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Resurgence of the Birthright Citizenship Debate

Katherine Nesler*

INTRODUCTION

There are two fundamental principles by which countries grant citizenship: *jus sanguinis* (the right of blood) and *jus soli* (the right of birth).¹ In countries that recognize *jus sanguinis* citizenship, children are granted the citizenship of their parents, regardless of birthplace.² Countries that recognize *jus soli*³ citizenship grant citizenship based on place of birth.⁴ In the United States, citizenship is granted under both principles.⁵ *Jus soli*, or birthright citizenship, is only recognized in thirty other countries.⁶ Recently, there has been a sweeping trend of abolishing birthright citizenship.⁷ Of developed nations, only the United States and Canada still grant citizenship automatically without major qualifications.⁸ France, Germany, Greece, Italy, Portugal, Spain, and the United Kingdom all recognize birthright citizenship in exceptionally narrow circumstances subject to specific qualifications.⁹ All the while, many developed countries

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1. BLACK'S LAW DICTIONARY, <http://thelawdictionary.org/jus-sanguinis/>.

2. See, e.g., *Jus Sanguinis Revisited*, ECONOMIST (Mar. 2, 2013), <https://www.economist.com/news/europe/21572822-how-not-treat-people-more-one-passport-jus-sanguinis-revisited> (noting that under *jus sanguinis* in Germany before World War I, citizenship was granted to “anybody of German descent, but not to foreigners born in Germany”).

3. As this Note focuses primarily on *jus soli* citizenship, it will use the term “birthright citizenship” to refer to this mechanism of granting citizenship, not to *jus sanguinis* citizenship.

4. See *Jus Sanguinis Revisited*, *supra* note 2.

5. *U.S. Citizenship & Naturalization Overview*, FINDLAW, <http://immigration.findlaw.com/citizenship/u-s-citizenship-naturalization-overview.html>.

6. Will Cabaniss, *S.E. Cupp: Only About 30 Other Countries Offer Birthright Citizenship, Making U.S. 'Anomaly'*, POLITIFACT (Aug. 23, 2015, 6:07 PM), <http://www.politifact.com/punditfact/statements/2015/aug/23/se-cupp/se-cupp-only-about-30-other-countries-offer-birth/>.

7. John Feere, *Birthright Citizenship in the United States: A Global Comparison*, CENTER FOR IMMIGRATION STUDIES (Aug. 2010), <http://cis.org/birthright-citizenship>. Countries following this trend include the Dominican Republic (2010), New Zealand (2006), Ireland (2010), Malta (1989), India (1987), Australia (1986), and the United Kingdom (1983). *Id.*

8. See *Nations Granting Birthright Citizenship*, NUMBERSUSA (Aug. 24, 2015), <https://www.numbersusa.com/content/learn/issues/birthright-citizenship/nations-granting-birthright-citizenship.html>.

9. See Constance A. Johnson, *CITIZENSHIP BASED ON BIRTH IN COUNTRY*, LAW LIBRARY OF CONGRESS (May 2012), <https://www.loc.gov/law/help/citizenship-birth-country/citizenship-birth-country.pdf>. For example, France grants birthright citizenship to “any child born in France of an unknown father and mother, [to] any child born in France of stateless parents, and [to] any child born

that do not recognize birthright citizenship are facing population crises and declining labor markets.¹⁰ The United States likewise is facing low birthrates, however, the outlook for the labor market is more positive due to annual immigration into the United States.¹¹

The United States has adopted *jus soli* citizenship via the Fourteenth Amendment which provides “[a]ll 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.”¹² With respect to *jus sanguinis* citizenship, Congress has enacted legislation that grants citizenship to children born overseas to parents who are United States citizens with certain limited exceptions.¹³

in France for whom foreign laws on nationality do not permit in any way the conveyance of the nationality of either one of the parents to him/her.” *Id.* citing France Civil Code, current through Mar. 24, 2012, LEGIFRANCE, <http://legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT00000607021&dateTexte=20120417> (in French). This citizenship is taken away if before the child becomes an adult it is discovered that one of the child’s parents is a citizen of another country (the child then acquires their parent’s citizenship). Johnson, CITIZENSHIP BASED ON BIRTH IN COUNTRY, LAW LIBRARY OF CONGRESS (May 2012). Additionally, children are considered “French if born in France to at least one parent also born in France. If only one parent was born in France, the child may renounce French citizenship.” *Id.*

10. See Ana Swanson, *Japan’s Birth Rate Problem Is Way Worse Than Anyone Imagined*, WASH. POST (Jan. 7, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/01/07/japans-birth-rate-problem-is-way-worse-than-anyone-imagined/> (reporting in 2014, Japan had approximately 1.001 million births and 1.269 deaths); Ashifa Kassam Madrid et al., *Europe Needs More Babies to Avert a Population Disaster*, GUARDIAN (Aug. 22, 2015), <http://www.theguardian.com/world/2015/aug/23/baby-crisis-europe-brink-depopulation-disaster> (noting Spain is estimated to have one of the lowest birthrates in the EU, averaging 1.27 births per woman of childbearing age while the EU average is 1.55).

11. Mark Mather, *World Population Data Sheet 2014: The Decline in U.S. Fertility*, POPULATION REFERENCE BUREAU, <http://www.prb.org/Publications/Datasheets/2014/2014-world-population-data-sheet/us-fertility-decline-factsheet.aspx>.

12. U.S. CONST. amend. XIV.

13. Citizenship is granted to children born outside of the United States and its outlying territories when both parents are citizens and one parent has been a resident of the United States prior to the child’s birth; when one parent is a citizen and who has been physically present in the United States or an outlying territory continuously for one year prior to the birth of the child and the other parent is a United States national, but not a citizen. 8 U.S.C. § 1401(c)–(d) (1994). Citizenship is granted to children born in outlying United States territories when one parent is a citizen who has been physically present in the United States or an outlying territory continuously for one year at any time prior to birth. 8 U.S.C. § 1401(e). Finally, a child born outside of the United States or any of its territories to one parent who is an immigrant and another who is a citizen who was physically present in the United States or an outlying territory for at least five years, two of which must have been after the age of fourteen. 8 U.S.C. § 1401(g). Further, § 1401(g) provides the physical presence requirement is satisfied if the citizen parent was the child of a member of the Armed Forces, a government official,

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John F. Kennedy called the United States “a nation of immigrants.”¹⁴ Recognizing birthright citizenship via *jus soli* makes the United States relatively unique among developed countries.¹⁵ This rather anomalous practice has led to debate over the years about whether the United States should offer birthright citizenship via *jus soli* at all.¹⁶

In Part I, this Note will explore the history of birthright citizenship and discuss the contemporary birthright citizenship debate by highlighting key historical, textual, legal, and policy-based arguments on both sides of the debate. In Part II, this Note will discuss reasons why historical perspective, the text of the Fourteenth Amendment, and Supreme Court precedent support our current interpretation of the Citizenship Clause. Further, Part II discusses how birthright citizenship has played a pivotal role in developing our national identity resulting in a unique cultural richness and diversity that should be valued. Additionally, eliminating birthright citizenship would result in detrimental economic costs including the potential for a decreased labor market and forcing American citizens to bear increased financial burdens to prove their own citizenship when they have children. Finally, Part III asserts that proponents of birthright citizenship should continue to advocate for its constitutionality and value to the United States. This advocacy can be achieved by continuing to counter the vocal minority in opposition to birthright citizenship both politically and in the lower courts. However, because those who support birthright citizenship seek to maintain the status quo, they should not lead the charge to get a case before the Supreme Court unless there is a favorable ideological shift in the Court via the appointment of new Justices who interpret the Fourteenth Amendment as conferring *jus soli* citizenship on all individuals born in the United States.¹⁷

or with a qualifying international organization, or by any time the citizen parent spends abroad as a dependent and unmarried child of either: (1) a member of the Armed Forces, or (2) an employee of the United States government or qualifying international organization. *Id.*

14. John F. Kennedy, Keynote Address at the 50th Annual Meeting of the Anti-Defamation League (Jan. 1963), <http://archive.adl.org/immigrants/video.html#.VrteTscleRs>.

15. See Cabaniss, *supra* note 6.

16. See, e.g., Eric Thayer, *Should 'Birthright Citizenship' Be Abolished?*, N.Y. TIMES, THE OPINION PAGES—ROOM FOR DEBATE (Aug. 24, 2015), <http://www.nytimes.com/roomfordebate/2015/08/24/should-birthright-citizenship-be-abolished>.

17. See *infra* notes 131-139 and accompanying text (discussing the death of Justice Scalia, the 2016 election, and subsequent nomination and confirmation of Justice Gorsuch cementing the

I. HISTORY

*A. Birthright Citizenship Before
the Passage of the Fourteenth Amendment*

The Naturalization Act of 1790 codified United States naturalization law for the first time.¹⁸ This Act provided “[t]hat any alien, being a free white person” who had “resided within the limits and under the jurisdiction of the United States” for two years could become a citizen.¹⁹ This provision effectively excluded “indentured servants, slaves, and most women.”²⁰ The Act also implied that immigrants who were not white did not qualify for naturalization but was silent on “citizen status of non-white persons born on American soil.”²¹

Chief Justice Taney addressed the issue of whether non-white persons born on American soil could be citizens in the infamous majority opinion of *Dred Scott v. Sanford*.²² In *Dred Scott*, the Court held that neither slaves nor their descendants were considered citizens under the federal Constitution.²³ Further, the Court found that Congress had the power to enact the Naturalization Act of 1790 as written because it “confines the right of becoming citizens ‘to aliens being free white persons[,]’” but that Congress would not have the same power with respect to immigrants from

conservative balance of the Roberts Court for the foreseeable future).

18. *Naturalization Act of 1790*, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/Naturalization_Act_of_1790/#cite_note-ftnt_ref1-1.

19. *An Act to establish an uniform Rule of Naturalization*, 1 Stat. 103 (1790), *repealed by act of January 29, 1795*, ch. 20. Upon meeting these initial requirements, individuals could become citizens by (1) applying to a court of record in a state where he had resided for at least a year, (2) making satisfactory proof that he is of good character and (3) taking an oath or affirmation to support the Constitution. *Id.* Further, if at the time of naturalization, the person had children under twenty-one, those children automatically became United States citizens. *Id.* Finally, children of citizens born overseas were to be considered natural born citizens. *Id.*

20. See *Naturalization Act of 1790*, *supra* note 18.

21. See *Naturalization Act of 1790*, *supra* note 18.

22. *Dred Scott v. Sanford*, 60 U.S. 393 (1859). See also *Dred Scott v. Sanford (1857)*, OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=29>; Melvin I. Urofsky, *Dred Scott Decision*, ENCYCLOPEDIA BRITANNICA, (Feb. 10, 2015), <http://www.britannica.com/event/Dred-Scott-decision> (discussing widespread criticism for the decision among constitutional scholars).

23. *Dred Scott*, 60 U.S. at 407 (finding the “the legislation and histories of the times, and the language used in the Declaration of Independence” supported their conclusion).

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Africa nor their descendants who were born in the United States.²⁴

Chief Justice Taney did not have the final word on the matter. Two days after President Lincoln issued the Emancipation Proclamation, Secretary of the Treasury Salmon P. Chase wrote to Attorney General Edward Bates for an advisory opinion on the following question: “Are colored men Citizens of the United States, and therefore Competent to command American vessels?”²⁵ Attorney General Bates observed that the Constitution does not use any special qualifying language when referring to natural born citizens.²⁶ Consequently, “every person born in the country is, at the moment of birth, *prima facie* a citizen[.]”²⁷

Before 1866, the common law principle of *jus soli* granted citizenship to children born within the bounds of the United States.²⁸ Congress incorporated this principle when it passed the 1866 Civil Rights Act, which spoke in unequivocal terms and granted citizenship and constitutional rights for the first time “without distinction of race or color, or previous condition of slavery or involuntary servitude[.]”²⁹

B. The Fourteenth Amendment

Just two years after Attorney General Bates authored his advisory opinion, the Fourteenth Amendment was ratified.³⁰ Section 1 provides “[a]ll persons born or naturalized in the United States, and subject to the

24. *Id.* at 419 (emphasis in original).

25. Michael Vorenberg, *Emancipation—Then What?*, N.Y. TIMES, THE OPINION PAGES (Jan. 15, 2013), <http://opinionator.blogs.nytimes.com/2013/01/15/emancipation-then-what/>.

26. EDWARD BATES, OPINION OF ATTORNEY GENERAL BATES ON CITIZENSHIP, (Government Printing Office) (1862) Bates noted that “As far as I know, Mr. Secretary, you and I have no better title to citizenship which we enjoy than ‘the accident of birth—the fact that we happened to be born in the United States.’” *Id.* at 12. Further, when the Constitution speaks of “*natural born citizens*, [it] uses no affirmative language to make them such, but only recognizes and reaffirms the universal principle, common to all nations, and as old as political society, that people born in a country do constitute the nation, and as individuals, are *natural* members of the body politic.” *Id.*

27. *Id.*

28. See Immigr. & Naturalization Serv.: U.S. Dep’t of Justice, INS Interpretation Letter 301.1: United States Citizenship (2001), 2001 WL 1333852, at *1 (“Prior to 1866, absent any statutory or constitutional provision, it was generally held, under the common-law principle of *jus soli*, that a person born in the United States acquired citizenship at birth”).

29. See *id.*, 14 Stat. 27–30 (1865).

30. *14th Amendment to the U.S. Constitution*, PRIMARY DOCUMENTS IN AMERICAN HISTORY, LIBRARY OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html>.

jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”³¹ The language of the Fourteenth Amendment is mostly straightforward. However, the words “subject to the jurisdiction thereof” have left room for debate.³²

C. Supreme Court Decisions Interpreting the Fourteenth Amendment

Elk v. Wilkins grappled with the inherent ambiguities in determining what makes someone “subject to the jurisdiction” of the United States.³³ In *Elk*, the Supreme Court was confronted with the question of whether Native Americans born in the United States who later voluntarily separated from their tribe could be citizens within the meaning of the Fourteenth Amendment.³⁴ The Court held that the Fourteenth Amendment did not confer citizenship on Native American people at birth.³⁵ The Court reasoned that because Native Americans are subject to the jurisdiction of their respective tribes at birth, they were not United States citizens even though they were born within the bounds of the United States.³⁶ As such, the only path to citizenship under the Fourteenth Amendment was through naturalization.³⁷

The modern interpretation of the Citizenship Clause stems from the

31. U.S. CONST. amend. XIV.

32. Eyder Peralta, *3 Things You Should Know About Birthright Citizenship*, NPR, THE TWO-WAY, (Aug. 18, 2015, 1:24 PM), <http://www.npr.org/sections/thetwo-way/2015/08/18/432707866/3-things-you-should-know-about-birthright-citizenship>.

33. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

34. The plaintiff, John Elk, had attempted to register to vote in Nebraska and was denied. *Id.* at 99.

35. *Id.* at 101–02.

36. The Court reasoned that Native Americans born in the United States owed allegiance to their tribe which they characterized as “an alien, though dependent, power[.]” *Id.* at 102. As such, “although in a geographical sense [they are] born in the United States,” children born into Native American tribes “are no more ‘born in the United States and subject to the jurisdiction thereof . . . than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.” *Id.* at 102.

37. The Court found that Section 1 “contemplates two sources of citizenship, and two only: birth and naturalization.” *Id.* at 101. The Court homed in on the language “subject to the jurisdiction thereof” finding “[t]he evident meaning of these last words is, not merely subject to some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.” *Id.*

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Supreme Court's decision in *United States v. Wong Kim Ark*.³⁸ In *Wong Kim Ark*, the Court confronted the question of whether Section 1 of the Fourteenth Amendment automatically confers citizenship on a child born in the United States to parents who were “subjects of the emperor of China, but ha[d] permanent domicile and residence in the United States[.]” and conducted business in the United States, but who were Chinese diplomats or acting in an official governmental capacity.³⁹ The Court held that Section 1 of the Fourteenth Amendment grants citizenship to “children born within the territory of the United States of all . . . persons, of whatever race or color, domiciled within the United States” with the exception “of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of [the United States], and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.”⁴⁰ Thus, that a child’s parents were immigrants and not citizens did not bar a child from acquiring *jus soli* citizenship, “nor did their racial ineligibility for naturalization under former laws have such a result.”⁴¹

*D. Analysis of the Phrase “Subject to the Jurisdiction Thereof”
Leads Scholars to Divergent Conclusions*

Currently, consistent with the Fourteenth Amendment and Supreme Court precedent, children who are born within the United States are

38. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In *Wong Kim Ark*, the Supreme Court addressed the issue of whether a child born in the United States to Chinese citizens who were permanently domiciled residents of the United States is considered subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment. *Id.* at 652–53. *Wong Kim Ark* was born in California and had resided there since birth. *Id.* In 1890 when he was roughly seventeen, he went to China for a temporary visit intending to return to the United States. *Id.* at 653. He returned the same year and was permitted to enter the country by the collector of customs on “the sole ground that he was a native-born citizen of the United States.” *Id.* at 651. In 1894, he embarked on another temporary visit to China that lasted until August of 1895. *Id.* When he tried to re-enter the country he denied permission “upon the sole ground that he was not a citizen of the United States.” *Id.* The Court engages in a lengthy discussion of common law, historical practice, the text of the Fourteenth Amendment, Supreme Court precedent interpreting the amendment, ultimately concluding that even though *Wong Kim Ark* was born to parents who were Chinese citizens, he became a citizen of the United States upon his birth in the country. *Id.* at 657–65.

39. *Id.* at 653.

40. *Id.* at 693.

41. See INS Interp. Letter 301.1, *supra* note 28.

automatically granted citizenship regardless of the citizenship status of their parents.⁴² Some people believe that this practice goes too far, reasoning that it encourages people to come to the United States just to have children or “because they see [birthright citizenship] as arbitrary and undeserved.”⁴³ Further, even after the Supreme Court’s decision in *Wong Kim Ark*, there exists substantial debate over the term “subject to the jurisdiction” of the United States and whether it truly was intended to be read as broadly as the Court’s precedent suggests.⁴⁴

One author argues that the canons of statutory construction suggest that the Fourteenth Amendment should be significantly narrowed by the term “subject to the jurisdiction thereof,” emphasizing that the phrase follows an “and,” thereby making the clause conjunctive.⁴⁵ This author warns that “[w]ithout the benefit of historical perspective, or with the detriment of misapplied modern denotation, the distinction of limitation fades into a thoughtlessly accepted bromide.”⁴⁶ He notes that an interpretation of the Citizenship Clause that concludes that any person born within the United States is automatically “subject to [its] jurisdiction” results in redundancy.⁴⁷ This redundancy, he argues, is in violation of a “well-established doctrine of legal interpretation[:]” all legal texts, including the Constitution, should not be interpreted to create redundancy

42. See *Wong Kim Ark*, 169 U.S. at 693; U.S. Const. amend. XIV.

43. *The “Birthright Citizenship” Debate*, L.A. TIMES, EDITORIALS, (Oct. 26, 2014, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-birthright-citizenship-20141026-story.html>.

44. See, e.g., Lino A. Graglia, *Birthright Citizenship for Children of Illegal Immigrants: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, (2009); William M. Stevens, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment’s Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 366 (2008).

45. Stevens, *supra* note 44, at 366 (noting that “[t]he first part of the Citizenship Clause seems to be universally inclusive, based on the territory defined by the borders of the United States...[defining] not a legal status so much as a physical presence” and that the second part of the clause following the “and” “narrows the scope of the birthright citizenship.”); Adam C. Abrahms, *Closing the Immigration Loophole: the 14th Amendment’s Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 469, 470 (1998) (arguing that “[c]ontrary to the view of some commentators the Fourteenth Amendment’s ‘Jurisdiction Requirement’ does not mandate that children of illegal aliens born within the territory of the United States” be granted citizenship and that such an interpretation “is incompatible with the spirit and intent of the Fourteenth Amendment, its framers and the philosophical underpinnings of the American social contract.”).

46. Stevens, *supra* note 44, at 366.

47. Stevens, *supra* note 44, at 366.

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unless “any other interpretation would lead to absurd results.”⁴⁸ The view that citizenship was conferred by mere birth is consistent with the English common law tradition.⁴⁹ Thus, the author argues, in order for “subject to the jurisdiction” to be more than “mere tautology[,]” the phrase instead limits the Citizenship Clause breaking with English common law tradition.⁵⁰ Turning to legislative history, the author notes the striking similarities between the Fourteenth Amendment and the Civil Rights Act of 1866, which were written “by the same body, for the same purpose, and . . . within weeks of each other” honing in on what he views as a key difference between the two texts: “those same framers substituted ‘subject to the jurisdiction thereof’ in place of the Civil Rights Act language ‘not subject to a foreign power[,]’”⁵¹ Alas, this distinction still does not shed light on what “subject to the jurisdiction thereof” truly means.⁵² As such, the author turns to a final cannon of statutory construction, common sense. Because the “framers’ use of the word jurisdiction connot[ed] political allegiance[,]”⁵³ he ultimately concludes that reading the “Citizenship

48. Stevens, *supra* note 44, at 367.

49. Stevens, *supra* note 44, at 368. Accord Eric Nelson, *Birthright Citizenship: The Case of Julia Lynch (1844)*, DAILY KOS (Aug. 20, 2015, 3:21 AM), <http://www.dailykos.com/story/2015/08/20/1413731/-Birthright-Citizenship-The-case-of-Julia-Lynch-1844#> (“The common law by which all person [sic] born within the King’s allegiance became subjects whatever were the situation of their parents, became the law of the colonies and so continued, while they were connected to the crown of Great Britain. It was thus the law of each and all of the states at the Declaration of Independence.”); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997) (“Remarkably, the rule of birthright citizenship derived from Calvin’s Case remained a status conferred by the common law, as opposed to statutory or constitutional law, for centuries. Until 1898 in the United States, and as late as 1949 in Britain, there were still some cases in which the determination of nationality depended upon the common-law rule of birth within a territory.”).

50. Stevens, *supra* note 44, at 368.

51. Stevens, *supra* note 44, at 368.

52. Stevens, *supra* note 44, at 368.

53. Stevens, *supra* note 44, at 369–70 (quoting John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, Heritage Foundation Legal Memorandum No. 18, 2 (Mar. 30, 2006), https://www.researchgate.net/publication/265675989_From_Feudalism_to_Consent_Rethinking_Birthright_Citizenship).

When pressed about whether Indians living on reservations would be covered by the clause since they were “most clearly subject to our jurisdiction, both civil and military,” for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that “subject to the jurisdiction” of the United States meant subject to its “complete” jurisdiction, “[n]ot owing allegiance to anybody else.” And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of

Clause as only a requirement of birth by geographical location, without the jurisdiction phrase that narrows the scope of the birthright citizenship, creates a universally applicable citizenship rule with no exceptions, allowing literally anyone to become a citizen of the United States.”⁵⁴

Expressing the contrary view, other scholars believe the current broad interpretation of the Citizenship Clause is not a mistake, but instead exactly what the framers intended when they drafted the Fourteenth Amendment.⁵⁵ Proponents of this broad interpretation place weight on the plain meaning of the words “subject to the jurisdiction” of the United States in the context of legislative history and argue that “the word ‘jurisdiction’ retains its natural reading of actual subjection to the lawmaking power of the state.”⁵⁶ This interpretation does not result in redundancy as many opponents argue, “because it excludes those people who fell under common law exceptions of immunity to U.S. law” including children of diplomats and invading armies.⁵⁷ Proponents further

the Senate, contended that it should be construed to mean “a full and complete jurisdiction,” “the same jurisdiction in extent and quality as applies to every citizen of the United States now” (i.e., under the 1866 Act). That meant that the children of Indians who still “belong[ed] to a tribal relation” and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin explicitly to exclude “Indians not taxed,” as the 1866 Act had done, was rejected as redundant.

Id.

54. Stevens, *supra* note 44, at 370.

55. See, e.g., Nicole Newman, *Birthright Citizenship: the Fourteenth Amendment’s Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437 (2008); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 95–96 (1997) (concluding that “[t]he Fourteenth Amendment’s Birthplace Criterion is not a constitutional accident” but rather a “means for ensuring that American government is appropriately sensitive to the interests of all the people living within its jurisdiction” resting “upon the idea that when the United States uses its sovereign power to organize residents’ lives for the common benefit, the people subject to that power deserve a fair share of the benefits that result from the collective enterprise in which they participate.”); Robert J. Schulman, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Rights and Privileges to American Born Children of Illegal Immigrants?*, 22 PEPP. L. REV. 669, 693–94 (1995) (noting “[s]ince the passage of the Fourteenth Amendment, courts have interpreted its meaning broadly, holding that all those born in the United States, other than children of diplomats or children of prisoners of war, are citizens” and concluding that this broad interpretation “has solidified the ideals of the Constitution as well as those of the Declaration of Independence.”).

56. Newman, *supra* note 55, at 453 (internal quotations omitted).

57. Newman, *supra* note 55, at 453 (noting these individuals receive diplomatic and enemy combatant immunity, respectively).

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believe that a broader, more natural reading of the Citizenship Clause explains why many senators were confused “over the inclusion of some Native Americans . . . because no common law exception existed that would incorporate [their] unique situation . . . living under tribal quasi-sovereignty” which resulted in the framers struggling “to invent a new definition under which some Native Americans would be included and others excluded.”⁵⁸

In further support is the statement of Michigan Senator Jacob Howard, who co-authored the Amendment with Senator Trumbull, noting that he viewed the Fourteenth Amendment as 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.”⁵⁹ Because Senator Howard indicated intent to intone what was considered “the law of the land already,” proponents believe “the best interpretation of the Citizenship Clause is one that applies basic common law exceptions and the plain meaning of the word ‘jurisdiction.’”⁶⁰ Additionally, proponents believe that a contrary “reading of the legislative history is flawed because it alters the meaning of the language by removing certain phrases from the context of the debate” including discussions of children born to foreign ambassadors.⁶¹

Lastly, taking into account debates over both the Fourteenth Amendment and the Civil Rights Act and “considering that the overarching goal of the legislation and the amendment was to abolish the racial caste of *Dred Scott* and the Black Codes, proponents argue that only a more inclusive . . . definition of citizenship can be consistent.”⁶²

Beyond disagreements on the textual and historical support for the proper meaning of the phrase “subject to the jurisdiction thereof,” scholars also disagree on whether *Wong Kim Ark* is controlling on the issue of automatic birthright citizenship for children born to undocumented immigrants. Opponents of the present broad interpretation of the

58. Newman, *supra* note 55, at 453.

59. Newman, *supra* note 55, at 453–54, *citing* CONG. GLOBE, 39th Cong., 1st Sess. 2893, 171 (1866).

60. Newman, *supra* note 55, at 454.

61. Newman, *supra* note 55, at 454.

62. Newman, *supra* note 55, at 454–55.

Fourteenth Amendment insist *Wong Kim Ark* is not controlling on the issue because the issue in that case pertained to a child born to Chinese parents who were legally domiciled within the United States.⁶³ In further support of the current, broad interpretation, some scholars point to a more recent Supreme Court case, *Plyler v. Doe*.⁶⁴

E. The Contemporary Birthright Citizenship Debate

Calls to abolish birthright citizenship as conferred by our current interpretation of the Fourteenth Amendment are not new. For example, in the early 1990s, California Governor Pete Wilson “spearheaded [a bill that] would deny automatic citizenship to any child born in the United States of illegal immigrant parents.”⁶⁵ In 1993, Senator Harry Reid (D-Nev.) sponsored the Immigration Stabilization Act of 1993 which, among other things, sought to exclude babies born to undocumented immigrants on United States soil from being considered “subject to the jurisdiction” of the United States.⁶⁶ Reid later referred to this attempt as “the biggest mistake [he] ever made.”⁶⁷ During the 1996 presidential election cycle, the

63. See Graglia, *supra* note 44, at 11.

64. *Plyler v. Doe*, 457 U.S. 202, n. 10 (1982) (citing *Wong Kim Ark* and noting “given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to the Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.”).

65. Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Immigrants?*, 22 PEPP. L. R. 669, 673 (1995).

66. S. 1351, 103d Cong. (1993). The Act provided in pertinent part:

[T]he Congress has determined and hereby declares that any person born after the date of enactment of this title to a mother who is neither a citizen of the United States nor admitted to the United States as a lawful permanent resident, and which person is a national or citizen of another country of which either of his or her natural parents is a national or citizen, or is entitled upon application to become a national or citizen of such country, shall be considered as born subject to the jurisdiction of that foreign country and not subject to the jurisdiction of the United States within the meaning of section 1 of such Article and shall therefore not be a citizen of the United States or of any State solely by reason of physical presence within the United States at the moment of birth. *Id.*

67. Tal Kopan, *Birthright Citizenship: Can Donald Trump Change the Constitution?*, CNN POLITICS (Aug. 18, 2015 6:12 PM), <http://www.cnn.com/2015/08/18/politics/birthright-citizenship-trump-constitution/>.

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Republican Platform Committee made abolishing birthright citizenship as guaranteed in the Fourteenth Amendment part of the party platform.⁶⁸ When Representative Nathan Deal (R-Ga.) retired, he had made an attempt to end birthright citizenship via Congressional action for seventeen consecutive years.⁶⁹ And in 2005 Texas Representative Ron Paul “proposed three amendments to a[n] . . . immigration bill ‘to end so-called birth-right citizenship.’”⁷⁰ More recently, the birthright citizenship debate has come into renewed focus with many prominent Republicans calling for reform or complete abolishment.⁷¹ For example, Donald Trump has referred to birthright citizenship as “the biggest magnet for illegal immigration.”⁷²

The data behind this proposition is difficult to nail down definitively, however, some research indicates approximately 7.5% of births in the United States are children of unauthorized immigrants.⁷³ Overall, estimates range from between 4.1 to 4.5 million as to the number of children of undocumented immigrants who have benefitted from the United States’ birthright citizenship policy to date.⁷⁴ If the United States were to stop offering citizenship to children born within its bounds when both parents are undocumented immigrants, studies indicate that in 2050

68. Robert Pear, *Citizenship Proposal Faces Obstacle in the Constitution*, N.Y. TIMES, Aug. 7, 1996.

69. Roy Beck, *Retiring Rep. Deal Leaves 17-Year Record of Trying to End Birthright Citizenship*, NUMBERSUSA (Mar. 2, 2010, 10:49 AM), <https://www.numbersusa.com/content/nusablog/beckr/march-1-2010/retiring-rep-deal-leaves-17-year-record-trying-end-birthright-citizenshi>.

70. Katherine Pettit, *Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birthright Citizenship Intact*, 15 TUL. J. INT’L & COMP. L. 265, 268 (2006).

71. Mark Murray, *Where the GOP 2016 Candidates Stand on Birthright Citizenship*, MSNBC (Aug. 18, 2015, 6:34 PM), <http://www.msnbc.com/msnbc/where-the-gop-2016-candidates-stand-birthright-citizenship>.

72. Aaron Zitner, *Birthright Citizenship, by the Numbers*, THE WALL STREET JOURNAL BLOGS, THE NUMBERS (Aug. 20, 2015, 8:47 AM), <http://blogs.wsj.com/briefly/2015/08/20/birthright-citizenship-by-the-numbers-the-numbers/>.

73. *Id.* This estimate does not come from the Census Bureau; they do not track this statistic. Rather, this “estimate comes from the nonpartisan Pew Hispanic Center, which says that about 7.5% of all births in the U.S., or 300,000 births per year, are to unauthorized immigrants. That figure is lower than the estimated 340,000 births in 2008, reflecting lower inflows of illegal immigrants and declining birth rates.” *Id.*

74. *Id.*

the undocumented immigrant population would be 16 million.⁷⁵ If our current policy does not change, that estimate is 11 million.⁷⁶ The Census Bureau estimates that by 2060 almost one fifth of the United States' population will have been born abroad.⁷⁷

These children, whether born to parents who have lived in the United States without documentation for years or born to mothers who have come to the United States shortly before giving birth, are frequently pejoratively referred to as “anchor babies.”⁷⁸ Some states have taken measures making it more difficult for children born to undocumented parents to prove their citizenship.⁷⁹ While much of the current birthright citizenship debate is centered around immigrants from Latin American countries, the term “anchor babies” is not used solely in reference to Latino Americans.⁸⁰

75. *Id.*

76. *Id.*

77. Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population 2014-2060*, P25-1143, U.S. CENSUS BUREAU (Mar. 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf>.

78. Amy Davidson, *The Anchor Baby Question at the G.O.P. Debate*, THE NEW YORKER (Sept. 15, 2015), <http://www.newyorker.com/news/amy-davidson/the-anchor-baby-question-at-the-g-o-p-debate> (“Insofar as a slur can have a technical definition, it refers to a child born in the United States to parents who are undocumented, whether those parents have been here for years or for a day, and regardless of how long they hope to stay.”).

79. For example, in Texas the Department of State Health Services and Vital Statistics Unit has refused to issue birth certificates to children born to undocumented mothers from Mexico. *Serna et al. v. Texas Dept. of State Health Servs.*, 2015 WL 611823, at *1 (W.D. Tex. Oct. 16, 2015) (No. 1-15-CV-446 RP); *See also* Eyder Peralta, *Texas Fights Suit After Denying Birth Certificates to Children of Illegal Immigrants*, NPR (July 30, 2015, 1:58 PM), <http://www.npr.org/sections/thetwo-way/2015/07/23/425568894/texas-fights-suit-after-denying-birth-certificates-to-children-of-illegal-immigr>; Julian Aguilar, *Judge Denies Emergency Relief in Birth Certificate Case*, THE TEXAS TRIBUNE (Oct. 16, 2015), <http://www.texastribune.org/2015/10/16/judge-denies-emergency-relief-birth-certificate-ca/>. Mothers have filed suit on behalf of their citizen children alleging that a violation of the Privileges and Immunities Clause of the Fourteenth Amendment because “a birth certificate is the foundational document that all U.S.-born citizens must have to enjoy the benefits of citizenship.” Jim George, *Texas Violates 14th Amendment in Denying Birth Certificates*, TRIBTALK: PERSPECTIVES ON TEXAS, A PUBLICATION OF THE TEXAS TRIBUNE (Oct. 22, 2015), <http://www.tribtalk.org/2015/10/22/texas-violates-14th-amendment-in-denying-birth-certificates/>. Further, it bears mentioning that if birthright citizenship were ended solely with respect to undocumented immigrants, United States citizens could incur difficulties and increased costs proving their citizenship and obtaining birth certificates for their children. *See* Margaret Stock, *The Cost to Americans and America of Ending Birthright Citizenship*, NATIONAL FOUNDATION FOR AMERICAN POLICY (Mar. 2012), <http://www.nfap.com/pdf/NFAPPolicyBrief.BirthrightCitizenship.March2012.pdf>.

80. *See, e.g.*, Reena Flores, *Donald Trump: “Anchor Babies” Aren’t American Citizens*, CBS NEWS (Aug. 19, 2015, 10:44 AM), <http://www.cbsnews.com/news/donald-trump-anchor-babies-arent->

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Aside from children born to undocumented immigrants who are living in the United States long-term, the phenomenon of “birth tourism” or “maternity tourism” results in a much smaller number of United States citizens — 7,955 in 2012 by one estimate.⁸¹ These figures are difficult to establish with precision — another source estimates that in 2012, there were 10,000 such births in the United States to Chinese parents alone.⁸² Speculation on what motivates parents to participate in this practice varies, however, some possible incentives include access to the United States university system; ability to raise children in a less polluted area; better future job prospects for their children; in the case of Chinese parents, avoiding China’s draconian one-child policy;⁸³ and the hope that theoretically once the child turns twenty-one, they could sponsor United States citizenship for their parents.⁸⁴

Additional concerns beyond incentivizing illegal immigration include losing control of the nation’s future, dilution of traditional American values, increasing the number of individuals with dual citizenship,

american-citizens/ (claiming that babies born on U.S. soil to undocumented immigrants do not possess the rights of citizens, Donald Trump explains “[w]hat happens is they’re in Mexico, they’re going to have a baby, they move over here for a couple of days, and they have the baby[.]”); MJ Lee, *5 Things to Know About the Asian ‘Anchor Baby’ Controversy*, CNN POLITICS (Aug. 26, 2015, 5:19 PM), <http://www.cnn.com/2015/08/26/politics/asian-anchor-babies-jeb-bush/> (reporting that when he faced criticism for using the term “anchor babies” while campaigning for the 2016 election, Jeb Bush attempted to defend against “charges that he had used a derogatory term stereotyping Hispanics,” and asserted “that ‘anchor babies’ were ‘frankly more related to Asian people[.]’” which “sparked outrage from Asian-American politicians, interest groups and Twitter users.”).

81. See Zitner, *supra* note 72. The article explains that “[b]irth tourism” . . . generally refers to people from wealthier countries flying to the U.S. to have children but then returning to their home countries.” *Id.* According to the Centers for Disease Control and Prevention, this figure has increased since 2009 when the figure was estimated to be 7,171. *Id.* “It’s not a huge-scale enterprise.” *Id.* Further, some opponents to changing birthright citizenship assert that “birth tourism is a separate phenomenon that should be discouraged through targeted policies.” *Id.*

82. Hannah Beech, *I Want an American Baby! Chinese Women Flock to the U.S. to Give Birth*, TIME (Nov. 27, 2013), http://world.time.com/2013/11/27/chinese-women-are-flocking-to-the-u-s-to-have-babies/?hpt=hp_t2.

83. *Id.* In October 2015, China changed its policy allowing married couples to have two children. Economic fears stemming from China’s aging population prompted leadership to change this policy, which had been in place since the late 1970s. Chris Buckley, *China Ends One-Child Policy, Allowing Families Two Children*, N.Y. TIMES (Oct. 29, 2015), http://www.nytimes.com/2015/10/30/world/asia/china-end-one-child-policy.html?_r=0.

84. *Id.* See also Richard Chang, *American Benefits Beget Rise in ‘Birth Tourism,’* SACRAMENTO BEE (Sept. 24, 2012, 12:00 AM), <http://www.richardychang.com/wp-content/uploads/2014/09/American-benefits-beget-rise-in-birth-tourism.pdf>.

difficulties deporting parents of United States citizens who are undocumented immigrants, and increased welfare costs.⁸⁵

Proponents of birthright citizenship support their position with a compelling array of policy arguments that favor upholding the current practice bolstering these arguments with concrete examples from countries that have abolished the practice.⁸⁶ Ending birthright citizenship in the

85. See *Arguments Against Birthright Citizenship*, NUMBERSUSA FOR LOWER IMMIGRATION LEVELS (Feb. 3, 2015, 1:04 PM), <https://www.numbersusa.com/content/learn/illegal-immigration/arguments-against-birthright-citizenship.html>; Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Immigrants*, 22 HARV. J.L. & PUB. POL'Y 465 (1999). But see Madeline Zavodny, *Birthright Citizenship Makes America Great*, U.S. NEWS (Aug. 27, 2015 9:00 AM), <http://www.usnews.com/opinion/economic-intelligence/2015/08/27/trump-is-wrong-birthright-citizenship-makes-america-great> (observing that undocumented immigrants come to the United States to fulfil their American dream—“for the opportunity to work hard and in return have a better life, for themselves and especially for their children.”); Ben Domenech, *Republicans and the Politics of Birthright Citizenship*, FEDERALIST (Aug. 18, 2015), <http://thefederalist.com/2015/08/18/republicans-and-the-politics-of-birthright-citizenship/> (noting that ending birthright citizenship “runs counter to every major American historical narrative about what we believe about the possibilities of our nation, where we came from and where we are going.”).

86. Charlotte Alfred, Elise Foley & Roque Planas, *These Countries Show Why Losing Birthright Citizenship Could Be a Disaster*, HUFFINGTON POST (Aug. 27, 2015, 3:39 PM), http://www.huffingtonpost.com/entry/birthright-citizenship-other-countries_us_55df2a82e4b08dc0948699f3. In Germany, there is a huge underclass of stateless individuals of Turkish descent living in the country. *Id.* This is a result of Germany's 1960s era guest worker program to address temporary labor shortages. *Id.* Roughly 750,000 Turkish individuals came to Germany and about half of these workers stayed. *Id.* Their descendants are now more likely to receive sub-par education, earn lower incomes, and “German Turks fear mounting racism and Islamophobia[.]” *Id.* The Dominican Republic long recognized birthright citizenship. *Id.* However, following increased migration of Haitians the country began legal changes to end birthright citizenship in 2004 which were ultimately memorialized in their constitution 2010. *Id.* In 2013, this requirement became retroactive. *Id.* The consequence was an estimated 200,000 stateless individuals, 60,000 of whom are children. *Id.* Lacking citizenship documents children are frequently barred from attending public high schools. *Id.* Adults without documentation face employment difficulties. *Id.* Some individuals who have worked in the Dominican Republic for decades, frequently “in some of the most onerous jobs available, like cutting sugar cane or working as a home servant[.]” now could face deportation, separating them from family members and forfeiting pensions. *Id.* After Japan annexed Korea in 1910, roughly two million Koreans moved to Japan in search of economic opportunities and “due to forced conscription during World War II.” *Id.* Following WWII, “around 600,000 Koreans remained in Japan out of both choice and economic necessity.” *Id.* These individuals had their citizenship revoked and were then known as the “Zainichi,” a Japanese term meaning “residing in Japan.” *Id.* They were stripped of their voting rights, forced to submit to fingerprinting, and were largely banned from jobs. *Id.* Japan does not recognize birthright citizenship and thus the children of these Korean citizens likewise faced obstacles including harsh naturalization laws which forced Koreans to take Japanese names and end Korean citizenship, which created barriers to access the country's national health insurance and state pensions, an underfunded Korean language school system whose pupils were excluded from taking required university entrance exams until the late 1990s, and widespread discrimination based on their heritage. *Id.* While some

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United States would result in an enormous group of stateless people born in the country but not citizens of the United States nor of any other country.⁸⁷

F. Political Attempts to End Birthright Citizenship

Public opinion on birthright citizenship widely supports birthright citizenship in the Democratic Party while opinions are split among Republican voters.⁸⁸ Beginning in 2007 during the 110th session of Congress, a bill has been proposed annually in the House called the Birthright Citizenship Act.⁸⁹ During the 112th session of Congress, the Senate began introducing its own parallel attempt each year.⁹⁰ If passed, these bills seek to amend the Immigration and Nationality Act by providing a definition for who is subject to the jurisdiction of the United States by focusing on the status of the child's parents.⁹¹

While attempting to change birthright citizenship through legislative action has become a popular annual endeavor in both houses, many prominent legal scholars believe that simply passing a statute is not sufficient and what is needed to make such a sweeping change is a

measures have relaxed, discrimination persists. *Id.*

87. *Id.*

88. Sara Goo, *What Americans Want to Do About Illegal Immigration*, PEW RESEARCH (Aug. 24, 2015), <http://www.pewresearch.org/fact-tank/2015/08/24/what-americans-want-to-do-about-illegal-immigration/>. In a 2011 poll, Pew Research reported 73% of Hispanics, 73% of people under thirty, and 66% of Democrats were opposed to the idea of ending birthright citizenship while Republicans were split—49% supporting the current policy and 47% favoring abolishment via constitutional amendment. *Id.*

89. See H.R. 1940, 110th Cong. (1st Sess. 2007); H.R. 1868, 111th Cong. (1st Sess. 2009); H.R. 140, 112th Cong. (1st Sess. 2011); H.R. 140, 113th Cong. (1st Sess. 2013); H.R. 140, 114th Cong. (1st Sess. 2015).

90. See S.R. 723, 112th Cong. (1st Sess. 2011); S.R. 301, 113th Cong. (1st Sess. 2013); S.R. 45, 114th Cong. (1st Sess. 2015).

91. Summary: H.R.140—114th Congress (2015–2016), <https://www.congress.gov/bill/114th-congress/house-bill/140?q=%7B%22search%22%3A%5B%22%5C%22birthright+citizenship+act%5C%22%22%5D%7D&resultIndex=1>. The Birthright Citizenship Act of 2015 seeks to amend the Immigration and Nationality Act:

[T]o consider a person born in the United States "subject to the jurisdiction" of the United States for citizenship at birth purposes if the person is born in the United States of parents, one of whom is: (1) a U.S. citizen or national, (2) a lawful permanent resident immigrant whose residence is in the United States, or (3) an immigrant performing active service in the U.S. Armed Forces. *Id.*

constitutional amendment.⁹² Endeavoring to amend the constitution to narrow the Citizenship Clause and abolish birthright citizenship would be quite difficult. Of the approximately 11,699 attempts to amend the constitution since 1789, only 27 have succeeded.⁹³ Nevertheless, there have been attempts to make constitutional amendments to the Fourteenth Amendment.⁹⁴

II. ANALYSIS AND PROPOSAL

A. Historical Perspective, the Text of the Fourteenth Amendment, and Supreme Court Precedent Support the Current Interpretation of Birthright Citizenship as Granted by the Fourteenth Amendment.

Historical context prior to the passage of the Fourteenth Amendment largely supports the current interpretation of the Fourteenth Amendment. When the Fourteenth Amendment was written and adopted, the common

92. See Rebecca Kaplan, *Is It Possible to End Birthright Citizenship?*, CBS NEWS (Aug. 18, 2015, 6:00 AM), <http://www.cbsnews.com/news/ending-birthright-citizenship/>; Polly J. Price, *On Birthright Citizenship, Congress Can't 'Trump' Constitution*, HILL (Aug. 24, 2015, 6:00 AM), <http://thehill.com/blogs/pundits-blog/immigration/251768-on-birthright-citizenship-congress-cant-trump-constitution> (changing birthright citizenship “cannot be accomplished through legislation by Congress. Such legislation would be a waste of Congress’s valuable time; the U.S. Supreme Court would promptly strike it down as beyond congressional authority. If the rule is to be changed, it must be through the arduous process of amending the federal constitution.”).

93. *Measures Proposed to Amend the Constitution*, U.S. SENATE, http://www.senate.gov/reference/measures_proposed_to_amend_constitution.htm. See also Price, *supra* note 49 and accompanying text (explaining that the common-law principle of birthright citizenship originated with Calvin’s Case and was part of the common law for centuries before becoming a matter of statutory or constitutional law).

94. See for example the 2009 attempt to amend the Constitution introduced by Senator David Vitter (R-LA) which provided that:

A person born in the United States shall not be a citizen of the United States unless—

- (1) one parent of the person is a citizen of the United States;
- (2) one parent of the person is an alien lawfully admitted for permanent residence in the United States who resides in the United States;
- (3) one parent of the person is an alien performing active service in the Armed Forces of the United States; or
- (4) the person is naturalized in accordance with the laws of the United States.

S.J. Res. 6, 111th Cong. (2009).

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law concept of *jus soli* citizenship granting children citizenship based on birthplace was a well-established principle.⁹⁵ The drafters of the Fourteenth Amendment would have had this common law principle in mind when writing the Amendment.⁹⁶ If the drafters had intended to significantly narrow this common law principle they could have done so.⁹⁷ The fact that prominent legal scholars including Attorney General Edward Bates were of the opinion that all children born on United States soil became “*prima facie* a citizen” provides additional compelling evidence in favor of the current interpretation.⁹⁸

The language of the Fourteenth Amendment restricts the reach of the common law principle of *jus soli* citizenship by requiring that to become a citizen of the United States by virtue of birth on United States soil a child must also be subject to the jurisdiction of the United States.⁹⁹ While scholars disagree on how restrictive this language was intended to be, there is agreement that the phrase is limiting.¹⁰⁰ Opponents of the present interpretation argue the current broad interpretation of the Citizenship Clause violates canons of statutory construction by creating redundancy.¹⁰¹ The jurisdiction requirement is reduced to mere tautology, it is argued, by automatically considering children born within the United

95. See INS Interp. Letter 301.1, *supra* note 28.

96. See BATES, *supra* note 26, at 12–13.

97. Indeed, the drafters did narrow this common-law principle by including the language “subject to the jurisdiction thereof” in the amendment, though scholars reach divergent conclusions on precisely how much narrowing this language was intended to confer. See Stevens, *supra* note 44. See also Newman, *supra* note 55, at 459.

98. See BATES, *supra* note 26, at 12, where Attorney General Bates issued an advisory opinion expressing this view two years before the Fourteenth Amendment was ratified. One notable exception is the Supreme Court’s opinion in *Dred Scott v. Sanford* in which the Court held that children of African descent could never be United States citizens regardless of whether they were born on domestic soil. *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1859). While *Dred Scott* indicates some legal scholars believed not all children born on American soil became citizens, this decision is widely criticized as one of the most deplorable in Supreme Court history and was the very decision the Thirteenth and Fourteenth Amendments were designed to overturn. See, e.g., *Dred Scott v. Sanford* (1857), *supra* note 22; Urofsky, *supra* note 22 (noting constitutional scholars widely consider *Dred Scott* “the worst decision ever rendered by the Supreme Court” and “the most egregious example in the [C]ourt’s history of wrongly imposing a judicial solution on a political problem.”).

99. See U.S. CONST. amend. XIV.

100. See Stevens, *supra* note 44 and accompanying text. See also Schulman, *supra* note 55, at 693–94.

101. See Stevens, *supra* note 44, at 366–67.

States to be subject to its jurisdiction.¹⁰² This argument, however, overlooks the modern interpretation that does not automatically consider every person born in the United States to be subject to its jurisdiction. Rather, children born to foreign diplomats and enemy combatants, for example, are not considered to be subject to the jurisdiction of the United States and thus are not granted citizenship when born within the United States.¹⁰³ Accordingly, the modern interpretation does not reduce the jurisdictional requirement to mere tautology, but rather does impose restrictions on the reach of the principle that any child born on United States soil is automatically granted citizenship.¹⁰⁴ This provides further support for the current interpretation and is in line with the more recent Supreme Court decisions interpreting the Citizenship Clause.¹⁰⁵ In one such decision, *United States v. Wong Kim Ark*, the Court highlights that granting citizenship to children of European parents born on United States soil was a long-recognized practice.¹⁰⁶

Supreme Court decisions interpreting the Citizenship Clause likewise support the current interpretation.¹⁰⁷ In *Wong Kim Ark*, the Supreme Court reasoned that the Fourteenth Amendment, consistent with the common law, grants citizenship based on birthplace “irrespective of parentage” with only four exceptions or qualifications which also existed at common law.¹⁰⁸ Since *Wong Kim Ark* was decided in 1898 the Supreme Court has

102. See Stevens, *supra* note 44, at 366.

103. See Newman, *supra* note 55, at 453. See also Schulman, *supra* note 55, at n.26 (citing PETER H. SCHULK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL IMMIGRANTS IN THE AMERICAN POLITY 85 (1985)); *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities*, U.S. DEP’T OF STATE OFFICE OF FOREIGN MISSIONS, <http://www.state.gov/documents/organization/150546.pdf> (explaining diplomatic immunity practices).

104. These exceptions (children of foreign sovereigns or diplomats, children of enemy combatants, and children born on foreign ships in United States waters) were likewise recognized at common law. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

105. See *infra* notes 106–09 and accompanying text.

106. *Wong Kim Ark*, 169 U.S. at 694 (observing that if the Fourteenth Amendment does not confer citizenship upon “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.”).

107. The first Supreme Court decision interpreting the Citizenship Clause was *Elk v. Wilkins*, 112 U.S. 94 (1884) which held children born to members of Native American tribes were not citizens. See *supra* notes 36–37 and accompanying text. See also Schulman, *supra* note 55, at n.157 (citing THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 974 (interim 2d ed. 1991)).

108. *Wong Kim Ark*, 169 U.S. at 690–63 (1898). The exceptions enumerated in *Wong Kim Ark*

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been relatively silent on the issue of birthright citizenship. Opponents of the current interpretation urge that because the facts of *Wong Kim Ark* specifically contemplated legal resident immigrants, it is not controlling on the issue of children born to undocumented immigrants.¹⁰⁹ The Court's 1982 decision in *Plyler v. Doe* includes a footnote with respect to *Wong Kim Ark* which states that "no 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."¹¹⁰ While this language appears in a footnote, it is a convincing indication that a more modern Court supports the current interpretation of the Citizenship Clause and agrees that children born to undocumented immigrants are nevertheless still subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment.

That the Supreme Court has not addressed a case directly on whether children born to undocumented immigrants on United States soil are automatically granted citizenship by virtue of birth within United States does not indicate that these children are not citizens. Children born to undocumented immigrants are unlike the children of foreign diplomats and enemy combatants who receive diplomatic and enemy combatant immunity, respectively.¹¹¹ Like permanent United States residents as in *Wong Kim Ark*, but unlike diplomats and enemy combatants, undocumented immigrants are subject to the jurisdiction of the United States and can be arrested, prosecuted, convicted, and imprisoned for their acts in the United States.¹¹² Nevertheless, while such disagreements continue and despite difficulties attendant to amending the Constitution, these periodic calls to end birthright citizenship are likely to persist until the Court addresses a case and definitively holds that children born to undocumented immigrants are indeed subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment.

are children of foreign sovereigns or diplomats, those born on foreign ships in United States waters, children of enemy combatants, and lastly children born to and owing allegiance to their several Native American tribes. *Id.* at 693.

109. See Graglia, *supra* note 44, at 9.

110. *Plyler v. Doe*, 457 U.S. 202, 202 n.10 (1982).

111. See Newman, *supra* note 55, at 453. See also *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities*, *supra* note 103.

112. See Schulman, *supra* note 55, at n.172.

B. Birthright Citizenship Has Played a Pivotal Role in Developing Our National Identity and Is Worthy of Preservation.

Birthright citizenship has played a pivotal role in developing our national identity and is worthy of protection. As President John F. Kennedy once said, we are “a nation of immigrants.”¹¹³ The ethnic and cultural diversity that results from having citizens from a plethora of backgrounds has shaped the development of our country. Some opponents urge that birthright citizenship will lead to a dilution of American values.¹¹⁴ This rationalization overlooks the diversity and cultural richness that has resulted from being a nation of immigrants. This diversity has helped shape our national identity and the values that we consider quintessentially American.

The freedom, equality, and opportunity of the American Dream is what inspires many to immigrate to America and it is what inspired many of our ancestors to come to America, sometimes generations ago. The American Dream inspires immigrants who wish to work hard to give themselves and their children better lives — not so that in twenty-one years their children can sponsor their green card applications.¹¹⁵ Abolishing birthright citizenship would be turning our backs on this history at the expense of the diversity that has continued to make our country so unique.

Ending birthright citizenship altogether would result in increased costs to parents who are American citizens and give birth within the United States. Currently, a birth certificate showing that a child was born in the United States can serve as proof of citizenship.¹¹⁶ Studies indicate that without birthright citizenship, even parents who are United States citizens would face costs ranging from \$1,200 to \$1,600 to prove the citizenship of

113. See Kennedy, *supra* note 14.

114. See Wood, *supra* note 85, at 495–96.

115. See, e.g., Zavodny, *supra* note 85; Domenech, *supra* note 85. But see Chang, *supra* note 84.

116. *Proof of U.S. Citizenship and Identification When Applying for a Job*, U.S. CITIZENSHIP & IMMIG. SERVS., <https://www.uscis.gov/us-citizenship/proof-us-citizenship-and-identification-when-applying-job>.

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their new babies.¹¹⁷ Additional economic costs that would result from such a change include a reduced tax base, decreased contributions to Social Security, and increased bureaucratic costs.¹¹⁸

If the United States ended birthright citizenship for children of undocumented immigrants, it is estimated that the country would lose between 4.7 and 13.5 million future citizens by 2050.¹¹⁹ Many developed countries are facing rapidly declining birthrates.¹²⁰ Such rapidly declining birthrates could lead to decreased labor forces, threaten economic growth, pensions, along with straining healthcare and social services.¹²¹ The Population Reference Bureau has observed that while the fertility rate in the United States is approaching that in many European countries, the future United States labor market has a better outlook than other developed nations.¹²² This is because a rapid increase in the United States labor force is projected due in large part to the number of young immigrants who come to the United States annually.¹²³ Ending birthright citizenship could curb this increase in the young population and lead to potential labor shortages and other negative consequences that other developed nations with low birthrates may encounter.

Yet another cost of the effort to end birthright citizenship comes from the debate itself. Annual attempts to legislatively end birthright citizenship in the House and Senate squander legislative time and resources that could be used working to enact other legislation.¹²⁴ The time spent repeatedly trying to pass these same pieces of legislation to change birthright citizenship seems all the more wasteful considering that many scholars believe the Supreme Court would strike it down as overreach.¹²⁵

117. See Stock, *supra* note 79, at 1.

118. See Stock, *supra* note 79, at 2.

119. See Stock, *supra* note 79, at 1.

120. See Swanson, *supra* note 10 (discussing the Japanese birthrate crisis and stating that in 2014 the country had roughly 1.001 million births and 1.269 deaths); Madrid et al., *supra* note 10, at 1 (discussing low birthrates in European countries with Spain ranking as one of the lowest in the EU with approximately 1.27 births per woman of childbearing age).

121. See Madrid et al., *supra* note 10, at 2; Swanson, *supra* note 10.

122. See Mather, *supra* note 11, at 4.

123. See Mather, *supra* note 11, at 4.

124. See Kaplan, *supra* note 92.

125. See Kaplan, *supra* note 92. See also Amanda Sakuma, *GOP Candidates Rethinking Constitution to End Birthright Citizenship*, MSNBC (Aug. 18, 2015, 11:20 AM), <http://www.msnbc.com/msnbc/gop-candidates-rethinking-constitution-end-birthright-citizenship>.

C. Opportunities to Curtail the Birthright Citizenship Debate.

One opportunity to curb the birthright citizenship debate is through the political process. Surveys have shown that a policy abolishing birthright citizenship is widely opposed among Hispanics, young people and Democrats while Republicans are divided on the issue.¹²⁶ So far the political process has not proven effective at resolving the birthright citizenship debate. This level of pressure could increase in coming years as the Census Bureau projects the Hispanic population in the United States will increase by nearly 115% by the year 2060 and that by the same year nearly one fifth of the United States population will have been born overseas.¹²⁷

Another way to potentially curtail the birthright citizenship debate would be for the Supreme Court to rule on a case and clarify whether the children of undocumented immigrants are covered within the meaning of the Citizenship Clause. One possible opportunity for the Court to speak on the issue could come from Texas, where the state is currently refusing to grant birth certificates to Texas-born children of undocumented immigrants.¹²⁸ In October 2015, District Court Judge Robert Pitman refused to enter a temporary order to grant birth certificates to children of undocumented immigrants born in Texas during the pendency of the case.¹²⁹ If a case like this were to make it to the Supreme Court, and the Court were to clarify the Citizenship Clause with respect to children of

126. See Goo, *supra* note 88, at 3 and accompanying text (reporting a 2011 poll indicated a majority Hispanics, people under thirty, and Democrats opposed to ending birthright citizenship, while Republicans were split on the issue). See also Cabaniss, *supra* note 6 (reporting only roughly thirty other countries currently have birthright citizenship).

127. See Colby & Ortman, *supra* note 77, at 9. See also Domenech, *supra* note 85 (observing that calls to abolish birthright citizenship generate a “horde of new political enemies . . . [because] . . . anyone who knows anyone who is a birthright citizen is going to view this effort as an act of xenophobic rage” and that the effort “creates no new friends to offset these new enemies . . . [because] . . . anyone who is opposed to birthright citizenship was likely already your supporter anyway.”).

128. See George, *supra* note 79

129. See Aguilar, *supra* note 79.

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undocumented immigrants, this clarification would likely curb much of the debate. If the Court were to rule in favor of the current interpretation, the arduous task of passing a constitutional amendment would be the sole remedy for opponents of the current interpretation.¹³⁰

Numerous decisions of the present Supreme Court have been both conservative and unexpected.¹³¹ With several Justices approaching or in their eighties, Supreme Court nominations was a critical issue in the 2016 presidential election¹³² because the next president would almost certainly have the opportunity to radically change the makeup of the Supreme Court.¹³³ This opportunity came to fruition when Justice Scalia passed away and Republicans staged a “blockade of the nomination of Judge Merrick B. Garland, President Obama’s pick for the Supreme Court[.]”¹³⁴ an obstructionist effort that a study conducted by two law professors has termed “historically unprecedented[.]”¹³⁵ Hopes of a more liberal-leaning

130. See *Measures Proposed to Amend the Constitution*, *supra* note 93. See also S.J. Res. 6, *supra* note 94.

131. See for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008) an opinion that has been described as “upending the well-established meaning of the Second Amendment” evidencing a “big rightward swerve” when the Court invalidated key provisions of D.C.’s handgun ban. Dorothy Samuels, *The Second Amendment Was Never Meant to Protect an Individual’s Right to a Gun*, NATION (Sept. 23, 2015), <http://www.thenation.com/article/how-the-roberts-court-undermined-sensible-gun-control/>. Additional cases from the Roberts court—*Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)—have been described as imposing a “startling new corporatism” on America. See Jamie Raskin, *The Supreme Court in the Citizens United Era: A Century After the Lochner Era, the Roberts Court Imposes a Startling New Corporatism on America*, PEOPLE FOR THE AMERICAN WAY, <http://www.pfaw.org/media-center/publications/supreme-court-citizens-united-era-century-after-lochner-era-roberts-court->

132. In 2017 Justice Ginsburg will turn eighty-four, Justice Kennedy will turn eighty-one, and Justice Breyer will turn seventy-nine. Bill Whalen, *The Supreme Court May Be the Sleeper Issue of the 2016 Election*, FORBES POLITICS (Oct. 18, 2015, 11:09 PM), <http://www.forbes.com/sites/billwhalen/2015/10/18/with-maybe-two-seats-to-fill-does-the-high-court-become-supremely-huge-in-2016/#1e8b01e27ef5>.

133. *Id.* Assuming Justices Ginsburg and Breyer—both Clinton appointees from the 1990s—die or retire, the next president could make as many as four Supreme Court appointments. *Id.* If a Republican were elected this could provide a 7-2 conservative majority leaving Justices Sotomayor and Kagan in the minority. *Id.* On the other hand, if a Democrat becomes the next president there is an opportunity to create a 6-3 progressive majority with Justices Thomas, Alito, and Roberts in the minority. *Id.*

134. Adam Liptak, *Study Calls Snub of Obama’s Supreme Court Pick Unprecedented*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html>.

135. Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the*

Court vanished when Donald Trump was elected president. His nominee, Neil Gorsuch, was confirmed to the Court and has been described as “a judge who not only admires the justice he would replace but also in many ways resembles him.”¹³⁶ Given the historically conservative nature of the Roberts Court, proponents of the current interpretation of the Citizenship Clause may find it safer to wait to try to get this issue in front of a Court more likely to rule in favor of their cause — and after the results of the 2016 election, this could be a long wait.¹³⁷

D. The Path Forward for Proponents of Birthright Citizenship.

Despite the merits of birthright citizenship discussed, the vocal minority opposed to birthright citizenship is likely to persist in making these periodic calls to end our unique practice.¹³⁸ If this vocal minority were to succeed, the negative repercussions would be immense and run counter to our history as a nation.¹³⁹

Proponents of birthright citizenship should continue to advocate for its constitutionality supported by over a century of Supreme Court precedent¹⁴⁰ and value to our nation¹⁴¹ rooted in common law tradition.¹⁴²

Constitution Really Say About President Obama's Powers to Appoint a Replacement For Justice Scalia, 91 N.Y.U. L. REV. 53, 58 (2016).

136. Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html?_r=0.

137. Ever since Chief Justice John Roberts became Chief Justice in 2005, the Court has been described as reliably conservative. Pema Leavy, *Sorry, Liberals, But the Roberts Court Is Still Conservative*, MOTHER JONES (July 1, 2015, 5:00 AM), <http://www.motherjones.com/politics/2015/06/supreme-court-liberal-conservative>.

138. See Goo, *supra* note 88 (reporting Pew Research poll results indicate 66% of Democrats and 49% of Republicans support our current policy, while 47% of Republicans favor a constitutional amendment).

139. See, e.g., Swanson, *supra* note 10 (discussing Japan's birthrate problem); Madrid et al., *supra* note 10 (discussing declining birthrates in Europe); Alfred et al., *supra* note 86 and accompanying text (giving examples of discrimination and negative policies that adversely affected children of immigrants in countries that abolished birthright citizenship); Stock, *supra* note 79 (discussing costs that would be incurred by American citizens who have children).

140. *Elk v. Wilkins*, 112 U.S. 94 (1884); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Plyler v. Doe*, 457 U.S. 202 (1982).

141. See *supra* notes 86–87 and accompanying text. See also *supra* Section IIB (discussing the importance of birthright citizenship and negative consequences that would result if it were ended).

142. See Price, *supra* note 49 (discussing the common law origins of birthright citizenship from

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One way to accomplish this task is to write scholarly articles and vocally support birthright citizenship in the media when the issue is raised. Another opportunity to counter the vocal minority is for voters who support birthright citizenship to exercise their ability to exert political pressure on those in opposition. Lawmakers who support birthright citizenship should continue to resist attempts to accomplish a change to the practice through legislative means. Finally, proponents should continue to support birthright citizenship in briefs in the lower courts while delaying any attempt for Supreme Court review, if possible, until the composition of the Court changes.

CONCLUSION

It is important for proponents of birthright citizenship to continue engaging in advocacy in its favor and counter the vocal minority opposed to it. This can be accomplished through the political process, writing scholarly articles, supporting it in the news, and by writing briefs to support it in the lower courts. A definitive ruling from the Supreme Court in support of the current interpretation of the Fourteenth Amendment would go a long way to end the debate. Among other things, this ruling would likely stop endeavors by legislators that waste valuable time.¹⁴³ Proponents should not lead the charge to get a case in front of the Supreme Court. Because several notable decisions of the Roberts Court have been both unexpected and highly conservative,¹⁴⁴ it is safer for proponents of the current interpretation of the Citizenship Clause to either wait for a shift in the Court or not push to get a case in front of the Court to clarify the issue.¹⁴⁵

The current birthright citizenship debate consumes valuable legislative resources and time while simultaneously threatening to abolish our current system of citizenship rooted in the common law that is responsible for the great diversity and culture that comes from being a nation of immigrants. The current interpretation of the Citizenship Clause not only is rooted in

Calvin's Case).

143. See Kaplan, *supra* note 92.

144. See *supra* notes 131 and 137 and accompanying text.

145. See Whalen, *supra* note 132.

our nation's history and responsible for rich cultural diversity, but is also important for ensuring our future. With declining birthrates, if the United States does not add to its younger population through birthright citizenship, it could face some of the difficulties other developed nations are worried about regarding a decreasing labor force, smaller tax base, and healthcare and social welfare program concerns.¹⁴⁶ Beyond the benefits that come with our current interpretation of the Citizenship Clause, the text of the Fourteenth Amendment, Supreme Court precedent, and the history surrounding the amendment all support the current interpretation. Birthright citizenship is a longstanding and integral practice in the United States with numerous benefits it should be preserved.

146. *See supra* notes 120–123.