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# **Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate**

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## Summary

The first clause of the Fourteenth Amendment to the U.S. Constitution, known as the Citizenship Clause, provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” This generally has been taken to mean that any person born in the United States automatically gains U.S. citizenship, regardless of the citizenship or immigration status of the person’s parents, with limited exceptions such as children born to recognized foreign diplomats. The current rule is often called “birthright citizenship.”

However, driven in part by concerns about unauthorized immigration, some have questioned this understanding of the Citizenship Clause, and in particular the meaning of “subject to the jurisdiction [of the United States].” Proponents of a narrower reinterpretation of that phrase argue that the term “jurisdiction” can have multiple meanings, and that in the Citizenship Clause, “jurisdiction” should be read to mean “complete jurisdiction” based on undivided allegiance and the mutual consent of the sovereign and the subject. This has been termed a “consensual” approach to citizenship. Conversely, proponents of the conventional view interpret the term “jurisdiction” to mean territorial jurisdiction, that is, the authority of a sovereign to enforce its laws within its boundaries. Under the conventional rule, citizenship is ascribed to a person at birth on the basis of the geographic location of that person’s birth in the United States. This birthright citizenship rule has sometimes been termed an “ascriptive” approach to citizenship.

Proponents of either side of this legal debate argue that a variety of sources and arguments support their respective positions. The two approaches differ in their interpretations of pre-Revolutionary English common law, pre-Civil War understandings of citizenship, the legislative history of the Civil Rights Act of 1866 and the Citizenship Clause of the Fourteenth Amendment, and subsequent case law. Two key Supreme Court cases in particular, *Elk v. Wilkins* (1884) and *United States v. Wong Kim Ark* (1898), interpreted the Citizenship Clause. *Elk* held that a member of a recognized Indian tribe was outside the scope of the Citizenship Clause because he was born owing allegiance to the tribe, rather than the United States, and the tribe was a political community not fully subject to the jurisdiction of the United States. *Wong Kim Ark* held that a person born in the United States to resident aliens became a U.S. citizen at birth, even when the person’s parents were barred from ever naturalizing. However, some argue that *Wong Kim Ark*’s statements limiting the exceptions to birthright citizenship were not necessary to its holding, and that no Supreme Court case has ever squarely held that the Citizenship Clause requires a broad view of jurisdiction that extends birthright citizenship to children of unlawfully or temporarily present aliens. Twentieth and 21<sup>st</sup> century case law also can be seen to support the conventional interpretation of the Citizenship Clause, but again, not in direct case holdings.

Bills have been introduced since the early 1990s to deny birthright citizenship to persons born in the United States to aliens other than lawful permanent residents. While a few proposals have suggested constitutional amendments, most seek to change the birthright citizenship rule by statute. It would likely fall to federal courts to determine whether such a statute could be upheld as constitutional. The weight of the legislative history of the Fourteenth Amendment, the analysis and discussion in *Wong Kim Ark*, the statements in various cases defining “jurisdiction” more often on the basis of territory rather than undivided allegiance, and the embrace of the prevailing birthright citizenship interpretation by more than a century of subsequent law, would probably factor against the constitutionality of a statute limiting birthright citizenship. Nevertheless, the scope of the guarantee of the Citizenship Clause remains a legal question of great interest and importance to many.

## Contents

Introduction .....	1
Historical Development of U.S. Citizenship by Birth in the United States.....	3
U.S. Citizenship Before the Civil War .....	3
The Civil Rights Act of 1866 .....	5
The Fourteenth Amendment to the U.S. Constitution .....	5
Litigation Involving the Citizenship Clause.....	6
<i>Slaughter-House Cases</i> and <i>Elk v. Wilkins</i> .....	6
<i>United States v. Wong Kim Ark</i> .....	8
Twentieth and 21 <sup>st</sup> Century Case Law on Birthright Citizenship.....	10
<i>Plyler v. Doe</i> and “Jurisdiction” .....	10
<i>Hamdi v. Rumsfeld</i> and Presumption of Citizenship.....	11
Cases on Birthright Citizenship in U.S. Territories.....	12
The Modern Legal Debate over Birthright Citizenship.....	13
Two Competing Interpretations of the Citizenship Clause.....	13
“Ascriptive” versus “Consensual” Conceptions of Citizenship.....	14
Divergent Interpretations of Common Law, Legislative History, Constitutional Text, and Case Law .....	15
Disagreement over Historical Precedent for Modern Immigration Issues.....	17
Proposed Legislative Reinterpretations of the Citizenship Clause .....	17
Legality of Narrowing the Citizenship Clause Without Constitutional Amendment .....	19

## Contacts

Author Contact Information .....	22
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## Introduction

In recent years, some scholars, legislators, and others have proposed to reexamine and potentially reinterpret the U.S. Constitution's Citizenship Clause to change and limit the current rule of conferring U.S. citizenship at birth to any person born in the United States, or "birthright citizenship."<sup>1</sup> The Citizenship Clause is the first clause of the Fourteenth Amendment, and 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...."<sup>2</sup> The policy debates on the topic of birthright citizenship are far-ranging, driven by concerns regarding unauthorized immigration,<sup>3</sup> global antiterrorism efforts,<sup>4</sup> reports of "birth tourism,"<sup>5</sup> and congressional redistricting,<sup>6</sup> among other issues. The legal debates, however, center squarely on the six words in the middle of the Citizenship Clause: "and subject to the jurisdiction thereof."

The Citizenship Clause has conventionally been taken to require U.S. citizenship generally to be accorded automatically to any child born within the United States,<sup>7</sup> regardless of the citizenship or status of the child's parents. The "subject to the jurisdiction thereof" language has been interpreted to impose limited exceptions, such as for children of diplomats and foreign ministers (who are accorded immunity from U.S. law).<sup>8</sup> This interpretation flows from the English common law doctrine of *jus soli* ("right of soil"), under which a person's nationality at birth is determined by the territory within which the person was born. The alternative doctrine of *jus sanguinis* ("right of blood"), which determines a person's nationality by descent, is now the more common

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<sup>1</sup> See generally, e.g., Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary, 109<sup>th</sup> Cong. No. 63, at 2 (2005) ("2005 House Hearing"); Birthright Citizenship: Is It The Right Policy for America? Hearing before the Subcomm. on Immigration and Border Security of the House Committee on the Judiciary, 114<sup>th</sup> Cong., No. 21 (2015) ("2015 House Hearing").

<sup>2</sup> U.S. CONST. art. XIV, §1, cl. 1.

<sup>3</sup> See, e.g., 2005 House Hearing, 2015 House Hearing, *supra* footnote 1. Note that a child born in the United States can sponsor a parent for eligibility for permanent residence in the United States only upon reaching the age of 21 and meeting various qualifications such as financial sponsorship; even with an eligible sponsor, unauthorized immigrants who entered the country without inspection may still be ineligible to adjust status. See Immigration and Nationality Act (INA) §§201(b)(2)(A)(i), 203, 213A, 245, 8 U.S.C. §§1151(b)(2)(A)(i), 1153, 1183a, 1255. However, the Obama Administration's proposal to create a new Deferred Action for Parental Accountability (DAPA) program would, if implemented, permit some alien parents of U.S. citizens or permanent residents to obtain temporary relief from removal. See U.S. Citizenship and Immigration Services, Executive Actions on Immigration (2015), <http://www.uscis.gov/immigrationaction> (describing proposal and noting federal court order barring implementation); CRS Legal Sidebar WSLG1273, *Implementation of DAPA and the DACA Expansion Remain Barred After Fifth Circuit Decision*, by (name redacted).

<sup>4</sup> See generally, e.g., 2005 House Hearing, *supra* footnote 1 (discussing case of Yaser Hamdi); *infra*, "Hamdi v. Rumsfeld and Presumption of Citizenship."

<sup>5</sup> See, e.g., 2015 House Hearing, *supra* footnote 1; *Oforji v. Ashcroft*, 354 F.3d 609, 619-621 (7<sup>th</sup> Cir. 2003) (Posner, concurring).

<sup>6</sup> E.g., Charles Wood, *Losing Control of America's Future – The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J. L. & PUB. POL'Y 465 (1999).

<sup>7</sup> For purposes of the Immigration and Nationality Act, the United States includes "Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands." 8 U.S.C. §1101(a)(38). The citizenship of children born on vessels in U.S. territorial waters or on the high seas has generally been held to be determined by the citizenship of the parents. *Lam Mow v. Nagle*, 24 F.2d 316 (9<sup>th</sup> Cir. 1928).

<sup>8</sup> See generally *infra*, "Litigation Involving the Citizenship Clause."

general system outside of North and South America.<sup>9</sup> However, each system's adherents have incorporated some elements of the other, with few purely adopting one or the other.<sup>10</sup>

The *jus soli* interpretation of the Citizenship Clause is recognized in a number of judicial decisions;<sup>11</sup> however, arguably, no case has ever directly held whether the Citizenship Clause extends to children of aliens who are present in the United States unlawfully. The factual scenarios of the key cases interpreting the Citizenship Clause, *Elk v. Wilkins* (1884)<sup>12</sup> and *United States v. Wong Kim Ark* (1898),<sup>13</sup> involved Native Americans and children of domiciled resident aliens, respectively. *Elk* found that members of Indian tribes were not granted U.S. citizenship by the Fourteenth Amendment (a situation which was eventually remedied by statute),<sup>14</sup> while *Wong Kim Ark* found that the child of Chinese citizens residing in San Francisco had become a U.S. citizen at the time of his birth and therefore was not subject to the Chinese Exclusion Acts of the time.

Some scholarship in the past few decades has argued that the phrase “and subject to the jurisdiction thereof” in the Citizenship Clause was in fact intended by the framers of the Fourteenth Amendment to include only those children born to lawfully present or lawfully resident aliens, and not children of unauthorized or nonimmigrant aliens.<sup>15</sup> These arguments have been embraced by some legislators, who have introduced bills since the early 1990s seeking to change the *jus soli* rule in various ways.<sup>16</sup> Many of these bills target Section 301 of the Immigration and Nationality Act (INA), which tracks the language of the Citizenship Clause and states: “The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof....”<sup>17</sup>

Any statute reinterpreting the Citizenship Clause to exclude children of certain aliens would face judicial review by federal courts. Because of the core constitutional principles involved, it seems probable that any case on such a statute could reach the Supreme Court. The Court could find such a statute constitutional if it interpreted the “subject to the jurisdiction” language of the Citizenship Clause to exclude the children of certain aliens from the scope of the Clause's protection. To uphold a statute limiting birthright citizenship, it would also appear that the Court would have to find either (1) that the discussion in *Wong Kim Ark* apparently supporting the conventional interpretation of birthright citizenship was mere dicta, not binding precedent, and the case's holding was limited to the facts of that case; or (2) that *Wong Kim Ark* incorrectly

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<sup>9</sup> Scott Bomboy, *What do other countries' constitutions say about birthright citizenship?*, CONSTITUTION DAILY (Aug. 26, 2015), <http://blog.constitutioncenter.org/2015/08/what-do-other-countries-constitutions-say-about-birthright-citizenship/> (“In general, birthright citizenship is common among Western Hemisphere countries and uncommon in other parts of the world.”).

<sup>10</sup> *Id.*

<sup>11</sup> See *infra*, “Litigation Involving the Citizenship Clause.”

<sup>12</sup> 112 U.S. 94 (1884).

<sup>13</sup> 169 U.S. 649 (1898).

<sup>14</sup> Indian Citizenship Act, P.L. 68-175, 43 Stat. 253 (1924); Nationality Act of 1940, P.L. 82-414, §201(b), 54 Stat. 1137, 1158; INA §301(b), 8 U.S.C. §1401(b)). The statutory expansion of automatic U.S. citizenship to Native Americans illustrates that the Citizenship Clause operates as a baseline guaranteeing the minimum of citizenship rights—wherever that baseline may be—and Congress has the power to provide citizenship to categories of people not covered by the constitutional guarantee. Congress has extended citizenship rights to children born of U.S. citizen parents in a foreign nation under certain circumstances. INA §301(c)-(e), (g), 8 U.S.C. §1401(c)-(e), (g).

<sup>15</sup> See *infra*, “Two Competing Interpretations of the Citizenship Clause.”

<sup>16</sup> See *infra*, “Proposed Legislative Reinterpretations of the Citizenship Clause.”

<sup>17</sup> INA §301(a), 8 U.S.C. §1401(a).

interpreted the Citizenship Clause, at least in some respects, and should be overruled. If a statute could not change the meaning of the Citizenship Clause, then a constitutional amendment, as some have proposed, would have the power to do so.<sup>18</sup> Proponents and opponents of the current birthright citizenship rule have marshalled a variety of arguments and historical records on all of these points.<sup>19</sup>

This report first sets the stage for analyzing the modern debates by providing a brief historical review of U.S. citizenship from the time of the founding through the Civil Rights Act of 1866 and the Citizenship Clause of the Fourteenth Amendment of 1868. It then describes the primary Supreme Court decisions analyzing the scope of the Citizenship Clause, as well as subsequent decisions generally reflecting the conventional understanding of birthright citizenship. This report then presents an overview of the main legal arguments for and against reassessing the scope of the Citizenship Clause, building on the history and judicial precedent described in previous sections. In light of the various bills that have been proposed to modify birthright citizenship, this report closes by discussing the primary legal considerations that would determine whether any congressional action to restrict birthright citizenship of U.S.-born children of alien parents without constitutional amendment could be upheld.

## Historical Development of U.S. Citizenship by Birth in the United States

### U.S. Citizenship Before the Civil War

The original framers of the U.S. Constitution referenced, but did not define, national citizenship. The Constitution required that a person have been a citizen of the United States for seven years to be a Representative and for nine years to be a Senator,<sup>20</sup> and that a person be a natural-born citizen or a citizen at the time of the adoption of the Constitution in order to be eligible to be President.<sup>21</sup> It also gave Congress the power to establish a uniform rule of naturalization, but naturalization refers to the manner in which a non-citizen acquires citizenship, rather than citizenship by birth.<sup>22</sup> Nor did the Naturalization Act of 1790 or subsequent acts until the Civil Rights Act of 1866 define citizenship by birth within the United States.<sup>23</sup>

In the absence of any statement in the Constitution or federal statutes that U.S. citizenship was acquired by right of birth in the United States, citizenship at birth generally was construed in the context of the English common law.<sup>24</sup> As noted by the Supreme Court, “[t]he interpretation of the

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<sup>18</sup> See, e.g., Walter Dellinger, Asst. Atty. Gen., *Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 OPS. OF THE OFFICE OF LEGAL COUNSEL 340, 348-349 (1995) (observing that “Congress is, of course, constitutionally free to propose, and the states to ratify, any amendment to the Constitution,” but arguing that to do so would “tamper [with] ... basic presuppositions of American constitutionalism”).

<sup>19</sup> See *infra*, “Two Competing Interpretations of the Citizenship Clause.”

<sup>20</sup> U.S. CONST. art. I, §2, cl. 2 (Representatives); U.S. Const. art. I, §3, cl. 3 (Senators).

<sup>21</sup> U.S. CONST. art. II, §1, cl. 5.

<sup>22</sup> U.S. CONST. art. I, §8, cl. 4. Naturalization has been described by the Supreme Court as “the act of adopting a foreigner, and clothing him with the privileges of a native citizen.” *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892).

<sup>23</sup> Act of March 26, 1790, 1 Stat. 103; Act of January 29, 1795, 1 Stat. 414; Act of April 14, 1802, 2 Stat. 153; Act of February 10, 1855, 10 Stat. 604. These naturalization acts specified that only “free white persons” could be naturalized.

<sup>24</sup> See “Common Law and the Constitution,” in CRS Report R42097, *Qualifications for President and the “Natural”* (continued...)

Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”<sup>25</sup>

For example, in an 1824 inheritance case, the Supreme Court proceeded on the assumption that three girls born in the United States were citizens, although their father was an Irish citizen who never naturalized.<sup>26</sup> In 1830, the Supreme Court held that the law of England as to citizenship at birth was the law of the English colonies, and that a person born in New York after the Declaration of Independence on July 4, 1776 was a citizen of the United States, unless he was born in British-occupied territory, left for England as a minor, and did not elect to affirm his U.S. citizenship within a reasonable time after attaining his majority.<sup>27</sup> In another early case more directly on point, *Lynch v. Clarke*, a New York court held in 1844 that Julia Lynch, born to Irish aliens while they were temporarily sojourning in New York, was a U.S. citizen.<sup>28</sup> In determining the appropriate national law to apply, the *Lynch* court looked to the traditional English common law doctrine of *jus soli*,<sup>29</sup> holding that by the “law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.”<sup>30</sup>

These birthright citizenship principles were not extended to slaves, or generally to Native Americans.<sup>31</sup> Moreover, in the infamous 1857 case of *Dred Scott v. Sandford*, Supreme Court Chief Justice Roger B. Taney wrote that the Constitution “point[ed] directly and specifically to the negro race as a separate class of persons, and show[ed] clearly that they were not regarded as a portion of the people or citizens of the Government then formed,”<sup>32</sup> and held that the Constitution precluded both Congress and states from granting citizenship to descendants of slaves or people of African descent generally.<sup>33</sup> As such, the *Dred Scott* decision applied a rigid racial limitation on the *jus soli* doctrine.

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(...continued)

*Born” Citizenship Eligibility Requirement*, by (name redacted)

<sup>25</sup> *Smith v. Alabama*, 124 U.S. 465, 478 (1888). English common law was also often adopted or recognized as in force in the constitutions or early legislative actions of the original thirteen states. *See generally* Maskell, *supra* footnote 24.

<sup>26</sup> *M’Creery’s Lessee v. Somerville*, 22 U.S. 354 (U.S. 1824).

<sup>27</sup> *See Inglis v. Sailor’s Snug Harbor*, 28 U.S. (3 Peters) 99, 136 (1830) (Johnson, J., concurring) (“By the principles of [common] law, the demandant owed allegiance to the king of Great Britain, as of his province of New York. By the revolution that allegiance was transferred to the state ... [and thus the demandant] was entitled to inherit as a citizen, born of the state of New York.”). *See also id.* at 164 (Story, J., dissenting in part on other grounds) (“Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.”). *See also, e.g., Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 119 (1804) (involving the claim of a person born in the United States, whom the Court presumed to be an American citizen in assessing whether he had expatriated or merely resided on a Danish island).

<sup>28</sup> *Lynch v. Clarke*, 1 Sandford Ch. 583, 646, 663 (N.Y. 1844) (concluding that “I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.”).

<sup>29</sup> *Id.* at 656-663.

<sup>30</sup> *Id.* at 663.

<sup>31</sup> *See* U.S. CONST. art. 1, §2, cl. 3 (apportionment); *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>32</sup> 60 U.S. 393, 411 (1857).

<sup>33</sup> *Id.* at 445-454.

## The Civil Rights Act of 1866

Following the Civil War, Congress passed the Civil Rights Act of 1866.<sup>34</sup> The first section of that act repealed *Dred Scott*. It provided “[t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States....”<sup>35</sup>

Prior to passage of the act, Congress debated its effects on citizenship, particularly the language “not subject to any foreign power, excluding Indians not taxed.”<sup>36</sup> Senator Lyman Trumbull, a lead sponsor, introduced language similar to the above but omitting the exclusion for “Indians not taxed” on January 30, 1866.<sup>37</sup> Senator Trumbull explained that “[o]ur dealings with the Indians are with them as foreigners, as separate nations,”<sup>38</sup> and in response to an inquiry from Senator Edgar Cowen whether the provision would “have the effect of naturalizing the children of Chinese and Gypsies born in this country,” responded: “Undoubtedly.”<sup>39</sup> Notably, Senator Trumbull and Senator Cowen agreed that “the children of German parents” were citizens under what was then the current law, and disagreed over the effects of race, rather than alien status of the parents.<sup>40</sup> However, in other statements on the citizenship provision, Senator Trumbull discussed the requirements of citizenship to be enshrined by the provision in terms of “owing allegiance” to the United States, or similar conditions seemingly additional to geographic presence.<sup>41</sup>

## The Fourteenth Amendment to the U.S. Constitution

The Civil Rights Act of 1866 was passed over President Andrew Johnson’s veto on April 9, 1866, and the Fourteenth Amendment was introduced soon thereafter, in May 1866.<sup>42</sup> As passed in the House and introduced in the Senate, the proposed Fourteenth Amendment lacked a citizenship provision. Senator Benjamin Wade proposed an amendment that would remove the word “citizen” from what would become the “privileges and immunities” clause and replace it with “person,” saying that “the word ‘citizen’ ... is a term about which there has been a good deal of uncertainty in our Government.”<sup>43</sup> In the discussion that ensued, Senator Wade explained his understanding that the only instance in which “a person may be born here and not be a citizen” was “in the case of children of foreign ministers....”<sup>44</sup>

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<sup>34</sup> 14 Stat. 27, §1, 39 Cong. Ch. 31 (1866).

<sup>35</sup> *Id.*

<sup>36</sup> See Mark Shawhan, “*By Virtue of Being Born Here*”: Birthright Citizenship and the Civil Rights Act of 1866, 15 HARV. LATINO L. REV. 1 (2012), for a presentation of some of the legislative history of the act pertaining to birthright citizenship principles. Much of the debate over the citizenship provision pertained to whether and to what extent Native Americans should be included or excluded.

<sup>37</sup> CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 498 (1866).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* at 527, 572.

<sup>42</sup> H.R. 127, 39<sup>th</sup> Cong. (1866); Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2764 (1866).

<sup>43</sup> CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2768 (1866).

<sup>44</sup> *Id.* at 2769.



The Citizenship Clause was initially introduced by Senator Jacob Howard to read: “All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.”<sup>45</sup> Senator Howard 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 their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.<sup>46</sup>

Once again, Senator Cowen objected and inquired, “Is the child of the Chinese immigrant in California a citizen? ... [I]s it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration...?”<sup>47</sup> Senator John Conness, of California, responded: “The proposition before us ... relates simply to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens.... I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States....”<sup>48</sup>

Further debate proceeded largely on the topic of Native American status.<sup>49</sup> In that context, Senator Trumbull stated: “What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means. Can you sue a Navajoe [sic] Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction.”<sup>50</sup>

Despite the Citizenship Clause’s expansion of birthright citizenship to “all persons born ... in the United States, and subject to the jurisdiction thereof” regardless of race, *naturalization* remained racially restricted even after the Fourteenth Amendment was ratified in 1868; the Naturalization Act of 1870 extended the naturalization process to “aliens of African nativity and to persons of African descent,” but other aliens who were not “free white persons” remained excluded.<sup>51</sup>

## Litigation Involving the Citizenship Clause

### *Slaughter-House Cases and Elk v. Wilkins*

The first Supreme Court decision to interpret the new Fourteenth Amendment, known as “*The Slaughter-House Cases*” decision, was not focused on the scope and interpretation of the Citizenship Clause.<sup>52</sup> Among other conclusions, this landmark 1873 decision rendered the

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<sup>45</sup> *Id.* at 2890.

<sup>46</sup> *Id.* Senator Howard continued, rather optimistically: “It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States.” *Id.*

<sup>47</sup> *Id.* at 2890-91. Senator Cowen was also, again, concerned with “the Gypsies,” saying: “If the mere fact of being born in the country confers that right [to be shielded from expulsion by a state], then they will have it; and I think it will be mischievous.” *Id.* at 2891.

<sup>48</sup> *Id.* at 2891.

<sup>49</sup> *See id.* at 2892-97.

<sup>50</sup> *Id.* at 2893.

<sup>51</sup> 16 Stat. 254 (1870); 10 Stat. 604 (1855).

<sup>52</sup> 83 U.S. (16 Wall.) 36 (1873).

Privileges and Immunities Clause a “practical nullity”<sup>53</sup> in holding that it referred only to federal rights as designated in the Constitution or as necessarily implied as belonging to citizens of the United States, and did not forbid the states from withholding the privileges and immunities pertaining to state citizenship.<sup>54</sup> In the course of its decision, the majority stated that “[t]he phrase, ‘subject to its jurisdiction,’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States, born within the United States.”<sup>55</sup> However, this statement is generally regarded as dicta, that is, a remark not controlling as precedent on later courts because it was made in reference to an issue not actually before the court.<sup>56</sup>

*Elk v. Wilkins*, decided in 1884, did target the meaning of the Citizenship Clause, although not with respect to children of aliens. John Elk was born a member of a recognized Indian tribe, but had separated from his tribe and “taken up his residence among the white citizens” of Omaha, Nebraska, although the petition in the case did not allege that he had ever been naturalized or taxed.<sup>57</sup> A local registrar refused to register Elk as a qualified voter, on the grounds that Elk “was an Indian, and therefore not a citizen of the United States.”<sup>58</sup> The Supreme Court upheld the dismissal of Elk’s case against the registrar, holding that the Citizenship Clause of the Fourteenth Amendment did not make members of Indian tribes U.S. citizens at birth, largely because of the tribes’ special status as independent political communities.<sup>59</sup> It declared that a member of an Indian tribe was born owing allegiance to that tribe rather than to the United States, and tribes were not fully subject to the jurisdiction of the United States. The Court stated:

The evident meaning of these last words [“subject to the jurisdiction thereof”] is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.

... Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more “born in the United States and subject to the jurisdiction thereof,” within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.<sup>60</sup>

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<sup>53</sup> *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 665 (E.D. Tenn. 2000).

<sup>54</sup> 83 U.S. at 74-79.

<sup>55</sup> *Id.* at 73.

<sup>56</sup> *See, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 679 (1898); Brief of Amicus Curiae the Claremont Inst. Ctr. for Constitutional Jurisprudence in Supp. of Resp’ts. at 8-9, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

<sup>57</sup> *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>58</sup> *Id.* at 97.

<sup>59</sup> *Id.* at 109.

<sup>60</sup> *Id.* at 102. The Court also declared that the second section of the Fourteenth Amendment, which provides that “representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed,” supported the exclusion of members of recognized Indian tribes from birthright citizenship. *Id.* As noted above, Native Americans now are citizens not by virtue of the Fourteenth Amendment but by various statutes as well as earlier treaties naturalizing specific tribes. *See supra* footnote 14.

## ***United States v. Wong Kim Ark***

To this day, the primary Supreme Court case on the meaning of the Citizenship Clause as to birthright citizenship remains *United States v. Wong Kim Ark*, decided in 1898.<sup>61</sup> Wong Kim Ark was born in 1873 in San Francisco and resided and worked in California.<sup>62</sup> His parents, who were Chinese citizens and ineligible to naturalize under then-existing law, returned to their home country in 1890.<sup>63</sup> When Wong Kim Ark returned to the United States from a several month visit to China in 1895, he was detained on his steamship when a customs agent (responsible for immigration enforcement at the time) declared that he was not a U.S. citizen and that he therefore was barred from entry by the Chinese Exclusion Acts.<sup>64</sup> The government argued before the Supreme Court that “subject to the jurisdiction” referred to those born within the political, not territorial, jurisdiction of the United States. It pointed to the *Slaughter-House Cases*, *Elk v. Wilkins*, international adoption of *jus sanguinis* rules, some historical documents, and policy grounds to argue for limits on citizenship.<sup>65</sup> Wong Kim Ark’s attorneys raised a number of arguments in opposition, including common law jurisprudence, the purpose of the Fourteenth Amendment and its context following the Civil War, and principles of national sovereignty.<sup>66</sup>

More than a year after the case was argued, Justice Horace Gray found for Wong Kim Ark in an opinion that:

- traced the development of the English common law with regard to *jus soli*, and countered the argument that it had been superseded by *jus sanguinis*;<sup>67</sup>
- read the original Constitution’s references to citizenship in light of the common law while reviewing pre-Fourteenth Amendment judicial decisions on citizenship;<sup>68</sup>
- delved into the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment;<sup>69</sup>
- reviewed interpretations of the Citizenship Clause by lower federal and state courts<sup>70</sup> and the executive branch;<sup>71</sup>
- analyzed and distinguished the *Slaughter-House Cases* and *Elk v. Wilkins*;<sup>72</sup> and
- stated:

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth

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<sup>61</sup> 169 U.S. 649 (1898).

<sup>62</sup> *Id.* at 652-653.

<sup>63</sup> *Id.* at 652.

<sup>64</sup> *Id.* at 653.

<sup>65</sup> *Id.* at 649, 660, 666, 676-682.

<sup>66</sup> See generally Lucy E. Salyer, Wong Kim Ark, in IMMIGRATION STORIES 51, 70-74 (2005).

<sup>67</sup> 169 U.S. at 653-675.

<sup>68</sup> *Id.* at 654-666, 683-688.

<sup>69</sup> *Id.* at 675-676, 688, 697-699.

<sup>70</sup> *Id.* at 692-697 (citing *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884), and other California district court decisions, as well as state supreme court decisions from Nevada (*State v. Ah Chew*, 16 Nev. 50 (1881)) and New Jersey (*Benny v. O’Brien*, 29 Vroom (58 N.J. Law) 36 (1895))).

<sup>71</sup> *Id.* at 688-692.

<sup>72</sup> *Id.* at 676-682.

within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. 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.<sup>73</sup>

The Court declared that “[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States,” reading allegiance fairly broadly and indeed “independently of any domiciliation ... [or] renouncing any former allegiance....”<sup>74</sup> The enumerated exceptions to birthright citizenship, for children of foreign diplomats, foreign public ships, or hostile occupying enemies, and members of Indian tribes, were also reiterated on several occasions in the opinion.<sup>75</sup> Moreover, the birthright citizenship guaranteed by the Citizenship Clause could not be abridged by the Chinese Exclusion Acts or any other legislation: “The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.”<sup>76</sup>

The Court’s ultimate holding, on the specific facts of the case, was phrased more narrowly than the foregoing general pronouncements on *jus soli* generally:

[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 domicil 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.<sup>77</sup>

Chief Justice Fuller and Justice Harlan dissented, objecting to the application of the English common law rule and urging a narrower view of allegiance and jurisdiction.<sup>78</sup> They emphasized a treaty and statute disqualifying Chinese parents and their children from naturalization.<sup>79</sup>

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<sup>73</sup> *Id.* at 693.

<sup>74</sup> *Id.* at 693-694. The Court also observed that “[t]o hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.” *Id.* at 694.

<sup>75</sup> *E.g., id.* at 657-658, 664, 678-679, 682, 688.

<sup>76</sup> *Id.* at 703.

<sup>77</sup> *Id.* at 705.

<sup>78</sup> *Id.* at 706-732. The core dissent argument—reflected in the modern legal debate over birthright citizenship—was that “to be ‘completely subject’ to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government,” and that:

The children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country.

*Id.* at 725.

<sup>79</sup> *Id.* at 725-732.

## Twentieth and 21<sup>st</sup> Century Case Law on Birthright Citizenship

After *Elk v. Wilkins* and *United States v. Wong Kim Ark*, the meaning of the Citizenship Clause of the Fourteenth Amendment as to U.S. born children of alien parents was generally taken to be fairly settled. U.S. citizenship was and is automatically granted to any person born within the geographic United States, unless the person fell within a specific exception and therefore outside the “subject to the jurisdiction thereof” requirement of the Fourteenth Amendment. The main exceptions are children born as members of recognized Indian tribes (now citizens by statute),<sup>80</sup> and children born to foreign diplomatic officers.<sup>81</sup> The alien status, or even unlawful presence, of a child’s parent or parents has not been held to deny U.S. citizenship to a child born in this country.<sup>82</sup> Notably, in World War II, former California attorney general Ulysses S. Webb brought an unsuccessful test case seeking to overturn *Wong Kim Ark* and remove Japanese Americans from voter rolls on the theory that they were not citizens.<sup>83</sup> The U.S. Court of Appeals for the Ninth Circuit summarily affirmed the district court’s dismissal of that case “[o]n the authority of the [F]ourteenth Amendment to the Constitution, § 1, making all persons born in the United States citizens thereof, as interpreted by the Supreme Court of the United States in *United States v. Wong Kim Ark* ... and a long line of decisions”;<sup>84</sup> the Supreme Court did not grant review.<sup>85</sup>

### *Plyler v. Doe* and “Jurisdiction”

The Supreme Court has not directly addressed whether the Citizenship Clause necessarily requires U.S. citizenship to be granted to persons born in the United States to unlawfully present aliens. However, it has made pronouncements arguably relevant to that question while addressing other issues. Perhaps most notably, in 1983, the Supreme Court decided *Plyler v. Doe*, holding that a Texas statute which withheld state funds for the education of children who were not “legally admitted” into the United States, and which authorized local school districts to deny enrollment to such children, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>86</sup> Texas had argued “that the Equal Protection Clause directs a State to afford its protection to persons *within its jurisdiction*” and that “persons who have entered the United States illegally are not ‘within the jurisdiction’ of a State even if they are present within a State’s boundaries and subject to its laws.”<sup>87</sup> The Court disagreed, holding that “[t]o permit a State to employ the phrase ‘within its jurisdiction’ in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and

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<sup>80</sup> See *supra* footnote 14.

<sup>81</sup> Children born to foreign diplomatic officers accredited to the United States may be considered lawful permanent residents at birth. 8 C.F.R. §101.3. See also *supra* footnote 7.

<sup>82</sup> See, e.g., *Perkins v. Elg*, 307 U.S. 325, 328-329 (1939) (“On her birth in New York, the plaintiff became a citizen of the United States”) (citing Civil Rights Act of 1866, Citizenship Clause, and *Wong Kim Ark*); *Bedoya Lopez de Zea v. Holder*, 761 F.3d 75, 78 (1<sup>st</sup> Cir. 2014) (noting that petitioner’s child “is a United States citizen and was born ... during one of [petitioner’s] visits to the United States,” but upholding petitioner’s removal); *Hernandez-Rivera v. Immigration & Naturalization Service*, 630 F.2d 1352, 1356 (9<sup>th</sup> Cir. 1980) (affirming rule disallowing minor U.S. citizen children from petitioning for their parents until age 21, noting “[a]n alien cannot gain favored status merely because he or she has a child who is a United States citizen”).

<sup>83</sup> *Regan v. King*, 134 F.2d 413 (9<sup>th</sup> Cir. 1943).

<sup>84</sup> *Id.* at 413.

<sup>85</sup> 319 U.S. 753 (1943) (denying certiorari). See also Greg Robinson, “Regan v. King,” *DENSHO ENCYCLOPEDIA* (Brian Niiya, ed.), [http://encyclopedia.densho.org/Regan\\_v.\\_King/](http://encyclopedia.densho.org/Regan_v._King/) (last visited October 6, 2015).

<sup>86</sup> 457 U.S. 202 (U.S. 1982).

<sup>87</sup> *Id.* at 211 (emphasis in original).

applied equally to those persons, would undermine the principal purpose [of] the Equal Protection Clause ....<sup>88</sup>

While the threshold inquiry in *Plyler* centered on the “person within [a state’s] jurisdiction” language of the Equal Protection Clause, the Court also analogized that phrase to the use of “jurisdiction” in the Citizenship Clause, in a footnote, stating:

Although we have not previously focused on the intended meaning of this phrase [“within its jurisdiction”], we have had occasion to examine the first sentence of the Fourteenth Amendment, which provides that “[all] persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States....” (Emphasis added.) Justice Gray, writing for the Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), detailed at some length the history of the Citizenship Clause, and the predominantly geographic sense in which the term “jurisdiction” was used. He further noted that it was “impossible to construe the words ‘subject to the jurisdiction thereof,’ in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words ‘within its jurisdiction,’ in the concluding sentence of the same section....”

Justice Gray concluded that “[every] citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.” *Id.*, at 693. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment “jurisdiction” can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.<sup>89</sup>

In the same Equal Protection context, the Court in *Plyler* also recognized “[p]ersuasive arguments” for withholding benefits “from those whose very presence within the United States is the product of their own unlawful conduct,” but was more skeptical of “classifications imposing disabilities on the minor children of such illegal entrants,” who could not control their parents’ conduct or their own status.<sup>90</sup>

### ***Hamdi v. Rumsfeld* and Presumption of Citizenship**

In 2004, the Supreme Court was invited to reassess the automatic granting of U.S. citizenship to children born to aliens in the United States by several *amici curiae* briefs in *Hamdi v. Rumsfeld*.<sup>91</sup> That case presented legal questions about the rights owed to a U.S. citizen, born in Louisiana to Saudi parents, who had been detained in Afghanistan as an enemy combatant.<sup>92</sup> The briefs by the

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<sup>88</sup> *Id.* at 213.

<sup>89</sup> *Id.* at 211 n.10 (citing C. BOUVE, EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 425-427 (1912)).

<sup>90</sup> *Id.* at 219-220.

<sup>91</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>92</sup> *Hamdi*, 542 U.S. at 507. Four separate opinions were written by the *Hamdi* Court, with none receiving support from a majority of the Justices. However, a majority of the Court recognized that Congress’s enactment of the 2001 Authorization for Use of Military Force authorized the President to detain persons captured while fighting U.S. forces in Afghanistan, including U.S. citizens. *Id.* at 518 (O’Connor, J., plurality opinion), 588-589 (Thomas, J., dissenting). A clear majority also believed that U.S. citizens held as “enemy combatants” have the right to a hearing where they may challenge the legality of their detention before a judge or other neutral decision-maker. *Id.* at 518, 533 (O’Connor, J., plurality opinion, joined by Breyer, J., Kennedy, J., and Rehnquist, C.J.); 553 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.). Justices Scalia and Stevens took the view that detention without criminal charge was only permissible if Congress suspended the writ of habeas corpus. *Id.* at 554 (Scalia, J., dissenting, joined by Stevens, J.).

Eagle Forum Education & Legal Defense Fund<sup>93</sup> and the Claremont Institute Center for Constitutional Jurisprudence<sup>94</sup> argued that *Wong Kim Ark* had been read too broadly. The *amici* argued that the Citizenship Clause of the Fourteenth Amendment should instead be read to advance a legal concept of citizenship based on consent, of both the individual and the sovereign, embodied in the Clause's "subject to the jurisdiction thereof" language.<sup>95</sup> The Court declined the invitation and did not discuss the issue of granting American citizenship to children of aliens, although a dissent authored by Justice Antonin Scalia did refer to Hamdi as "a presumed American citizen."<sup>96</sup>

## Cases on Birthright Citizenship in U.S. Territories

Several recent cases have touched on the meaning of "subject to the jurisdiction thereof" in assessing the scope of another phrase in the Citizenship Clause, "born ... in the United States."<sup>97</sup> For example, in *Tuaua v. United States*, decided in June 2015, the U.S. Court of Appeals for the D.C. Circuit held that "born ... in the United States" did not extend to those born in the U.S. territory of American Samoa.<sup>98</sup> In doing so, the court analyzed the geographic scope of the *ius soli* doctrine and applied both *Elk v. Wilkins* and *United States v. Wong Kim Ark*. The court viewed the English common law rule as defining the domain of the king broadly, with those born in, for example, the American colonies treated as subjects of the king; however, the court was "unconvinced ... that *Wong Kim Ark* reflects the constitutional codification of the common law rule as applied to outlying territories," since *Wong Kim Ark* was born in San Francisco and issues regarding geographical scope of the Citizenship Clause were not addressed.<sup>99</sup> Rather, the American Samoan plaintiffs were more analogous to Indian tribe members under *Elk v. Wilkins* in terms of being "significantly self-governing."<sup>100</sup> American Samoa's situation was, perhaps more importantly, determined to a significant extent by *The Insular Cases*, a series of decisions beginning in 1901 in which the Supreme Court addressed whether the Constitution, by its own force, applies in any territory that is not a state.<sup>101</sup>

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<sup>93</sup> Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Supp. of Resp'ts, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (hereinafter "Eagle Forum Brief").

<sup>94</sup> Brief of Amicus Curiae the Claremont Inst. Ctr. for Constitutional Jurisprudence in Supp. of Resp'ts., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (hereinafter "Claremont Institute Brief").

<sup>95</sup> Eagle Forum Brief at 4-13; Claremont Institute Brief at 5-19.

<sup>96</sup> 542 U.S. at 554 (Scalia, J., dissenting).

<sup>97</sup> See, e.g., *Nolos v. Holder*, 611 F.3d 279, 284 (5<sup>th</sup> Cir. 2010) (holding that persons born in the Philippines during its status as a U.S. territory were not "born ... in the United States" under the Fourteenth Amendment and distinguishing *Wong Kim Ark*); *Valmonte v. INS*, 136 F.3d 914, 915-21 (2d Cir. 1998) (same); *Rabang v. INS*, 35 F.3d 1449, 1450-54 (9<sup>th</sup> Cir. 1994) (same). Note that Congress has extended citizenship by statute to persons born in the current U.S. territories, except for American Samoa; citizenship was never extended to Filipinos before Philippine independence. See INA §101(a)(36), (38), 8 U.S.C. §1101(a)(36), (38). Thus, case law on this particular question mostly concerns American Samoa and the Philippines.

<sup>98</sup> *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

<sup>99</sup> *Id.* at 304-306 (discussing *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)).

<sup>100</sup> *Id.* at 305-306 (discussing *Elk v. Wilkins*, 112 U.S. 94 (1884)).

<sup>101</sup> *Id.* at 306-312. As summarized by Chief Justice Rehnquist in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990), "not every constitutional provision applies to governmental activity even where the United States has sovereign power." See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico).

Notably, the Circuit Court in *Tuaua* briefly addressed and dismissed an argument that Congress could change the interpretation of the Citizenship Clause by statute, without constitutional amendment, stating:

The United States Government also argues, “even if Plaintiffs were correct that ... the Fourteenth Amendment should generally confer birthright citizenship [on persons born in American Samoa,] ... Congress’s direct modification of that status by statute trumps that interpretation” ... (relying on *Rogers v. Bellei*, 401 U.S. 815, 828 (1971)). This argument is novel, if curious. Yet it erroneously conflates Congress’s broad powers over naturalization with authority to statutorily abrogate the scope of birthright citizenship available under the Constitution itself. Congress’s authority for the latter is wanting. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (“[T]he constitution is superior to any ordinary act of the legislature.”).<sup>102</sup>

## The Modern Legal Debate over Birthright Citizenship

The debate over American birthright citizenship for children of aliens has, of course, significant policy and political philosophy components—and real world consequences—which are generally outside the scope of this report. In focusing on the legal and constitutional aspects of the debate, the remainder of this report begins by briefly introducing the main competing perspectives and their respective approaches to analyzing the history, constitutional text, and case law developments summarized in previous sections. It then notes some legislative proposals to limit birthright citizenship and discusses how, if enacted, they would likely be assessed by the Supreme Court. Those who seek a reinterpretation of the Citizenship Clause would seem to face substantially greater legal and constitutional hurdles than those who would maintain the birthright citizenship status quo. Nevertheless, it is not necessarily clear that the question has been truly settled.

### Two Competing Interpretations of the Citizenship Clause

There are, broadly speaking, two sides to the current legal debate over whether the Citizenship Clause of the Fourteenth Amendment requires the automatic granting of U.S. citizenship to all persons born in the United States, including those born to unlawfully or temporarily present aliens.<sup>103</sup> It would be futile to attempt a comprehensive review of the many statements cited and arguments made on both sides, but even a summary of selected points illustrates the deep philosophical differences underlying the legal disagreements. The following sections highlight a few of the principal themes, although a full examination of points and counter-points on the issues below—and others—is outside the scope of this report.

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<sup>102</sup> *Tuaua v. United States*, 788 F.3d 300, 303 (D.C. Cir. 2015) (some citations omitted).

<sup>103</sup> This is separate from the debate over whether a new amendment should be made to the Constitution to eliminate the automatic granting of U.S. citizenship to children of unlawfully or temporarily present aliens. However, some of those who believe that the Citizenship Clause already allows that result have also expressed support for such an amendment, if the prevailing interpretation of the Citizenship Clause is held to be required by its current text. *See, e.g.,* Wood, *supra* footnote 6, at 522; *Societal and Legal Issues Surrounding Children Born in the U.S. to Illegal Alien Parents: Joint Hearing before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the House Committee on the Judiciary*, 104<sup>th</sup> Cong. (1995).



## “Ascriptive” versus “Consensual” Conceptions of Citizenship

What is generally considered the majority view, embodied in applicable law and policy, is that the Fourteenth Amendment does require U.S. citizenship to be automatically conferred on “[a]ll persons born . . . in the United States”; and that the phrase “subject to the jurisdiction thereof” excludes from that general rule only certain common-law-based exceptions to the *jus soli* doctrine, for those born in the United States to foreign diplomats, hostile occupying forces, or members of recognized Indian tribes. Legally, the “jurisdiction” referred to by the Citizenship Clause is territorial jurisdiction, which is the power of a sovereign to enforce its laws within its territorial limits.<sup>104</sup> This conventional interpretation has been called the “ascriptive” view (at least by some opponents) because it determines citizenship by the objective geographical circumstances of a person’s birth.<sup>105</sup>

On the other side, some argue that the Fourteenth Amendment does not *require* U.S. citizenship to be automatically granted to persons born in the United States to aliens, especially those aliens who are present unlawfully or who are domiciled elsewhere.<sup>106</sup> The core of this argument is that the phrase “subject to the jurisdiction thereof” was intended to codify a limitation on the birthright citizenship principle that, in the words of two of its early proponents, “demanded a more or less complete, direct power by government over the individual, and a reciprocal relationship between them at the time of birth, in which the government consented to the individual’s presence and status and offered him complete protection.”<sup>107</sup> The “jurisdiction” referred to by the Citizenship Clause, in this view, is a more “complete” jurisdiction that entails undivided allegiance.<sup>108</sup> This opposing view has been called the “consensual” approach, as its proponents would “make political membership a product of mutual consent by the polity and the individual.”<sup>109</sup> In short, as one of the aforementioned *Hamdi v. Rumsfeld* amicus brief argued unsuccessfully before the Supreme Court in 2004, “[i]t is not the physical location of birth that defines citizenship, but the express or implied consent to jurisdiction of the sovereign.”<sup>110</sup> It is

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<sup>104</sup> See *United States v. Wong Kim Ark*, 169 U.S. 649, 683-686 (1898) (analyzing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)); see also, e.g., Dellinger, *supra* footnote 18; Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 ST. LOUIS U. PUB. L. REV. 329 (2013).

<sup>105</sup> See generally, e.g., PETER H. SCHUCK AND ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (Yale University Press, 1985).

<sup>106</sup> Note that different reinterpretations are aimed at different concerns. Some would exclude from automatic U.S. citizenship those born to non-domiciled temporary visitors (whether legally present or not), but not unlawfully present aliens. See, e.g., Richard Posner, *The Controversy over Birthright Citizenship*, THE BECKER POSNER BLOG (Oct. 17, 2010), <http://www.becker-posner-blog.com/2010/10/the-controversy-over-birthright-citizenshipposner.html>. Others would exclude those born to unlawfully present aliens, but not necessarily to those lawfully present, even temporarily as nonimmigrants. See, e.g., Wood, *supra* footnote 6; Justin Lollman, *Note: The Significance of Parental Domicile Under the Citizenship Clause*, 101 VA. L. REV. 455 (2015). Still others propose that the Citizenship Clause does not require granting automatic U.S. citizenship to anyone but those with one or even both parents who are citizens or lawfully present and domiciled immigrants. E.g., SCHUCK AND SMITH, *supra* footnote 105; *infra*, “Proposed Legislative Reinterpretations of the Citizenship Clause.”

<sup>107</sup> SCHUCK AND SMITH, *supra* footnote 105, at 86.

<sup>108</sup> See, e.g., Wood, *supra* footnote 6, at 506-508.

<sup>109</sup> See, e.g., Dellinger, *supra* footnote 18, at 346. The pro-reinterpretation view has also been called the “revisionist” approach, primarily by opponents. See, e.g., Mark Shawhan, “*By Virtue of Being Born Here*”: *Birthright Citizenship and the Civil Rights Act of 1866*, 15 HARV. LATINO L. REV. 1, 1-2 (2012).

<sup>110</sup> Eagle Forum Brief, *supra* footnote 93, at 4. See also *supra*, “*Hamdi v. Rumsfeld* and Presumption of Citizenship.”

generally acknowledged that opposition to the conventional interpretation is the minority viewpoint.<sup>111</sup>

### **Divergent Interpretations of Common Law, Legislative History, Constitutional Text, and Case Law**

Both sides of the birthright citizenship debate look back to colonial and pre-colonial times for evidence for their respective positions. Some legal writers favoring a narrower reinterpretation of birthright citizenship have emphasized statements in English common law cases referring to “aliens in amity”; they argue that even the common law doctrine of *jus soli* came to rely upon mutual consent between the citizen and the sovereign, and that the Fourteenth Amendment did not intend to abandon what they interpret as common law notions of consent.<sup>112</sup> Other consensualist legal writers say that to the extent the English common law made persons English subjects purely on the basis of the place of their birth, the American Revolution rejected this element of the English common law and enshrined more consensualist ideals of a social contract.<sup>113</sup> Consensualist legal writers have also emphasized the right of expatriation, or the voluntary ending of citizenship, as a corollary that they argue supports an allegiance based approach to gaining citizenship at birth.<sup>114</sup> Proponents of the conventional interpretation of the Citizenship Clause generally argue that the American Founders understood the English common law doctrine of *jus soli* to include only limited exceptions for children born to diplomats and hostile occupying forces, and that, as various passages in the *Wong Kim Ark* decision describe, this understanding of the *jus soli* doctrine informed the framing of the Fourteenth Amendment.<sup>115</sup>

Interpretations of the legislative history of the Citizenship Clause of the Fourteenth Amendment, and of its precursor language in the Civil Rights Act of 1866, are similarly divergent, even as to some of the very same passages in the *Congressional Globe*. As recognized by the Supreme Court, “the legislative history of the Fourteenth Amendment ... like most other legislative history, contains many statements from which conflicting inferences can be drawn....”<sup>116</sup> Those in favor of narrowing birthright citizenship often point to passages in the 1866 congressional debates referring to “complete jurisdiction”<sup>117</sup> or notions of “allegiance,”<sup>118</sup> arguing that the framers of the Fourteenth Amendment would not have understood today’s unlawfully present aliens or their U.S. born children as meeting these requirements. However, the legislators’ statements cited by

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<sup>111</sup> See, e.g., Lauren Carroll, ‘Many’ scholars say ‘anchor babies’ aren’t covered by Constitution, POLITIFACT.COM (Aug. 25, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/aug/25/donald-trump/trump-many-scholars-say-anchor-babies-arent-cover/> (quoting Peter Schuck that “our [consensualist] view on the constitutional issue is decidedly the minority view”).

<sup>112</sup> E.g., Dan Stein and Jon Bauer, *Interpreting the 14<sup>th</sup> Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, 7 STANFORD L. & POL’Y REV. 127, 128-129 (1996) (citing Lord Edward Coke, *Calvin’s Case* (1608)); Wood, *supra* footnote 6, at 508-508 (same); see also, e.g., SCHUCK AND SMITH, *supra* footnote 105, at 42 (“American law has in fact embodied ascriptive and consensual elements from its earliest days.”).

<sup>113</sup> E.g., Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. LAW & POL. 1, 10 (2009); Claremont Institute Brief, *supra* footnote 94, at 16-19; see also *United States v. Wong Kim Ark*, 169 U.S. 649, 710 (1898) (Fuller, J., dissenting).

<sup>114</sup> E.g., SCHUCK AND SMITH, *supra* footnote 105, at 87.

<sup>115</sup> See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649, 657-658, 664, 678-679, 682, 688 (1898).

<sup>116</sup> *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967).

<sup>117</sup> E.g., Wood, *supra* footnote 6, at 508-510 (analyzing statements of Senators Trumbull, Howard, and Williams, Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2893-2897 (1866)); SCHUCK AND SMITH, *supra* footnote 105, at 81-83 (same); Eagle Forum Brief, *supra* footnote 93, at 6-7 (also citing Senator Cowen).

<sup>118</sup> E.g., SCHUCK AND SMITH, *supra* footnote 105, at 80.

consensualist writers were made largely, though not entirely, in the context of the exclusion from the Citizenship Clause of members of Indian tribes.<sup>119</sup> As proponents of retaining birthright citizenship point out, other indicia in the legislative history indicate that children of aliens were considered differently than children of Indian tribe members and were broadly intended to be included within the Citizenship Clause's scope.<sup>120</sup> The two sides also differ as to how the Civil Rights Act of 1866's language giving citizenship to all persons born in the United States "not subject to any foreign power" should be evaluated in interpreting the modified language in the Citizenship Clause of the Fourteenth Amendment.<sup>121</sup>

Within the consensualist camp, it appears that most argue that *Wong Kim Ark* could be interpreted narrowly, rather than overturned, in order to support reinterpreting the Citizenship Clause.<sup>122</sup> As noted above, Wong Kim Ark's parents had apparently established as firm a foothold in the United States as was legally available to them; the holding of the case referred to their "permanent domicil and residence in the United States" at the time of his birth, although the rest of the analysis and the discussion in the case ranged much more broadly. Proponents of the birthright citizenship status quo argue that the *Elk v. Wilkins* and *Wong Kim Ark* Supreme Court decisions in the 1800s essentially settled the meaning of the Citizenship Clause, in part by enumerating the few exceptions to the *jus soli* doctrine, which did not include the unlawful or temporary presence in the United States of a person's alien parents at the time of that person's birth.<sup>123</sup>

Supporters of the ascriptive and consensual viewpoints also debate, for example, whether other case law supports giving the term "jurisdiction" in the Citizenship Clause its more conventional and straightforward definition based on geographic territoriality, or a narrower and more context-specific definition based on allegiance and consent.<sup>124</sup> Supporters of the prevailing interpretation also argue that a broader interpretation of "jurisdiction" hews more closely to a textualist approach, and avoids having to draw an "elaborate construct" of consent and allegiance from contextual sources.<sup>125</sup>

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<sup>119</sup> See generally CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2790-2794 (1866).

<sup>120</sup> See generally Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U.L. REV. 331, 334-35 (2010); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *supra*, "The Fourteenth Amendment to the U.S. Constitution."

<sup>121</sup> Compare, e.g., John C. Eastman, Legal Memorandum No. 18, *From Feudalism to Consent: Rethinking Birthright Citizenship*, The Heritage Foundation (2006), available at <http://www.heritage.org/research/reports/2006/03/from-feudalism-to-consent-rethinking-birthright-citizenship> (the Civil Rights Act of 1866 formulation "makes clear" that "any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child's parents, remained a citizen or subject of the parents' home country was not entitled to claim the birthright citizenship," and the Fourteenth Amendment was not intended to be broader); with Epps, *supra* footnote 120, at 349-353 (rebutting Eastman's interpretation and observing that the act's sponsors considered children of Chinese subjects, born in the United States, "undoubtedly" citizens under the act). See also, e.g., Shawhan, *supra* footnote 109 (describing and excerpting legislative debates and supporting prevailing view of birthright citizenship).

<sup>122</sup> See, e.g., 2015 House Hearing, *supra* footnote 1, at 8-9, 22-27 (statement of Eastman, saying *Wong Kim Ark*'s holding was confined to automatic citizenship of children of "people who are here lawfully and permanently who we have recognized as having some extent of allegiance to the United States" and its broader language was mere dicta); *id.* at 33, 35-36 (statement of Lino T. Graglia, siding with *Wong Kim Ark* dissenting justices but arguing that the case did not address situation of unlawfully present parents).

<sup>123</sup> See, e.g., Wood, *supra* footnote 6, at 511 ("[P]roponents of the prevailing view ... argue that because illegal aliens are not within one of the specific common law exceptions, the general territorial rule would apply to them.") (discussing Dellinger, *supra* footnote 18); John Eastman and Ediberto Roman, *Symposium: The U.S. Immigration Crises: Enemies at Our Gates or Lady Liberty's Huddled Masses?: Article: Debate on Birthright Citizenship*, 6 FIU L. REV. 293, 306 (2011) (statement of Ediberto Roman); 2015 House Hearing, *supra* footnote 1, at 73 (statement of J. Richard Cohen).

<sup>124</sup> See generally, e.g., Eastman and Roman, *supra* footnote 123.

<sup>125</sup> E.g., Dellinger, *supra* footnote 18, at 347; Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and* (continued...)

## Disagreement over Historical Precedent for Modern Immigration Issues

An argument often raised by those who wish to change the current rule of birthright citizenship is that illegal immigration, in the form it exists today, did not exist prior to the adoption of general immigration statutes, which was well after the adoption of the Fourteenth Amendment.<sup>126</sup> Some commentators have argued that “it is simply wrong to assert that there has ever been a conscious deliberate decision, by the framers of the Fourteenth Amendment or its judicial interpreters, to accord birthright citizenship under the [Citizenship] clause to children of illegal aliens.”<sup>127</sup> Proponents of a narrower interpretation argue that the United States embraced a more open borders policy prior to the Twentieth Century,<sup>128</sup> and point out that the framers of the Fourteenth Amendment apparently did not discuss unlawfully present aliens *per se*, as recorded in the *Congressional Globe* (precursor to today’s *Congressional Record*).<sup>129</sup> The *Wong Kim Ark* decision also did not expressly declare that the children of unlawfully present aliens were included within the scope of the Citizenship Clause, because Wong Kim Ark’s parents had apparently been lawfully domiciled in San Francisco at the time of his birth.

On the other hand, the Chinese Exclusion Acts were a legal fact by the time the *Wong Kim Ark* case was decided,<sup>130</sup> and any Chinese citizen who entered the United States in violation of these Acts would have been unlawfully present. Violations of the Chinese Exclusion Acts were known by the time of *Wong Kim Ark* to have occurred, and some late nineteenth century writers believed they had occurred at a large scale.<sup>131</sup> Some modern commenters have also pointed to slaves imported in violation of the slave import ban that took effect in 1808,<sup>132</sup> or to socially isolated and generally unwelcome “Gypsies” allegedly entering the United States,<sup>133</sup> as nineteenth century precursors to today’s unlawfully present aliens that would have been known to the framers and judicial interpreters of the Citizenship Clause. The discussion over whether modern illegal immigration is novel also raises broader issues regarding how to apply the Constitution to social conditions that may have been unanticipated by the framers.

## Proposed Legislative Reinterpretations of the Citizenship Clause

Lawmakers in Congress, as well as state-level legislators and various interest groups, have offered proposals since at least the early 1990s to restrict automatic U.S. citizenship at birth.<sup>134</sup>

(...continued)

*Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 513-514 (2008). *Cf., e.g.*, Eagle Forum Brief, *supra* footnote 93, at 7 (“Fundamental principles of statutory interpretation require that the term ‘jurisdiction’ be construed in the context of ‘citizenship’, which means far more than physical presence.”).

<sup>126</sup> SCHUCK AND SMITH, *supra* footnote 105, at 92 (citing 18 Stat. 477 (1875) as “the first federal exclusion legislation ... [which] barred convicts and prostitutes”).

<sup>127</sup> *Id.* at 129.

<sup>128</sup> *Id.* at 92.

<sup>129</sup> Graglia, *supra* footnote 113, at 5-6.

<sup>130</sup> 22 Stat. 58 (1882), 23 Stat. 115 (1884), 25 Stat. 476, 504 (1888), 27 Stat. 25 (1892), 28 Stat. 390 (1894).

<sup>131</sup> *See, e.g.*, J. Thomas Scharf, *The Farce of the Chinese Exclusion Laws*, THE NORTH AM. REV. (Vol. 166, Iss. 494, 1898), available at [http://www.digitalhistory.uh.edu/dispatch\\_textbook.cfm?smtID=3&psid=4055](http://www.digitalhistory.uh.edu/dispatch_textbook.cfm?smtID=3&psid=4055) (presenting opinion of a former immigration inspector that “the immigration [from China] has continued in spite of legislation forbidding it”).

<sup>132</sup> *E.g.*, Magliocca, *supra* footnote 125, at 513-514 (noting Act Prohibiting Importation of Slaves, 2 Stat. 426 (1807)).

<sup>133</sup> Epps, *supra* footnote 120, at 351-352, 356-357, 361.

<sup>134</sup> *E.g.*, H.R. 3605, 102<sup>nd</sup> Cong. (1991); *see also* 2015 House Hearing, *supra* footnote 1, at 58 (testimony of Jon Feere, Center for Immigration Studies) (noting legislation to limit birthright citizenship introduced in “nearly every Congress” since early 1990s).

Some of these have taken the form of resolutions proposing to amend the Constitution,<sup>135</sup> but it appears that the more often proposed approach is to amend the Immigration and Nationality Act without constitutional amendment.

In 1995, a hearing was held on a collection of bills and resolutions to deny automatic citizenship at birth to children born in the United States to parents who are not citizens or permanent residents.<sup>136</sup> A decade later, another hearing was held involving the topic of birthright citizenship.<sup>137</sup>

More recently, companion measures entitled the “Birthright Citizenship Act of 2015” were introduced in both the House and the Senate. The bills would amend Section 301 of the Immigration and Nationality Act to provide, applicable prospectively as of the date of enactment, that:

Acknowledging the right of birthright citizenship established by section 1 of the 14<sup>th</sup> amendment to the Constitution, a person born in the United States shall be considered ‘subject to the jurisdiction’ of the United States for purposes of subsection (a)(1) if the person is born in the United States of parents, one of whom is—

- (1) a citizen or national of the United States;
- (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or
- (3) an alien performing active service in the armed forces....<sup>138</sup>

In other words, if both parents were unlawfully present aliens or were present only on nonimmigrant visas or as refugees or asylees at the time of the birth of their child, that child would not be granted U.S. citizenship. At least one parent would have to be a citizen, a non-citizen national (such as an American Samoan),<sup>139</sup> a lawful permanent resident (i.e., green card holder), or actively serving in the U.S. Armed Forces in order for a U.S. born child to obtain citizenship at birth. An amendment with similar contents was offered in March 2015 to the Justice for Victims of Trafficking Act, but the amendment was not added to the bill.<sup>140</sup>

The House Judiciary Committee’s Subcommittee on Immigration and Border Security held a hearing in April 2015 entitled “Birthright Citizenship: Is It the Right Policy for America?”<sup>141</sup> Attendees and witnesses at the hearing extensively discussed legal and constitutional issues of

<sup>135</sup> *E.g.*, H.J.Res. 87, 104<sup>th</sup> Cong. (1995).

<sup>136</sup> *Societal and Legal Issues Surrounding Children Born in the U.S. to Illegal Alien Parents: Joint Hearing before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the House Committee on the Judiciary*, 104<sup>th</sup> Cong. (1995) (discussing 104 H.R. 705; 104 H.R. 1363; 104 H.J.Res. 56; 104 H.J.Res. 64; 104 H.J.Res. 87; 104 H.J.Res. 88; and 104 H.J.Res. 93, 104<sup>th</sup> Cong. (1995)).

<sup>137</sup> 2005 House Hearing, *supra* footnote 1. A bill had been introduced in that Congress to give any child born in the United States “the same citizenship and immigration status at birth as the citizenship and immigration status of the child’s mother.” End Birth Citizenship to Illegal Aliens Act of 2006, H.R. 6294, 109<sup>th</sup> Cong. (2006). That provision would have directly conflicted with *Wong Kim Ark*, and its “status of the child’s mother” language does not appear to have been used in any subsequent citizenship legislation.

<sup>138</sup> S. 45, H.R. 140, 114<sup>th</sup> Cong. (2015).

<sup>139</sup> 8 U.S.C. §1408 (defining “Nationals but not citizens of the United States at birth”).

<sup>140</sup> S.Amdt. 284 to S.Amdt. 271 to S. 178, 114<sup>th</sup> Cong. (2015). S. 178 became P.L. 114-22.

<sup>141</sup> 2015 House Hearing, *supra* footnote 1.

restricting birthright citizenship by statute, including much of the historical development, legislative history, and case law reviewed in this report.<sup>142</sup>

## **Legality of Narrowing the Citizenship Clause Without Constitutional Amendment**

It is generally acknowledged, even by those who would change it, that the current policy of automatically granting U.S. citizenship to essentially every person born in the United States is at least *permissible* under the Citizenship Clause.<sup>143</sup> This is because the Citizenship Clause sets a minimum guarantee, a floor above which Congress may but is not required to extend U.S. citizenship by birth to additional groups, as it has done for Native Americans and for children of U.S. citizens born abroad under certain circumstances. If, as many argue,<sup>144</sup> the current interpretation is *required* under the language and context of the Citizenship Clause and relevant judicial precedent, then a statute or other action purporting to reinterpret the Citizenship Clause more narrowly would be held unconstitutional, and a new amendment to the Constitution would be necessary to impose new restrictions on America’s birthright citizenship policy.<sup>145</sup>

It would likely fall to the judicial branch to determine whether the Citizenship Clause would permit a narrower interpretation by Congress (or by the Executive Branch).<sup>146</sup> This determination could potentially require a court to weigh a number of complex considerations, including:

- canons of constitutional interpretation, including the degree to which textualist, originalist, traditionalist, prudential, and aspirational or ethical approaches should be applied to the Citizenship Clause;
- separation of powers, and each branch’s relative authority to interpret—and particularly to limit—rights set forth in the Constitution, especially the Fourteenth Amendment;<sup>147</sup>

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<sup>142</sup> See generally *id.*

<sup>143</sup> See, e.g., SCHUCK AND SMITH, *supra* footnote 105, at 129; Eastman, *supra* footnote 121; 2015 House Hearing, *supra* footnote 1, at 28 (statement of John C. Eastman).

<sup>144</sup> See, e.g., Editorial, *Born in the U.S.A.: A Primer on Birthright Citizenship and the U.S. Constitution*, WALL ST. J., Aug. 20, 2015, <http://www.wsj.com/articles/born-in-the-u-s-a-1440113798>; James C. Ho, Commentary: *Ban on Birthright Citizenship Unconstitutional*, WASH. TIMES Apr. 8, 2011, <http://www.washingtontimes.com/news/2011/apr/8/ban-on-birthright-citizenship-unconstitutional/>; Saby Ghoshray, *Rescuing the Citizenship Clause from Nativistic Distortion: A Reconstructionist Interpretation of the Fourteenth Amendment*, 51 WASHBURN L.J. 261 (2012); Dellinger, *supra* footnote 18.

<sup>145</sup> Some, including a standing Department of Justice Office of Legal Counsel (OLC) Opinion from 1995, have argued that while a constitutional amendment to limit birthright citizenship would be within Congress’s and the states’ “naked power,” it would violate “bedrock principles” of American constitutionalism relating to equality and other values. Walter Dellinger, Asst. Atty. Gen., *Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 OPS. OF THE OFFICE OF LEGAL COUNSEL 340, 348-349 (1995); see also, e.g., “How Would the Constitution Change If We Abandoned the Birthplace Criterion?” in Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U.L. REV. 54, 85-96 (1997).

<sup>146</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (“The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”).

<sup>147</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the ‘provisions of [the Fourteenth Amendment].’”); cf. 2015 House Hearing, *supra* footnote 1, at 28 (testimony of Dr. John C. Eastman).

- stare decisis, or adherence to judicial precedent, and how to interpret and apply relevant cases; and
- the specific nature and language of the citizenship-limiting statute or other action under review.

Opinions on the most likely outcome of such a determination differ. Judge Richard Posner, of the U.S. Court of Appeals for the Seventh Circuit, stated in a 1996 concurrence that “[a] constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it. . . . Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense.”<sup>148</sup> Some commentators have testified before Congress that they believe a statute denying birthright citizenship to children of unlawfully present aliens would likely survive constitutional challenge.<sup>149</sup> Others, however, have concluded that any of a number of legal and constitutional obstacles would more likely prove insurmountable to a narrower reinterpretation of the Citizenship Clause.<sup>150</sup>

Since automatic granting of American citizenship to all who are born here, without inquiring into parental origins or status, has been the practice and the law for more than a century, some supporters of the status quo have contended that a reinterpretation of the Citizenship Clause would mark a “seismic shift” in constitutional law.<sup>151</sup> The size of the policy change, in itself, could present an impediment to judicial support for the constitutionality of a citizenship-limiting statute. Opponents of reinterpretation could also urge a court to take into legal consideration what they view as practical, policy, or ethical considerations stemming from issues such as the potential for creation of a stateless subpopulation.<sup>152</sup> It has also been argued that “[t]he justices may also be reluctant to weaken a constitutional amendment explicitly designed to override a previous Supreme Court ruling—especially if that ruling was *Dred Scott*.”<sup>153</sup> On the other hand, proponents of a narrower reinterpretation could potentially avail themselves of a number of practical and policy counterarguments; for example, some have asserted that a major divergence of modern circumstances from historical assumptions warrants a change from the prevailing interpretation.<sup>154</sup>

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<sup>148</sup> *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7<sup>th</sup> Cir. 2003) (Posner, concurring) (citing SCHUCK & SMITH, *supra* footnote 105, at 116-117, and Dan Stein & John Bauer, *Interpreting the 14<sup>th</sup> Amendment: Automatic Citizenship for Children of Illegal Immigrants*, 7 STANFORD L. & POLICY REV. 127, 130 (1996)). *Oforji v. Ashcroft* upheld a denial of derivative asylum for a Nigerian citizen on behalf of her U.S. citizen children; the citizenship of the children was not questioned by the majority. *Id.* at 614-619. See also Richard Posner, *The Controversy over Birthright Citizenship*, THE BECKER POSNER BLOG (Oct. 17, 2010), <http://www.becker-posner-blog.com/2010/10/the-controversy-over-birthright-citizenshipposner.html> (stating potentially modified view that a constitutional amendment would “maybe not” be required to “clos[e] the loophole that encourages foreigners to come to the United States solely to make their future children U.S. citizens,” but otherwise observing that “[c]oncern with birthright citizenship is probably misplaced”).

<sup>149</sup> See, e.g., 2015 House Hearing, *supra* footnote 1, at 9, 33, 59-60 (statements of Dr. John C. Eastman, Professor Lino A. Graglia, and Jon Feere).

<sup>150</sup> E.g., Dellinger, *supra* footnote 18 (asserting that legislation denying automatic citizenship to persons born in the United States to parents who are not citizens or permanent resident aliens is “unquestionably unconstitutional”); 2015 House Hearing, *supra* footnote 1, at 74 (statement of J. Richard Cohen).

<sup>151</sup> Matt Ford, *Could Birthright Citizenship Be Undone?*, THE ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/08/could-birthright-citizenship-be-undone/401759/>.

<sup>152</sup> See Dellinger, *supra* footnote 18, at 349 (“permanent caste of aliens, generation after generation”); Epps, *supra* footnote 120, at 334.

<sup>153</sup> Ford, *supra* footnote 151.

<sup>154</sup> Wood, *supra* footnote 6.

Congress's authority to reinterpret the Citizenship Clause, to exclude persons born in the United States to unlawfully or temporarily present aliens from its scope, would be significantly constrained if the *Wong Kim Ark* decision and subsequent case law were to be interpreted as having settled that issue in favor of those persons' inclusion. Factors that the U.S. Supreme Court generally considers when responding to a request to overrule precedent include whether that precedent "has proved 'unworkable' . . . , the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."<sup>155</sup> Ultimately, the Court "does not overturn its precedents lightly. Stare decisis . . . is a foundation stone of the rule of law, . . . [and] 'any departure' from the doctrine 'demands special justification.'"<sup>156</sup> However, if any discussion in *Wong Kim Ark* arguably extending beyond the citizenship of a person born to lawfully present and domiciled aliens is deemed mere dicta, unnecessary to the case's holding, then the Court would not be bound by it, although it could still weigh the dicta's persuasive value.<sup>157</sup>

Other precedent less specific to citizenship issues could pose legal obstacles to a reinterpretation as well. For example, courts would have to grapple with the meaning of "jurisdiction" as it has been interpreted in the context of the Equal Protection Clause, which follows the Citizenship Clause in the Fourteenth Amendment.<sup>158</sup>

Finally, any statute reinterpreting the Citizenship Clause would be far more difficult to uphold if it were designed to operate retroactively to remove or revoke any living person's U.S. citizenship. As stated by the Supreme Court in *Afroyim v. Rusk*, a 1967 case that held unconstitutional a statute that provided that a U.S. citizen would lose his citizenship upon voting in a political election in a foreign state:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. . . . The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.<sup>159</sup>

However, Congress tends to propose applying birthright citizenship restrictions only prospectively, which, as a consequence, would not result in the loss of citizenship by any person already a citizen.<sup>160</sup> Nevertheless, a number of hurdles to such bills likely remain, including but

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<sup>155</sup> *Montejo v. Louisiana*, 556 U.S. 778, 792-793 (2009).

<sup>156</sup> *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

<sup>157</sup> *Cohens v. Virginia*, 9 U.S. 264, 399 (1821); see Meese/Eastman Brief at 14 (arguing that *Wong Kim Ark* "need not be read so expansively").

<sup>158</sup> See, e.g., *supra*, 'Plyler v. Doe' and "Jurisdiction"; Wood, *supra* footnote 6, at 519-521 (discussing and rejecting argument that the Citizenship Clause's jurisdiction requirement is the same as that under Equal Protection).

<sup>159</sup> *Afroyim v. Rusk*, 387 U.S. 253, 267-268 (1967). See also *Vance v. Terrazas*, 444 U.S. 252, 260 (1980) (holding that the United States may not deprive a person "born or naturalized in the United States" of his U.S. citizenship "'unless he voluntarily relinquishes it.'" (quoting *Afroyim*, 387 U.S. at 262)); *Jolley v. INS*, 441 F.2d 1245, 1248 (5<sup>th</sup> Cir. 1971) ("[B]ecause of the precious nature of citizenship, it can be relinquished only voluntarily, and not by legislative fiat.").

<sup>160</sup> See *supra*, "Proposed Legislative Reinterpretations of the Citizenship Clause" (discussing S. 45 and H.R. 140, 114<sup>th</sup> Cong. (2015)); see also 2015 House Hearing, *supra* footnote 1, at 28 (testimony of Dr. John C. Eastman urging Congress to clarify in those bills that "this retroactive grant of citizenship to people who were not 'subject to the jurisdiction' of the United States at the time of their birth . . . is made pursuant to Congress's plenary power over naturalization, not because of some perceived mandate of the Fourteenth Amendment"). Note that as a matter of (continued...)



not limited to the weight of the legislative history of the Fourteenth Amendment, the extensive discussion in *Wong Kim Ark*, the statements in various cases defining “jurisdiction” more often on the basis of territory rather than undivided allegiance, and the embrace of the prevailing birthright citizenship interpretation by more than a century of subsequent law and practice. In light of these factors, it appears likely that a constitutional challenge to a statute denying citizenship to persons born to unlawfully present or nonimmigrant aliens could possibly succeed in barring the statute, absent a constitutional amendment providing that such persons do not acquire citizenship by right of their birth in the United States.

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statutory construction, statutes are generally presumed to operate prospectively unless retroactivity is expressly indicated. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in [this country’s] jurisprudence, and embodies a legal doctrine centuries older than [the] Republic.”).

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