

4-1-2008

Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System

Nicole Newman

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>



Part of the [Fourteenth Amendment Commons](#)

Recommended Citation

Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. Third World L.J. 437 (2008), <http://lawdigitalcommons.bc.edu/twlj/vol28/iss2/6>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

BIRTHRIGHT CITIZENSHIP: THE FOURTEENTH AMENDMENT'S CONTINUING PROTECTION AGAINST AN AMERICAN CASTE SYSTEM

NICOLE NEWMAN*

Abstract: Intending to reverse *Dred Scott* and to abolish the southern “Black Codes,” Congress ratified the Fourteenth Amendment in 1868, guaranteeing automatic citizenship to most people born on U.S. soil. However, the Amendment’s framers specifically excluded particular groups, including those considered not “subject to the jurisdiction” of the United States. In 1898, the Supreme Court clarified the meaning of this Citizenship Clause in *Wong Kim Ark*, and citizenship by birth has been part of American jurisprudence ever since. Currently, many Americans oppose providing birthright citizenship to children of undocumented immigrants. This note examines the basic purpose of the Citizenship Clause and how Americans have made similar attempts in the past to exclude unwanted minority groups. Such attempts have failed over time and should be rejected now because they would recreate the hereditary caste system the Fourteenth Amendment sought to eliminate and are unnecessary considering the existing legal barriers to chain migration.

INTRODUCTION

Our perception that we are “a nation of immigrants” is as fundamental to the American identity as our deep-seated fear of the “other.”¹ Throughout history, those comprising “We the people” have defined

* Senior Articles Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2007–2008).

¹ See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 81–84 (1989); Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111, 118 (1996) (noting the fear of cultural and other changes brought by immigrants, the fear of the “other,” and the fear of losing control over economic and social life, underlie much of today’s call for immigration reform); 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 Aliens?*, 22 PEPP. L. REV. 669, 669 (1995). The concept that America is a “nation of immigrants” stems from the fact that, besides Native Americans, everyone now living in the United States is an immigrant or has descended from immigrants. See Shulman, *supra*, at 669 & n.3.

inclusion in the American community by simply excluding outsiders.² Frequently, those who consider themselves the “true” Americans do so at the expense of outsiders, deeming them inferior beings whose inclusion would infest and degrade society.³ With each passing generation, the question of who really belongs in American society reopens to face a new outsider.⁴ The dirtiest little trick of American community members, used repeatedly and now predictably, is to declare that the “people of the United States” were never originally intended to include anyone other than the current community members themselves.⁵

Unsurprisingly, reports that the United States has lost control of its borders strike at the heart of the American fear of being “overrun by another and a different race.”⁶ For those on the inside, this loss of control means inundation and dilution of so-called American values.⁷ While restrictions on immigration to America have existed since the late eighteenth century, systematic efforts to stem the tide of immigration began with the Chinese Exclusion Acts of the 1880s.⁸ Since then,

² U.S. CONST. pmbli.; see KARST, *supra* note 1, at 2. For example, during the senate debates over the Civil Rights Act of 1866, Kentucky Senator Garrett Davis struggled to define citizenship, concluding, “It is easier to answer what [a citizen] is not than what [a citizen] is, and I say that a negro is not a citizen.” CONG. GLOBE, 39th Cong., 1st Sess. 529 (1866).

³ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (regarding African Americans “as beings of an inferior order, and altogether unfit to associate with the white race”); CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866); KARST, *supra* note 1, at 21.

⁴ See KARST, *supra* note 1, at 2 (quoting ROBERT H. WEIBE, *THE SEGMENTED SOCIETY* 95 (1975)).

⁵ See *Dred Scott*, 60 U.S. at 404–05. At the Civil Rights Act of 1866 debates, Senator Davis articulated this premise:

My position is that this is a white man’s Government. It was made so at the beginning. . . . When the troubles with the mother country commenced in 1764, and culminated in revolution and a Declaration of Independence in 1776, all of that protracted and important transaction was by white men, and by white men alone. The negro had nothing to do with it, no more than the Indian; he was no party to it. . . . I say that the negro is not a citizen.

CONG. GLOBE, 39th Cong., 1st Sess. 528 (1866).

⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). “[T]here has always been apprehension of the stranger. This suspicion and anxiety can escalate into the terror of believing that the stranger will grow into a horde of strangers sweeping across the land, taking whatever it can, and crushing one’s way of life and culture in the process.” Shulman, *supra* note 1, at 675.

⁷ See Shulman, *supra* note 1, at 671; Charles Wood, *Losing Control of America’s Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465, 495 (1999).

⁸ See generally *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (upholding Congress’s plenary power over the exclusion of foreigners at any time); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19–20 (1996); Adam C. Abrahms, Note, *Closing the Immigration Loophole: The 14th Amendment’s Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 469, 470–71 (1998).

there has been no shortage of nativist bills aimed both at excluding others from entering and at forcing assimilation upon those already within U.S. borders.⁹ In fact, American history is replete with radical proposals of how to terminate unwanted immigration, all under the well established assertion that “Congress regularly makes rules [for immigrants] that would be unacceptable if applied to citizens.”¹⁰

Recently, in the wake of the terrorist attacks of September 11, 2001, the demand for absolute control of U.S. borders, and consequently an end to illegal immigration, has grown fierce.¹¹ Whereas Americans have historically viewed “the stranger as the enemy,” the stranger has now become the *terrorist*.¹² Heightened fears over national security have not only brought illegal immigration issues to the forefront, but have also

⁹ See KARST, *supra* note 1, at 84–85; Shulman, *supra* note 1, at 672–73.

¹⁰ See Mathews v. Diaz, 426 U.S. 67, 80 (1976). Since 1918, proposals introduced in Congress and state governments include doubled income tax on nonresident aliens, suppression of the foreign language press, mass internments, denial employment, and bans on teaching foreign languages in public schools or speaking them in public places. See KARST, *supra* note 1, at 84–85. In the 1990s, proposals included forcing doctors to report illegal alien patients, requiring all citizens to carry a tamper proof identification card, and California’s controversial Proposition 187, cutting off all but emergency medical and social services to illegal aliens and denying public education to undocumented children. See 1994 Cal. Legis. Serv. Prop. 187 (West) (approved on Nov. 8, 1994) (codified at CAL. PENAL CODE §§ 113, 114, 834b; CAL. WELF. & INST. CODE § 10001.5; CAL. HEALTH & SAFETY CODE § 130; CAL. EDUC. CODE § 48215; CAL. EDUC. CODE § 66010.8) [hereinafter Prop. 187]; Shulman, *supra* note 1, at 672–73. Proposition 187 passed by a wide margin in 1994 through voter initiative, but it was never implemented due the success of several court challenges on constitutionality and a final mediation with newly elected Governor Gray Davis. See League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997); Evelyn Nieves, *California Calls Off Effort to Carry Out Immigrant Measure*, N.Y. TIMES, July 30, 1999, at A1.

¹¹ See Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11: Testimony on Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty Before the Subcomm. on Immigration, Border Security and Claims of the H. Comm. on the Judiciary, 109th Cong. 5 (2005) (Statement of John C. Eastman, Director, The Claremont Institute Center for Constitutional Jurisprudence), available at <http://judiciary.house.gov/media/pdfs/eastman092905.pdf> [hereinafter *Testimony*]; Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 424 (2003). Although tension over the application of citizenship to disfavored groups has existed throughout American history, it has frequently become most controversial during times of crisis in America. See Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 561–62 (2006).

¹² See Román, *supra* note 11, at 575–78; Shulman, *supra* note 1, at 719. Before the September 11th attacks, Americans cited increases in crime, drugs and violence, decreases in job security, along with unjustified burdens to the American welfare, public education, and healthcare systems as urgent reasons to tighten control of U.S. borders. See, e.g., HEATHER MAC DONALD, CRIME & THE ILLEGAL ALIEN: THE FALLOUT FROM CRIPPLED IMMIGRATION ENFORCEMENT I (2004), available at <http://www.cis.org/articles/2004/back704.pdf>; Christine J. Hsieh, *American Born Legal Permanent Residents? A Constitutional Amendment Proposal*, 12 GEO. IMMIGR. L.J. 511, 523 (1998); Shulman, *supra* note 1, at 676–77; Wood, *supra* note 7, at 493.

provided a forum to promulgate racist and xenophobic policies.¹³ Instead of improving the failed *legal* processes of immigration, however, impassioned Americans stubbornly focus their fears on ways to communicate to illegal immigrants that they are unwanted—now more than ever.¹⁴ Unfortunately, this effort has become centered on the most vulnerable group possible: the children of undocumented immigrants.¹⁵

Many frightened Americans fervently call for an elimination of the “loophole” in the Fourteenth Amendment, which currently grants automatic citizenship to children of undocumented immigrants physically present in the United States during birth.¹⁶ Those in favor of overturning more than a century of consistent jurisprudence cite unbear-

¹³ Román, *supra* note 11, at 575–78. Román explains that the “plenary power” doctrine, which grants complete power to Congress over immigration issues, evolved over a series of judicial decisions that assert national security concerns, while espousing racism and xenophobia. *See id.* at 578 & nn.115–32. For a detailed discussion of the plenary power doctrine as a legal rationale which creates significant human rights problems for immigrants, Indians, and colonial subjects, see generally Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427 (2002).

¹⁴ *See generally* Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203 (2002) (detailing problems with existing immigration system). Instead of making sense out of the confusing and piecemeal system of legal immigration, both the Senate and the House have proposed legislation supporting the construction of a U.S.-Mexico border fence and the criminalization of unlawful presence, attempting merely to impede illegal immigration. *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2d Sess. 2005); Securing America’s Borders Act, S. 2454, 109th Cong. (2d Sess. 2006). Though never implemented, the passage of California’s Proposition 187 signaled widespread support by whites to cut off all but emergency medical and social services to illegal immigrants, to deny public education to undocumented children, and to deny automatic citizenship to children born to illegal immigrant parents. *See* Prop. 187, *supra* note 10; Shulman, *supra* note 1, at 673. *See generally* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D.Cal. 1995). Popular support for even the most extreme proposals has been widespread for at least a decade. *See* Abrahms, *supra* note 8, at 473.

¹⁵ *See* NEUMAN, *supra* note 8, at 178.

¹⁶ One recent poll showed that forty-nine percent of Americans believe that a child of an illegal alien should not be entitled to U.S. citizenship. Scott Rasmussen, 60% Favor Barrier on Mexican Border (Nov. 7, 2005), <http://www.rasmussenreports.com/2005/Immigration%20November%207.htm>; *see* Abrahms, *supra* note 8, at 469. Granting automatic citizenship based on birth on U.S. soil has remained the basic assumption in American jurisprudence since the Supreme Court’s landmark 1898 decision in *U.S. v. Wong Kim Ark*, 169 U.S. 649, 693–94 (1898) (holding that a child born to resident alien parents in the United States is entitled to birthright citizenship); Abrahms, *supra* note 8, at 484–85. This interpretation has never been successfully challenged, but the Supreme Court has yet to rule whether this principle properly applies to children of illegal immigrant parents. *See* Katherine Pettit, Comment, *Addressing the Call for the Elimination for 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).

able burdens on American public services and “perverse” incentives that reward illegal immigration.¹⁷ These incentives, they claim, include not only granting citizenship to children, but also allowing parents who manage to circumvent immigration laws to use their children as a conduit to avoid deportation, and ultimately to obtain their own citizenship.¹⁸ This threat of chain migration, pejoratively called the “anchor baby” phenomenon, is the most inflammatory rhetoric that opponents of birthright citizenship employ.¹⁹

Many of those clamoring to deny birthright citizenship assert one basic premise: the current interpretation of the Fourteenth Amendment is the result of a huge, costly mistake.²⁰ The Citizenship Clause of the Fourteenth Amendment reads, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

¹⁷ See Hsieh, *supra* note 12, at 512–13; Wood, *supra* note 7, at 497; Abrahms, *supra* note 8, at 472. “[A] nation may struggle to provide a basic level of well-being or opportunity to its own citizens, but it cannot subsidize the well-being of the entire world.” Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 82 (1997).

¹⁸ See Abrahms, *supra* note 8, at 471–72.

¹⁹ See Wood, *supra* note 7, at 522.

[E]very week that passes thousands more children of illegal aliens are born in this country, and each is now granted citizenship. The political impact of such individuals increases greatly when . . . at age twenty-one, they can petition for the legal immigration of their parents and other relatives, each of whom can naturalize and each of whom can petition for additional immigrants who may also become citizens.

Id. The “anchor baby” theory assumes that pregnant women illegally cross the U.S.-Mexico border just as they are about to give birth with the sole intention of gaining U.S. citizenship for their children. See Hsieh, *supra* note 12, at 520. The myth continues that not only is the citizen child given free, indefinite access to American welfare, education, and healthcare services, but the illegal alien parents are able to avoid deportation and eventually to bootstrap their own citizenship off of the child. See *id.* at 513 n.16, 521. Therefore, the citizen child provides the “anchor” of a chain by which his or her entire immediate and extended family may receive social benefits and gain citizenship, all derived from a single act of illegal immigration. See Wood, *supra* note 7, at 494. Moreover, opponents conclude, this system sends a problematic message to law abiding foreigners who patiently wait years on visa waiting lists only to watch illegal immigrants gain a slew of unfair advantages and rewards. See Hsieh, *supra* note 12, at 512–13.

²⁰ See John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over Bush v. Gore?*, 94 GEO. L.J. 1475, 1484 (2006) (“[C]ourt rulings . . . have rested on a flawed understanding of the Citizenship Clause.”); Natalie Smith, *Developments in the Legislative Branch: Bill Challenges Birthright Citizenship*, 20 GEO. IMMIGR. L.J. 325, 326 (2006) (“[T]he Fourteenth Amendment has been misapplied over the years and was never intended to grant citizenship automatically to babies of illegal immigrants.”) (citation omitted); Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, 7 STAN. L. & POL’Y REV. 127, 127 (1996) (“[F]rom a noble cause comes an unintended modern dilemma.”).

the United States and of the State wherein they reside.”²¹ The traditional interpretation of this Citizenship Clause follows a version of the *jus soli* rule of citizenship, or citizenship by right of the soil, which means that citizenship follows birth within a national territory.²² Frequently, those who claim that the clause has been severely misinterpreted believe that the mistake should be remedied either through a constitutional amendment, or through a legislative act to reinterpret the phrase “subject to the jurisdiction thereof” to exclude explicitly children born to anyone illegally present.²³

Recently, Georgia Republican Representative Nathan Deal introduced the Citizenship Reform Act of 2005, intended to revoke birthright citizenship “to children born in the U.S. to parents who are not citizens or permanent resident aliens.”²⁴ While the proposed legislation never made it out of committee, it drew the support of more than eighty cosponsors.²⁵ A similar bill proposed in 2003 was backed by Seventh Circuit Judge Richard Posner, who wrote that the current interpretation of the Citizenship Clause “makes no sense” and should be rethought by Congress.²⁶ In addition, the Federation of American Immigration Reform backed Representative Deal’s proposal, stating, “it doesn’t make any sense for people to come into the country illegally,

²¹ U.S. CONST. amend. XIV, § 1.

²² See NEUMAN, *supra* note 8, at 165. That principle is one of the three mechanisms by which a person may become a U.S. citizen. *Id.* The other two are naturalization and *jus sanguinis*, or citizenship by right of the blood, meaning that only the children of citizens may inherit citizenship at birth. See *id.* Those who oppose the *jus soli* rule support these other two mechanisms as the sole ways to become a U.S. citizen. See *id.*

²³ See Abrahms, *supra* note 8, at 489. The concept that birthright citizenship for children of illegal immigrants could be voided through mere legislative act, as opposed to a new amendment to the Constitution, originated with scholars Peter Schuck and Rogers Smith. See generally PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT* (1985).

²⁴ Citizenship Reform Act of 2005, H.R. 698, 109th Cong. (1st Sess. 2005). More specifically, the bill would amend the Immigration and Naturalization Act (INA) to limit the grant of automatic citizenship at birth to children who are born in wedlock where at least one parent is a U.S. citizen or lawful permanent resident, or born out of wedlock to a mother who is a U.S. citizen or lawful permanent resident. *Id.*; Smith, *supra* note 20, at 325. By no means is this the first proposed legislation of this kind. See, e.g., H.R.J. Res. 396, 103d Cong. (2d Sess. 1994) (proposing an amendment to the Constitution to provide that no person born in the United States will be a citizen on account of birth unless a parent is a citizen); H.R.J. Res. 117, 103d Cong. (1st Sess. 1993) (proposing an amendment to the Constitution to restrict the requirement of citizenship by virtue of birth in the United States to persons with a legal resident mother or father).

²⁵ See Smith, *supra* note 20, at 325.

²⁶ See *Oforji v. Ashcroft*, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring); Citizenship Reform Act of 2003, H.R. 1567, 108th Cong. (1st Sess. 2003).

give birth and have a new U.S. citizen.”²⁷ Moreover, Americans across the country articulate their fervent support for such a change, claiming that “[b]ecoming a U.S. citizen should require more than your mother successfully sneaking past the U.S. Border Patrol.”²⁸ These views have become so popular, in fact, that Representative Ron Paul advocated absolute termination of birthright citizenship during his 2008 presidential campaign.²⁹

Even the most zealous revisionists recognize, however, that such proposals are unlikely to succeed because “advocates for illegal immigrants will make a fuss . . . [claiming] you’re punishing the children.”³⁰ While it is true that effectuating either new legislation or a new amendment remains unlikely, such insinuations miss the crux of the debate.³¹ At issue is an understanding of the fundamental purpose of the Citizenship Clause of the Fourteenth Amendment and whether it remains legitimate today.³²

This note will confront the arguments in favor of denying birthright citizenship to the children of undocumented immigrants born in the United States.³³ Part I discusses the historical underpinnings of the

²⁷ See “Birthright Citizenship” Debate Set to Begin, MSNBC, Dec. 26, 2005, <http://www.msnbc.msn.com/id/10609068/> [hereinafter *Birthright Debate*].

²⁸ E.g., Daniel John Sobieski, *Being Born in the U.S. Doesn’t Make a Citizen*, CHI. TRIB., Jan. 8, 2006, at 8.

²⁹ See Ron Paul, Ron Paul 2008, *Issue: Border Security and Immigration Reform*, <http://www.ronpaul2008.com/issues/border-security-and-immigration-reform/> (last visited Mar. 1, 2008). Along with Representative Ron Paul, former Governor Mitt Romney stated that he would “end ‘chain migration’” if he were to become president. See Editorial, *The Candidates and Illegal Immigration*, WASH. TIMES, Jan. 2, 2008, at A12.

³⁰ See *Birthright Debate*, *supra* note 27.

³¹ See NEUMAN, *supra* note 8, at 166.

³² *Id.*

³³ In the main text, this note will refer to 8 U.S.C. §§ 1101–1537 by its popular name, the Immigration and Nationality Act (INA). Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2000). In the footnotes, this note will provide citations to both the INA section numbers and the United States Code section numbers. This note is limited to the discussion of citizenship given automatically to the children of illegal immigrants. The term “illegal” refers to those who cross the U.S. border without gaining legal admission through inspection as defined in the INA, and those who stay beyond the expiration of their visa, rendering them undocumented and inadmissible. INA § 2212(a), 245(a), 8 U.S.C.A. §§ 1182(a), 1255(a) (West 2007). In addition, the term “immigrant” refers to those who intend to reside in the country permanently, as opposed to “nonimmigrants” who intend to stay only temporarily and must prove so in order to obtain a visa. INA § 101(a)(15), 8 U.S.C.A. § 1101(a)(15).

Furthermore, although this note seeks to interpret the Citizenship Clause of the Fourteenth Amendment, it will not discuss several significant issues that contributed to the formation of the Clause, including: state sovereignty over citizenship, substantive rights provided by the privileges and immunities clause, violation of or conformity with interna-

Fourteenth Amendment, providing a contextual understanding of citizenship in the nineteenth century. Part II explores the Framers' intentions behind the construction of the Citizenship Clause, demonstrating that the current interpretation is not a mistake. Part III identifies the common themes among failed American movements that resisted applying the Clause to non-whites; it uncovers how these themes parallel arguments currently made against the children of illegal immigrants, showing that contemporary resistance efforts are as inconsistent with the purpose of the Clause as their historical counterparts. Part IV details the reality of chain migration and the provisions of the Immigration and Nationality Act (INA) which prevent birthright citizenship from becoming the enormous loophole opponents portray it to be. Finally, this note concludes that singling out children of undocumented immigrants as scapegoats for the serious problems caused by illegal immigration is a violation of the most fundamental purpose of the Fourteenth Amendment, that "no hereditary caste of exploitable denizens should be created."³⁴

I. HISTORICAL UNDERPINNINGS OF THE FOURTEENTH AMENDMENT'S CITIZENSHIP CLAUSE

A. *Developing Notions of American Citizenship*

The *jus soli* principle of citizenship embodied in the Fourteenth Amendment's citizenship clause has roots reaching back to early seventeenth century English common law.³⁵ These roots are significant because the early U.S. Supreme Court relied on them to interpret the constitutional meaning of "citizenship" in the absence of a constitu-

tional law, and children's rights. For discussion of these significant issues, see Hsieh, *supra* note 12, at 522 (contrasting U.S. citizenship policy to that of other countries); Shulman, *supra* note 1, at 696-710 (explaining history of children's rights and presumption against corruption of blood principle); Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 802-04 (1997) (discussing Citizenship Clause's affect on privileges and immunities); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 309-16 (2001) (examining intention of Citizenship Clause to establish federal citizenship paramount to state citizenship).

³⁴ See NEUMAN, *supra* note 8, at 166; Michael Gunlicks, Note, *Citizenship as a Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States*, 63 GEO. WASH. L. REV. 551, 583 (1995).

³⁵ See Calvin v. Smith (*Calvin's Case*), 77 Eng. Rep. 377, 409 (K.B. 1608); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 73 (1997); Bernadette Meyler, Note, *The Gestation of Birthright Citizenship, 1868-1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 526 (2001).

tional definition.³⁶ In particular, these conventions were drawn from Sir Edward Coke's report on *Calvin's Case*.³⁷ The main issue in the case was whether Calvin, a man born in Scotland after Scotland and England had been combined under King James' sovereignty, should be considered an alien; if so, he would be prohibited from inheriting land or bringing suit in England.³⁸

Both arguments for and against Calvin's subjecthood centered on his allegiance to the King.³⁹ Calvin's opposition argued that his allegiance was necessarily divided between King James' two separate bodies politic—England and Scotland.⁴⁰ In contrast, Coke found that the law of nature deemed Calvin a native because he had been born under King James' natural body, ruling over both England and Scotland simultaneously.⁴¹ Furthermore, Coke reasoned that in exchange for allegiance, King James had a reciprocal obligation to protect Calvin's rights as he would for any subject born within his domain.⁴² *Calvin's Case* thus established the *jus soli* precedent, whereby birth within the territory constituted subjecthood along with the legal protections accompanying that status.⁴³ Debated extensively in the U.S. Supreme Court and nu-

³⁶ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872) ("No such definition [of citizenship] was previously found in the Constitution, nor had any attempt been made to define it by act of Congress."); Jonathan Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 683–84 (1995); Smith, *supra* note 33, at 691; Meyler, *supra* note 35, at 526.

³⁷ See *Calvin's Case*, 77 Eng. Rep. at 409; Price, *supra* note 35, at 74; Meyler, *supra* note 35, at 526. Sir Edward Coke was one of the judges deciding *Calvin's Case*, and his report became one of the most significant English common law decisions in early American jurisprudence. See Price, *supra* note 35, at 74, 83.

³⁸ See *Calvin's Case*, 77 Eng. Rep. at 405–06; Price, *supra* note 35, at 73; Meyler, *supra* note 35, at 527 & n.52.

³⁹ See *Calvin's Case*, 77 Eng. Rep. at 377, 380, 389–89, 391; Price, *supra* note 35, at 82–83; Meyler, *supra* note 35, at 527.

⁴⁰ See *Calvin's Case*, 77 Eng. Rep. at 380; Price, *supra* note 35, at 82; Meyler, *supra* note 35, at 527.

⁴¹ See *Calvin's Case*, 77 Eng. Rep. at 377, 388–89, 391; Price, *supra* note 35, at 113–17; Meyler, *supra* note 35, at 527.

⁴² See *Calvin's Case*, 77 Eng. Rep. at 389; Price, *supra* note 35, at 114; Meyler, *supra* note 35, at 527–28.

⁴³ See Meyler, *supra* note 35, at 528. However, natural allegiance and *jus soli* were not exactly synonymous: "[I]f alien armies should occupy English soil, their children would not be under the protection of the king and would not be subjects." Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485, 487 (1987) (reviewing SCHUCK & SMITH, *supra* note 23). Furthermore, the king's protection would extend to children born to his ambassadors while abroad. *Id.*

merous federal and state courts, *Calvin's Case* became American law in *Lynch v. Clarke*.⁴⁴

Some scholars contend that the American notion of citizenship was not only formed by this traditional *ascription*, in which objective characteristics of individuals result in their assignment of a polity, but also a second tradition of citizenship by *consent*, in which assignment of a polity depends on a mutual and voluntary consent between both the individual and the polity.⁴⁵ This concept of consent may be more dangerous than it sounds, though, considering that the state could potentially abuse its power by withholding or withdrawing consent arbitrarily.⁴⁶ Although American citizenship law largely followed the ascriptive common law tradition, the failure of the Constitution to define citizenship opened the door to potential abuse of the consensual interpretation realized by the infamous *Dred Scott* decision in 1857.⁴⁷

B. *Dred Scott v. Sandford: A Caste System of Hereditary Citizenship*

In *Dred Scott*, the Supreme Court held that emancipated African Americans were not, and could not, become citizens of the United States, despite having been born on U.S. soil.⁴⁸ Born in Missouri, Dred Scott was a slave who was temporarily brought by his master to Illinois, a free state, and was then returned to Missouri.⁴⁹ Embracing the consensual conception of citizenship, Chief Justice Roger B. Taney found that the country had never consented to the inclusion of free African Americans, who were considered "property of a master," into the national political community.⁵⁰ Taney deviated dramatically from the ascriptive

⁴⁴ 1 Sand. Ch. 583 (N.Y. Ch. 1844) (finding federal common law that plaintiff's birth in United States made him a "natural born citizen," entitled to inherit land); see, e.g., *Dawson's Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321, 323 (1808) (reaffirming common law right to inherit land based on obligation of allegiance at birth).

⁴⁵ See Neuman, *supra* note 43, at 486, 487. See generally SCHUCK & SMITH, *supra* note 23. Schuck and Smith emphasized John Locke's theory that members of the self-governing national community were bound to each other by compact, meaning that citizenship depended on the explicit or tacit consent of adult individuals. See SCHUCK & SMITH, *supra* note 23, at 25–26; Drimmer, *supra* note 36, at 685; Neuman, *supra* note 43, at 487.

⁴⁶ SCHUCK & SMITH, *supra* note 23, at 37; Neuman, *supra* note 43, at 487.

⁴⁷ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857); Neuman, *supra* note 43, at 488, 491.

⁴⁸ See *Dred Scott*, 60 U.S. at 404; see Smith, *supra* note 33, at 757, 771. For a detailed analysis of the *Dred Scott* decision, see KARST, *supra* note 1, at 43–49; Smith, *supra* note 33, at 757–92.

⁴⁹ *Dred Scott*, 60 U.S. at 397.

⁵⁰ *Id.* at 476 (Daniel, J., concurring). In his concurring opinion, Justice Daniel wrote, "[A] slave, the *peculium* or property of a master, and possessing within himself no civil nor political rights or capacities, cannot be a CITIZEN." *Id.*; see SCHUCK & SMITH, *supra* note

common law tradition, where mere birth within the territory of the sovereign established citizenship without regard for parental lineage.⁵¹

Instead, Taney reasoned that the Framers of the Constitution formed a *closed community* in which membership was restricted to descendants of the founders, and that the colonial community had regarded African Americans “as beings of an inferior order, and altogether unfit to associate with the white race.”⁵² Thus, the Court ruled that citizenship depended more on genealogy than place of birth or even allegiance.⁵³ By providing no means by which a free African American could gain citizenship status, this ruling made American citizenship an exclusive club for whites.⁵⁴ It effectively created a constitutionally mandated racial caste system within the United States.⁵⁵

II. OVERCOMING *DRED SCOTT*: INTENTIONS BEHIND THE CITIZENSHIP CLAUSE

The Citizenship Clause, section one of the Fourteenth Amendment, is widely recognized as a response to *Dred Scott*'s decree that free African Americans were not and could not become citizens without a constitutional amendment.⁵⁶ However, before the Fourteenth Amendment, Congress tried and failed twice to confer certain basic rights upon free African Americans; the first attempt was the Thirteenth Amendment, and the second was the Civil Rights Act of 1866.⁵⁷

Taking effect in December 1865, the Thirteenth Amendment proved inadequate because it merely prohibited slavery, but did not provide any protected status based solely on being free.⁵⁸ Most notably, it did not prevent states from inventing an intermediate status between slavery and full citizenship specifically intended to deprive African Americans of fundamental civil capacities considered inherent in

23, at 72; Drimmer, *supra* note 36, at 692; Smith, *supra* note 33, at 758–60, 774; Neuman, *supra* note 43, at 488.

⁵¹ See SCHUCK & SMITH, *supra* note 23, at 72; Neuman, *supra* note 43, at 488; Drimmer, *supra* note 36, at 692.

⁵² *Dred Scott*, 60 U.S. at 407; see KARST, *supra* note 1, at 44; Drimmer, *supra* note 36, at 692, 693.

⁵³ See *Dred Scott*, 60 U.S. at 407; Drimmer, *supra* note 36, at 693.

⁵⁴ See Smith, *supra* note 33, at 795; Neuman, *supra* note 43, at 488.

⁵⁵ Smith, *supra* note 33, at 795.

⁵⁶ See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857); Smith, *supra* note 33, at 792.

⁵⁷ See U.S. CONST. amend. XIII; CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866); Smith, *supra* note 33, at 792.

⁵⁸ U.S. CONST. amend. XIII; KARST, *supra* note 1, at 50; Smith, *supra* note 33, at 793.

citizenship.⁵⁹ Therefore, in response to the Thirteenth Amendment, eight southern states passed their own “Black Codes,” reaffirming the very caste system that the Thirteenth Amendment attempted to abolish.⁶⁰ These Black Codes deprived free African Americans of many of the rights inherent in citizenship, such as the right to move, contract, own property, assemble, speak freely, and bear arms.⁶¹

Consequently, the Civil Rights Act of 1866 was designed to abolish this new racial caste by conferring citizenship upon free African Americans through legislation.⁶² However, under the social compact model of citizenship articulated by the *Dred Scott* Court, membership in a political community was based on mutual consent.⁶³ Therefore, mere legislation to include African Americans in the polity would be insufficient because it lacked the consent of the whole people.⁶⁴ Ultimately, it became apparent that a new constitutional amendment would be necessary to grant citizenship status to African Americans, to restore the common law tradition of ascriptive, birthright citizenship, and to eliminate racial caste systems in southern states.⁶⁵

A. *Competing Interpretations of the Citizenship Clause*

The primary purpose of the Fourteenth Amendment’s Citizenship Clause was to overturn the caste systems imposed by *Dred Scott* and the Black Codes by providing a firm constitutional foundation for the citizenship of African Americans born in the United States.⁶⁶ Beyond this primary goal, however, the broader intentions of the Amendment’s Framers were varied and complicated.⁶⁷ Upon first glance, the follow-

⁵⁹ See Smith, *supra* note 33, at 795.

⁶⁰ See KARST, *supra* note 1, at 50; Smith, *supra* note 33, at 797. For a more detailed description of the Black Codes and the intentions behind them, see Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473, 480–82 (2002).

⁶¹ Smith, *supra* note 33, at 797 n.384; see Román, *supra* note 11, at 574 n.99. The Black Codes combined vagrancy laws with a convict-lease system, which assured that former slaves would remain laborers for plantation owners. KARST, *supra* note 1, at 50.

⁶² Civil Rights Act, 14 Stat. 27 (1866) (codified in U.S. CONST. amend. XIV, § 1); KARST, *supra* note 1, at 50; Smith, *supra* note 33, at 792.

⁶³ Smith, *supra* note 33, at 792–93; see *Dred Scott*, 60 U.S. (19 How.) at 426.

⁶⁴ Smith, *supra* note 33, at 793. Much of the senate debate over the Civil Rights Act of 1866 dealt with whether Congress had the authority to pass a bill conferring citizenship on free African Americans or if defining citizenship required a constitutional amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 474, 497 (1866).

⁶⁵ See Drimmer, *supra* note 36, at 695–96; Smith, *supra* note 33, at 793, 797.

⁶⁶ See NEUMAN, *supra* note 8, at 167; Smith, *supra* note 33, at 797.

⁶⁷ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).

ing sentence may seem clearly applicable to anyone born in the United 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.”⁶⁸ Claiming otherwise, though, many scholars assert that the phrase “subject to the jurisdiction thereof” functions as a strict limit on those who may receive birthright citizenship.⁶⁹ This controversy turns on one question: who is born in the United States but *not* subject to the jurisdiction thereof?⁷⁰

1. Subject to the *Complete* Jurisdiction Thereof: Arguments of Opponents of Broad Birthright Citizenship

Many of those who oppose the current interpretation of the Citizenship Clause insist that the phrase “subject to the jurisdiction thereof” is based on the concept of *exclusive allegiance*.⁷¹ Opponents make their case by citing one of the principle authors of the clause, Illinois Senator Lyman Trumbull as he explained the purpose and meaning of his text during the senate debates of both the 1866 Civil Rights Act and the Fourteenth Amendment.⁷²

During the Civil Rights Act debates Trumbull defended his text, which read, “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby to be declared citizens of the United States”⁷³ Before Trumbull added the phrase “excluding Indians not taxed” to the 1866 Act, he faced intense questioning from fearful Kentucky and Kansas senators regarding whether Native Americans would be included in the citizenship legislation.⁷⁴ Forced to detail the explicit purpose of his text and who it was meant to exclude, Trumbull stated,

[My desire] is to make citizens of everybody born in the United States who owe allegiance to the United States. We cannot make a citizen of the child of a foreign minister who is

⁶⁸ U.S. CONST. amend. XIV, § 1.

⁶⁹ See Eastman, *supra* note 20, at 1485; Abrahms, *supra* note 8, at 477.

⁷⁰ Eisgruber, *supra* note 17, at 63.

⁷¹ See Abrahms, *supra* note 8, at 479.

⁷² CONG. GLOBE, 39th Cong., 1st Sess. 572, 2893 (1866); Wood, *supra* note 7, at 509; Abrahms, *supra* note 8, at 479. Because the text of the Fourteenth Amendment was derived from the 1866 Act, many look to the 1866 Act in order to shed light on the final text of the Amendment. See Abrahms, *supra* note 8, at 480.

⁷³ Civil Rights Act, 14 Stat. 27 (1866) (codified in U.S. CONST. amend. XIV, § 1); see Abrahms, *supra* note 8, at 478.

⁷⁴ CONG. GLOBE, 39th Cong., 1st Sess. 498, 504, 525–27 (1866).

temporarily residing here. There is a difficulty in framing the amendment so as to make citizens of all the people born in the United States and [only those] who owe allegiance to it. . . . [A] sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens⁷⁵

The senator went on to explain that, “[t]he term ‘Indians not taxed’ means Indians not counted in our enumeration of the people of the United States,” in fact he agreed that they should be “considered virtually as foreigners.”⁷⁶ Opponents use this language to claim five basic points, all of which, they allege, would yield the exclusion of the children of today’s undocumented immigrants.⁷⁷

First, the text manifests the importance of allegiance and that being born within the borders is necessary but not sufficient for citizenship.⁷⁸ To owe the requisite allegiance, as described in *Calvin’s Case*, there must be an exclusive connection between the individual and the nation, where subjects exchange their allegiance and obedience for the protection of the sovereign.⁷⁹ Opponents interpret this allegiance exchange as mandating that “a person had to be born under the protection and control of the Crown and, at the time and place of birth, the sovereign had to be ‘in full possession and exercise’ of its power.”⁸⁰ Therefore, they reason, Trumbull must have relied on a consensual view of allegiance, dependent on the will of the community as well as the will of the people.⁸¹ Any abstract language, opponents assert, should be interpreted consistently with the principles of this version of underlying common law.⁸²

⁷⁵ *Id.* at 572.

⁷⁶ *Id.*

⁷⁷ See Abrahms, *supra* note 8, at 480. For the most part, systematic and quantitative restrictions on immigration did not exist before 1875. See NEUMAN, *supra* note 8, at 19–20. Therefore, no comprehensive parallel can be drawn between the contemporary concept of an “illegal immigrant” and any term used to describe “foreigners” or even “aliens” by the framers of the Fourteenth Amendment. See generally CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). Frequently, opponents will cite this “open borders” myth as evidence that illegal immigrants could not have been included in the Citizenship Clause’s automatic grant of birthright citizenship because they did not exist at the time. See Abrahms, *supra* note 8, at 477.

⁷⁸ Wood, *supra* note 7, at 510; Abrahms, *supra* note 8, at 479.

⁷⁹ See *Calvin v. Smith (Calvin’s Case)*, 77 Eng. Rep. 377, 409 (K.B. 1608); Wood, *supra* note 7, at 505.

⁸⁰ *Id.*

⁸¹ See *id.*; Abrahms, *supra* note 8, at 480.

⁸² See Wood, *supra* note 7, at 506–07.

Second, Trumbull articulated the difficulty he faced in framing the clause such that all of the people who are born here but who do not owe any allegiance would be excluded.⁸³ Opponents claim that this explains why he later changed the text to more abstract language in the Fourteenth Amendment, but did not change his intent to include only those with exclusive allegiance.⁸⁴

Third, Trumbull clearly rejected any form of common law allegiance established by temporary residents.⁸⁵ In *Calvin's Case*, Coke actually provided citizenship for temporary sojourners who are born in the territory.⁸⁶ Trumbull understood this, and for that reason, he explicitly chose not to state that all those "who owe allegiance" would be born U.S. citizens.⁸⁷ Therefore, the text he selected was specifically intended to exclude temporary residents from any allegiance the common law would have otherwise assumed.⁸⁸

Fourth, Trumbull justified his exclusion of Native Americans by emphasizing that they were technically not part of the population, not included in the census, and not intended parties of the original Constitution's vision of "people of the United States."⁸⁹ Trumbull later explained that Native Americans could only become citizens if they separated from their tribes.⁹⁰ In so separating, he reasoned, Native Americans integrate into American communities and thereby came within the jurisdiction of the United States, "so as to be counted."⁹¹

Finally, Trumbull specified that Native Americans could be considered "virtually as foreigners," which means that they did not come within the jurisdiction of the Citizenship Clause.⁹² Trumbull explained

⁸³ See Abrahms, *supra* note 8, at 480.

⁸⁴ See Eastman, *supra* note 20, at 1486. In fact, during the Fourteenth Amendment debates, Trumbull explained the congruence between the phrase "subject to the jurisdiction thereof" in the Fourteenth Amendment and the phrase "not subject to any foreign power" in the 1866 Act. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866). He asserted that "subject to the jurisdiction thereof" meant, "[n]ot owing allegiance to anybody else . . . subject to the complete jurisdiction of the United States." *Id.* (emphasis added). Factors that removed Native Americans from the complete jurisdiction of the United States included: (1) they could not be sued in court, (2) the United States made treaties with them, (3) they were not taxed, and (4) the United States did not punish crimes committed by one Native American on another. *See id.*

⁸⁵ Abrahms, *supra* note 8, at 480.

⁸⁶ *Calvin's Case*, 77 Eng. Rep. at 377; Meyler, *supra* note 35, at 528.

⁸⁷ CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866).

⁸⁸ *See id.*; Abrahms, *supra* note 8, at 480.

⁸⁹ CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866); Abrahms, *supra* note 8, at 480.

⁹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866).

⁹¹ *Id.*

⁹² *Id.*; see Abrahms, *supra* note 8, at 480.

that belonging to a foreign government, as the Native Americans remaining in their tribes did, should be an obvious bar to U.S. citizenship.⁹³

Many opponents of the current interpretation of birthright citizenship assert that an extension of these five principles to contemporary illegal immigrants would render them outside the intended jurisdiction of the Citizenship Clause as articulated by Trumbull.⁹⁴ First, illegal immigrants lack the consent of the nation to protect them in exchange for their allegiance.⁹⁵ In addition, the children of illegal immigrants are not born "within the allegiance" required by English common law because their unlawful presence manifests constant disobedience to the State, which is a determining factor.⁹⁶ Second, although a broad reading of the jurisdiction requirement in the Citizenship Clause might arguably include illegal immigrants, Trumbull stated that his exact intentions were otherwise, but that he simply had trouble framing it explicitly.⁹⁷ Third, Trumbull's overt exclusion of temporary residents would likely exclude illegal aliens, "as at best they are temporarily in the United States until the I.N.S. discovers their illegal presence and excludes them."⁹⁸ Fourth, just as Native Americans were excluded because they were not counted in the census and not "regarded as part of our people," neither are illegal immigrants.⁹⁹ Finally, Trumbull's most obvious example of a person outside the jurisdiction is one who is virtually a foreigner; an illegal immigrant is nothing if not a foreigner.¹⁰⁰ Therefore, although the framers of the Citizenship Clause could not have contemplated the application of birthright citizenship to the children of illegal

⁹³ CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866).

⁹⁴ See Abrahms, *supra* note 8, at 480.

⁹⁵ See *id.*

⁹⁶ Wood, *supra* note 7, at 507.

⁹⁷ See Abrahms, *supra* note 8, at 480.

⁹⁸ *Id.* Scholars have questioned this basic assumption of temporary presence, noting the relative stability of the undocumented immigrant population in the United States. See, e.g., David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 52, 65-66 (2005) (noting "a more permanent pattern of settlement for undocumented immigrants").

⁹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866); Abrahms, *supra* note 8, at 480. Today, undocumented immigrants are counted by the U.S. Census Bureau. See U.S. CENSUS BUREAU, POPULATION DIVISION, CENSUS 2000, PROFILE OF SELECTED DEMOGRAPHIC AND SOCIAL CHARACTERISTICS FOR THE NON-U.S. CITIZEN POPULATION tbl.FBP-1, <http://www.census.gov/population/cen2000/stp-159/noncitizen.pdf> (last visited, Mar. 1, 2008). The Bureau attempts to count every person residing in the country, including "people born outside the U.S. who have not been conferred U.S. citizenship, such as lawful permanent residents, students, refugees, and people illegally present in the United States." See *id.*

¹⁰⁰ Abrahms, *supra* note 8, at 480.

immigrants, opponents believe that the legislative history shows that they never would have intended to provide such a loophole.¹⁰¹

2. Subject to *the Laws of* the Jurisdiction Thereof: Arguments of Proponents of Broad Birthright Citizenship

Despite the rationale of birthright citizenship opponents, those who support the validity of the current interpretation minimize these specific points and emphasize instead the plain meaning of the phrase “subject to the jurisdiction thereof,” within the context of different passages from the same legislative history.¹⁰² Proponents claim that within that clause, the word “jurisdiction” retains its natural reading of “actual subjection to the lawmaking power of the state.”¹⁰³ This does not reduce the phrase to mere redundancy, because it excludes those people who fell under common law exceptions of immunity to U.S. law.¹⁰⁴ Most notably, this language describes children born to foreign diplomats, who have always enjoyed diplomatic immunity, and children born to parents accompanying an invading army, who receive enemy combatant immunity.¹⁰⁵

Moreover, proponents claim that this more natural interpretation explains the confusion of many senators over the inclusion of some Native Americans.¹⁰⁶ Because no common law exception existed that would incorporate the unique situation of Native Americans living under tribal quasi-sovereignty, the framers struggled to invent a new definition under which some Native Americans would be included and others excluded.¹⁰⁷

Proponents find support in the words of Trumbull’s co-author, Michigan Senator Jacob Howard, who stated,

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

¹⁰¹ See *id.* at 477.

¹⁰² See NEUMAN, *supra* note 8, at 171–72.

¹⁰³ *Id.* at 172.

¹⁰⁴ *Id.* at 171; James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2d 367, 369 (2006).

¹⁰⁵ See NEUMAN, *supra* note 8, at 171; Ho, *supra* note 104, at 369. These were the two common law exceptions for aliens closely aligned with a foreign government when the Fourteenth Amendment was adopted. NEUMAN, *supra* note 8, at 171.

¹⁰⁶ See NEUMAN, *supra* note 8, at 171–72.

¹⁰⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

their jurisdiction, is by virtue of natural law and national law a citizen of the United States.¹⁰⁸

Proponents assert that this statement manifests that the best interpretation of the Citizenship Clause is one that applies basic common law exceptions and the plain meaning of the word "jurisdiction."¹⁰⁹ They reason that such an interpretation is the only way to grasp what the framers would have considered "the law of the land already."¹¹⁰

Furthermore, proponents claim that the opponents' 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.¹¹¹ For example, immediately after the text cited above, Howard explained, "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 persons."¹¹² By omitting the italicized text, opponents have alleged that foreigners and aliens were never meant to be included.¹¹³ Proponents, on the other hand, emphasize the importance of the italicized text as obvious clarification of whom Howard considered to be a foreigner or alien.¹¹⁴

Finally, one of the proponents' strongest arguments gives meaning to the portion of the debates where the senators argue over whether birthright citizenship should include the children of Chinese immigrants and Gypsies.¹¹⁵ During both the debates on the Civil Rights Act and the Fourteenth Amendment, Pennsylvania Senator Edgar Cowan spearheaded efforts to exclude both groups, the Chinese immigrants who he believed were overrunning California, and the gangs of Gypsies he regarded as infesting his state.¹¹⁶ In both scenarios, Cowan was confronted by other senators who explicitly told him that these immigrant children would be included in the grant of citizenship.¹¹⁷ Ultimately, considering that the overarching goal of the legislation and the

¹⁰⁸ *Id.* at 2890 (emphasis added); see NEUMAN, *supra* note 8, at 171.

¹⁰⁹ See NEUMAN, *supra* note 8, at 171.

¹¹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866); see NEUMAN, *supra* note 8, at 171.

¹¹¹ See Ho, *supra* note 104, at 372.

¹¹² CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (emphasis added).

¹¹³ See Abrahms, *supra* note 8, at 481.

¹¹⁴ See Ho, *supra* note 104, at 372.

¹¹⁵ See *id.*

¹¹⁶ CONG. GLOBE, 39th Cong., 1st Sess. 498, 2890-91 (1866).

¹¹⁷ *Id.* For example, during the Civil Rights Act debates, Cowan asked, "whether [the Act] will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?" *Id.* at 489. Trumbull responded with one word: "Undoubtedly." *Id.*

amendment was to abolish the racial caste of *Dred Scott* and the Black Codes, proponents argue that only a more inclusive, ascriptive definition of citizenship can be consistent.¹¹⁸

B. *Resolving the Controversy*

The flaw in both sides of the contemporary version of this debate is that many have felt driven to make broad assertions that the legislative history clearly and unquestionably weighs in their favor.¹¹⁹ Although this results-based investigation may seem convincing, it reveals weaknesses in both arguments as neither is willing to concede that the senators who drafted and voted on each phrase of the text were, in fact, confused.¹²⁰

Indeed, it is actually through this confusion that we may best understand underlying principles often missed in narrowly tailored inquiries that seek only to find references to “foreigners” or “aliens.”¹²¹ Such inquiries overlook three major points: (1) both theories of citizenship existed among the framers of the Fourteenth Amendment, (2) the consensualist theory was plagued by racism and xenophobia, and (3) the framers’ tactical decisions to reject certain language manifests overarching principles in line with abolishing the *Dred Scott* decision’s racial caste system.¹²²

First, during the debates, the senators explicitly articulated both theories of citizenship.¹²³ Disagreement over these theories existed

¹¹⁸ See NEUMAN, *supra* note 8, at 172.

¹¹⁹ See, e.g., HO, *supra* note 104, at 374 (“History confirms that the Citizenship Clause applies to the children of aliens.”); Abrahms, *supra* note 8, at 477 (“[T]he historical background of both the 1866 Civil Rights Bill and the Fourteenth Amendment is unambiguous and the debates make intentions clear. The essential limiting principle that was discernable from the debates was consensualist in nature, mandating that citizenship required the existence of conditions indicating mutual consent to political membership, in addition to being born in the United States.”).

¹²⁰ See CONG GLOBE, 39th Cong., 1st Sess. 2894 (1866). Moreover, academic scholars at the time were also confused about how to interpret the terms and the intentions of the drafters. Compare George D. Collins, *Citizenship by Birth*, 29 AM. L. REV. 385, 386 (1895) (“upon birth alone . . . citizenship can never be predicated”), with Henry C. Ide, *Citizenship by Birth—Another View*, 30 AM. L. REV. 241, 242 (1896) (“[A]ll persons (generally speaking, not including children of foreign ministers, etc.) born within the United States . . . were citizens of this country . . . both before and after the adoption of the Fourteenth Amendment to the constitution.”).

¹²¹ See Abrahms, *supra* note 8, at 481.

¹²² See CONG GLOBE, 39th Cong., 1st Sess. 498, 2890–91, 2897 (1866).

¹²³ See *id.* at 2897.

even among those who voted in favor of the language selected.¹²⁴ This disagreement has allowed both proponents and opponents of the current interpretation of the Citizenship Clause to find legislative history conveniently replete with examples of ascriptive and consensual theories of citizenship, respectively.¹²⁵ However, neither may be considered necessarily wrong because both theories existed among the framers of the Fourteenth Amendment.¹²⁶

Second, although the theory of consent and exclusive allegiance is articulated throughout the legislative history, it is a mistake to ignore the theory's explicitly racist and xenophobic justifications, which are embarrassing and repugnant in today's society.¹²⁷ Afraid of granting citizenship to the children of Gypsies and Chinese immigrants, Cowan

¹²⁴ See *id.* The prime example of this occurs at the end of the May thirtieth debate over the constitutional amendment. See *id.* After extensive debate, two senators who both voted to omit the phrase "excluding Indians not taxed" from the text of the Amendment offered contradictory explanations just before the vote was held. See *id.* Oregon Senator George Williams explained,

I think it is perfectly clear In one sense, all persons born within the geographical limits of the United States are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense. . . . I understand the words here, "subject to the jurisdiction of the United States," to mean fully and completely subject to the jurisdiction of the United States. . . . [I]n any court or by any intelligent person, these two sections [of the Fourteenth Amendment] would be construed not to include Indians not taxed, I do not think the amendment is necessary.

Id. Williams' version aligns with consensualist theories, emphasizing the concept of full and complete jurisdiction as requiring something more than mere birth within the borders. See *id.*; Abrahms, *supra* note 8, at 480. However, immediately juxtaposed against Williams' explanation is that of Delaware Senator Willard Saulsbury:

I do not presume that any one will pretend to disguise the fact that the object of this first section is simply to declare that negroes shall be citizens of the United States. . . . I feel disposed to vote against [the addition of the phrase "excluding Indians not taxed"] because if these negroes are to be made citizens of the United States, I can see no reason in justice or in right why the Indians should not be made citizens.

CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866). Saulsbury's rationale highlights basic tenets of the ascriptive theory of citizenship, that beyond the existing common law exceptions, there is no justification for differentiating among people born in the territory. See *id.*; NEUMAN, *supra* note 8, at 172. Both senators voted to reject the phrase "Indians not taxed" from the constitutional amendment. CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).

¹²⁵ See Ho, *supra* note 104, at 374; Abrahms *supra* note 8, at 477.

¹²⁶ See Eastman, *supra* note 20, at 1484.

¹²⁷ See Shulman, *supra* note 1, at 685; Abrahms, *supra* note 8, at 480 ("[T]he limitations [on birthright citizenship] are not racist but philosophical.").

argued against their inclusion at every turn.¹²⁸ A number of other senators employed similar racially charged arguments throughout the debates in blatant attempts to draw the arbitrary line of allegiance in a manner that would exclude the particular group of outsiders present in his state.¹²⁹ Although analyzing these perspectives sheds light on some of the framers' consensualist theory of citizenship, there can be no doubt that these perspectives fail to achieve the primary purpose of the Citizenship Clause: to eliminate systems of racial caste.¹³⁰

Lastly, some of the most instructive elements of the legislative history are the texts that the framers explicitly rejected as mechanisms of ascertaining their primary goal.¹³¹ Two of these significant rejections

¹²⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866).

Is the child of the Chinese immigrant . . . [or] of a Gypsy born in Pennsylvania a citizen? . . . He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptance of the word.

.....

. . . It is utterly and totally impossible to mingle all the various families of men, from the lowest form of the Hottentot up to the highest Caucasian, in the same society.

.....

. . . I am as liberal as anybody toward the rights of all people, but I am unwilling [to give up the State's right] . . . of expelling a certain number of people who invade her borders; who owe to her 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

.....

Id. Throughout this passage and others, Cowan continues to insist that the influx of Chinese immigrants will end the republican government in California. *Id.* at 499.

The term "Hottentots" was first used by European settlers to refer to the Khoikhoi, an South African tribe of cattle herders. See Tamara Rice Lave, Note, *A Nation at Prayer; A Nation in Hate: Apartheid in South Africa*, 30 STAN. J. INT'L L. 483, 488 n.34 (1994). In general, European settlers believed that the African Hottentot symbolized the lowest, most savage type of human being possible, ranking only slightly above the highest nonhuman animal. See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1734 (1996); Derek W. St.Pierre, Note, *The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255, 264 (1998).

¹²⁹ See CONG. GLOBE, 39th Cong., 1st Sess. 506, 526, 528–29 (1866). For example, California Senator John Conness sought to exclude the "Digger Indians," whom he considered "the lowest class known of Indians, and utterly and totally unfit to become citizens;" Kentucky Senator Garrett Davis sought to make the United States "a close white corporation," open only to Europeans because the Government was formed with the interests of only their ancestors in mind; Kansas Senator James Lane was even laughed at by the other senators because his racial bias against the inclusion of Native Americans was so blatant. See *id.*

¹³⁰ See Smith, *supra* note 33, at 795.

¹³¹ See CONG. GLOBE, 39th Cong., 1st Sess. 498, 2896 (1866).

included a phrase that would have limited the Amendment's grant of automatic citizenship solely to African Americans, and a clause that would have conferred on Congress the power to define the criteria for national citizenship.¹³²

Originally, Trumbull's 1866 Act read, "[t]hat all persons of African descent born in the United States are hereby declared to be citizens of the United States"¹³³ In an effort ostensibly to subvert the Bill, West Virginia Senator Paul Van Winkle attacked that language because it confined citizenship exclusively to African Americans.¹³⁴ Presumably, Van Winkle invoked the image of white Americans sharing their citizenship rights with hordes of "inferior races," who "could only tend to the deterioration of the mass" in order to garner opposition to the legislation.¹³⁵

However, Trumbull's reaction was likely unexpected: he immediately asked to withdraw his previous amendment and replace it with the words, "All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color."¹³⁶ This dramatic maneuver is significant because it combats contemporary assertions that although the Citizenship Clause uses inclusive and broad terms, the framers only intended to grant citizenship to the very narrow class of African Americans harmed by *Dred Scott*.¹³⁷ It shows that this restrictive application could not have satisfied the primary purpose of the amendment because the

¹³² *Id.*

¹³³ *Id.* at 474.

¹³⁴ *See id.* at 497, 498. He stated:

[This] is one of the gravest subjects that ever could be submitted to the people of the United States, and it involves not only the negro race, but other inferior races that are now settling on our Pacific coast, and perhaps involves a future immigration to this country of which we have no conception I need not pause to say that this would be detrimental to the best interests of our country.

. . . .

. . . I would like to see it tested by a fair vote of the people of the United States whether they are willing that these piebald races from every quarter shall come in and be citizens with them in this country, and enjoy the privileges which they are now enjoying as such citizens.

Id.

¹³⁵ *See id.* at 497.

¹³⁶ CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).

¹³⁷ *See, e.g.,* Abrahms, *supra* note 8, at 478 ("The narrow purpose of the Fourteenth Amendment was to elevate to constitutional status the purposes of the Civil Rights Bill.")

option was both considered and discarded in the face of rather threatening opposition.¹³⁸

As an alternative to such a narrow reading, some suggest that the framers used more flexible terminology in order to confer implicitly upon Congress the power to define and change the criteria for national citizenship.¹³⁹ This possibility, however, was also considered and rejected as failing to meet the primary purpose of the amendment.¹⁴⁰ During the Fourteenth Amendment debates, Wisconsin Senator James Doolittle stridently argued that the text include the phrase “Indians not taxed” because without it, Native Americans would otherwise be included as “subject to the jurisdiction thereof.”¹⁴¹ Nearing the end of his case, he asked, “why amend the Constitution” if there is no doubt “as to the constitutional power of Congress to pass the civil rights bill”?¹⁴² Howard, Trumbull’s co-author, interjected,

We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin [Doolittle], who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.¹⁴³

Howard’s statement illustrates that his goal was to eliminate the racial caste system that oppressed African Americans, and that the Amendment was necessary to prevent racist and nativist fears from determining U.S. citizenship requirements.¹⁴⁴ The framers siding with Howard, who voted against Doolittle’s amendment, did not trust that future members of Congress would recognize the rights of African Americans, Asian Americans, or other immigrants, over their own xenophobia.¹⁴⁵ The next section details why “[h]istory has amply vindicated that judgment.”¹⁴⁶

¹³⁸ See CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).

¹³⁹ See Eastman, *supra* note 20, at 1486.

¹⁴⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

¹⁴¹ *Id.* Throughout his speech, Senator Doolittle openly and repeatedly declared that he sought to “exclude the wild Indians from being regarded or held as citizens of the United States.” *Id.* at 2897.

¹⁴² *Id.* at 2896.

¹⁴³ *Id.* at 2896.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*; NEUMAN, *supra* note 8, at 186–87.

¹⁴⁶ NEUMAN, *supra* note 8, at 187.

III. REPEATED REJECTION OF RACIST EXCLUSION: APPLICATIONS OF THE CITIZENSHIP CLAUSE TO OTHER MINORITY GROUPS

In 1873, the Supreme Court ruled on the Thirteenth and Fourteenth Amendments for the first time in the *Slaughter-House Cases*.¹⁴⁷ The central issue in the *Slaughter-House Cases* was the extent to which the Thirteenth, Fourteenth, and Fifteenth Amendments protected the privileges and immunities of New Orleans butchers whose businesses had been taken over by a state-run corporation.¹⁴⁸ Although the plaintiff butchers' complaints did not actually implicate the Citizenship Clause, Justice Miller, writing for the majority, addressed it in controversial dicta.¹⁴⁹ Regarding the pervading purpose and underlying foundation of all three of the Reconstruction Amendments, Justice Miller cited "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."¹⁵⁰ Justice Miller further elaborated on the language and spirit of the Amendments, asserting,

We do not say that no one else but the negro can share in this protection. . . . [I]n any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished¹⁵¹

Despite Justice Miller's instruction, other minority groups have encountered harsh barriers to their inclusion within the protections of

¹⁴⁷ 83 U.S. (16 Wall.) 36, 67 (1872); Meyler, *supra* note 35, at 539.

¹⁴⁸ See 83 U.S. at 66. The Court ruled in favor of the new corporation, holding that the butchers' Fourteenth Amendment rights had not been violated because the Amendment only affected the rights of national citizenship, not state citizenship. See *id.* at 74, 78–79.

¹⁴⁹ See *id.* at 72–74. Much of the controversy revolves around Justice Miller's statement that "[t]he phrase, 'subject to the jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." *Id.* at 73. Opponents of the current interpretation of birthright citizenship emphasize this sentence as evidence of the consensualist theory of citizenship, requiring exclusive allegiance in order to be "subject to the jurisdiction." See Collins, *supra* note 120, at 393; Eastman, *supra* note 20, at 1486–87. In contrast, proponents of the birthright citizenship minimize its importance as "pure dicta." See, e.g., Ho, *supra* note 104, at 377; Ide, *supra* note 120, at 244.

¹⁵⁰ *Slaughter-House Cases*, 83 U.S. at 71.

¹⁵¹ *Id.* at 72.

the Citizenship Clause.¹⁵² For example, restrictive interpretations of the clause specifically excluded Chinese Americans and Native Americans, subverting the “pervading spirit” of the amendments intended to remedy the evil of racial caste.¹⁵³

Both of these exclusionary interpretations have failed over time.¹⁵⁴ Chinese Americans struggled until 1898, when the Supreme Court held, in *United States v. Wong Kim Ark*, that a child born in the United States to Chinese parents is a natural born citizen.¹⁵⁵ Meanwhile, Native Americans were held in limbo until 1924, when a federal statute declared that all Indians born in the United States are natural born American citizens.¹⁵⁶ The opposition each of these groups faced in obtaining birthright citizenship is significant because the same failed arguments employed then have reemerged against the inclusion of the children of illegal immigrants today.¹⁵⁷

A. *Resistance to the Birthright Citizenship of Chinese Americans*

The California gold rush of 1848 commenced the first wave of large scale Chinese immigration into the United States.¹⁵⁸ During the construction of the Central Pacific Railroad, between 1864 and 1869, Chinese laborers were welcomed to alleviate labor shortages.¹⁵⁹ In fact, in 1868, the United States and China ratified the Burlingame Treaty to increase trade and ensure unrestricted migration.¹⁶⁰ Although the Chi-

¹⁵² See *id.*; Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 556 (2000); Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529, 532 (1984).

¹⁵³ See *Slaughter-House Cases*, 83 U.S. at 72; KARST, *supra* note 1, at 53; Drimmer, *supra* note 36, at 687–91. For a broader analysis of the impact of discriminatory immigration laws on different groups of Asian-American, see Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1066 (1994).

¹⁵⁴ See Law of June 2, 1924, ch. 233, 43 Stat. 253 (current version codified at 8 U.S.C. § 1401(b) (2000)); *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898).

¹⁵⁵ 169 U.S. at 704.

¹⁵⁶ 43 Stat. at 253.

¹⁵⁷ See Pettit, *supra* note 16, at 272–74.

¹⁵⁸ See THOMAS A. ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 171 (5th ed. 2003).

¹⁵⁹ See *id.*; Saito, *supra* note 13, at 434.

¹⁶⁰ Additional Article to the Treaty between the United States and China of June 18, 1858, U.S.-P.R.C., July 28, 1868, 16 Stat. 739; Saito, *supra* note 13, at 434. The treaty emphasized “the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration . . . for purposes of curiosity, of trade, or as permanent residents.” Additional Article to the Treaty between the United States and China of June 18, 1858, *supra*, art. V.

nese laborers were welcomed on the West Coast, many Americans expressed fears of being “overrun by a flood of immigration of the Mongol race.”¹⁶¹ These fears were mitigated by assurances that *all* Chinese immigrants intended to return to China, which made them “useful” and relatively unthreatening.¹⁶² For decades, Americans convinced themselves that the Chinese were only temporary residents who did “not expect permanently to remain in this country.”¹⁶³

With the end of the gold rush and the completion of the transcontinental railroad, the demand for Chinese laborers plummeted and nativism spread.¹⁶⁴ The Chinese were attacked violently; they were accused of being criminals, prostitutes, and opium addicts.¹⁶⁵ When the United States entered into an economic depression in 1877, extreme anti-alien fervor centered on forcing the Chinese out of California through federal legislation.¹⁶⁶ The United States responded with the Treaty of 1880, authorizing the regulation or suspension of immigration of Chinese laborers whenever their entry or residence “affects or threatens to affect the interests of [the United States].”¹⁶⁷ In 1882, less than a year later, Congress enacted the first set of Chinese Exclusion Acts, prohibiting all Chinese laborers from immigrating for ten years.¹⁶⁸ These laws, intended to keep the “undesirable” Asians out of U.S. territory, became increasingly restrictive over the following decade.¹⁶⁹

¹⁶¹ See CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

¹⁶² *Id.* In response to Pennsylvania Sen. Edgar Cowan’s fanatical fears over the Chinese immigrants flooding the Pacific coast and receiving birthright citizenship, California Sen. John Conness assured him that “They will return . . . either living or dead.” See *id.*

¹⁶³ See *Id.*, *supra* note 120, at 250; Pettit, *supra* note 16, at 273–74. For example, Henry Ide rationalized, “They all look forward to a return, sooner or later, to China. Their original allegiance has never been weakened. Hence they may consistently be considered to stand upon an entirely different basis as to their children born here, from other nationalities.” *Id.*, *supra* note 120, at 250.

¹⁶⁴ See ALEINIKOFF ET AL., *supra* note 158, at 171–73; Saito, *supra* note 13, at 434.

¹⁶⁵ ALEINIKOFF ET AL., *supra* note 158, at 171. For example, in Wyoming, white miners attacked and killed twenty-eight Chinese laborers who refused to join a strike. *Id.*

¹⁶⁶ See *id.* at 171–73. Californians sought a change in federal policies after state statutes discriminating against the Chinese since the 1850s had been struck down. *Id.* at 172–73. See generally *Lin Sing v. Washburn*, 20 Cal. 534 (1862) (voiding capitation tax on Chinese); *People v. Downer*, 7 Cal. 169 (1857) (invalidating fifty dollar tax on Chinese passengers).

¹⁶⁷ Treaty Concerning Immigration, U.S.-P.R.C., Nov. 17, 1880, 22 Stat. 826, T.S. No. 49; ALEINIKOFF ET AL., *supra* note 158, at 173.

¹⁶⁸ Law of May 6, 1882, ch. 126, 22 Stat. 58; ALEINIKOFF ET AL., *supra* note 158, at 173.

¹⁶⁹ Chiu, *supra* note 153, at 1066. The Chinese Exclusion Acts were the first federal immigration statutes to be subjected to judicial scrutiny. ALEINIKOFF ET AL., *supra* note 158, at 171. The landmark Supreme Court decisions formed the basis of the plenary power doctrine in immigration law. See *Chae Chan Ping v. United States (Chinese Exclusion Case)* 130 U.S. 581, 609 (1889) (upholding Congress’ plenary power over the exclusion of foreigners at any

Despite acknowledging the significant economic contributions of Chinese laborers, Americans alienated them by denying access to citizenship.¹⁷⁰ Many argued that the Chinese refused to assimilate, were racially inferior, and would degrade the national polity if ever included.¹⁷¹ Because Americans perceived the Chinese laborers as seeking “to make a quick fortune and return home,” they saw them as permanent foreigners who intended to retain their culture, language, and heredity—refusing to become “Americans.”¹⁷² Rampant racism was used to justify the exclusion of all Asians from political recognition, as articulated by Senator Cowan,

[If] this door shall now be thrown open to the Asiatic population. . . . [T]here is an end to republican government [on the Pacific coast], because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding it or of carrying it out.¹⁷³

Even though parental lineage was supposed to be irrelevant to birthright citizenship, the children of Chinese immigrants born here were denied citizenship because they were deemed temporary laborers, who were racially and culturally inferior.¹⁷⁴

The first step towards remedying this injustice was an 1884 decision by California’s Circuit Court, *In re Look Tin Sing*, where a boy was born in the United States to Chinese parents, left for China at the age

time); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (reaffirming Congress’ plenary power to expel or deport foreigners based on necessity of public interest).

¹⁷⁰ See Drimmer, *supra* note 36, at 687–88.

¹⁷¹ See *id.*

¹⁷² McClain, *supra* note 152, at 532; see Drimmer, *supra* note 36, at 687.

¹⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866); see also *People v. Hall*, 4 Cal. 399, 405 (1854) (holding testimony of Chinese witness inadmissible because he represents “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation”).

¹⁷⁴ Drimmer, *supra* note 36, at 689; see CONG. GLOBE, 39th Cong., 1st Sess. 498–99 (1866). Americans considered the Chinese to be morally and culturally subordinate, “utter heathens, treacherous, sensual, cowardly and cruel.” Chiu, *supra* note 153, at 1066 n.84 (quoting Henry George, *The Chinese in California*, N.Y. TRIB., May 1, 1869, at 1). The refusal to allow Chinese persons to assume U.S. citizenship through naturalization was challenged and upheld in *In re Ah Yip*, where the California Circuit Court held that the Chinese did not fit under the term “white person” as designated in the statute. 1 F. Cas. 223, 224 (C.C.Cal. 1878) (No. 104).

of nine, and then sought to return five years later.¹⁷⁵ Writing for the court, Justice Field held that the boy was a natural born citizen and could not be excluded by the Chinese Exclusion Acts.¹⁷⁶ He recognized that the boy had been born within the territory to parents who had resided in California for twenty years, who were Chinese, and who had “always been subjects of the emperor of China,” but who were not here in any diplomatic capacity.¹⁷⁷ Justice Field then interpreted the Citizenship Clause’s phrase, “subject to the jurisdiction thereof,” as excluding only the children of foreign diplomats.¹⁷⁸ Thus, he concluded, the boy was a citizen at birth, which meant that he could not be prevented from reentering the country.¹⁷⁹ Justice Field’s analysis of birthright citizenship as it applied to minorities other than African Americans was the beginning of the interpretation that the Supreme Court would definitively affirm fourteen years later in *Wong Kim Ark*.¹⁸⁰

The *Wong Kim Ark* Court unambiguously explained the meaning of the Citizenship Clause as it applied to non-whites and non-citizens domiciled in the United States, and it has never been challenged successfully.¹⁸¹ Wong Kim Ark was a laborer, born in San Francisco to Chinese parents who were legal permanent residents and who were never employed in any diplomatic capacity.¹⁸² In 1895, he visited China for about a year and was denied reentry upon his return because the collector of customs did not consider him to be a citizen.¹⁸³ Because of the

¹⁷⁵ *In re Look Tin Sing (The Citizenship of a Person Born in the United States of Chinese Parents)*, 21 F. 905, 906, 908–09 (1884) (holding Chinese boy born in United States cannot be prohibited from reentering).

¹⁷⁶ *See id.* at 908–09.

¹⁷⁷ *Id.* at 906.

¹⁷⁸ *Id.* Justice Field explained,

The jurisdiction . . . must, at the time [of birth], be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country.

Id.

¹⁷⁹ *In re Look Tin Sing*, 21 F. at 908–09.

¹⁸⁰ *Wong Kim Ark*, 169 U.S. at 705; *In re Look Tin Sing*, 21 F. at 909 (explaining that the Citizenship Clause was meant to overturn *Dred Scott*, thereby eliminating the requirement of congressional naturalization before conferral of citizenship by birth).

¹⁸¹ 169 U.S. at 705; Pettit, *supra* note 16, at 268. This is the landmark decision that opponents of birthright citizenship contend misread the Citizenship Clause, catalyzing more than a century of a consistently “erroneous interpretation of that language.” *See Testimony*, *supra* note 11, at 15.

¹⁸² 169 U.S. at 652.

¹⁸³ *Id.* at 653.

aggressive enforcement of the Chinese Exclusion Acts at the time, Wong Kim Ark could only be admitted if his birthright citizenship was recognized.¹⁸⁴

Writing for the majority, Justice Gray relied on English common law and the senate debates to decipher the meaning of the Citizenship Clause and the intent of its framers.¹⁸⁵ Based on that analysis, he stated that the jurisdiction requirement should be read narrowly, excluding only children of hostile enemy aliens and children of diplomats.¹⁸⁶ Justice Gray affirmatively asserted, “The amendment, in clear words and in manifest intent, *includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States.*”¹⁸⁷ Furthermore, Justice Gray rejected the theory of consensual citizenship, stressing that merely because Congress had refused to extend naturalization to the Chinese does not exclude them from receiving the full protections of the Fourteenth Amendment’s Citizenship Clause.¹⁸⁸ The Court held,

*[A] child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States.*¹⁸⁹

Unsurprisingly, contemporary opponents of birthright citizenship cite this case as the source of the mistaken interpretation of the Citizenship Clause, and attempt to limit it by emphasizing the fact that Wong Kim Ark’s parents were lawful residents permanently domiciled

¹⁸⁴ Compare *id.* (stating that if he is a citizen, the Chinese Exclusion Acts “do not and cannot apply to him”), with *Chae Chan Ping*, 130 U.S. at 609 (upholding Congress’ plenary power over the exclusion of foreigners at any time).

¹⁸⁵ *Wong Kim Ark*, 169 U.S. at 654–58.

¹⁸⁶ *Id.* at 682, 693.

¹⁸⁷ *Id.* at 693 (emphasis added). Justice Gray further reasoned,

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 in the United States.

Id. at 694.

¹⁸⁸ See *id.* at 694, 703–04.

¹⁸⁹ *Id.* at 705 (emphasis added).

in the United States, unlike illegal immigrants today.¹⁹⁰ However, these critics fail to recognize the broader principle of this landmark decision: the Court refused to allow racist accusations and xenophobia to subvert the Fourteenth Amendment's goal of eliminating a caste system of citizenship in America.¹⁹¹

B. *Resistance to the Birthright Citizenship of Native Americans*

Just as with Chinese laborers, Native Americans were excluded from birthright citizenship based on claims of racial inferiority and fears over the degradation of white America.¹⁹² As early as the founding of the nation, Native Americans were considered "savages"—"the antithesis of civilization."¹⁹³ Consequently, early American policy regarding Native American peoples centered on maintaining separation by forcing tribes to move westward.¹⁹⁴ Somewhat ironically, one of the incentives offered to particular groups of Native Americans in exchange for their relocation was the grant of American citizenship.¹⁹⁵ This was because, unlike the American delusion that the Chinese laborers were only temporary residents, Native Americans were seen as a permanent "'problem' in need of fixing," and forced assimilation was considered a less burdensome solution than others.¹⁹⁶ However, many Native Americans had no desire to become incorporated into white America, or to be subject to its laws.¹⁹⁷

Although some desire to "civilize" the Native Americans existed among Americans at the time, the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment emphasized the need to exclude

¹⁹⁰ See *Testimony*, *supra* note 11, at 11, 15; Wood, *supra* note 7, at 513.

¹⁹¹ See *Wong Kim Ark*, 169 U.S. at 676; *Testimony*, *supra* note 11, at 11, 15; Drimmer, *supra* note 36, at 689; Wood, *supra* note 7, at 513.

¹⁹² See ALEINIKOFF ET AL., *supra* note 158, at 171; Maltz, *supra* note 152, at 556.

¹⁹³ See Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 110–11 (1999) (quoting Frederick E. Hoxie, *The End of the Savage: Indian Policy in the United States Senate, 1880–1890*, in CHRONICLES OF OKLAHOMA 157, 178 (1977)).

¹⁹⁴ See *id.* at 111.

¹⁹⁵ See *id.* at 111 n.22.

¹⁹⁶ McClain, *supra* note 152, at 532; Porter, *supra* note 193, at 108, 111. Other solutions that had been attempted included massacring Native Americans as needed for westward expansion, or taking their land and forcibly herding them onto "reservations." See Porter, *supra* note 193, at 108.

¹⁹⁷ Maltz, *supra* note 152, at 556.

Native Americans from birthright citizenship.¹⁹⁸ Whereas the Chinese laborers' allegiance was questioned on account of their presumed intent to return to China, that of the Native Americans was questioned on account of their allegiance to "quasi-foreign nations."¹⁹⁹ Several senators stressed their belief that Native Americans had "no competency for citizenship" because they were "outlaws" who refused to recognize the authority of the United States.²⁰⁰ The senators deemed the Native Americans' "partial allegiance" to the United States government insufficient.²⁰¹ Moreover, the senators reasoned that Native Americans "are not regarded as part of our people" because "[they are] not counted in our enumeration of *the people of the United States*."²⁰² Near the end of the Civil Rights Bill debates, Missouri Senator John Henderson concluded, "We are deciding to-day that [this Government] was made for the white man and the black man, but that the red man shall have no interest in it."²⁰³ Consequently, Native Americans were specifically carved out of the Civil Rights Act of 1866, and implicitly written out of the Fourteenth Amendment.²⁰⁴

When confronted with the applicability of the Citizenship Clause to Native Americans, courts became similarly determined not to dilute citizenship with classes of people who were considered "inferior."²⁰⁵ Courts relied on the pretext that Native Americans were "distinct and independent political communities," that were "not a portion of the political community called the 'People of the United States.'"²⁰⁶ Finally,

¹⁹⁸ See CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866); Porter, *supra* note 193, at 108 (noting the American desire to "kill the Indian and save the man").

¹⁹⁹ See CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

²⁰⁰ See *id.* at 526–27.

²⁰¹ See *id.* at 2893.

²⁰² See *id.* at 572 (emphasis added).

²⁰³ *Id.* at 574.

²⁰⁴ See Civil Rights Act, 14 Stat. 27 (1866) (codified in U.S. CONST. amend. XIV, § 1). The Civil Rights Act of 1866 explicitly excluded Native Americans, reading, "[A]ll 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 . . ." *Id.* (emphasis added). The Fourteenth Amendment's Citizenship Clause implicitly does the same by stating, "All persons born or naturalized in the United States, and *subject to the jurisdiction thereof* . . ." U.S. CONST. amend. XIV, § 1 (emphasis added).

²⁰⁵ VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 145 (1999); Román, *supra* note 11, at 582; see, e.g., Goodell v. Jackson, 20 Johns. 693, 712 (N.Y. Sup. Ct. 1822) (holding the purchase of property from a Native American was not valid without congressional consent).

²⁰⁶ U.S. v. Osborn, 2 F. 58, 59 (1880) (holding it a crime to give Native Americans liquor because "Indians are not a portion of the political community called the 'People of the United States'"); see also Goodell, 20 Johns. at 712 ("Though born within our territorial limits,

in 1884, the Supreme Court faced the issue in *Elk v. Wilkins*, when a Native American, John Elk, sought to vote based on his Fourteenth Amendment right.²⁰⁷ He argued that not only had he been born in the United States, but he had also deliberately demonstrated his intention to become a citizen by leaving his tribe, moving to Omaha, buying a home, becoming a member of the state militia, and paying taxes.²⁰⁸ The Court ruled against Elk, unequivocally adopting a consensual theory of citizenship.²⁰⁹ Ultimately, the Court held that although he had been born within the geographic limits of the United States, Elk was not subject to the jurisdiction of the United States, as provided in the Fourteenth Amendment; he could not “*at will* be alternatively a citizen of the United States and a member of the tribe.”²¹⁰

The *Elk* Court confirmed that there were no means by which a Native American could affirmatively choose to become a citizen but, by 1924, it was clear that Congress could unilaterally confer citizenship on Native Americans at its convenience.²¹¹ For example, Native Americans could become citizens through treaty provisions, grants of an allotment, issuance of a patent in fee simple, and pursuant to specific acts of Congress.²¹² Consequently, when the Indian Citizenship Act of 1924 was passed, most Native Americans already were citizens.²¹³ Notwith-

the Indians are considered as born under the dominion of their tribes. They are not our subjects . . . because they are not born in obedience to us.”); Román, *supra* note 11, at 582.

²⁰⁷ 112 U.S. 94, 103 (1884).

²⁰⁸ *Id.* at 95; DELORIA & WILKINS, *supra* note 205, at 145.

²⁰⁹ *Elk*, 112 U.S. at 100. The Court stated, “[M]embers of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect” *Id.* This meant that although Congress had specifically made citizens out of some Indians, it had not done so with respect to Elk or Elk’s tribe; therefore, he was not a citizen and could not vote. *See id.* at 103–07; Porter, *supra* note 193, at 133–34.

²¹⁰ *Elk*, 112 U.S. at 103 (emphasis added). Justice John Harlan dissented on the grounds that only “Indians not taxed” were intended to be excluded, whereas Elk was subject to taxation and should have, therefore, become a citizen. *See id.* at 111–12 (Harlan, J., dissenting).

²¹¹ *See* Porter, *supra* note 193, at 123–24 & nn.90–94.

²¹² *See id.*

²¹³ Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version codified at 8 U.S.C. § 1401(b) (2000)); Porter, *supra* note 193, at 124. Only 125,000 Native Americans, or one third of the total Native American population, were not citizens when the Act was ratified. Porter, *supra* note 193, at 124. The Act stated that

all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

standing lingering racist rhetoric among American society, Congress passed the legislation without much debate.²¹⁴ Scholars have noted, however, that the motivation for supporting the Act was mainly regulatory because it prevented the Interior Department from otherwise acquiring complete discretionary power over each Native American's potential access to citizenship.²¹⁵

Despite the resistance of many Native Americans to Congressional efforts to confer citizenship upon them, their experience represents a broader principle consistent with the primary goal of the Citizenship Clause.²¹⁶ Native Americans were explicitly excluded by the framers of the Fourteenth Amendment and the Supreme Court because of their partial allegiance to a foreign government.²¹⁷ History has shown that this rationale was nothing more than a pretext for racist perceptions of inferiority.²¹⁸ Requirements of exclusive allegiance were conveniently used to separate Native Americans from white Americans.²¹⁹ However, excluding generation upon generation from legal protection or recognition, unless granted status on an ad hoc basis, proved so obviously unjust that there was no meaningful opposition to the passage of the Indian Citizenship Act of 1924.²²⁰

C. *Resistance to Birthright Citizenship of Illegal Immigrants: The Revival of Historically Failed Arguments*

When seeking to exclude others, the American community repeatedly asserts that whoever comprises the group of "others" was never intended to comprise "We the people."²²¹ Each time this argument is employed, it initially receives support from American community members who simultaneously seek to justify both their own inclusion

43 Stat. at 253.

²¹⁴ See Porter, *supra* note 193, at 124–25. The American Indian Defense Association's Herbert J. Spinden voiced opposition to the legislation, because a Native American "has not developed politically sufficiently to justify his being . . . turned loose as an American citizen The bulk of the Indians . . . would form [a] dangerous mass of alien stock in our political system if they were given privileges of citizenship." *Id.* at 125 n.105.

²¹⁵ See *id.* at 124–25. Prior drafts of legislation regarding Native American citizenship would have allowed the Secretary to grant certificates of citizenship to individual Native Americans or groups. See *id.*

²¹⁶ See *id.* at 126.

²¹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

²¹⁸ See Román, *supra* note 11, at 582–83.

²¹⁹ See *Elk*, 112 U.S. at 109; CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

²²⁰ See Porter, *supra* note 193, at 125.

²²¹ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 528 (1866) (remarks by Sen. Davis) ("[T]his is a white man's Government. It was made so at the beginning.").

and the exclusion of the “other.”²²² Yet, the Fourteenth Amendment cannot be reconciled with this exclusive view of citizenship.²²³ If the United States were meant to be “a close white corporation,” then the Citizenship Clause would have been written to ensure a *jus sanguinis* rule of citizenship, whereby *only* those whose ancestors were citizens at the formation of the Republic could inherit citizenship at birth.²²⁴

Therefore, when contemporary opponents to birthright citizenship argue that illegal immigrants are not a part of “We the people” and should consequently be barred as a group from ascertaining the protections of citizenship, we should be skeptical.²²⁵ Historically, this rationale has been plagued by racist perceptions of superiority and fears that inclusion of the “other” will “infest society,” degrading the Anglo-Saxon character of the American community.²²⁶ This type of blatant racism is a deplorable and shameful feature of American history, and it is abhorrent that it remains a major motivation driving national policy today.²²⁷

Nevertheless, U.S. history has not deterred opponents of birthright citizenship from claiming that the presence of illegal immigrants and the inclusion of their children in American society dilutes “traditional American values,” eroding the voting power, political representation, public benefits, and entitlements owed to current citizens.²²⁸ Just as the American community created the legal fiction of “partial allegiance” to exclude Native Americans, we should be reminded that the “illegality” of an immigrant is entirely a social and legal construct, which “is neither inherent nor natural, but rather legal and political.”²²⁹ The construct serves only to categorize different groups of entrants, but illegality is not a defining characteristic of those entrants at all times.²³⁰

²²² See *Elk*, 112 U.S. at 103–07; *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856); CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (remarks by Sen. Trumbull) (“The term ‘Indians not taxed’ means Indians not counted in our enumeration of the people of the United States.”); KARST, *supra* note 1, at 44; Chiu, *supra* note 153, at 1066.

²²³ See U.S. CONST. amend. XIV, § 1.

²²⁴ CONG. GLOBE, 39th Cong., 1st Sess. 529 (1866) (remarks by Sen. Davis).

²²⁵ See Wood, *supra* note 7, at 468–69.

²²⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 498, 2891 (1866); Drimmer, *supra* note 36, at 686 & n.130.

²²⁷ See Shulman, *supra* note 1, at 685, 719.

²²⁸ See Wood, *supra* note 7, at 495–97.

²²⁹ CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866); Thronson, *supra* note 98, at 50 (quoting Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN’S L.J. 138, 203 (2004)).

²³⁰ See Thronson, *supra* note 98, at 50.

To bolster their exclusionary policies, though, opponents of birthright citizenship assert that illegal immigrants are temporary residents, who were never intended to be included by the framers of the Citizenship Clause.²³¹ However, illegal immigrants are no more temporary than the Chinese laborers who Americans deluded themselves into believing sought only to make a quick fortune and return to China.²³² Opponents refuse to acknowledge the reality that vast numbers of children born to illegal immigrants in the United States will remain here for substantial periods of time, or forever, because the government is simply incapable of enforcing timely deportation.²³³ Instead, they hold onto nativist notions that “[t]he national interest would be better served if the entire family returned to their homeland,” and that with better enforcement and fewer social benefits, illegal immigrants actually would return to their homeland voluntarily.²³⁴ Evidence proves otherwise—“virtually all of the undocumented persons who come into this country seek employment opportunities,” not social benefits.²³⁵

Arguments that children of illegal immigrants were not born with the requisite allegiance, refuse to assimilate because they eventually intend to return to their homeland, or degrade the American polity with their crime and drugs are not new.²³⁶ They are exact replicas of claims

²³¹ See Abrahms, *supra* note 8, at 480.

²³² See NEUMAN, *supra* note 8, at 184; McClain, *supra* note 152, at 532; Abrahms, *supra* note 8, at 480.

²³³ See NEUMAN, *supra* note 8, at 184. In *Plyler v. Doe*, the Court recognized that

[s]heer incapability or lax enforcement of the laws barring entry into this country, coupled with failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor

457 U.S. 202, 218–19 (1982) (holding unconstitutional a Texas law that withheld funds for local school districts that educated children of undocumented-alien parents). Many proponents of the current interpretation of birthright citizenship emphasize the impact of the *Plyler v. Doe* decision on the legitimacy of incorporating children of undocumented immigrants into American society. See, e.g., Ho, *supra* note 104, at 375–76; Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 36–40 (1988). Unsurprisingly, opponents of the current interpretation of birthright citizenship emphasize the “very narrow grounds” of the decision. See Abrahms, *supra* note 8, at 486–87.

²³⁴ Wood, *supra* note 7, at 500.

²³⁵ See *Plyler*, 457 U.S. at 228 n.24 (citation omitted); Shulman, *supra* note 1, at 721 & n.389.

²³⁶ See Pettit, *supra* note 16, at 272–74.

made against freed slaves, Chinese laborers, and Native Americans—all of whom are entitled to citizenship through birth within the territory of the United States.²³⁷ Although these assertions arguably have a historical basis and have gained support among Americans continuously in fear of the “other,” they remain inconsistent with the primary goal of the Fourteenth Amendment: to eliminate a hereditary system of racial caste in America.²³⁸ The Citizenship Clause was never meant to be a narrowly construed scheme designed merely to give status to freed African Americans, but rather a broadly written affirmation of ascriptive rights.²³⁹ It was constructed to eliminate the system that mandated a permanent subclass of peoples, who would inherit paltry legal rights and protections with each generation.²⁴⁰

The Supreme Court’s interpretation of the Citizenship Clause in *Wong Kim Ark* was not a mistake; basing citizenship entirely on parentage necessarily leads down the path of injustice suffered by Dred Scott.²⁴¹ Guaranteeing birthright citizenship to the population of children born to illegal immigrants in the United States today is consistent with this primary goal of the Fourteenth Amendment, preventing such fundamental injustice from occurring.²⁴² Therefore, the term “subject to the jurisdiction thereof” should not be reinterpreted, and the children of illegal immigrants should not be specifically carved out of birthright citizenship though a new constitutional amendment.²⁴³ These proposals are reactionary, and, as we have seen in the past, only result in the subversion of the original purpose of the Fourteenth Amendment by creating a permanent class of “subordinate and inferior” beings.²⁴⁴

²³⁷ See *Dred Scott*, 60 U.S. at 404–05; CONG. GLOBE, 39th Cong., 1st Sess. 526–27 (1866); Drimmer, *supra* note 36, at 687–88.

²³⁸ See CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866) (remarks by Sen. Howard); KARST, *supra* note 1, at 50.

²³⁹ NEUMAN, *supra* note 8, at 170.

²⁴⁰ See KARST, *supra* note 1, at 50; NEUMAN, *supra* note 8, at 170.

²⁴¹ See 169 U.S. 649, 693–94 (1898); KARST, *supra* note 1, at 44; Drimmer, *supra* note 36, at 693.

²⁴² See Ho, *supra* note 104, at 378.

²⁴³ See *id.*

²⁴⁴ See *Dred Scott*, 60 U.S. at 404–05. Shulman notes that “the purpose of nearly every amendment to date has been to define procedures or to *increase* or protect the rights and privileges of citizens, not to *narrow* or deprive rights as would be the case with the proposed denial of citizenship to domestically born children of illegal aliens.” Shulman, *supra* note 1, at 711.

IV. RESOLVING THE REAL MISREADING: THE INA

Opponents of conferring birthright citizenship to the children of illegal immigrants call the issue a “loophole” in the INA.²⁴⁵ They insist that gaps in the INA provide perverse incentives that reward illegal immigrant parents with unwarranted benefits.²⁴⁶ Opponents claim that undocumented immigrants exploit the INA “loophole” in two ways, which allow millions of illegal immigrants to have an easy alternative to the lengthy and difficult processes of legal immigration.²⁴⁷ First, undocumented parents use their citizen child as a conduit to gaining their own permanent resident status, and ultimately citizenship; and, second, undocumented parents with a citizen child are less likely to be deported, especially if they manage to stay undetected for several years.²⁴⁸ These misleading claims are false in almost all circumstances.²⁴⁹ Taking the time to understand pertinent portions of the INA will quickly dispel both of these myths, including that of the “anchor baby” itself.²⁵⁰ The INA does not create a loophole in need of closure; it properly balances the need to restrict immigration against the creation of a permanent class people who inherit oppression.²⁵¹

A. *Relevant INA Structure and Terminology*

Because the INA gives particular definitions to terms commonly considered interchangeable among Americans, this section gives a brief overview of the statute’s basic starting points. “Immigrants” are noncitizens who intend to reside permanently in the United States.²⁵² The INA presumes that anyone seeking admission into the United States intend to stay *permanently* unless he or she can prove otherwise.²⁵³ Those who

²⁴⁵ See Abrahms, *supra* note 8, at 469.

²⁴⁶ See Hsieh, *supra* note 12, at 512.

²⁴⁷ See *id.* at 512–13; Wood, *supra* note 7, at 497–98, 522; Abrahms, *supra* note 8, at 471.

²⁴⁸ See Hsieh, *supra* note 12, at 512–13; Wood, *supra* note 7, at 497–98, 522; Abrahms, *supra* note 8, at 471. Another assertion frequently made is that a child citizen allows the whole family to benefit from public assistance and welfare. See Wood, *supra* note 7, at 498. For a discussion of the limitations on undocumented immigrants’ eligibility for benefits and services, see Thronson, *supra* note 98, at 70–71.

²⁴⁹ See INA §§ 212(a), 237, 240A, 245, 8 U.S.C.A. §§ 1182(a), 1227, 1229b, 1255 (West 2007).

²⁵⁰ See *id.*

²⁵¹ See NEUMAN, *supra* note 8, at 166.

²⁵² INA § 101(a)(15), 8 U.S.C.A. § 1101(a)(15). Actually, the statute only defines the term “immigrant” in the negative; every alien who does not fall within one of the listed classes of “nonimmigrants” is considered an “immigrant.” See *id.*

²⁵³ *Id.*

can prove that they intend only to enter the United States for a specific purpose, to be accomplished during a *temporary* stay, are called “non-immigrants.”²⁵⁴ To be classified as a nonimmigrant an individual must fit into one of the enumerated groups described in INA § 101(a)(15).²⁵⁵ The INA provides for four preference categories of immigrants: (1) family-sponsored, (2) employment-based, (3) diversity, and (4) refugees.²⁵⁶ Applicants in each of these categories are subject to very long waitlists depending on the date that they filed their petition, called the “priority date,” and the quotas for each category.²⁵⁷ The only type of applicant who does not have to wait is an “immediate relative” of a U.S. citizen.²⁵⁸ Immediate relatives are defined as “the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least twenty-one years of age.”²⁵⁹ This age requirement is the first and most obvious impediment to the chain migration theory.²⁶⁰

Noncitizens in either group, immigrants or nonimmigrants, must show that they qualify for *admission* by proving that none of the multiple grounds of inadmissibility, codified in INA § 212(a), render them ineligible upon inspection.²⁶¹ Once admitted, immigrants are generally referred to as *lawful permanent residents*, or LPRs.²⁶² After admission, cer-

²⁵⁴ *Id.*

²⁵⁵ *Id.* Nonimmigrants bear the burden of proving that they are, in fact, temporary residents. *See id.*; ALEINIKOFF ET AL., *supra* note 158, at 292.

²⁵⁶ INA §§ 201–203, 8 U.S.C.A. §§ 1151–1153 (West 2007).

²⁵⁷ *Id.* For a detailed introduction to the workings of these preference categories and the effect of priority dates, see ALEINIKOFF ET AL., *supra* note 158, at 279–90.

²⁵⁸ INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000). Immediate relatives do not have to wait because there is no quota restricting their entry. ALEINIKOFF ET AL., *supra* note 158, at 287.

²⁵⁹ INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). The statute further defines these terms; a “child” is an unmarried person under twenty-one who was either born in wedlock or, under certain conditions, was born out of wedlock, is a stepchild, or is adopted. INA § 101(b)(1), 8 U.S.C.A. § 1101(b)(1) (West 2007). A child who is married or over twenty-one is thus referred to as a “son or daughter,” not a “child.” *Id.* Likewise, the terms “parent,” “father,” or “mother” are only used where a relationship actually exists; “the term ‘parent’ does not include the natural father of the child if the father has disappeared or abandoned or deserted the child” INA § 101(b)(2), 8 U.S.C. § 1101(b)(2).

²⁶⁰ INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Most opponents of birthright citizenship have recognized this provision, but claim that it has no limiting effect on chain migration. *See, e.g.,* Wood, *supra* note 7, at 494 n.82.

²⁶¹ INA § 212(a), 8 U.S.C.A. § 1182(a). The terms “admission” or “admitted” refer to the lawful entry of the alien into the United States after inspection and authorization by an immigration officer at the border. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2000).

²⁶² INA § 101(a)(20), 8 U.S.C. § 1101(a)(20); *see* ALEINIKOFF ET AL., *supra* note 158, at 265.

tain categories of nonimmigrants may apply for an *adjustment of status* from nonimmigrant to LPR.²⁶³ LPRs can stay indefinitely, so long as they do not commit crimes or other acts that would render them deportable under INA § 237.²⁶⁴ Typically, after five years, an LPR may choose to apply for naturalization to become a citizen, but there is no requirement to do so.²⁶⁵

In addition, it is important to note that the INA is riddled with provisions allowing the Attorney General to make ultimate and interpretive discretionary decisions for waivers, relief from removal, and adjustments to LPR status.²⁶⁶ Consequently, many decisions are barred from judicial review.²⁶⁷

The INA not only defines who is a legal immigrant, but also who is an illegal or undocumented immigrant.²⁶⁸ In order to immigrate legally, an applicant must first be *admissible*.²⁶⁹ To be admissible, an applicant must not fall under any of the INA § 212 *grounds of inadmissibility*, otherwise he or she will be denied admission and will be ineligible for a visa.²⁷⁰ For the purposes of this note, the two most significant grounds of inadmissibility are INA § 212(a)(6), which prohibits illegal entrants and immigration violators, and INA § 212(a)(9)(B), which addresses the penalties for aliens unlawfully present in the United States.²⁷¹

Section 212(a)(6) specifies that “an alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney

²⁶³ INA § 245, 8 U.S.C.A. § 1255. For a list of the categories of nonimmigrants who were “admitted,” but who are nevertheless ineligible for an adjustment of status, see AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION PROCEDURES HANDBOOK § 20:5 (Thompson/West ed., 2007).

²⁶⁴ INA § 1101(a)(20), 8 U.S.C. §§ 1101(a)(20) (2000); INA § 237, 8 U.S.C.A. § 1227.

²⁶⁵ ALEINIKOFF ET AL., *supra* note 158, at 265.

²⁶⁶ *Id.* at 261.

²⁶⁷ INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (Supp. 2005); ALEINIKOFF ET AL., *supra* note 158, at 265. Administrative review is possible for noncitizens who have been found removable through the Board of Immigration Appeals (BIA), which is a multi-member review board appointed by the Attorney General. ALEINIKOFF ET AL., *supra* note 158, at 251.

²⁶⁸ Thronson, *supra* note 98, at 50 (quoting Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 484 (2002)).

²⁶⁹ FRAGOMEN ET AL., *supra* note 263, § 19:6. Because this note only specifically addresses the case of immigrants who unlawfully cross the border, there is no question that they are subject to these grounds of inadmissibility; however, under certain conditions LPRs are subject to the grounds upon reentry. See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

²⁷⁰ INA § 212(a), 8 U.S.C.A. § 1182(a) (West 2007). Many of these grounds of inadmissibility were revised and added by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA). Omnibus Consolidated Appropriations Act, 1997, § 309(c)(4)(E), as codified as amended at 8 U.S.C. § 1101 (2000).

²⁷¹ INA § 212(a)(6), (a)(9)(B), 8 U.S.C.A. § 1182(a)(6), (a)(9)(B).

General, is *inadmissible*.”²⁷² At first this may seem strange: an alien is deemed “inadmissible” after he or she has already managed to evade border patrol by sneaking into the country.²⁷³ However, this provision is extremely significant because that violation essentially follows that person wherever he or she may go within the country, forever.²⁷⁴ Thus, no matter how long illegal immigrants are able to remain undocumented, they will face the possibility of deportation for their unlawful entry.²⁷⁵

Moreover, if an illegal immigrant enters without inspection and admission and then leaves voluntarily, INA § 212(a)(9)(B) creates penalties for that unlawful presence.²⁷⁶ Depending on the duration of the unlawful presence, the illegal immigrant may be barred from entry for three or ten years.²⁷⁷

B. *Dispelling the Myth of the Anchor Baby Loophole*

Opponents of providing birthright citizenship to the children of illegal immigrants claim that undocumented parents with citizen children can use their child as a conduit to becoming an LPR, and eventually a citizen if they so choose.²⁷⁸ This assertion is flatly contradicted by INA § 245, which provides for the adjustment of status from nonimmigrant to LPR.²⁷⁹ The statute demands that when a nonimmigrant applies for an adjustment of status, he or she must have been admitted, must not have engaged in unlawful employment while here, must have maintained lawful status at all times, must be eligible for immigration, must be admissible, and must merit a favorable exercise of discretion.²⁸⁰ An illegal immigrant necessarily violates at least three of those requirements, and likely violates them all.²⁸¹ By entering the country without inspection at the border, the immigrant was not “admitted.”²⁸²

²⁷² § 1182(a)(6) (emphasis added).

²⁷³ *Id.*

²⁷⁴ See INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (2000) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is *deportable*.”) (emphasis added).

²⁷⁵ *Id.*

²⁷⁶ INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B) (West 2007).

²⁷⁷ *Id.* If an alien was unlawfully present for more than 180 days, but less than a year, he or she will be barred from entry for three years from the date of his or her departure. *Id.* If an alien was unlawfully present for a year or more, he or she will be barred for ten years from the date of departure. *Id.*

²⁷⁸ See Hsieh, *supra* note 12, at 512; Abrahms, *supra* note 8, at 471.

²⁷⁹ INA § 245(a), 8 U.S.C.A. § 1255(a).

²⁸⁰ *Id.*; FRAGOMEN ET AL., *supra* note 263, § 20:4.

²⁸¹ INA § 245(a), 8 U.S.C.A. § 1255(a).

²⁸² *Id.*; FRAGOMEN ET AL., *supra* note 263, § 20:4.

By never having any lawful status, such as a valid nonimmigrant visa, the immigrant necessarily failed to maintain lawful status at all.²⁸³ And, as an illegal entrant who is unlawfully present, the immigrant is inadmissible.²⁸⁴ Clearly, at no time can undocumented parents “bootstrap permanent residency onto [themselves]” through citizen children.²⁸⁵

Basically, the only way that an undocumented mother could gain citizenship status for her child and not seriously harm her future chances of obtaining LPR status is by proving that she had her child within the territory, but stayed fewer than 180 days.²⁸⁶ This option does not resemble the bootstrapping claims of opponents to birthright citizenship.²⁸⁷ If an undocumented mother chooses to stay after giving birth to her citizen child, she simply cannot adjust her status to legal permanency while she remains within the territory.²⁸⁸ Moreover, if she leaves after staying 180 days, she will be barred from entry for three or ten years, depending on the length of her unlawful presence.²⁸⁹ If undocumented parents choose to stay, their only real hope of gaining legal status through their citizen child is a legislative change in the INA or a grant of amnesty.²⁹⁰

²⁸³ INA § 245(a), 8 U.S.C.A. § 1255(a) (West 2007); FRAGOMEN ET AL., *supra* note 263, § 20:7.

²⁸⁴ INA §§ 212(a)(6), (a)(9)(B), 245(a), 8 U.S.C.A. §§ 1182(a)(6), (a)(9)(B), 1255(a).

²⁸⁵ INA §§ 212(a)(6), (a)(9)(B), 245(a), 8 U.S.C.A. §§ 1182(a)(6), (a)(9)(B), 1255(a); *see* Hsieh, *supra* note 12, at 512. There are two extremely narrow exceptions to this general rule. First, INA § 212(a)(6)(A)(ii) provides that certain battered women and children will be exempted from a violation of illegal entry if they have been “battered or subjected to extreme cruelty” and “there was a substantial connection” between the battery and the unlawful entry. 8 U.S.C.A. § 1182(a)(6)(A)(ii). Second, in 1994, the adjustment procedure was expanded to cover many previously ineligible aliens, under INA § 245(i), which provided a “special adjustment provision.” 8 U.S.C. § 1255(i) (2000). That provision permitted aliens who entered without inspection to be eligible for status so long as they paid a substantial fee of \$1,000, they were otherwise qualified for admission under the INA § 212(a), and the Attorney General chose to allow it. *Id.*; INA § 212(a), 8 U.S.C.A. § 1182(a). However, since the 2000 LIFE Act, *only* beneficiaries of immigrant visa petitions and labor certificates filed by April 30, 2001 may adjust their status under this provision. *See* Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 106-553, 114 Stat. 2762 (codified as amended in scattered sections of 8 U.S.C.); ALEINIKOFF ET AL., *supra* note 158, at 520. This is highly unlikely to apply to pregnant mothers sneaking across the border. *See* INA § 245(i)(1)(B)(i)–(ii), 8 U.S.C. § 1255(i)(1)(B)(i)–(ii); FRAGOMEN ET AL., *supra* note 263, § 19:13.

²⁸⁶ INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B).

²⁸⁷ *See* Hsieh, *supra* note 12, at 512; Abrahms, *supra* note 8, at 471.

²⁸⁸ INA § 245, 8 U.S.C.A. § 1255.

²⁸⁹ INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B).

²⁹⁰ *See* James C. Ho, Op-Ed., *Citizenship by Birth—Can It Be Outlawed?*, L.A. TIMES, Mar. 10, 2007, at A21 (noting new proposals by conservative activists to provide amnesty for illegal immigrants with relatives here now, but no birthright citizenship in the future).

Second, opponents claim that undocumented parents are less likely to be deported if they have a citizen child, especially once they have been in the country for seven years.²⁹¹ This assertion makes light of INA § 240A, which allows for the cancellation of removal and adjustment of status, providing separate qualifications first for LPRs, and then for non-LPRs.²⁹² If the undocumented parent of a citizen child is apprehended, and placed in removal proceedings, INA § 240A(b) only applies in very narrow situations.²⁹³ There are five mandatory requirements for an otherwise inadmissible or deportable immigrant to be granted a cancellation of removal or adjustment of status: (1) the Attorney General must determine the case warrants favorable discretion; (2) the immigrant must have been *physically present* for a *continuous* period of at least ten years; (3) the immigrant must have been a person of *good moral character* while present; (4) the immigrant must not have been convicted of any offense listed in the grounds of inadmissibility or grounds of deportation; (5) the immigrant must establish that removal would result in *exceptional and extremely unusual hardship* to the immigrant's spouse, parent, or child, who is a citizen or LPR.²⁹⁴ Opponents who make this claim rarely discuss the first four requirements, if at all, and severely downplay the difficulty in meeting the fifth requirement.²⁹⁵

In fact, each of the requirements is a real barrier to most claims, especially the last requirement.²⁹⁶ First, the provision begins with the phrase, "the Attorney General *may* cancel removal," meaning that even if an undocumented immigrant is able to meet all of the other requirements, his or her claim may be denied under the ultimate discretion of the Attorney General.²⁹⁷ Second, "physical presence" ends any time the immigrant has committed one of the specified crimes, or if the immigrant has departed the country "for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days."²⁹⁸ Over a period of ten years, it is not unlikely that a person with family and friends abroad will take a three month trip or travel a total exceeding 180

²⁹¹ See Hsieh, *supra* note 12, at 512–13; Wood, *supra* note 7, at 497–98.

²⁹² INA § 240A, 8 U.S.C.A. § 1229b (West 2007). This note is limited to the discussion of *undocumented* parents, so the requirement of seven years of continuous residence does not apply, as it would to an LPR. INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2) (2000).

²⁹³ INA § 240A(b), 8 U.S.C.A. § 1229b(b).

²⁹⁴ INA § 240A(b)(1), 8 U.S.C.A. § 1229b(b)(1).

²⁹⁵ See, e.g., Hsieh, *supra* note 12, at 512–13; Wood, *supra* note 7, at 497–98.

²⁹⁶ INA § 240A(b)(1), 8 U.S.C.A. § 1229b(b)(1).

²⁹⁷ *Id.* (emphasis added).

²⁹⁸ INA § 240A(d)(1)–(2), 8 U.S.C. § 1229b(d)(1)–(2) (2000).

days.²⁹⁹ Third, although a person of “good moral character” might seem to be a subjective category, the INA lists eight non-exclusive violations, one of which includes having ever been “a habitual drunkard, for example.”³⁰⁰ Fourth, “conviction” of an offense listed in INA § 212(a)(2) or § 237(a), includes very minor crimes and does not, in fact, require a conviction.³⁰¹ The crimes listed by the statute include any drug offense, even the most minor crimes involving marijuana.³⁰² Especially ambiguous are the crimes involving “moral turpitude,” which include any crime involving fraud, forgery, crimes against property, or crimes against a person.³⁰³

Lastly, however, is the burden on the undocumented parent to show that his or her removal would result in *exceptional and extremely unusual hardship* to his or her citizen child.³⁰⁴ This means a great deal more than merely having a citizen child who would be left behind without care if the undocumented parent were removed.³⁰⁵ Opponents’ assertions otherwise conflict with years of case law, where courts have consistently refused to find exceptional and extremely unusual hardship due to the de facto deportation of the citizen child.³⁰⁶ The standard for relief is very high.³⁰⁷ Undocumented parents may not simply claim that their children will suffer hardship because of lower levels of education, health care, and economic opportunities than they would have here.³⁰⁸ Courts generally disregard the de facto deportation they

²⁹⁹ See *id.*

³⁰⁰ See INA § 101(f)(1)–(9), 8 U.S.C.A. § 1101(f)(1)–(9) (West 2007).

³⁰¹ INA § 212(a)(2), 8 U.S.C. §§ 1182(a)(2) (Supp. 2005); INA § 237(a), 8 U.S.C.A. § 1227(a). The INA defines a “conviction” as “a formal judgment of guilt” of the immigrant entered by a court, which includes the admission of sufficient facts to warrant a finding of guilt and some form of restraint on liberty. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

³⁰² INA § 212(a)(2), 8 U.S.C. § 1182(a)(2); FRAGOMEN ET AL., *supra* note 263, § 19:9.

³⁰³ INA § 212(a)(2), 8 U.S.C. § 1182(a)(2); FRAGOMEN ET AL., *supra* note 263, § 19:9. Fragomen notes, “As you can see, there is not much in the way of a conviction that is not swept into this category.” FRAGOMEN ET AL., *supra* note 263, § 19:9.

³⁰⁴ INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2000).

³⁰⁵ See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1196 (2006).

³⁰⁶ See, e.g., *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003) (rejecting argument that would in effect “allow deportable aliens . . . to attach derivatively to the right of their citizen children to remain in the United States”); see Thronson, *supra* note 305, at 1171–72, 1195–97.

³⁰⁷ Thronson, *supra* note 305, at 1172. Parents must demonstrate a hardship to children that is “substantially different from, or beyond that which would normally be expected from the deportation of an alien with close family members here.” *Id.* (quoting *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001)).

³⁰⁸ *Id.* at 1172. In fact, to determine what is “unusual” the courts have found that the correct comparison group is that of other children accompanying deported parents, not

order for citizen children when denying a cancellation of removal for an undocumented parent; they focus instead on the choice of the family to have the children stay behind, and the choice of the child to return as a U.S. citizen later in life.³⁰⁹ In fact, one court suggested that removal from the United States made the mother “unfit.”³¹⁰ There can be no doubt that the myth of easy chain migration has been greatly exaggerated by opponents to birthright citizenship.³¹¹ When undocumented parents face removal, the fact that they have a citizen child only makes the decision more tragic.³¹² It does not, however, make it more likely that they will avoid removal and become an LPR.³¹³

The truth is that the “anchor baby” is just a myth, nothing more.³¹⁴ Whether or not undocumented pregnant mothers actually are “touring the parking lot [of American hospitals] waiting for their pains to start so they can go in and deliver,” they are never handed an easy route to legal status because of it.³¹⁵ The Citizenship Clause of the Fourteenth Amendment merely serves as a backstop, preventing the creation of a permanent subclass of people and children who would have no other route to legalized status.³¹⁶ Therefore, birthright citizenship, as effectively limited by the INA, should not be eliminated as opponents insist.³¹⁷

children with citizen parents who face no threat of removal and family separation. *Id.* (citing *Jimenez v. INS*, 16 F.3d 1485 (9th Cir. 1997)).

³⁰⁹ See *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (viewing de facto deportation of citizen child as a parental choice rather than a governmental decision); Thronson, *supra* note 305, at 1193–94.

³¹⁰ See *In re D.R.*, Nos. CP01002554A, CP01002555A, CP01002556A, 2004 WL 423993 at *8 (Conn. Super. Ct. 2004) (stating that the mother’s “return to Honduras renders her effectively unable to serve as a responsible parent”); Thronson, *supra* note 305, at 1197 n.159.

³¹¹ See Hsieh, *supra* note 12, at 512–13; Wood, *supra* note 7, at 497–98.

³¹² See Thronson, *supra* note 305, at 1197.

³¹³ See *id.* at 1195 nn.151, 152 (listing uniform rejection of cases in virtually every circuit, where children’s immigration and citizenship rights are asserted to defeat parents’ removal).

³¹⁴ See Pettit, *supra* note 16, at 277.

³¹⁵ Abrahms, *supra* note 8, at 469 (quoting *Citizenship Reform Act of 1997 and Voter Eligibility Verification Act: Hearing on H.R. 7 and H.R. 1428 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. (1997)); see INA §§ 212, 245, 8 U.S.C.A. §§ 1182, 1255 (West 2007); Thronson, *supra* note 305, at 1196.

³¹⁶ See NEUMAN, *supra* note 8, at 166.

³¹⁷ See Abrahms, *supra* note 8, at 469.

CONCLUSION

Although the United States may be in a constant state of fear, Americans must not revert back to entrenched fears of the “other” to justify the recreation of racial castes. The original purpose of the Fourteenth Amendment was not only to grant citizenship status to freed slaves, but to uproot and destroy the entire system of hereditary, exploitable laborers. Even if, as opponents to birthright citizenship suggest, children of illegal immigrants could be carved out of their entitlement to birthright citizenship through statute, they should not be. National policies driven by nativism, racism, and xenophobia only result in the undermining of the nation’s traditional, fundamental values. The current interpretation of the Citizenship Clause is not a century-old mistake; its original purpose remains legitimate and necessary today. Amending the INA or the Constitution to deny certain U.S.-born children citizenship because of their parentage would only recreate the type of society that excluded Dred Scott.

