenth Amendment had intended. *Id.* at 122 (Harlan, J., dissenting). The debate was resolved in the early 1900s, however, when, as the federal government dissolved the legal authority and independence of the Native American tribes, Congress extended citizenship to Indians. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 64 (2002).

[29] CONG. GLOBE, 39th Cong., 1st Sess. 2890-91 (1866).

[30] CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). *See generally* Ho, *supra* note 6, at 368-69 (discussing the Cowan-Conness exchange).

III. The Principles of the Fourteenth Amendment

While the text and history and of the Citizenship Clause demonstrate the intent and effectuation of the Reconstruction Framers' desire to enshrine automatic birthright citizenship in the Constitution, the principles behind Reconstruction may be even more 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, the so-called "anchor baby" charge. These undocumented immigrants, the argument continues, often hope the United States will grant citizenship to them as well for the sake of the children. They argue that the Congress should pass legislation that prospectively denies citizenship to children of undocumented immigrants.

At the time the Fourteenth Amendment was drafted, opinions on race and ethnicity were passionately held and forcefully debated. The *Dred Scott*[31] 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,"[32] Justice 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."[33] 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.[34]

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, and logically so.[35] After cataloguing the discriminatory enactments of the

[31] 60 U.S. (19 How.) 393 (1856).
[32] *Id.* at 419.
[33] *Id.* at 577-78.
[34] *Id.*
[35] *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (Thomas M. Cooley ed., 4th ed. 1873) (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

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.[36]

Indeed, Senator 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."[37] 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 1880s[38] 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 to birthright citizenship further confirms the good judgment of the Framers of the Fourteenth Amendment in placing the question of citizenship beyond "consent" of the political majority at any given point in time. 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.[39] 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

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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").

[36] *See* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

[37] CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

[38] 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*, 72 CAL. L. REV. 529, 535 (1984) (illustrating that as more Chinese arrived in the United States, resentment against them began to build).

[39] CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

vote to enjoy the privileges and immunities of U.S. citizenship—they simply have to be born here.

IV. Debunking Modern Arguments Against Birthright Citizenship

Despite the strength of the argument—rooted in text, history, and long-standing Supreme Court precedent—that the Constitution guarantees citizenship at birth to U.S.-born children regardless of their 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,[40] while others simply argue for the Supreme Court to change its long-standing interpretation of the Citizenship Clause. Douglas Kmiec, a professor at Pepperdine University School of Law, and then an informal advisor to 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.[41] Most recently, the new chairman of the House Judiciary Committee, Representative Lamar Smith (R-Tx.), has similarly opined: "The granting of automatic citizenship comes from a misinterpretation of the 14th Amendment. Fortunately, it wouldn't take as much as a constitutional amendment – we can fix it with congressional action."[42]

A. 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.

To be sure, the congressional debates over the Citizenship Clause include occasional references to "allegiance," which some commentators use to argue that the Citizenship Clause protects only the children of those who owe complete and exclusive allegiance to the United States. But, even if "allegiance" were the defining characteristic of birthright citizenship, the

[40] *E.g.*, James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 TEX. REV. L. & POL. 161, 161 n.1 (2007) (citing examples).

[41] Teddy Davis, *Romney Weathers "Illegal Worker" Allegations*, ABC NEWS, Feb. 13, 2007, http://abcnews.go.com/Politics/Story?id=2873594&page=1.

[42] *See* Politico.com, *Rep. Lamar Smith's Response to "End of Birthright Citizenship? President Obama's Tough Love for Teachers?"*, http://www.politico.com/arena/perm/Rep__Lamar_Smith_BE1DCBC6-0F8B-417B-AF18-097C59473EE8.html.

Reconstruction Framers understood allegiance to spring from the place of one's birth, not the citizenship status of one's parents. The 1866 debates show that allegiance is not inconsistent with birthright citizenship, because a person "owes allegiance to the country of his birth, and that country owes him protection."[43] Similarly, one of the opinions from the *Dred Scott* decision, which was the backdrop against which the Citizenship Clause was drafted, acknowledged that "allegiance and citizenship spring from the place of birth."[44]

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."[45] 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."[46]

Case law from the period confirms this view. The case of *Lynch v. Clarke*, cited in the 1866 debates,[47] stated that "children born here are citizens without any regard to the political condition or allegiance of their parents."[48] 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."[49] Ten years after the *Lynch* case, the then-Secretary of State 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."[50] Thus, even if the relevant measure of citizenship were "allegiance" rather than birth within the territory of the United States, birthright citizenship would still be the constitutional rule.

B. Excepting Foreign Diplomats Is Not The Same As Excepting All Foreigners

[43] CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866).
[44] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 586 (1856) (Curtis, J., dissenting) (explaining 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).
[45] CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).
[46] CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).
[47] CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).
[48] 1 Sand. Ch. 583 (N.Y. Ch. 1844).
[49] *Id.* at 663 (emphasis added).
[50] Letter of William L. Marcy, U.S. Secretary of State, March 1854, *quoted in CONG. GLOBE, 39th Cong., 1st Sess. 1116 (1866) (statement of Rep. Wilson).*

An oft-repeated claim by opponents of birthright citizenship is that the Citizenship Clause was intended to exclude "foreigners" from its guarantee of automatic citizenship. In support of this claim, they cite a statement by Senator Howard, who introduced the language of the Citizenship Clause, in which he noted 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."[51]

This statement does not prove the anti-citizenship advocates' claim. Senator Howard's description of the only class of children born on U.S. soil who would not be U.S. citizens automatically at birth was merely a summary of the widely accepted understanding that children of diplomats would not be birthright citizens. This is because of the legal fiction that diplomats, while physically present here, remain in a sense on the home ground of their country—hence the concept of diplomatic immunity. Senator Howard used the terms "foreigners" and "aliens" in the sentence quoted above to describe those "who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States." If Howard was intending to list several categories of excluded persons (*e.g.*, foreigners, aliens or families of diplomats) he could have said so. Instead, the language he used strongly suggests he was describing a single excluded class, limited to 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 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."[52] 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."[53]

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 the overwhelming text, history, and principles that point to the opposite conclusion.

C. The Misguided "Consent" Theory

[51] CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).
[52] CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866).
[53] *Id.*

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 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. [54]

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.

Putting aside whether it makes good policy sense for Congress to "consent" to birthright citizenship—and scholars, notably Margaret Stock,[55] 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 themselves seem to be unsure whether they need to amend the Constitution to achieve their goal, or may simply legislate around it—the sponsors of legislation to end automatic citizenship alternate between proposing amendments to the Constitution and simply proposing legislation that denies citizenship to children born in the United States to undocumented parents.)

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[54] *E.g.*, WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY 1039 (1996) (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, 278 (1901) (concluding that the phrase "subject to the jurisdiction" embraces U.S. territories); *United States v. Bevans*, 16 U.S. (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*, 57 CASE W. RES. L. REV. 147, 160 (2006) (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).

[55] Margaret Stock, *Birthright Citizenship—The Policy Arguments*, 33 ADMIN. & REG. L. NEWS 7 (2007) (arguing that, even if the Fourteenth Amendment could be interpreted to allow a change from birthright citizenship, "such a change would be ill-advised from a policy perspective," and there is no evidence that changing the rule would reduce illegal immigration).

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. The Framers of the Fourteenth Amendment believed that providing citizenship to persons born in the United States without regard to race or color was 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."[56] 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."[57] 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.

V. State Efforts to Undue the Constitutional Guarantee of Citizenship at Birth

Arizona State Senator Russell Pearce—who sponsored his State's controversial "show us your papers" law, S.B. 1070—and a handful of other state legislators affiliated with State Legislators for Legal Immigration (SLLI) have drafted model legislation aimed at ending the centuries-old practice of granting automatic citizenship at birth to children born on American soil. Pearce's colleague, Representative John Kavanaugh has already introduced legislation seeking to challenge the right to U.S. citizenship for children born in the state whose parents are undocumented migrants or other non-citizens, and legislators from at least 14 other states intend to introduce such bills in 2011. As with S.B. 1070, Pearce's target is illegal immigration, but this time his focus is children born in the United States to undocumented immigrants—children who, under the 14th Amendment, are automatically U.S. citizens simply by being born here and are thus neither illegal nor immigrant.

The goal—which Pearce, and his allies have unabashedly admitted—is to force costly litigation in the hopes of taking a case on birthright citizenship all the way to the U.S. Supreme Court. Pearce is certainly no stranger to thorny constitutional litigation: the U.S. Court of Appeals for the Ninth Circuit is currently considering his S.B. 1070 bill after a federal district court in Arizona enjoined the law based on the likelihood that it will eventually be struck down as unconstitutional. But setting up the Constitution's guarantee of citizenship at birth for a legal showdown is a perilous gambit, and one contradicted by the words of the Constitution and the most fundamental of American values.

[56] *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).
[57] CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

The proposed state legislation attacks the Constitution's guarantee of citizenship in two ways: first, by creating two tiers of birth certificates, one of which the States would produce only for babies born to U.S. citizens and legal residents; and, second, by adding a second level of "state" citizenship that would be denied to children born to non-citizens. Both these efforts violate the Constitution.

As a threshold matter, the States lack the power to define citizenship. The 14th Amendment's Citizenship Clause was added to the Constitution after the Civil War and the abolition of slavery, and it unquestionably places the question of citizenship out of the hands of the States. The Citizenship Clause declares that children born within the jurisdiction of the United States are citizens of the United States "and of the State wherein they reside." It violates the letter and the spirit of the 14th Amendment for state legislators to try to sneak their way around the constitutional guarantee of citizenship by adding a distinct level of state citizenship that does not comport with the Citizenship Clause.

In addition, the 14th Amendment gives the federal government the authority to enforce the Constitution's guarantee of equal citizenship and ensure that States do not create second-class citizens, by, for example, issuing different birth certificates to U.S.-born children of non-citizens. America will not abide classes or castes, something that the drafters of the 14th Amendment's Citizenship Clause were keenly aware of, having lived through slavery and the Civil War. After cataloguing the discriminatory enactments of the slaveholding states, it would have made no sense for the post-Civil War drafters of the 14th Amendment to have made the citizenship of freed slaves open to easy revocation if these states regained legislative power.

Stated simply, the anti-citizenship state legislators appear to be deliberately setting up a showdown between state and federal power in an area where the Constitution has decisively taken power away from the States entirely. The Constitution vests the federal government with sole authority to resolve questions of naturalization, and the conditions of citizenship have been fixed in our federal charter since Reconstruction.

VI. Conclusion

If the Framers of the 14th Amendment had wanted Congress or the States to be able to define citizenship and establish castes and subclasses of Americans, they could have expressly left authority open to the States to create their own citizenship rules. 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 automatically be granted citizenship. But the drafters of the Citizenship Clause were not poor wordsmiths and they chose to do none of those things. Instead, they devised a rule that is elegantly simple and intentionally fixed.

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.

CWS statement to the U.S. House of Representatives Judiciary Committee, regarding its hearing on Birthright Citizenship, Wednesday, April 29, 2015

As the committee discusses the policy of birthright citizenship enshrined in the Fourteenth Amendment to the U.S. Constitution, Church World Service (CWS) urges all members to reflect on the important role this plays in preventing statelessness, and to affirm U.S. leadership in combating child statelessness globally. The Fourteenth Amendment guarantees 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 U.S. Supreme Court has concluded that "every person born within the dominions and allegiance of the United States, whatever was the situation of his parents, is a natural born citizen".[1]

Changing U.S. policies regarding acquisition of citizenship would put millions of infants born in the United States at risk of being born stateless. A stateless person is someone who is not considered a citizen by any country,[2] and is thus more vulnerable to human rights violations, discrimination, marginalization, abuse and systemic poverty. Children of asylum seekers, refugees, victims of human trafficking, individuals who have fallen out of current immigration status and other vulnerable populations are often unable to claim citizenship from their parent's home country, since they fled their home due to persecution. In countries without birthright citizenship policies, these children are often rendered stateless. Such travesties are seen in Europe due to the dissolution of the Soviet Union and in other parts of the world - Thailand, Kuwait, Senegal - but generally not in the United States, although there are stateless persons living in this country as well. In the last 25 years, more than 20 countries have made progress to prevent child statelessness by changing their birth registration and citizenship policies, and United States should not be the exception to this progress. CWS strongly opposes any proposal which would undermine right of infants born in the United States to U.S. citizenship and thus create a problem of child statelessness in the United States.

For decades, the United States has been a leader in encouraging countries to reduce statelessness.[3] UNHCR, the U.N. Refugee Agency, estimates that there are 12 million stateless persons globally.[4] The U.S. Department of State has established that one cause of statelessness stems from laws that target restrictions on the acquisition of citizenship against minority groups[5]. Countries in which nationality can only be derived based on descent from a national have larger stateless populations.[6] U.S. diplomatic missions have condemned laws that increase the risk of statelessness and restrict children's access to nationality based on a parent's migration situation.[7] The prevention of statelessness is part of international customary law,[8] and thus countries are called to protect children from being stateless.[9] CWS urges the committee to continue supporting U.S. efforts to combat statelessness, and to safeguard the value of citizenship derived by birth.

Weakening U.S. citizenship policies would fly in the face of our best values as a nation and take us back centuries. Such action would harmfully contradict the U.S. Constitution, U.S. Supreme Court jurisprudence and international law; contravene U.S. foreign policy efforts to end statelessness;[10] and lower the bar for other countries in terms of respecting basic human rights. CWS urges the members of the committee to affirm the U.S. government's international leadership in preventing and ending statelessness all over the world, and to support policies that help the United States lead by example at home, including the policy of birthright citizenship.

[1] US Supreme Court case of Lynch v. Clarke (1844) CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).
[2] For further details on the interpretation of Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, see UNHCR, Guidelines on the Definition of "Stateless Person" ("Definition Guidelines") <www.unhcr.org/refworld/docid/4f4371b82.html>.
[3] UNHCR, "UNHCR urges the United States to strengthen its fight against statelessness", 10 Dec 2012. <www.unhcr.org/50c608346.html>.
[4] Open Society Foundations, "Citizens of Nowhere: Solutions for the Stateless in the U.S.", December 2012. <www.opensocietyfoundations.org/reports/citizens-nowhere-solutions-stateless-us>.
[5] US Department of State "Statelessness"
[6] UNHCR, "Causes of Statelessness," <www.unhcr.org/pages/49c3646c15b.html>.
[7] U.S Embassy in Mali "U.S. Embassy Participates in Program Tackling Stateless Persons Dilemma",2015 <http://mali.usembassy.gov/stateless_persons.html>.
[8] UNHCR, "Guidelines on Statelessness No. 4:Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness", 21 Dec 2012. <www.unhcr.org/5465c9ff9.html>.
[9] UNHCR urges Dominican Republic to restore nationality, December 2013. <www.unhcr.org/52a0a59b9.html>.
[10] US Department of State "Statelessness" <www.state.gov/j/prm/policyissues/issues/c50242.htm>.

Lutheran Immigration and Refugee Service

STATEMENT FOR THE RECORD
On
"Birthright Citizenship: Is it the Right Policy for America?"

The House Committee on the Judiciary
Subcommittee on Immigration and Border Security

April 29, 2015

By Lutheran Immigration and Refugee Service

As Congress continues to debate changes to our immigration laws, some federal lawmakers have repeatedly contemplated the repeal of the 14th Amendment to the Constitution, which grants U.S. citizenship to all children born in the United States.

Lutheran Immigration and Refugee Service (LIRS)[1], the national organization established by Lutheran churches in the United States to serve uprooted people, believes that denying U.S. citizenship to children runs counter to our biblical mandate to care for sojourners in our midst by preserving their dignity and defending our system of justice for all. Further, it is an extremely misguided and unwarranted proposal that would undermine American values of equality, unnecessarily hurt children and families, and fail to remedy our broken immigration system.

Inconsistent with Biblical Mandates

Denying U.S. citizenship to children born in the United States contradicts biblical mandates to love and treat justly sojourners in our midst.

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[1] Founded in 1939, Lutheran Immigration and Refugee Service is the second largest refugee resettlement agency in the United States. It is nationally recognized for its leadership advocating with refugees, asylum seekers, unaccompanied children, immigrants in detention, families fractured by migration and other vulnerable populations. Through more than 75 years of service and advocacy, LIRS has helped over 500,000 migrants and refugees rebuild their lives in America.

"When a stranger sojourns with you in your land, you shall not do him wrong. You shall treat the stranger who sojourns with you as the native among you, and you shall love him as yourself…." (Leviticus 19:33–34, ESV).

Scripture affirms the dignity of all people as made in the image of God, deserving of justice and called to care for each other as neighbors. Repeatedly, Scripture calls the community of faith to care for and prevent injustice to the widow, the fatherless, and the foreigner (Deuteronomy 24:14-15, 17; Ps 146:9, ESV), showing God's heart for people at the margins, people vulnerable to exploitation.

Undermining American Values

After the Civil War, the U.S. Congress passed the 14th Amendment, affirming that U.S. citizenship could not be denied to individuals based on race, nationality or family history.

Repealing birthright citizenship would undermine fundamental American values of equality. The current law serves as a simple and efficient way to ensure equal rights and protections to all children born in the United States.

Harmful to Migrant Children and Families

If the 14th Amendment were to be curtailed or repealed, some newborn babies could obtain the nationality of their parents, yet for many others this may not be possible. As a result, many children would grow up in the United States without a nationality, subjecting more families to the threats of separation and instability. We oppose any laws or policies that create yet another marginalized and vulnerable population within our borders.

Misguided Proposal That Would Not Fix the Broken Immigration System

Repealing birthright citizenship would result in a larger undocumented population and would force more children to grow up in the shadows with fewer protections and limited access to basic services. We encourage Congress to dismiss this harmful proposal and instead work towards a solution that unites families, upholds justice, and welcomes migrants and refugees.

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

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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

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

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

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

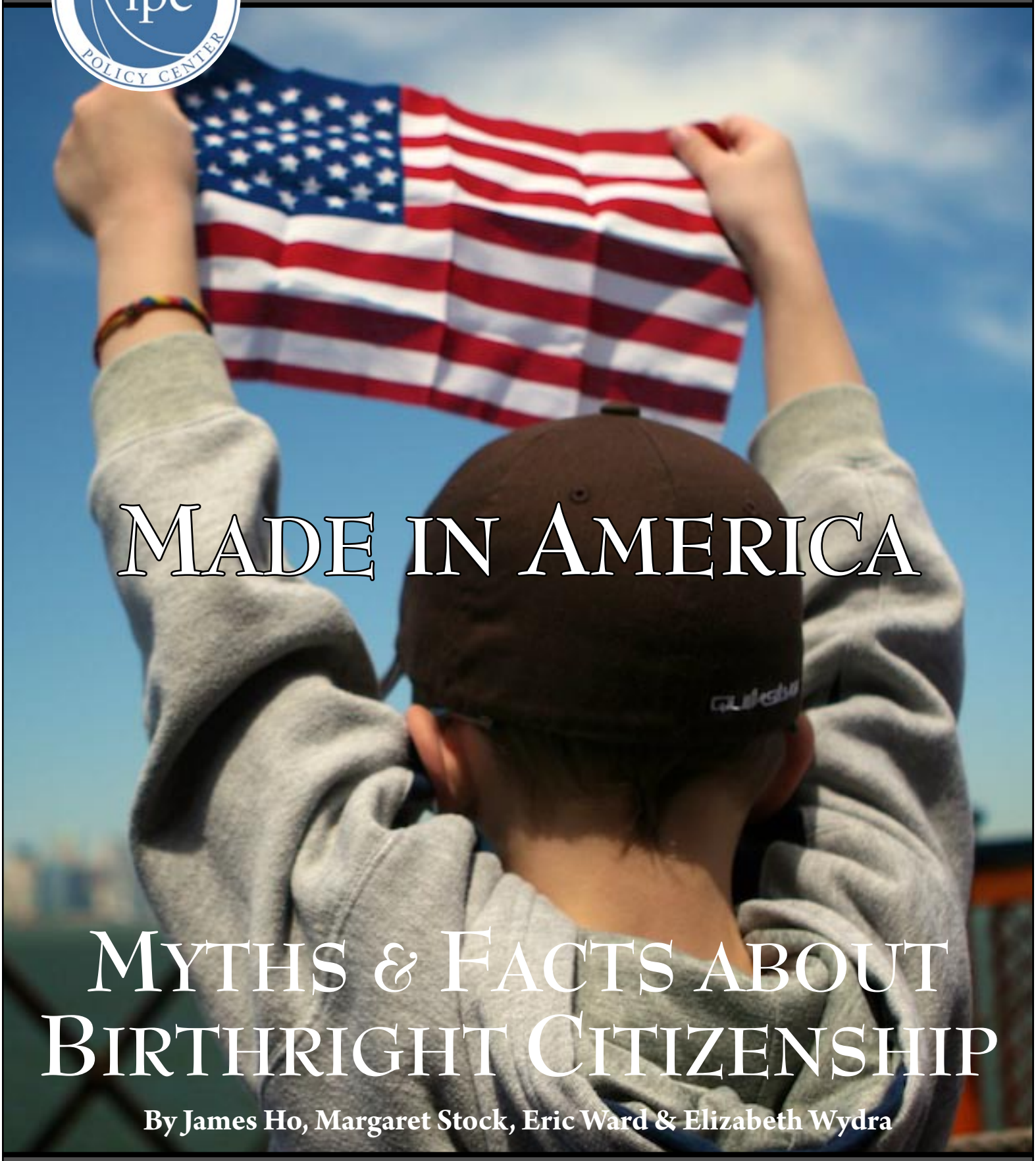
the case, the process can take weeks or even years, and can require the production of numerous documents, including old historical records.

- **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

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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

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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

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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

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[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.

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[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]

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[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.

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[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]

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[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

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[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

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[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]

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[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

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[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

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[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.

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[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.

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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

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[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

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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.

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[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

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[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

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[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.

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[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

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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.

April 29, 2015

The Honorable Chairman Trey Gowdy
U.S. House Judiciary Committee
Subcommittee on Immigration and Border Security
Washington, DC 20515

The Honorable Ranking Member Zoe Lofgren
U.S. House Judiciary Committee
Subcommittee on Immigration and Border Security
Washington, DC 20515

Dear Chairman Gowdy and Ranking Member Lofgren:

In light of the April 29th hearing on birthright citizenship by the U.S. House Judiciary Subcommittee on Immigration and Border Security, we, the undersigned Jewish organizations, strongly oppose efforts to amend or circumvent the birthright citizenship provisions of the United States Constitution.

The Fourteenth Amendment to the U.S. Constitution affirmed the concept of birthright citizenship, i.e., determining a person's citizenship by place of birth. Section 1 of the Fourteenth Amendment provides "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."[1] This constitutional provision insures "that all native-born children, whether members of an unpopular minority or descendants of privileged ancestors … have the inalienable right to citizenship and all its privileges and immunities."[2]

Section 1 of the Fourteenth Amendment reflects the American Dream—that only hard work and ability, not ancestry or class, should determine one's achievement in our nation. This concept, reflected in inspired words by the Jewish American poet Emma Lazarus, was cast into the base of the Statute of Liberty, welcoming nearly twelve million aspiring Americans (including almost three million Jews) who came through Ellis Island, and the statue bearing these words remains a beacon of opportunity for immigrants to this day.

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[1] The principal purpose of Section 1 was to explicitly overrule *Dred Scott v. Sandford*, 60 U. S. 393 (1856) which held that U.S.-born Negroes whose ancestors were slaves could never become citizens of the United States regardless of the state in which they were born or resided. It majestically and explicitly rejected the racist reasoning of that case. The Fourteenth Amendment also provides for its enforcement by Congress, not the states, and explicitly provides that no State may deprive any citizen of any of the privileges and immunities of a citizen, of life, liberty or property without due process, or of the equal protection of the laws.
[2] Wydra, Elizabeth, "The Fourteenth Amendment's Guarantee of Birthright Citizenship" (The Constitutional Accountability Center 2009).

We believe that defending birthright citizenship is of vital concern to the interests and moral imperatives of the Jewish community. Efforts to amend the Constitution or to interpose legislation to force a judicial challenge to settled law concerning the meaning of the Fourteenth Amendment pose a profound danger to the rights of citizens, to the ability of all of our citizens to prove their citizenship without undue administrative burdens, and to our country's core values. These efforts threaten to undermine our historic role as a welcoming nation, attracting the finest minds in the world to become productive, innovative citizens here without distinction in class or rights from those who are native born or whose ancestors immigrated earlier.

Thank you for allowing us to present our perspective on the dangers of amending the birthright citizenship provisions of the Fourteenth Amendment or legislative attempts to circumvent the current understanding of the clause. Birthright citizenship is a unique expression of the American Dream and a critical protection of our national values of equality, opportunity, and justice.

Sincerely,

American Jewish Committee (AJC)
Anti-Defamation League
B'nai B'rith International
Bend the Arc Jewish Action
Central Conference of American Rabbis
Hebrew Immigrant Aid Society
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Women International
National Council of Jewish Women
Rabbinical Assembly
Reconstructionist Rabbinical College
The Workmen's Circle
Union for Reform Judaism

Written Testimony of the
Jewish Council for Public Affairs

Jared Feldman
Vice President and Washington Director

For a Hearing on
Birthright Citizenship: Is it the Right Policy for America?

Submitted to the
U.S. House Judiciary Committee
Subcommittee on Immigration and Border Security

April 27, 2015

Chairman Gowdy, Ranking Member Lofgren, and members of the Subcommittee on Immigration and Border Security: Thank you for extending the opportunity to submit testimony concerning the importance of defending the birthright citizenship provisions of the United States Constitution.

The Jewish Council for Public Affairs (JCPA) is the American Jewish community's umbrella agency for multi-issue organizations engaged in public policy and community relations. Our membership includes 16 national organizations and 125 local affiliates. We work with government representatives, the media, and a wide array of religious, ethnic, and civic organizations to address a broad range of public policy concerns and share the Jewish community's consensus perspectives.

The JCPA strongly opposes efforts to amend or circumvent the birthright citizenship provisions of the Constitution. The Fourteenth Amendment to the Constitution affirmed the concept of birthright citizenship, i.e., determining a person's citizenship by place of birth. Section 1 of the Fourteenth Amendment provides "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."[1] This constitutional provision insures "that all native-born children, whether members of an unpopular minority or descendants of privileged ancestors . . . have the inalienable right to citizenship and all its privileges and immunities."[2] It reflects the American Dream—that only hard work and ability, not ancestry or class, should determine one's achievement in our nation. This concept, reflected in inspired words by the Jewish American poet Emma Lazarus, was cast into the base of the Statute of Liberty, welcoming nearly twelve million aspiring Americans (including almost three million Jews) who came through Ellis Island, and the statue bearing these words remains a beacon of opportunity for immigrants to this day.[3]

In the past, Congressional and state-level legislation has been proposed that would redefine citizenship, weakening birthright citizenship by imposing additional requirements. Many of these proposals and the political arguments supporting them willfully ignore the historical meaning and clear judicial precedents interpreting Section 1 of the Fourteenth Amendment. Supporters of these proposals maintain, erroneously, that the language of the Fourteenth Amendment has been misinterpreted, and that undocumented immigrations are not "subject to the jurisdiction of the United States" because they are citizens of, and owe allegiance to, their countries of origin.

By making citizenship depend even in part on ancestry, rather than objectively on place of birth, all citizens and their descendents would lose the ability to prove their citizenship by their birth certificate alone. They would need additional documentation of the United States citizenship of one or more of their ancestors, and perhaps multiple generations of ancestors. In time, proof of their citizenship would prove to be an unfair, expensive administrative nightmare for millions of Americans. Studies show that repeal of the birthright citizenship provisions would actually increase the number of undocumented aliens in the United States and create an unprecedented permanent, self-perpetuating class of unauthorized immigrants with hereditary disadvantages.

The JCPA believes that important battle lines are being drawn, both in Congress as well as on the state level, on the matter of birthright citizenship. Defending birthright citizenship is of vital concern to the

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[1] The principal purpose of Section 1 was to explicitly overrule *Dred Scott v. Sandford*, 60 U. S. 393 (1856) which held that U.S.-born Negroes whose ancestors were slaves could never become citizens of the United States regardless of the state in which they were born or resided. It majestically and explicitly rejected the racist reasoning of that case. The Fourteenth Amendment also provides for its enforcement by Congress, not the states, and explicitly provides that no State may deprive any citizen of any of the privileges and immunities of a citizen, of life, liberty or property without due process, or of the equal protection of the laws.

[2] Wydra, Elizabeth, "The Fourteenth Amendment's Guarantee of Birthright Citizenship" (The Constitutional Accountability Center 2009).

[3] "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"

interests and moral imperatives of the Jewish community. Efforts to amend the federal Constitution or to interpose legislation to force a judicial challenge to settled law concerning the meaning of the Fourteenth Amendment pose a profound danger to the rights of citizens, to the ability of all of our citizens to prove their citizenship without undue administrative burdens, and to our country's core values. Often politically motivated, these efforts threaten to undermine our historic role as a welcoming nation, attracting the finest minds in the world to become productive, innovative citizens here without distinction in class or rights from those who are native born or whose ancestors immigrated earlier.

The birthright citizenship provisions of the Constitution echo the founding precepts of our Declaration of Independence that, endowed by their Creator with inalienable rights, "all men are created equal." They embody the elegant thoughts of Abraham Lincoln in his July 4, 1858 speech, and later the Gettysburg address,[4] that those who were not blood descendents of the nation's founders and the drafters of our Declaration and Constitution were nevertheless every bit the equal of these blood descendents once they claimed those moral principles as their own.

Thank you for allowing us to present our perspective on the danger of amending the birthright citizenship provisions of the Fourteenth Amendment or legislative attempts to circumvent the current understanding of the clause. Birthright citizenship is a unique expression of the American Dream and a critical protection of our national values of equality, opportunity, and justice.

[4] In his 1858 speech, Lincoln pointed out that those who were not blood descendents of the nation's founders and the drafters of our Declaration and Constitution were, nevertheless every bit the equal of these blood descendents once they claimed the moral principles of the Declaration of Independence and the Constitution as their own. Discussed and quoted in Gary Wills, *Lincoln at Gettysburg* (Simon & Schuster 1992) at 86-7.

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Franciscan Action Network Testimony on Birthright Citizenship
Margaret Magee, OSF President
Patrick Carolan, Executive Director

Submitted to the U.S. House Judiciary Committee
Subcommittee on Immigration and Border Security
for a Hearing on Birthright Citizenship:
Is it the Right Policy for America?

April 27, 2015

Chairman Gowdy, Ranking Member Lofgren, and members of the Subcommittee on Immigration and Border Security, thank you for extending the opportunity to submit testimony regarding defense of the birthright citizenship provisions of the United States Constitution.

Franciscan Action Network is a national organization of Franciscan religious and lay persons which provides a unified Franciscan voice for justice. Our network includes fifty member institutions and thousands of individuals across the United States, with members in all fifty states.

While it is difficult to believe that birthright citizenship is being challenged, Franciscan Action Network (FAN) wishes to lend its support to maintaining without amendment, Section 1 of the Fourteenth Amendment which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, and ensures "that all native-born children, whether members of an unpopular minority or descendants of privileged ancestors. . .have the inalienable right to citizenship and all its privileges and immunities."

Proposals have been submitted previously by legislators in national and state level governance that would weaken birthright citizenship by imposing additional requirements. Proponents maintain that the Fourteenth Amendment has been misinterpreted and that undocumented immigrants are not "subject to the jurisdiction of the United States" because they are citizens of their countries of origin. By making citizenship depend on ancestry, rather than on place of birth, all citizens and their descendants would lose the ability to prove their citizenship by their birth certificate alone. All of us who were born in this country, but whose parents or grandparents arrived in this country as immigrants would need documentation other than our birth certificates that we were born here, and thus, have been citizens from the time we were born.

Birthright citizenship, as defined in our Constitution, should not be in need of defense, but since it is being challenged, FAN strongly defends it on both judicial and moral grounds. Our faith teaches us that human dignity is at the core of social, ethical and civic values and that human rights must be defended. Our nation grew and prospered because of the many contributions of those who came here believing in the hope and promise of the American Dream. Birthright citizenship is a basic and critical protection of our national values of hospitality, opportunity, and justice.

Written Statement of Asian Americans Advancing Justice | AAJC and Asian Americans Advancing Justice | Los Angeles

House Committee on the Judiciary
Subcommittee on Immigration and Border Security

Hearing on: "Birthright Citizenship: Is It the Right Policy for America?"

April 29, 2015

Founded in 1991, Advancing Justice | AAJC is a national non-profit, non-partisan organization that works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Founded in 1983, Asian Americans Advancing Justice | Los Angeles is the nation's largest Asian American legal and civil rights organization and serves more than 15,000 individuals and organizations every year. We are leading experts on civil rights issues of importance to the Asian American and Pacific Islander (AAPI) community including: immigration and immigrants' rights, affirmative action, anti-Asian violence prevention/race relations, census, language access, television diversity and voting rights. We appreciate this opportunity to submit a statement for the April 29, 2015 hearing concerning constitutional citizenship.

The Fourteenth Amendment's guarantee of birthright citizenship has been profoundly beneficial for our nation. It has served as a cornerstone of the movement to secure civil rights for all Americans, including the right to vote. And it has played an important role in unifying America's great cultural diversity, which serves as a role model for the rest of the world. Repealing or restricting constitutional citizenship subverts the intent of our nation's founding fathers. The guarantee of constitutional citizenship was intended to put U.S. citizenship above the preferences and prejudices of any politician or era.

The Citizenship Clause and its benefits have particular resonance for the Asian American community. It was in 1898 when the meaning of the Citizenship Clause in the Constitution was conclusively determined in *U.S. v. Wong Kim Ark (*169 U.S. 649 (1898)). In *Wong Kim Ark*, the United States 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. For Asian American immigrants who were denied the right to naturalize for decades, the decision in *Wong Kim Ark* at least guaranteed that their children born in America could enjoy the rights and responsibilities of citizenship. Through birthright citizenship, Asian American communities were able to begin growing and establishing deep ties to the U.S. despite race-based restrictions on immigration and naturalization, and sometimes property rights, that were not lifted until many years later.

Restricting or repealing constitutional citizenship would impose a significant burden on *all* Americans, including AAPIs, who would no longer have an easy and inexpensive way to prove their citizenship. Currently, simply being born in the U.S. and having a U.S. birth certificate is proof enough of U.S. citizenship. The law serves as a simple and efficient way to ensure equal rights and protections to all children born in the U.S. Other than a birth certificate, most Americans do not have documents that establish their citizenship. A 2006 Brennan Center survey found that more than 13 million American adults cannot easily produce such documentation.

Establishing U.S. citizenship other than by birth is complex, and potentially time-consuming and costly. Americans would have to prove that their children derive U.S. citizenship through one or both of their parents—a difficult process for even experienced immigration attorneys. Some of the many considerations include: 1) whether one's parents were married at the time of one's birth, 2) the gender of the U.S. citizen parent, 3) whether or not a child was born abroad, and 4) what year the child was born. Assessing citizenship is an arduous and expensive process. The U.S. State Department and the Department of Homeland Security charge a substantial fee (currently $460) to make derivative citizenship assessments. Depending on the case, the process can take weeks or even years, and can require the production of numerous documents, including old historical records.

Many Americans could easily 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.

Moreover, eliminating or restricting constitutional citizenship would not solve the problem of unauthorized immigration. Rather, depending on how the law was changed, the undocumented population could dramatically increase. For example, if citizenship were denied to every child with at least one undocumented parent, the undocumented population in the U.S. would reach 24 million by 2050. Since roughly 1 in 10 undocumented individuals is currently AAPI, a significant portion of this unauthorized population would be AAPI.

U.S. citizen children do not protect their parents from deportation – and there is no evidence that undocumented immigrants come to the U.S. just to give birth. 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. Even if a petition is granted, parents must still leave the U.S. in most cases, from which they will be barred from re-entering the U.S. for at least 10 years. That's a total of 31 years. And re-admission is not guaranteed. Undocumented immigrants do not come to the U.S. to give birth as part of a 31-year plan to achieve legal status.

In America, every child is born with the same rights as every other U.S. citizen. This principle has remained settled law of the land for more than a century, and has helped to integrate new generations of immigrants into American society. The alternative is fundamentally unjust and un-American: to create a permanent sub-caste and undermine the promise engraved on the front of the United States Supreme Court Building – "equal justice under law." We urge the Subcommittee to focus on legislative solutions that unite Americans and promote prosperity for all.

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Statement of the American Immigration Lawyers Association

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:
Gregory Chen, Director of Advocacy
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Phone: 202/507-7615

1331 G Street, NW
Washington, DC 20005
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The American Immigration Lawyers Association (AILA) is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA has about 14,000 attorney and law professor members.

The question posed by this hearing—whether birthright citizenship is the right policy for America?—challenges a well-established principle guaranteed by the Fourteenth Amendment to the Constitution. The Fourteenth Amendment opens with the Citizenship Clause: "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." Ratified in 1868 after the Civil War, the amendment was intended to put citizenship above the politics and prejudices of any given era. The amendment forms the cornerstone of American civil rights by ensuring due process and equal protection under the law to all persons. The amendment's intent, repeatedly recognized by the Supreme Court, was to guarantee equal citizenship for all children born on U.S. soil (except children born to diplomats or invading soldiers), regardless of the status of their parents. It overturned one of the Supreme Court's most infamous rulings, *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which sought to deny citizenship to U.S.-born slaves and their children.

This right to citizenship under the 14th Amendment has been consistently recognized by courts and Attorneys General for over a century, most notably by the Supreme Court in *United States v. Wong Kim Ark*. With the exception of the brief period between the *Dred Scott* decision and the ratification of the 14th Amendment, birthright citizenship has been the rule since the founding of the Republic.

Citizenship based on place of birth is a fundamental right inextricably tied to our liberty and equal rights. In America, each person is born equal with no disadvantage or exalted status arising from the circumstance of their parentage.

Recent proposals by Congressman Steve King (R-IA) and Senator David Vitter (R-LA) seek to prevent the children of undocumented immigrants from receiving citizenship by redefining the Fourteenth Amendment. Their bills (H.R. 140 and S. 45) would restrict citizenship to persons who are born in the United States to those with one parent who is (1) a citizen or national of the United States; (2) a lawful permanent resident; or (3) a person performing active service in the armed forces.

Congressman King and Senator Vitter's proposals to restrict the right of citizenship offend this country's most sacred values and constitutional principles. Civil rights leaders have spoken out loudly and clearly that they view such proposals as unprecedented and unacceptable attacks on the rights of all Americans. Placing limits on citizenship rights would re-establish the very same discriminatory exclusion that the Fourteenth Amendment was intended to remedy.

By calling it a "policy" of birthright citizenship, Congressman King and Senator Vitter are suggesting that a bedrock principle embodied in the Constitution can and should be easily altered. In fact, restricting the Fourteenth Amendment's guarantee of birthright citizenship cannot be done by memorandum or even enactment of law—it must be done by a constitutional amendment as specified in the Constitution itself. The proponents of these bills put forward a fringe interpretation of the "subject to the jurisdiction thereof" clause, and emphasize that the Supreme Court should revisit its century-long jurisprudence by addressing the case of a child born to undocumented parents. Constitutional scholars, civil rights leaders, and leaders in both political parties have rejected this interpretation.

Restricting citizenship rights is also not a solution or alternative to immigration reform. Overwhelmingly the American public is calling upon Congress to pass real immigration reform that meets the needs of the American economy, businesses, workers, and families. America does not want leaders to engage in rhetorical or symbolic fights that accomplish nothing but to sow division in our country.

Finally, on a practical level, these proposals to restrict citizenship would create enormous administrative challenges for most American citizens, who would no longer be able to use their birth certificates as proof of citizenship. The only alternative would be costly new bureaucracies, either to judge each newborn child's worthiness to receive a birth certificate, or to create and run a national citizens' registry.

Statement for the Hearing Record

United States House of Representatives Judiciary Committee Subcommittee on Immigration and Border Security

"Birthright Citizenship: Is it the Right Policy for America"

April 29, 2015

Chairman Gowdy, Ranking Member Lofgren, members of the Subcommittee, on behalf of the National Council of Asian Pacific Americans (NCAPA) and our thirty-four national Asian Pacific American organizations, we thank you for the opportunity to submit this statement for inclusion in the record for today's hearing.

Today's hearing examines whether birthright citizenship is the right policy for America. It is important to note, however, that birthright citizenship is more than just a policy. The right of citizenship by birth on American soil is a bedrock Constitutional principle. Birthright citizenship is more than the right policy for America, it is enshrined in our Constitution.

Birthright citizenship stems from the citizenship clause, passed after the Civil War with the intention of overruling the notorious Supreme Court decision in *Dred Scott*. The citizenship clause was adopted to foreclose the possibility of an unequal class system of people born in the U.S. The clause rejects the notion that politics or prejudices can determine who born on U.S. soil is a citizen.

Just thirty years after the passage of the citizenship clause, it was affirmed by the Supreme Court in *United States v. Wong Kim Ark*. Wong Kim Ark, born in San Francisco, was the son of Chinese immigrants who spent his entire life in the U.S. After a short visit to China he was denied entry back into the U.S. on the basis that he was not a citizen. The Supreme Court held that the Fourteenth Amendment guaranteed citizenship to all individuals born in this country. The Court stated the citizenship clause was "in clear words and in manifest intent" and that persons, regardless of race or color, were granted citizenship upon birth on U.S. soil. The Court went on to say that Congress has no authority to restrict birthright citizenship.

There was a tremendous wave of backlash against Chinese immigration when the *Wong Kim Ark* case was decided in 1898. The Chinese Exclusion Act had been signed into law, ending the flow of migration of Chinese laborers into the U.S. Similarly, anti-immigrant sentiment is currently

on the rise and the growth of hate groups is well-documented. Throughout history the citizenship clause has stood for the equality of all individuals in the face of prejudice and animosity.

NCAPA urges members of this Committee to turn towards a serious discussion about humane legislative solutions to reform our broken immigration system. Any debate around immigration reform should align with our values of equality and fair treatment and promote the human rights and dignity of all those in our country today.

National Latina Institute for Reproductive Health

Testimony to the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Border Security

April 29, 2015

Dear Subcommittee Chairman Gowdy, Ranking Member Lofgren and all members of the Subcommittee on Immigration and Border Security:

On behalf of the National Latina Institute for Reproductive Health (NLIRH), I write to express our strong opposition to the premise of today's Subcommittee Hearing which will misguidedly question the role of birthright citizenship in our nation's constitutional democracy. NLIRH has consistently opposed proposals to abandon our country's most sacred values and Constitutional principles by altering how citizenship is granted to those born in the United States. As an organization that advances reproductive justice for the 26 million Latinas in the United States and for their families and communities, we view proposals to undermine birthright citizenship as thinly-veiled attacks on the reproductive health and decision-making of immigrant women. As such, we urge all members of this Subcommittee to reject any proposal that would undermine birthright citizenship – such as Representative Steve King's H.R. 140 – as an affront to our constitutional democracy and to respect immigrant women's bodily autonomy and reproductive healthcare decision-making.

Immigrant women make tremendous contributions to our nation's families, communities, and economy and are part of the social, cultural, economic, and intellectual fabric of our nation. Immigrant women make tremendous sacrifices in order to migrate to the United States and are motivated to provide a better life for themselves and for their children.[i] Others flee interpersonal and state violence, abuse, persecution in their home countries. Regardless of their individual circumstance, all immigrant women are survivors who have arrived with the goal of overcoming obstacles and living independently as productive leaders in their families and society. They have already shown promise and ambition through their journeys and arrivals. Yet, today's hearing contemplating changes to birthright citizenship offends the contributions of immigrant women to our communities and society because false allegations about immigrant women's reproductive decision will be on display.

In previous efforts by certain members of Congress to erode birthright citizenship, attacks on the reproductive healthcare decision-making of immigrant women, such as terms like "anchor babies," served as the core of these misguided efforts. Dehumanizing and demeaning accusations that children born to immigrant mothers are "anchor babies" are not only false, they have no place in our nation's civil discourse. Under current immigration laws, children are only able to petition for their parents through the family visa system at the age of 21 or older. Additionally, immigrant women in the United States face many harmful legal and policy barriers to the healthcare they need on the sole basis of their immigration status. NLIRH has long opposed these barriers to healthcare for immigrant women and families. These barriers were first enacted as part of welfare reform in 1996 and now encompass a number of confusing, complex, and incredibly harmful restrictions on programs like Medicaid, Children's Health Insurance Program (CHIP) and the Affordable Care Act (ACA) despite the

fact that immigrants contribute billions of dollars to the federal, state, and local tax base each and every year. Finally, language questioning women's reasons for migrating to the United States and for having children perpetuates misinformation and creates a culture of hostility toward immigrant women, who are the backbones of their families and communities.

The resulting policy proposals seeking to undermine birthright citizenship represent an unprecedented and unacceptable attack on the rights of all Americans by seeking to limit citizenship by birth to only those individuals who are children of U.S. citizens or nationals, lawful permanent residents, or immigrants in active-duty military service. Such proposals would deny citizenship to the children of undocumented immigrants, as well as lawfully present individuals, such as certain survivors of domestic violence, or individuals with student or employment visas.

Citizenship based on place of birth is a fundamental right inextricably tied to our liberty and equal rights. In the United States, each person is born equal with no disadvantage arising from the circumstance of their parentage. Civil rights leaders representing a broad and diverse coalition have unequivocally opposed these proposals as an unprecedented and unacceptable attack on the rights of all. Placing limits on citizenship rights would re-establish the very same discriminatory exclusion that the 14th Amendment was intended to remedy.

Finally, we urge members of today's Subcommittee to abandon the attacks on the health and rights of immigrant women and instead work toward humane, just, and comprehensive reforms to our nation's immigration laws to reflect our national values of fairness, justice, and equality of opportunity. Removing political interference and restoring immigrants' access to the healthcare programs their tax-dollars support must be part of any comprehensive solution to our nation's immigration laws so that immigrant women can fully contribute to and participate in our nation's shared prosperity.

Thank you for your time and consideration of these concerns. Should you have any additional questions, please do not hesitate to contact me at AnnMarie@LatinaInstitute.org or (202) 621-1435.

Sincerely,

Ann Marie Benitez
Senior Director of Government Relations
National Latina Institute for Reproductive Health

[i] New American Media.Women Immigrants: Stewards of the 21st Century Family. February 2009. Available at http://media.namx.org/images/communications/immwomenexecsummary.pdf. Accessed on January 13, 2013.

Statement for the Record

U.S. House of Representatives Judiciary Committee - Subcommittee on Immigration and Border Security

"Birthright Citizenship: Is it the Right Policy for America?"

April 29, 2015

Founded in 1982, the National Immigration Forum (the Forum) works to uphold America's tradition as a nation of immigrants. The Forum advocates for the value of immigrants and immigration to the nation, building support for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

Introduction

The Forum thanks the Subcommittee for the opportunity to provide its views on this hearing to discuss the matter of birthright citizenship, a foundational principle of our democracy enshrined in the 14th Amendment to the U.S. Constitution. Since 1898, the U.S. Supreme Court has held that this clause applies to children born on U.S. soil, regardless of the immigration status of their parents. Some have proposed reinterpreting the Amendment to restrict birth citizenship to only three categories of people: children of U.S. citizens or nationals, children of permanent residents, and children of non-citizens in active-duty military service. Others have even proposed formal constitutional amendments to change the Citizenship Clause of the 14th Amendment to end birthright citizenship. The Forum believes that ending birthright citizenship contravenes core American values and would have a devastating effect on American families.

Some proponents of ending birthright citizenship argue that revising the meaning of the 14th Amendment is necessary due to our current, broken immigration system. On the contrary, the Forum believes that the best way to address our broken immigration system is to pass broad immigration reform. We urge the members of the Subcommittee not to lose focus on the on-going need for broad immigration reform that includes a path to eventual citizenship.

In the past two years, an alliance of conservative faith, law enforcement and business leadership has come together to forge a new consensus on immigrants and America. These relationships formed through outreach in the evangelical community, the development of state compacts, and regional summits across the country.

Due to these relationships, the Forum launched the Bibles, Badges and Business for Immigration Reform Network (BBB) to achieve the goal of broad immigration reform. Targeting key states through a combination of field events, media coverage and direct advocacy BBB and its partners have had more than 700 meetings with Members of Congress and their staffs and held 303 events in key congressional districts across 40 states since 2013.

We maintain relationships with the faith, business and law enforcement communities all across the country as well as with local non-governmental organizations. Based on conversations with these individuals, it is clear that our country benefits from the current system of birthright citizenship. Below are a sample of some of the people we have encountered in our work:

America Is Stronger Because of Birthright Citizenship

Neil Alvarado

Neil is the youngest of 12 children. His entire family (parents and siblings) were all born in El Salvador. In the late '70s and early '80s, Neil's siblings made their way into the United States without documentation as a result of El Salvador's civil war. He was the only one in his family to be born in the U.S., obtaining citizenship, and accordingly was the first in his family to graduate from college.

Although all Neil's siblings were given traditional Spanish/biblical names, he was the only one named after an American hero, Neil Armstrong Alvarado. Although Neil was born a U.S. citizen, he says he experienced the life of an immigrant. He was raised in South Central Los Angeles, in a house with only Spanish speakers. As a child, he stood in line alongside other poor immigrants and African Americans during the Christmas season to get a "gift" from the local shelter or church.

As a child, Neil recalls being made fun of for not speaking English very well, but became proud of his heritage as he grew aware that his bicultural life was an asset, not a liability.

Witnessing his family's struggle, including loved ones' constant fear of being deported, made Neil realize how fortunate he was to be born a U.S. citizen. Unlike his siblings and parents, Neil never had to live in fear of being deported. Secure in his place in the United States and his community as he approached his college graduation, Neil realized that the goal he was about to accomplish belonged not only to himself, but also to his parents and siblings. In subsequent years, Neil's nieces and nephews followed in Neil's path to attend college.

Neil is a business owner in Colorado. He is a proud American who is proud of his Salvadorian heritage. Today, Neil speaks with parents and children who are facing the same predicament he and his family faced many years ago, and is thankful that he was born an American citizen, which has afforded him opportunities that he otherwise may not have had.

"Irving"

"Irving," who has requested that we use a pseudonym to protect undocumented members of his family, was born in Illinois in 1993. Though his mother and father did not have legal status in the United States, Irving was a U.S. citizen by birth, which has allowed him to flourish in the United States, to support his family, and to contribute to his community. Though he grew up in a low-income family headed by a single mom, Irving worked exceptionally hard in high school. He played a number of sports and worked a part-time job at the Panera Bread, which allowed him to help support his family. Shortly before graduation, he was chosen by the local newspaper as his high school's sole winner of its annual "Leadership Team" award. He went on to attend Wheaton College, a prestigious Christian liberal arts college, enrolling in 2011.

If he had not been born as a U.S. citizen, Irving says, "I probably wouldn't have been able to go to college at all." With a combination of federal financial aid available to him as a citizen, though, and private financial aid offered by his college, Irving has excelled at Wheaton College, majoring in Sociology. During the summer, he has worked at a local law firm, and he's considering applying to law schools in a few years, though his first goal, after he graduates this May, is to find a job that allows him to serve low-income communities. Irving knows that, by graduating from college, he will have achieved something that few in his neighborhood have—and he wants to use that experience to help inspire young people.

Irving notes that if he had not been born as a U.S. citizen, he probably would face the same limited work options as his mother, whom he has watched work incredibly hard for relatively small wages. As a citizen, Irving has a bright future. He has been able to complete his college education, and looks forward to launching a career that will allow him to give back to his community.

Ending Birthright Citizenship is Contrary to Our Constitutional Tradition

As others will be attesting through testimony and Statements for the Record, Congress cannot change the U.S. Constitution by statute. For more than 100 years, the U.S. Supreme Court has interpreted the 14th Amendment to provide for birthright citizenship for children of the undocumented. A change to the U.S. Constitution requires a formal constitutional amendment, as provided under Article V of the U.S. Constitution.

Second, the National Immigration Forum would be opposed to congressional attempts to change the 14th Amendment under the Article V process. Through the Citizenship Clause, the framers of the 14th Amendment distinguished our country from those where your ability to reach your fullest potential depends on your lineage. Intended to explicitly overrule the infamous *Dred Scott* Supreme Court decision, the 14th Amendment's Citizenship Clause ensures equality and fairness under the law through its grant of citizenship to anyone born on U.S. soil, regardless of who their parents are. Amending this essential constitutional provision would be contrary to American constitutional values.

Ending Birthright Citizenship Would Raise a Myriad of Problems

Practically, reinterpreting the 14th Amendment to end birthright citizenship for the children of undocumented individuals would raise a myriad of practical problems.

It would require DHS to certify the immigration status of the parents of every baby born in the United States, creating massive and unreasonable logistical burden for the Department while violating the privacy of parents and children, citizens and non-citizens alike.

In addition, ending birthright citizenship would also create an enormous and ever-expanding underclass of undocumented families living in the shadows. This would serve to only worsen an already broken immigration system, while doing nothing to address the real problems faced by churches, law enforcement, and business on a day-to-day basis.

Conclusion

The American people want better immigration policy. Multiple recent national polls show solid support for solutions that include, in addition to reasonable enforcement, creating improved and new legal channels for future immigrants and establishing tough but fair rules to allow undocumented immigrants to stay and continue to work in the U.S. and eventually earn U.S. citizenship.

A debate over ending birthright citizenship is a political sideshow that distracts from the real problems facing our broken immigration system. Attempts to end birthright citizenship, either by statue or amendment, are misguided.

And were Congress to end birthright citizenship, it would do so at enormous cost – undermining a valuable source of American strength, hurting American families, damaging American constitutional traditions, creating a myriad of practical problems. We urge this Subcommittee to reaffirm that birthright citizenship *IS* the right policy for America, and we look forward to continuing a positive discussion on how best to move forward with passing broad immigration reform into law.

We Belong TOGETHER
Women for Common Sense Immigration Reform

Statement of Andrea Cristina Mercado and Miriam Yeung, co-chairs of We Belong Together

Submitted to the Committee on the Judiciary of the U.S. House of Representatives
Subcommittee on Immigration and Border Security

Hearing on "Birthright Citizenship: Is It the Right Policy for America?"

April 29, 2015

Chairman Gowdy, Ranking Member Lofgren and members of the Subcommittee, we are Andrea Cristina Mercado and Miriam Yeung, co-chairs of We Belong Together. Thank you for the opportunity to submit testimony for inclusion in the record for today's hearing.

We Belong Together is a campaign co-anchored by the National Domestic Workers Alliance and the National Asian Pacific American Women's Forum to mobilize women in support of common-sense immigration reform that will keep families together and empower women. We Belong Together was launched on Mother's Day in 2010 and has exposed the dangerous impact of immigration enforcement on women and families, advocated for comprehensive immigration reform legislation and campaigned President Obama to take executive action within his legal authority to improve the broken immigration system.

The question presented before the Subcommittee today – whether birthright citizenship is the right policy for our country is purposefully misleading. Birthright citizenship is not a policy, it is a right that is enshrined in our Constitution. In fact, the guarantee of citizenship to any individual born on U.S. soil is a bedrock constitutional right.

Part of the Fourteenth Amendment, the citizenship clause was adopted after the civil war to overturn the infamous *Dred Scot* decision and ensure that there would be no unequal racial or class system to divide persons born in the U.S. Over a century ago, this right was affirmed by the Supreme Court which went on to hold that Congress has no authority to restrict birthright citizenship.

Birthright citizenship guarantees that every child born in this country has the same rights including the right to vote. This is the settled law of the land and has withstood waves of anti-immigrant backlash and prejudice throughout history.

We Belong Together urges the Subcommittee to move beyond the hateful rhetoric which underlies this examination into birthright citizenship and instead seriously debate how our immigration system can honor the contributions of immigrant women. Proposals on immigration reform must not undercut the reproductive rights of immigrant women. Immigrant women power our economies and are the backbones of our communities. They are community leaders, mothers, workers and survivors of gender-based violence. Rather than attacking children and families and the reproductive rights of immigrant women this Subcommittee should advance humane legislative proposals that would enact a broad pathway to citizenship for all members of the undocumented community, provide relief to families shattered by the visa backlogs, bring humanity and discretion to the enforcement system, protect and uplift women workers and enhance protections for survivors of gender-based violence and human trafficking. The Subcommittee should refocus the Congressional discourse on immigration to be grounded in our constitutional framework of due process, fairness and respect for human rights. Attacks on reproductive justice, children and families must be abandoned to explore permanent legislation that uplifts the needs and contributions of immigrant women.

COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES

29 April 2015

The Honorable Bob Goodlatte
Chairman of the House Committee on the Judiciary
The Honorable John Conyers
Ranking Member of the House Committee on the Judiciary
The Honorable Trey Gowdy
Chairman of the Subcommittee on Immigration and Border Security
The Honorable Zoe Lofgren
Ranking Member of the Subcommittee on Immigration and Border Security
2138 Rayburn House Office Building
Washington, DC 20515

RE: Hearing "Birthright Citizenship: Is it the Right Policy for America?"

Dear Chairman Goodlatte, Ranking Member Conyers, Chairman Gowdy and Ranking Member Lofgren:

Since 1986, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) has worked to advance the human and civil rights of immigrants and refugees; promote harmonious multi-ethnic and multi-racial human relations; and through coalition-building, advocacy, community education and organizing, empower immigrants and their allies to build a more just society in Los Angeles and California. A core part of our mission is to promote the value of citizenship, and this is why we object to the tone and tenor of this hearing on birthright citizenship. Being granted citizenship automatically in the country in which you are born is quintessentially American and dates back to the foundation of our Republic. Moreover, unlike some other foundational principles, it promotes inclusion and ensures that those who are born and grow up here become part of our national fabric.

As many other countries experience immigration, they tend to adopt broader citizenship laws, both in terms of birthright and via naturalization. This is done out of the experience that having large numbers of second class citizens is anathema to being a just society. Other aspects of our self-interest, from having larger jury pools and voter rolls, are also bolstered when the greatest possible number of residents are and become citizens. All this makes it doubly hard to fathom why Congress would propose to go in a polar opposite direction. Indeed, the simple truth that more not less citizens benefits our country is why we work so hard to increase the naturalization of eligible permanent residents, and why the cause of legalization within immigration reform is so crucial to our country's well-being.

It is hard to not see this hearing and the proposed solutions to the "problem" at hand as a proxy for dealing with tricky immigration politics instead of with common sense immigration policy. Following complete inaction on comprehensive immigration reform, attempts to undermine President Obama's November 2014 executive actions, Congress is now using the issue of citizenship to send exactly the wrong signals to the immigrant community. Attempting to

change birthright citizenship is not only unjust, but as it would have be done via a constitutional amendment process it would be a massive distraction from a whole host of issues. Historically, the amendment process has been used to correct historical wrongs and to strengthen the rights of the excluded. An amendment to abolish birthright citizenship would run against the tide of history.

Please contact our Policy Director, Joseph Villela, jvillela@chirla.org or our Policy Advocate, Carl Bergquist, cbergquist@chirla.org, if we can answer any questions or be of any further assistance.

Sincerely,

Angelica Salas,
Executive Director, Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)

Statement for the Hearing Record

United States House of Representatives Judiciary Committee Subcommittee on Immigration and Border Security

"Birthright Citizenship: Is it the Right Policy for America"

April 29, 2015

Chairman Gowdy, Ranking Member Lofgren, members of the Subcommittee, on behalf of the OCA – Asian Pacific American Advocates and our fifty local chapters around the country, we thank you for the opportunity to submit this statement for inclusion in the record for today's hearing.

Birthright citizenship remains a cornerstone right which is the foundation of all of the inalienable rights guaranteed by our Constitution. It has been instrumental in establishing Asian Americans as a collective people, despite our communities' geographic, linguistic, and cultural differences. To change such an important component of our nation's laws would undermine the progress that has been made to incorporate existing, emerging, and aspiring citizens into the United States, and would create a second tier of stateless Americans.

The 14th Amendment is of particular importance to the Asian American and Pacific Islander communities. The Chinese Exclusion Act of 1882 wrongfully denied Chinese persons born in the United States the right to both naturalized and birthright citizenship. It was through the Supreme Court's decision in *United States v. Wong Kim Ark*, that the Citizenship Clause was solidified and persons of Chinese descent could, at the very least, obtain citizenship through birth.

Changing the definition of birthright citizenship could raise the same concerns that currently face the American Samoan community. The case of *Tuaua v. United States*, highlights the barriers that American Samoans, born in a U.S. territory but considered nationals, face in obtaining federal employment, citizenship and fundamental rights that should have been guaranteed under the Constitution. To change this pivotal component of our Constitution now would be detrimental to all Americans, including a significant portion of Asian Americans and Pacific Islanders.

Amending the law could increase the burden on our already strained immigration system: for example, increasing family visa backlogs and the number of undocumented individuals in the United States. Some Asian Pacific American families have been waiting for visas for over twenty years.

Less draconian measures exist which could address the concerns which form the genesis of this ill-conceived idea. We would welcome the opportunity to engage in a dialogue to address these concerns while preserving a Constitutional right as old as our Republic. Eliminating this Constitutional protection would open the door to the type of discrimination used to enslave Africa Americans, cultivate a stateless Chinese community, and deny American Samoans their citizenship. It would undermine the principles of equality and justice that have guided the course of our nation. Instead of debating the wholesale elimination of a constitutionally guaranteed right, we urge Congress to focus on real solutions to the issues currently facing the American public, such as a new formula strengthening the Voting Rights Act to ensure equal access and equity and the reformation of our broken immigration system.