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BIRTHRIGHT CITIZENSHIP: IS IT THE RIGHT POLICY FOR AMERICA?

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND BORDER SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CONTENTS

APRIL 29, 2015

Page

OPENING STATEMENTS

The Honorable Trey Gowdy, a Representative in Congress from the State of South Carolina, and Chairman, Subcommittee on Immigration and Border Security 1
The Honorable Steve King, a Representative in Congress from the State of Iowa, and Member, Subcommittee on Immigration and Border Security 1
The Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration and Border Security 3
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary 5

WITNESSES

John C. Eastman, Ph.D., Founding Director, The Claremont Institute's Center for Constitutional Jurisprudence
Oral Testimony 8
Prepared Statement 10
Lino A. Graglia, A.W. Walker Centennial Chair in Law, University of Texas School of Law, testifying in his personal capacity
Oral Testimony 32
Prepared Statement 34
Jon Feere, Legal Policy Analyst, Center for Immigration Studies
Oral Testimony 53
Prepared Statement 55
J. Richard Cohen, President, Southern Poverty Law Center
Oral Testimony 73
Prepared Statement 75

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration and Border Security 84
Additional Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration and Border Security 86
Material submitted by the Honorable Luis V. Gutierrez, a Representative in Congress from the State of Illinois, and Member, Subcommittee on Immigration and Border Security 94

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration and Border Security 106
Prepared Statement of the Honorable Steve King, a Representative in Congress from the State of Iowa, and Member, Subcommittee on Immigration and Border Security 115

Page

OFFICIAL HEARING RECORD

UNPRINTED MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration and Border Security 5
http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103384

BIRTHRIGHT CITIZENSHIP: IS IT THE RIGHT POLICY FOR AMERICA?

WEDNESDAY, APRIL 29, 2015

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Subcommittee met, pursuant to call, at 1:14 p.m., in room 2141, Rayburn House Office Building, the Honorable Trey Gowdy (Chairman of the Subcommittee) presiding.

Present: Representatives Gowdy, Goodlatte, Labrador, Smith, King, Buck, Ratcliffe, Trott, Lofgren, Gutierrez, and Jackson Lee.

Staff Present: (Majority) George Fishman, Chief Counsel; Andrea Loving, Deputy Chief Counsel; Graham Owens, Clerk; and (Minority) Tom Jawetz, Minority Counsel.

Mr. GOWDY. The Subcommittee on Immigration and Border Security. This is a hearing on "Birthright Citizenship: Is It the Right Policy for America?"

And I would say, at the outset, to my colleagues and to our witnesses, I have a meeting that is going to regrettably take me away. So, at some point, I am going to turn the gavel over, but I want to thank you—because I won't be here at the end—and thank you for participating in this and thank my colleagues as well.

The Subcommittee on Immigration and Border Security will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone. And the other administrative note is we are expecting votes in the not too distant future, so we will need to go vote, and then the Members that are able to do so will then come back. And we apologize in advance for any inconvenience, but there is no way to avoid that.

At this point, I will recognize myself for an opening statement only to say that this is an interesting and important topic.

And, with that, I will yield to the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

I appreciate you yielding for the purposes of this opening statement. And I would like to raise these points at the beginning of this hearing, that this topic of birthright citizenship is something that I have worked on for some time. I want to give some credit

to the now Governor of Georgia, Nathan Deal, who used to be the one that was leading on this topic. And when he went back to Georgia, somebody had to pick up the ball and go with it. It is myself in the House primarily, with a lot of colleagues working together. And also Senator Vitter on the other side is the—is leading on a very similar bill that I am speaking to and not exactly that—as a component of the subject here that is before us.

And the 14th Amendment of the Constitution says that all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and the State where they reside. And that little troublesome clause in there, "subject to the jurisdiction thereof," is the subject of our discussion here in this—in this hearing today in that and the policies that flow from it.

And for those who argue that the physical birth of a baby on U.S. soil is an automatic grant of citizenship by policy, by Constitution, by statute, I believe, are uttering an ungrounded statement in that that clause, that troublesome clause of "subject to the jurisdiction thereof" defined it differently for clear reasons.

And, that is, that if I look at the quotes from a number of U.S. Senators who debated this topic back in 1865 and 1866—the 14th Amendment was ratified finally in 1868—the lead Senator on this, one of the authors, Senator Jacob Howard said this: This will not, of course, include persons born in the United States who are foreigners or 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.

And the purpose, of course, of the 14th Amendment was to guarantee that the babies born to the freed slaves would be citizens of the United States.

The specificity in the clause was debated fairly thoroughly in the United States Congress, and it was there because there were Native Americans, called Indians under this—under the statute then and the amendments then, who would lose their membership in the tribe if they were granted automatic citizenship. So the clause was carefully targeted to make sure that African American babies born in America were citizens, just as those—just as those newly freed slaves were. They became citizens under the 13th Amendment of the Constitution. It.

Did not contemplate that anyone who could sneak into the United States and have a baby would be conferred automatic citizenship on that baby. That is a practice that has evolved, not a law that has been passed, not a provision within the Constitution anywhere, including in the 14th Amendment. So we will get deeper into this definition of the "subject to the jurisdiction thereof."

This will be, if this bill is passed and becomes law—I don't think there is any doubt it will be litigated. I look forward to that litigation. I think an objective court that would review the documents that build to this point has to conclude the same thing that I have.

This is also something that flows from the *Dred Scott* decision that said that African Americans could never be citizens in the United States. That is the biggest reason that—well, it is one of the two big reasons for the Civil war. It is still debatable as to which is the biggest reason, I might point out. But it is the reason for the 13th Amendment and the 14th Amendment to correct *Dred Scott*.

And so it corrected it, and then we started this practice, so—and to protect Native Americans.

So the illegal parents, are they going to decide, or are we going to decide as representatives of the people of the United States of America? And I suggest that it is our job here as Congress to decide who will be citizens, not someone in a foreign country that can sneak into the United States and have a baby and then go home with a birth certificate.

By the way, birthright—birth tourism has grown substantially. We had a hearing on this some years ago. The turnkey price for a Chinese pregnant woman to fly to the United States and check into a hotel, go through the maternity process, have a baby, get the birth certificate, take the baby back to China was $30,000 in that testimony several years ago, that price has gone up to $40,000 to $80,000. However, they still attest that they can't pay for their medical bills. And so we, the taxpayers, fund that.

Also, the numbers of birth tourism were then 700 and—340,000 to 750,000. That is my recollection from that testimony. And today, I think, we are going to hear maybe 300,000 to 400,000 babies born automatically in America.

There is a lot of data to flow out here. The objective thing for us to do is set the policy like almost every other industrialized country in the world has done. I encourage that we do that.

I thank the Chairman. I yield back the balance of my time.

Mr. GOWDY. Thank the gentleman from Iowa.

The Chair would now recognize the gentlelady from California, Ms. Lofgren, for her opening statement.

Ms. LOFGREN. Thank you, Mr. Chairman.

Earlier this month, the House Committee on Science, Space, and Technology, where I also serve, held a hearing to cast doubt on global warming science. Never mind the overwhelming consensus in the scientific community that humans are contributing to climate change. Never mind the evidence that rapidly increasing greenhouse gas emissions are disrupting life all over the world. Rather than working to develop and support innovative methods of combatting climate change, the Science Committee held another hearing to debate whether established science is real.

I can't help but think that today's hearing is a similarly fruitless effort. The question that we are asked to consider is whether birthright citizenship is the right policy for America. I think the answer is clearly yes and that, in fact, no other policy would be worthy of this country.

The origins of birthright citizenship long predate the 14th Amendment. Supreme Court Justice Joseph Story said early on that, "Nothing is better settled at common law than the doctrine of jus soli or citizenship by place of birth."

The Supreme Court once diverged from this principle in the infamous *Dred Scott* decision when it denied birthright citizenship to the descendants of slaves. The violent institution of slavery itself was clearly an incredible injustice. In *Dred Scott*, the Supreme Court found a way to continue that injustice to reinforce the caste system at the heart of slavery, even with respect to children born in this country to freed slaves.

There is no question that the 14th Amendment was adopted and the citizenship clause was included as the very first sentence of that amendment to repudiate *Dred Scott* and to help us turn the corner of an ugly chapter in our Nation's history. But the clause did not simply say, as it could have, that children born in this country to freed slaves are citizens of this country. Rather, the Framers of the 14th Amendment spoke in general terms, guaranteeing that, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."

From the debate in Congress at the time, it is clear that they understood this language to have much broader reach. It is also clear that members were motivated to embed this language in the Constitution precisely because the constitutional right of citizenship would be protected from the caprice of Congress and the prejudices of the day.

Thirty years after the 14th Amendment was ratified, the Supreme Court had occasion to consider whether a child born in this country to Chinese immigrants, who were by law prohibited from naturalizing, was entitled to birthright citizenship. The Supreme Court answered the question in the affirmative with sweeping language that is worth quoting. The court held, "The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications as old as the rule itself of children of foreign sovereigns or their ministers, or born on foreign public ships, or of the enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of Indian tribes owing direct allegiance to their several tribes."

A minority view, among legal scholars, holds that Wong Kim Ark speaks only to children of legally present immigrants. The language in the case certainly does not suggest that additional exceptions or qualifications to the fundamental rule of birthright citizenship would apply to children of undocumented immigrants born in this country.

But even if that were true, the Supreme Court in the 1982 case of *Plyler v. Doe* settled the question. In *Plyler*, the Court explained that the phrase "subject to the jurisdiction" in the citizenship clause applies as comprehensively as the phrase "within its jurisdiction" in the equal protection clause and that no plausible distinction with respect to 14th Amendment jurisdiction can be drawn between resident aliens whose entry into the United States was lawful and resident aliens whose entry was unlawful.

So if there really isn't a serious debate among scholars about what the clause means, is the purpose of this hearing really to consider whether the citizenship clause of the 14th Amendment adopted in the aftermath of the Civil War has outlived its usefulness? Can we expect the full Committee to soon take up the question of whether the equal protection clause guarantees too much equality?

In preparing for this hearing, I thought about the Republican Party's history as the party of Lincoln. On the GOP's own Web site, there is a history of the party that proudly marks January 13,

1866, as the day that the 14th Amendment was passed by Congress, "with unanimous Republican support and against intense Democratic opposition."

And yet the question we are asked to consider today is whether the passage of the 14th Amendment and the citizenship clause almost 150 years ago was good policy for America.

It is no wonder that when this issue flared up last in 2010 and congressional Republicans voiced their support for legislation and a constitutional amendment to restrict birthright citizenship, prominent Republicans like Mark McKinnon cautioned that, "The 14th Amendment is a great legacy of the Republican Party; it is a shame and an embarrassment that the GOP now wants to amend it for starkly political reasons."

Republican leaders in the Senate narrowly avoided debate on this topic just last week when they prevented Senator Vitter from offering a birthright citizenship amendment to a bill on human trafficking. I cannot imagine the Republican leaders in the House are any more interested in bringing this issue to the floor. Actually, it has been 10 years since this Subcommittee last held a hearing on this topic, and I note that one of our witnesses, Professor Eastman, testified before us at that time. Hopefully, all of that means is this will be the last we hear of this issue for quite some time.

And, with that, Mr. Chairman, I would like to ask unanimous consent to place in the record a testimony from the Community Relations Council of the Jewish Federation of Silicon Valley as well as statements from the Leadership Conference on Civil and Human Rights; the American Civil Liberties Union; First Focus Campaign for Children; the National Association of Latino Elected and Appointed Officials; the League of United Latin American Citizens; the Constitutional Accountability Center; Church World Service; Lutheran Immigration and Refugee Services; American Immigration Council; a sign-on letter from 14 national Jewish organizations; the Jewish Council for Public Affairs; Franciscan Action Network; Asian Americans Advancing Justice; American Immigration Lawyers Association; National Council of Asian-Pacific Americans; the National Latina Institute for Reproductive Health; the National Immigration Forum; We Belong Together; the Coalition for Humane Immigrant Rights of Los Angeles; and OCA, the Asian-Pacific American advocate.

[**Note:** The submitted material is not printed in this hearing record but is on file with the Subcommittee, and may also be accessed at: *http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103384*.]

Mr. GOWDY. Without objection.

Thank you, gentlelady.

The Chair will now recognize the gentleman from Virginia, the Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I rarely have a conversation about general immigration policy in which the issue of birthright citizenship is not raised, yet it has been several years—nearly 10, I believe—since this Subcommittee has looked at the issue. So I thank the gentleman from South Carolina for holding this hearing.

The discussion is important as we move forward with any reforms to immigration law and policy. Birthright citizenship is the principle that the place of an individual's birth automatically determines that individual's citizenship.

The U.S. policy on birthright citizenship stems from the 14th Amendment to the U.S. Constitution, of which the citizenship clause states that: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States.

Congress subsequently included that language in the statute.

However, as we will hear today, the phrase "subject to the jurisdiction thereof" is central to the debate over whether the U.S. Constitution requires that the U.S. adhere to birthright citizenship. It is central to the question of whether the U.S.-born children of unlawful aliens should be considered citizens at birth.

A close look at and discussion of the legislative history of the 14th Amendment, the language of the Civil Rights Act of 1866, and relevant case law, like *Elk v. Wilkins* and *United States v. Wong Kim Ark*, are central to the determining the meaning of "subject to the jurisdiction thereof."

The question of whether our forefathers meant for birthright citizenship in all circumstances to be the law of the land is far from settled. In any event, we must still determine if it is the right policy for America today.

Very few countries with advanced economies have a policy of birthright citizenship. In fact, of the G20 countries, only the United States, Canada, and Mexico automatically grant citizenship based on the individual being born in the country, despite the citizenship or immigration status of the parents. That is not to say that just because other countries do not have a certain policy or law, the U.S. should not have that policy or law. But, as Members of Congress, we should have an open and honest discussion about the consequences of automatic birthright citizenship.

Evidence suggests that automatic birthright citizenship incentivizes illegal immigration and abuse of U.S. immigration law and policy. And extremely troubling is the rise of the birth tourism phenomenon in which pregnant women from foreign countries briefly come to the U.S. Specifically to give birth here so that their children become U.S. citizens. The women and children then return to their home countries. This is becoming a multimillion dollar business in certain areas of the U.S. where maternity hotels advertise in foreign countries to house pregnant foreign nationals in the U.S. until they give birth. Even if you believe that birthright citizenship is the right policy for the United States—and I do not—but even if you do, such abuse of our generous policy is unacceptable.

I look forward to the witness testimony and the discussion of whether and how to change the U.S. birthright citizenship policy.

And I yield back.

Thank you, Mr. Chairman.

Mr. GOWDY. The Chair thanks the gentleman from Virginia.

Without objection, other Members' opening statements will be made part of the record.

We have a distinguished panel before us.

And I will begin by swearing you in, and then I will introduce you en bloc and then recognize you individually.

So, if you would, please stand and raise your right hand. Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth so help you God?

May the record reflect all witnesses answered in the affirmative.

We will start with Dr. John Eastman. He is the founding director of the Constitutional Jurisprudence Clinic, a public interest law firm affiliated with The Claremont Institute. He also serves as the Henry Salvatori Professor of Law and Community Service at Chapman University Fowler School of Law and also served as the school's dean from 2007 to 2010. Prior to joining the Fowler School of Law faculty, he served as a law clerk for Justice Clarence Thomas at the United States Supreme Court and Judge Michael Luttig of the United States Court of Appeals in the Fourth Circuit. He earned his J.D. From the University of Chicago Law School, where he graduated with high honors.

Next after him will be Professor Lino Graglia—and if I mispronounce anyone's name, forgive me. Professor Graglia serves as the A.W. Walker Centennial Chair in Law at the University of Texas at Austin School of Law. He has been a visiting professor at the University of Virginia School of Law. He has written widely on constitutional law, especially on the judicial review, constitutional interpretation, race discrimination, and affirmative action, and also teaches and writes in the area of antitrust law. He received his J.D. And LL.B. From Columbia University School of Law, where he served as editor of the Law Review, and his B.S. In economics and political science from the City College of New York.

After him will be Mr. Jon Feere. He currently serves as a legal policy analyst for the Center for Immigration Studies. His editorials have appeared in various publications, including U.S. News & World Report and the Washington Times. He received his B.A. In political science and communications from the University of California Davis and his J.D. From America Universities Washington College of Law. While in law school, he worked on this very Subcommittee, which was then known as the Subcommittee on Immigration, Border Security, and Claims.

And, finally, Mr. Richard Cohen, currently serves as the president of Southern Poverty Law Center, where he has worked since 1986 when he joined their staff as its legal director. In this position, Mr. Cohen has litigated a wide variety of important civil rights actions, defending the rights prisoners to be treated humanely and working for equal educational opportunities for all children. He is a graduate of Columbia University and received his J.D. From the University of Virginia School of Law.

Welcome to each of you. The lights mean the same thing they mean traditionally in life. Green, go. Yellow, speed up. Red, go ahead and conclude that thought if you would.

Dr. Eastman.

TESTIMONY OF JOHN C. EASTMAN, Ph.D., FOUNDING DIRECTOR, THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE

Mr. EASTMAN. Thank you, Mr. Chairman, and all the Members of the Committee. And I am particularly delighted to be here again. I worked closely with now Governor Deal when he was here.

And I am so happy, Representative King, that you are taking up the charge. I think this is an extremely important issue.

Congress has the power over naturalization. It is a plenary power, and that means you get to set the policy of how large or small, how understrained or restrained our restriction—our immigration into this country is going to be. The Founders did that by design because it is an inherently political question.

The question for us is, whether one of the three great magnets to violating or ignoring the policy you set out can be addressed by statute or whether it requires a constitutional amendment. Those three magnets are, of course, an opportunity for a job, employment; access to our huge welfare benefits; and access to the Holy Grail of American citizenship.

Both members that talked about the Constitution's 14th Amendment rightly focused on the phrase "subject to the jurisdiction." If that phrase is not to be entirely redundant, it has to mean something other than being born on U.S. soil, and that something is allegiance. And I think, if you look at the debates in Congress, if you look at the language of the 1866 Civil Rights Act, if you look at the first couple of Supreme Court cases to address this issue and the legal commentators, including the most prominent one at the time, Thomas Cooley, they all recognize that the "subject to the jurisdiction" clause meant allegiance-owing.

There were two kinds of jurisdiction that was recognized in international law at the time. One they called mere partial or territorial. The other they called complete or whole jurisdiction. And it is the latter that the 14th Amendment refers to.

The best way I can describe this is to imagine a foreign national, say, from Great Britain who comes to visit the United States as a tourist. When he is here, he is subject to our laws. He drives on the right side of the road rather than the left side of the road as he does at home. But that does not make him subject to our other jurisdiction. He doesn't become a citizen. He doesn't participate in our political process. He can't be tried for treason if he takes up arms against us, although taking up arms would be subject him to other recourse. It is that lack of allegiance that makes him not subject to the jurisdiction in the full and complete sense that was envisioned by the 14th Amendment.

And so, too, today there are people who are here lawfully and permanently who we have recognized as having some extent of allegiance to the United States. And their children will be deemed automatic citizens by virtue of this 14th Amendment. That was the holding and the full extent of the holding of the *Wong Kim Ark* case in 1898.

Mr. Wong Kim Ark was a child of lawful permanent residents in the United States who had done everything we allowed them to do to demonstrate their allegiance to the United States. They were not here on tourist visas. They were not here as temporary sojourners,

to use the language of the day. They were here permanently, had taken up domicile as well as residence in the United States.

And the language that Representative Lofgren quoted from that case, there was a particular phrase in it that she said, "in the allegiance" of the United States, the Court held.

That meant it fit within the language of the 14th Amendment in a way that temporary visitors here—temporary visitors who may have come here legally and then overstayed their visa and were now here illegally and certainly temporary visitors who were never here legally in the first place, who never had been granted the consent of the United States to be here, who owed no allegiance to the United States and, in fact, continue to owe allegiance to their home country—their children, through them, owe allegiance to the home country, not to the United States, and are, therefore, not subject to the jurisdiction in that full sense.

That is not only what the Constitution sets out and requires, but it is phenomenally good policy because, otherwise, the fundamental break we made with the old feudal system—that if you were born on the sovereign soil, you shall forever more be a subject of that sovereign—the fundamental break we made with that idea in the Declaration of Independence is we form a body politic by mutual consent. If we are to accept this newfound version of birthright citizenship, that no matter how you get here, how little you have obtained consent for being here, you can demand automatic citizenship, blows a hole through that notion of consent of the governed. And until we get back to the Declaration's understanding of consent that is what creates citizens and what creates a people and a body politic, you will never be able to have any limitations on our immigration policy at all.

I think the various bills that have been proposed over the years clarify that that constitutional language creates a floor, and how far above that floor we want to go is a matter of policy judgment for the Congress.

I would suggest one thing: We have, for the last 40 or 50 years, adopted the notion by piecemeal and by osmosis almost that mere birth on U.S. soil is enough, and a lot of people have come to rely on that. So you might say: Let's get this fixed and clarified going forward, but for those people over the last 50 years who have relied on it, let's grant them citizenship as well retroactively, but let's make clear that that grant of citizenship is pursuant to Congress' naturalization powers, not because it is mandated by the 14th Amendment.

And I think if you do that, you will put on—this body on very clear record of what your understanding of the constitutional floor is.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Eastman follows:]

The True Meaning of the Fourteenth Amendment's Citizenship Clause

Testimony of

Dr. John C. Eastman

Henry Salvatori Professor of Law & Community Service
Chapman University Dale E. Fowler School of Law

Founding Director, The Claremont Institute Center for Constitutional Jurisprudence

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

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

April 29, 2015
2237 Rayburn House Office Building
Washington, D.C.

The True Meaning of the Fourteenth Amendment's Citizenship Clause

By John C. Eastman[1]

Good afternoon, Subcommittee Chairman Gowdy, Ranking Member Lofgren and other Members of the Subcommittee. I am delighted to be with you today as you take up once again what I consider to be an extremely important inquiry with profound consequences for our very notion of citizenship and sovereignty. As a few of the longer-serving members of this Committee may recall, I testified before this Committee back in 2005 at a hearing entitled "Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty." The Supreme Court had just recently decided the case of Yaser Esam Hamdi, an enemy combatant who had been captured fighting for the Taliban against U.S. forces in Afghanistan and ultimately transferred to the detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba.[2] When U.S. military officials discovered that Hamdi had been born in Baton Rouge, Louisiana, they began treating him as a U.S. citizen as a result of that birth on U.S. soil even those his parents were both subjects of the Kingdom of Saudi Arabia at the time, residing only temporarily in Louisiana while his father held a temporary visa to work as a chemical engineer on a project for Exxon.[3]

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[1] Henry Salvatori Professor of Law & Community Service and former Dean, Chapman University Dale E. Fowler School of Law; Ph.D., M.A., The Claremont Graduate School; JD., The University of Chicago Law School; B.A., The University of Dallas. The views expressed herein are those of Dr. Eastman and not necessarily those of the Universities with which he is or has been affiliated. Dr. Eastman is also a Senior Fellow at the Claremont Institute and the Founding Director of its Center for Constitutional Jurisprudence, in which capacity he appeared as *amicus curiae* before the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), addressing the issue of birthright citizenship. He previously testified before this Subcommittee on the subject in September 2005.

[2] Brief of the United States, *Hamdi v. Rumsfeld*, at 6-7.

[3] *See* Certificate of Live Birth, Birth No. 117-1980-058-00393, on file in the Vital Records Registry of the State of Louisiana and available at http://news.findlaw.com/cnn/docs/terrorism/hamdi92680birthc.pdf (last visited March 20, 2003); Frances Stead Sellers, *A Citizen on Paper Has No Weight*, Wash. Post B1 (Jan. 19, 2003).

The Supreme Court's holding in the case did not address whether Hamdi was actually a citizen[4]—Justices Scalia and Stevens even referred to him as merely a "presumed citizen"[5]—and the Court has never actually *held* that anyone who happens to make it to U.S. soil can unilaterally bestow U.S. citizenship on their children merely by giving birth here. Although such an understanding of the Fourteenth Amendment has become widespread in recent years, it is not the understanding of those who drafted the Fourteenth Amendment, or of those who ratified it, or of the leading constitutional commentators of the time. Neither was it the understanding of the Supreme Court when the Court first considered the matter in 1872, or when it considered the matter a second time a decade later in 1884, or even when it considered the matter a third time fifteen years after that in the decision many erroneously view as interpreting the Fourteenth Amendment to mandate automatic citizenship for anyone and everyone born on U.S. soil, whether their parents were here permanently or only temporarily, legally or illegally, or might even be here as enemy combatants seeking to commit acts of terrorism against the United States and its citizens.

As I describe more fully below, the modern view ignores—or misunderstands—a key phrase in the Citizenship Clause, which sets out two criteria for automatic citizenship rather than just one. Mere birth on U.S. soil is not enough. A person must be both "born or naturalized in the United States" *and* "subject to its jurisdiction" in order to be granted

[4] Rather, in an opinion by Justice O'Connor, the Court held that Hamdi had a right to challenge the factual basis for his classification and detention as an enemy combatant. *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2635 (2004). As the Supreme Court later made clear, that right did not turn on whether or not Hamdi was a citizen, for the Due Process clause applies not just to citizens but to all "persons." *See Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that other combatants who were clearly not citizens could bring a habeas petition because that provision, like the Due Process Clause of the Fifth Amendment, applied to all "persons" and not just citizens).

[5] *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2660 (2004) (Scalia, J., dissenting).

automatic citizenship. Congress remains free to offer citizenship more broadly than that, of course, pursuant to its plenary power over naturalization granted in Article I, Section 8 of the Constitution, but it has done so. Current law merely parrots the "birth" and "subject to the jurisdiction" requirements that are the floor for automatic citizenship already set by the Constitution.

With the ever-increasing waves of illegal immigration into this country undermining the policy judgments Congress has made about the extent of immigration that should be allowed, it is particularly important to get the birthright citizenship issue right, as the mistaken notion about it has provided a powerful magnet for illegal immigration for far too long. Worse, it has encouraged a trade in human trafficking that has placed at great risk millions of men, women, and children who have succumbed to the false siren's song of birthright citizenship. I am therefore heartened that this Committee is giving serious thought once again to correcting the misinterpretation of this important provision of our Constitution.

I. The Citizenship Clause of the Fourteenth Amendment

To counteract the Supreme Court's decision in *Dred Scott v. Sanford*[6] denying citizenship not just to Dred Scott, a slave, but to all African-Americans, whether slave or free, the Congress proposed and the states ratified the Citizenship Clause of the Fourteenth Amendment, which specifies: "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."[7] It is today routinely believed that, under the Clause, mere birth on U.S. soil is sufficient to confer U.S. citizenship. Legal commentator Michael

[6] 60 U.S. 393 (1857).

[7] U.S. Const. Amend. XIV, § 1.

Dorf, for example, noted some years back that "Yaser Esam Hamdi was born in Louisiana. Under Section One of the Fourteenth Amendment, he is *therefore* a citizen of the United States, even though he spent most of his life outside this country."[8] What Dorf's formulation omits, of course, is the other component of the Citizenship Clause. One must also be "subject to the jurisdiction" of the United States in order constitutionally to be entitled to citizenship.

To the modern ear, Dorf's formulation nevertheless appears perfectly sensible. Any person entering the territory of the United States—even for a short visit; even illegally—is considered to have subjected himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Indeed, former Attorney General William Barr has even contended that one who has never entered the territory of the United States subjects himself to its jurisdiction and laws by taking actions that have an effect in the United States.[9] Surely one who is actually born in the United States is therefore "subject to the jurisdiction" of the Unites States, and entitled to full citizenship as a result.

However strong this interpretation is as a matter of contemporary common parlance, is simply does not comport with either the text or the history surrounding adoption of the Citizenship Clause, or with the political theory underlying the Clause.

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[8] Michael C. Dorf, *Who Decides Whether Yaser Hamdi, Or Any Other Citizen, Is An Enemy Combatant?* FindLaw (Aug. 21, 2002) (emphasis added).

[9] *See, e.g.*, The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International law: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 3 (1989) (statement of William Barr, U.S. Assistant Attorney General); William J. Tuttle, *The Return of Timberlane? The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 Vanderbilt J. Transnat'l L. 319, 348 (Jan. 2003) (noting that in April 1992 then-Attorney General William Barr revised Department of Justice antitrust enforcement guidelines to permit lawsuits against foreign corporations who acted exclusively outside the United States if their operations were detrimental to U.S. exporters); *see also United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

Textually, such an interpretation would render the entire "subject to the jurisdiction" clause redundant—anyone who is "born" in the United States is, under this interpretation, necessarily "subject to the jurisdiction" of the United States—and it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results.[10]

A. The 1866 Civil Rights Act, Which the 14th Amendment Was Intended to Codify, Clearly Limits Automatic Citizenship to Those "Not Subject to Any Foreign Power."

Historically, the language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section 1 of the Fourteenth Amendment) was derived so as to provide a more certain constitutional foundation for the 1866 Act, strongly suggests that Congress did *not* intend to provide for such a broad and absolute birthright citizenship. The 1866 Act provides: "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."[11] As this formulation makes clear, 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

[10] *See, e.g.*, Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case. W. Res. L. Rev. 179 (1989); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562 (1995) ("this Court will avoid a reading which renders some words altogether redundant"). Some have argued that the "subject to the jurisdiction" clause serves to exclude foreign diplomats from the reach of the citizenship clause, and is therefore not entirely redundant with the "birth" clause. Quite apart from the fact that there is not a shred of evidence in the legislative or ratification history to support such a purpose, the explanation does not work. Because of the diplomatic fiction of "extraterritoriality" that an ambassador is the sovereign presence of his home nation even while in the United States, the ambassador's children are not "born . . . in the United States," and the "subject to the jurisdiction" clause, therefore, does not provide any additional limtiation.

[11] Chapter 31, 14 Stat. 27 (April 9, 1866).

citizen or subject of the parents' home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.

B. Despite its Slightly Different Phrasing, the Fourteenth Amendment Codified the Citizenship Language of the 1866 Act.

The Fourteenth Amendment was specifically designed to codify the provisions of the 1866 Civil Rights Act and to place that act beyond the ability of a future Congress to repeal. Nevertheless, because the jurisdiction clause of the Fourteenth Amendment is phrased somewhat differently than the jurisdiction clause of the 1866 Act, some have asserted that the difference dramatically broadened the guarantee of automatic citizenship contained in the 1866 Act. The positively-phrased "subject to the jurisdiction" of the United States might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act, the argument goes, one more in line with the contemporary understanding accepted unquestioningly by Dorf that birth on U.S. soil is alone sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading. When pressed about whether Indians living on reservations would be covered by the clause since they were "most clearly subject to our jurisdiction, both civil and military," for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that "subject to the jurisdiction" of the United States meant subject to its "complete" jurisdiction; "[n]ot owing allegiance to anybody else." And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now" (i.e., under the 1866 Act). That meant that the children of Indians

who still "belong[ed] to a tribal relation" and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. The switch from the "not subject to any foreign power" clause of the 1866 Act to the "subject to the jurisdiction" clause of the 14th Amendment simply avoided the concern that the Indian tribes might be deemed within rather than without the grant of automatic citizenship because they were "domestic" rather than "foreign" sovereign powers. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin to explicitly exclude "Indians not taxed," as the 1866 Act had done, was rejected as redundant.[12]

There is other evidence in the legislative history as well. During the debate over the 1866 Act, for example, Edgar Cowan, a one-term Senator from Pennsylvania, claimed disparagingly that the bill would "have the effect of naturalizing the children of Chinese and Gypsies born in this country." Senator Trumbull, the bill's lead manager, answered "Undoubtedly." But when Senator Cowan elaborated on the point during debate over the Fourteenth Amendment, it became clear that he was speaking about people who were mere "sojourners" to the United States, here only temporarily and without any obligation of allegiance to the United States, and he would not support an amendment that he mistakenly believed treated as citizens the children born on U.S. soil to such individuals. The response from Senator Conness of California was telling, for he claimed that Senator Cowan's concerns had no relevance "to the first section of the constitutional amendment before us," namely, the Citizenship Clause. Senator Cowan's concerns had no relevance because the Citizenship Clause was not understood by those who drafted it and those who

[12] Congressional Globe, 39th Cong., 1st Sess., 2892-97 (May 30, 1866). For a more thorough discussion of the debate, see Peter H. Schuck and Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity 72-89 (Yale Univ. Press 1985).

voted for it to cover people only subject to the *territorial* jurisdiction of the United States by virtue of (and only so long as) their temporary presence within the borders of the United States.

Indeed, as Senator Howard repeatedly pointed out, the proposed amendment would "not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[13] It was limited, as Senator Trumbull pointed out several times, to those who were subject to the "complete jurisdiction" of the United States, not merely a temporary and partial jurisdiction. And in response to a concern raised by Senator Johnson that the courts might erroneously interpret the "subject to the jurisdiction clause" to cover Indians because they were subject to our laws—that is, subject to our territorial jurisdiction—Senator Trumbull responded that Indians were not covered ("except in reference to those who are incorporated into the United States as some are, and are taxable and become citizens," as he noted during the 1866 Act debate[14]) because "they are not subject to our jurisdiction in the sense of owing allegiance solely to the United States." In other words, mere presence on U.S. soil was not enough; that subjected one only to the territorial jurisdiction of our laws, but it did not make one subject to the "complete jurisdiction, the

[13] Cong. Globe, at 2890 (May 30, 1866). Particularly noteworthy is the fact that, in this discussion, Senator Howard said that the Citizenship Clause would exclude not just the families of ambassadors but others who are "foreigners, aliens" as well—in other words, anyone who retained their allegiance to a foreign sovereign. That distinction, though perhaps not perfectly clear from the passage quoted above, becomes undeniable when considered in light of Senator Howard's very next comment, in response to a proposed amendment to exclude "Indians not taxed." "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born "subject to the jurisdiction of the United States," he said. Instead, [t]hey are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations." *Id.*

[14] Cong. Globe, at 498 (Jan. 30, 1866).

allegiance-owing jurisdiction that the drafters of the clause intended. Think of it this way: foreign tourists visiting the United States subject themselves to the laws of the United States while here. An Englishman must drive on the right side of the road rather than the left, for example, when visiting here. But they do not owe allegiance to the United States, they do not get to exercise any part of the political power of the United States, and they cannot be tried for treason if they take up arms against the United States. They are subject only to the partial, territorial jurisdiction while here, but not to the broader jurisdiction that would follow them beyond the borders, the more complete jurisdiction intended by the Fourteenth Amendment.

C. The Ratification Debates Confirm that the Citizenship Clause Did Not Cover Those Who Were Subject to a Foreign Power.

Of course, the statements of those who drafted the language of the Fourteenth Amendment and those who voted in Congress to propose it to the States does not necessarily reflect what the amendment's language meant to those who ratified it, and it is the latter who actually give the amendment its binding constitutional authority. But what little evidence we have from the ratification debates in the States confirms rather than detracts from the understanding of the clause discussed above.

Reports about the debates in the Louisiana legislature over ratification of the Fourteenth Amendment that were published in the New Orleans Tribune, for example, confirm the general understanding. On June 18, 1866, for example, the paper reported that the proposed amendment's Citizenship Clause meant the same thing as the language in the 1866 Act: "This [language] is the reiteration of the declaration in the Civil Rights Bill that every person born in the United States and not subject of a foreign power is an American citizen," the paper reported. This followed its earlier report of January 9, 1866,

that the amendment which had been proposed provided for equal privileges for all naturalized citizens and "among persons born on its soil of parents permanently resident there."

The same understanding of the language's meaning was expressed over in Alabama, both by those who supported and those who opposed ratification. The Clark County Journal reported on May 10, 1866, for example, that "Section 1 [of the Fourteenth Amendment] reaffirms the Civil Rights Act and incorporates it into the Constitution." On the other side of the ratification fight, the Union Springs Times reported that Section 1 "legitimized" the "bastard" Civil Rights Act.

D. The Supreme Court Adopts The Allegiance Understanding.

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by the Supreme Court—by both the majority and the dissenting justices—in *The Slaughter-House Cases*. The majority correctly noted that the "main purpose" of the Clause "was to establish the citizenship of the negro." It added 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,"[15] thereby rejecting the claim advanced by some recent scholars, discussed above, that "subject to the jurisdiction" only excluded the children of diplomats. Justice Steven Field, joined by Chief Justice Chase and Justices Swayne and Bradley in dissent from the principal holding of the case, likewise acknowledged that the Clause was designed to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were as a result citizens both of the

[15] 83 U.S. (16 Wall.) 36, 73 (1872).

United States and the state in which they resided, provided they were not at the time subjects of any foreign power.[16]

Although the statement by the majority in *Slaughter-House* was *dicta*, the position regarding the "subject to the jurisdiction" language advanced there was subsequently adopted by the Supreme Court in the 1884 case addressing a claim of Indian citizenship, *Elk v. Wilkins*.[17] The Supreme Court in that case rejected the claim by an Indian who had been born on a reservation and subsequently moved to non-reservation U.S. territory, renouncing his former tribal allegiance. The Court held that the claimant was not "subject to the jurisdiction" of the United States at birth, which required that he be "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."[18] John Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he "owed immediate allegiance to" his tribe and not to the United States. Although "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states," "they were alien nations, distinct political communities," according to the Court.[19] Drawing explicitly on the language of the 1866 Civil Rights Act, the Court continued:

> 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

[16] *Id.* at 92-93.

[17] 112 U.S. 94 (1884).

[18] *Id.* at 102.

[19] *Id.* at 99.

> 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.[20]

Indeed, if anything, Indians, as members of tribes that were themselves dependent to the United States (and hence themselves subject to its jurisdiction), had a stronger claim to citizenship under the Fourteenth Amendment merely by virtue of their birth within the territorial jurisdiction of the United States than did children of foreign nationals. But the Court in *Elk* rejected that claim, and in the process necessarily rejected the claim that the phrase, "subject to the jurisdiction" of the United States, meant merely territorial jurisdiction as opposed to complete, political jurisdiction.

Such was the interpretation of the Citizenship Clause initially given by the Supreme Court. As Thomas Cooley noted in his treatise, The General Principles of Constitutional Law in America, "subject to the jurisdiction" of the United States "meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government."

II. The Supreme Court's *Holding* in the 1898 *Wong Kim Ark* Case is Limited to Lawful, Permanent Residents; Its Broader *Dicta* is Erroneous and has Never Been Adopted by the Court.

The Supreme Court next confronted the Citizenship Clause in 1898, in the case of *United States v. Wong Kim Ark*.[21] Here, I must confess that the actual holding of the case (as opposed to its dicta) is a much closer call than I believed when I testified before this Committee back in 2005. Wong Kim Ark was a citizen, the Court held, because he was "born in the United States, of parents of Chinese descent, who at the time of his birth

[20] *Id.* at 102.

[21] 169 U.S. 649 (1898).

were subjects of the emperor of China, but have a permanent domicile and residence in the United States." I had previously focused on the Court's description of Wong Kim Ark's parents as being "subjects of the emperor of China," which should, standing alone, have placed Wong Kim Ark outside the scope of the automatic citizenship guaranteed by the Fourteenth Amendment because he would have been, through them, "subject to the jurisdiction" of another power. But I have come to appreciate that the issue was more complicated than that. Not only were Wong Kim Ark's parents lawful, permanent residents in the United States, but they were also "domiciled" in the United States, a legal term of art that conveys more than mere temporary residence but a fixed and permanent home. Moreover, they had not taken more formal steps to demonstrate allegiance to the United States (by becoming citizens, for example, and renouncing their former allegiance) because a U.S. treaty with the emperor of China foreclosed that possibility. In other words, Wong Kim Ark's parents had become as subject to the complete jurisdiction of the United States (and not just the territorial jurisdiction) as we had allowed. Under those circumstances, it is not a surprise that the Supreme Court held that Wong Kim Ark was a citizen because he had been born on U.S. soil to parents who were lawfully and permanently "domiciled" here. But that is the limit of the actual holding in the case.

To be sure, Justice Horace Gray, writing for the Court, spoke more broadly, and it is that *obiter dictum* that has erroneously come to be viewed in recent years as having established that birth on U.S. soil alone is sufficient for automatic citizenship, no matter the circumstances. After correctly noted that the language to the contrary in *The*

Slaughter-House Cases was merely dicta and therefore not binding precedent,[22] Justice Gray made several errors in his own *dicta*. He found the *Slaughter-House* dicta unpersuasive, for example, because of a subsequent decision holding that foreign consuls (unlike ambassadors) were "subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside,"[23] thereby demonstrating confusion about the critical distinction between partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of its laws, and complete, political jurisdiction, which requires as well allegiance to the sovereign.

More troubling than his rejection of the persuasive *dicta* from *Slaugher-House* was the fact that Justice Gray also repudiated the actual holding in *Elk v. Wilkins*, which he himself had authored. After quoting extensively from the opinion, including the portion, reprinted above, noting that the children of Indians owing allegiance to an Indian tribe were no more "subject to the jurisdiction" of the United States within the meaning of the Fourteenth Amendment than were the children of ambassadors and other public ministers of foreign nations born in the United States, Justice Gray simply claimed, without any analysis, that *Elk* "concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country."[24]

By limiting the "subject to the jurisdiction" clause to the children of diplomats, who neither owed allegiance to the United States nor were (at least at the ambassadorial

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[22] 169 U.S. at 678.

[23] *Id.* at 679 (citing, e.g., 1 Kent, Comm. 44; *In re Baiz*, 135 U.S. 403, 424 (1890)).

[24] *Id.* at 681-82.

level) subject to its laws merely by virtue of their residence in the United States as the result of the long-established international law fiction of extraterritoriality by which the sovereignty of a diplomat is said to follow him wherever he goes, Justice Gray simply failed to appreciate what he seemed to have understood in *Elk*, namely, that there is a difference between territorial jurisdiction and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified.

Justice Gray's failure even to address, much less appreciate, the distinction between territorial jurisdiction and complete, political jurisdiction was taken to task by Justice Fuller, joined by Justice Harlan, in dissent. Drawing on an impressive array of legal scholars, from Vattel to Blackstone, Justice Fuller correctly noted that there was a distinction between two sorts of allegiance—"the one, natural and perpetual; the other, local and temporary." The Citizenship Clause of the Fourteenth Amendment referred only to the former, he contended. He contended that the absolute birthright citizenship urged by Justice Gray was really a lingering vestige of a feudalism that the Americans had rejected, implicitly at the time of the Revolution, and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment.

Quite apart from the fact that Justice Fuller's dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray's broad interpretation led him to make some astoundingly incorrect assertions. He claimed, for example, that "a stranger born, for so long as he continues within the dominions of a foreign government, owes obedience to the laws of that government, *and may be punished for treason*."[25] That is simply not true, as allegiance to the sovereign is a necessary prerequisite for a charge

[25] *Id.* at 693.

of treason.[26] Justice Gray also had to recognize dual citizenship as a necessary implication of his position,[27] despite the fact that, ever since the Naturalization Act of 1795, "applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects."[28] That requirement still exists though it no longer seems to be taken seriously. Hopefully this Committee will, as a result of these hearings, begin to address that fundamental contradiction in our naturalization practice.

Finally, Justice Gray's broader *dicta* is simply at odds with the notion of consent that underlay the sovereign's power over naturalization. What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children unilaterally, merely by giving birth on American soil, whether or not their arrival on America's shores was legal or illegal, temporary or permanent, with the consent of the United States or explicitly contrary to its consent.

Justice Gray believed that the children of only two classes of foreigners were not "subject to the jurisdiction" of the United States and therefore not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment. First, as noted above, were the children of ambassadors and other foreign diplomats who, as the result of the fiction of extraterritoriality, were not even considered subject to the

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[26] *See* 18 U.S.C.A. § 2381 ("Whoever, *owing allegiance to the United States*, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason") (emphasis added).

[27] *Id.* at 691.

[28] *Id.* at 711 (Fuller, J., dissenting) (citing Act of Jan. 29, 1795, 1 Stat. 414, c. 20)

territorial jurisdiction of the United States. Second were the children of invading armies born on U.S. soil while it was occupied by the foreign army. But apart from that, all children of foreign nationals who managed to be born on U.S. soil were, in his formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens and who as a result had not yet renounced their allegiance to their prior sovereign would become citizens by birth on U.S. soil. This was true even if, as was the case in *Wong Kim Ark* itself, the parents were, by treaty, unable ever to become citizens.

Children of parents residing only temporarily in the United States on a work or student visa, such as Yaser Hamdi's parents, would also become U.S. citizens. Children of parents who had overstayed their temporary visa would also become U.S. citizens, even though born of parents who were now here illegally. And, perhaps most troubling from the "consent" rationale, children of parents who never were in the United States legally would also become citizens as the direct result of the illegal action by their parents. This would be true even if the parents were nationals of a regime at war with the United States and even if the parents were here to commit acts of sabotage against the United States, at least as long as the sabotage did not actually involve occupying a portion of the territory of the United States. The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to the former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in our territory illegally, is simply too absurd to be a credible interpretation of the Citizenship Clause.

III. Reviving Congress's Constitutional Power Over Naturalization

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals. But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone born in the United States, *and subject to its jurisdiction*, is a citizen. With the absurdity of Hamdi's claim of citizenship so recently and vividly before us, it is time for the courts, and for the political branches as well, to revisit Justice Gray's erroneous *dicta* purporting to interpret that language, and to restore to the constitutional mandate what its drafters actually intended, that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for the automatic grant of citizenship to which the people of the United States actually consented when they adopted the Fourteenth Amendment.

Of course, Congress has in analogous contexts been hesitant to exercise its own constitutional authority to interpret the Constitution in ways contrary to the pronouncements of the Courts. Even if that course is warranted in most situations so as to avoid a constitutional conflict with a co-equal branch of the government, it is not warranted here for at least two reasons. First, as the Supreme Court itself has repeatedly acknowledged, Congress's power over naturalization is "plenary," while "judicial power over immigration and naturalization is extremely limited."[29] While that recognition of plenary power does not permit Congress to dip below the constitutional floor, of course, it does counsel against any judicial interpretation that provides a broader grant of citizenship than is actually supported by the Constitution's text, history, and theory.

[29] *See, e.g.*, *Miller v. Albright*, 523 U.S. 420, 455 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 769-770 (1972); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

Second, the gloss that has been placed on the *Wong Kim Ark* decision is actually much broader than the actual holding of the case. This Committee should therefore recommend, and Congress should then adopt, a narrow reading of the decision that does not intrude on the plenary power of Congress in this area any more than the actual holding of the case requires. Wong Kim Ark's parents were actually in this country both legally and permanently, yet were barred from ever pursuing citizenship (and renouncing their former allegiance) by a treaty that closed that door to all Chinese immigrants. They were therefore as fully subject to the jurisdiction of the United States as they were legally permitted to be, and under those circumstances, it is at least arguable that the Citizenship Clause extends birthright citizenship to their children. But the effort to read *Wong Kim Ark* more broadly than that, as interpreting the Citizenship Clause to confer birthright citizenship on the children of those *not* subject to the full and sovereign (as opposed to territorial) jurisdiction of the United States, not only ignores the text, history, and theory of the Citizenship Clause, but it permits the Court to intrude upon a plenary power assigned to Congress itself. Yaser Hamdi's case has highlighted for us all the dangers of recognizing unilateral claims of birthright citizenship by the children of people only temporarily visiting this country, and highlighted even more the dangers of recognizing such claims by the children of those who have arrived illegally to do us harm. It is time for Congress to reassert its plenary authority here, and make clear, by resolution, its view that the "subject to the jurisdiction" phrase of the Citizenship Clause has meaning of fundamental importance to the naturalization policy of the nation.

Because the promise of citizenship has become one of the three most significant magnets for illegal immigration to this country—which is to say, one of the three things

that most seriously undermines Congress's considered policy judgments about the level of immigration that can be sustained, it is extremely important that we get back to the correct understanding of what the Constitution actually requires, and especially what it does not require.

I understand that a bill has been introduced in the House that would do just that. It confirms that children born on U.S. soil to parents, at least one of whom is a U.S. "citizen or national," are "subject to the jurisdiction" as contemplated by the Fourteenth Amendment and therefore automatic citizens at birth. It recognizes the actual holding of *Wong Kim Ark* and deems children born on U.S. soil to "an alien admitted for permanent residence in the United States whose residence is in the United States" are likewise "subject to the jurisdiction" for purposes of the Fourteenth Amendment. And the bill adds an important additional category of children who are properly deemed automatic citizens at birth under this allegiance-owing understanding of the "subject to the jurisdiction" requirement, namely, the children of those serving in the armed forces of the United States who, by virtue of their service, have already taken an oath of allegiance to the United States.

As important as clarifying what the Fourteenth Amendment covers is clarifying what it does not cover, however. The bill currently does that only implicitly, in a provision that states the bill should not be construed to affect the citizenship or nationality status of anyone born before the effective date of the Act. With a slight addition, this provision can make explicit what is now only implicit, namely, 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 in the way that phrase is properly understood, is

made pursuant to Congress's plenary power over naturalization, not because of some perceived mandate of the Fourteenth Amendment.

I applaud this Committee's efforts in beginning the process to address this problem, and I look forward to working with you and the Committee's staff to help in your efforts to clarify an important constitutional requirement, the misinterpretation of which is beginning to have profound implications for the very idea of sovereignty.

Mr. GOWDY. Thank you, Dr. Eastman.

Professor Graglia.

TESTIMONY OF LINO A. GRAGLIA, A.W. WALKER CENTENNIAL CHAIR IN LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW, TESTIFYING IN HIS PERSONAL CAPACITY

Mr. GRAGLIA. Thank you for inviting me. I am glad to have this opportunity to speak to this important question, though I am not sure I can add much to what Professor Eastman's so very thorough presentation did.

It is difficult to imagine a more irrational and self-defeating legal system than one that makes unauthorized entry into the country a criminal offense and simultaneously provides the greatest possible inducement to illegal entry, a grant of American citizenship. How could such a legal system have come to be and be permitted to continue? The answer, its defenders will tell you, is the Constitution.

As Robert Jackson said in response to such arguments, the Constitution is not a suicide pact. The basis of the constitutional claim of birthright citizenship is, of course, the citizenship clause of the 14th Amendment, which has been read many times. Not anyone born—not everyone born in the United States, therefore, is automatically a citizen, only those subject to the jurisdiction of the United States. So the question becomes, what does that jurisdictional statement mean? How should it be interpreted?

Like any writing or at least any law, it should be interpreted to mean what it was intended to mean by those who adopted it, the ratifiers of the 14th Amendment. They could not have meant to grant birthright citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868 because there were no restrictions on immigration.

The purpose of the 14th Amendment was to constitutionalize the great 1866 Civil Rights Act, our first civil rights statute, which begins with the statement from which the citizenship clause of the 14th Amendment is derived. And that statement is: All persons born in the United States and not subject to any foreign power are hereby declared to be citizens of the United States.

The phrase "not subject to any foreign power" would clearly exclude the children of resident aliens, legal as well as illegal. The 14th Amendment citizenship clause substitutes the phrase "and subject to the jurisdiction thereof," but there is no indication of any intent to change the original meaning.

Senators Lyman Trumbull of Illinois and Howard of Ohio, principle authors of the citizenship clause in both the 1866 act and the 14th Amendment, both stated that "subject to the jurisdiction of the United States" means not owing allegiance to anybody else, which, again, seems to clearly preclude birthright citizenship for the children of legal resident aliens and, a fortiori, more so of illegal aliens. It appears, therefore, that the Constitution far from requiring the grant of birthright citizenship to the children of illegal aliens is better understood as denying that grant.

In the 1873 Slaughter-House case, the Supreme Court stated, in dicta, that: The phrase "subject to the jurisdiction thereof" was intended to exclude from birthright citizenship children of ministers,

consuls, and citizens or subjects of foreign states born within the United States.

In 1884, in *Elk v. Wilkins*, the Court held that a child born to members of an Indian tribe did not have birthright citizenship because, although born in the United States, it was not "subject to the jurisdiction thereof."

No one, the Court said, can become a citizen of a Nation without its consent. And there cannot be a more total or forceful denial of consent to a person's citizenship than to make that person's presence in the Nation illegal.

In 1898, however, the Court held in *U.S. v. Wong Kim Ark* that the citizenship clause granted birthright citizenship to children born in the United States of legal resident aliens. Two dissenting Judges—Justices argued correctly that, "The rule making the locality of birth the criterion of citizenship is based on ancient English common law that did not survive the American Revolution."

Every European country, including Great Britain now, has rejected that rule.

Whatever the merits or lack of merit of *Wong Kim Ark* as to showing of legal residence, it does not settle the question of birthright citizenship as to children of illegal residents or children born of legally admitted aliens who have overstayed their visa. In 1982, however, in *Plyler v. Doe*, which was mentioned, a 5-to-4 decision, the Court in a footnote interpreted *Wong Kim Ark* as holding that, "No plausible distinction can be made between legal and illegal resident aliens."

That statement cannot settle the matter, however, because it is not only a dictum—it had nothing to do with the case—but it was based on a clearly mistaken understanding of *Wong Kim Ark*.

The apparent general assumption that the children of illegal aliens have birthright citizenship as a constitutional right is, therefore, clearly subject to challenge. A recent scholarly study of the issue concluded the Framers of the citizenship clause had no intention of establishing a universal rule of birthright citizenship and Congress has the authority to reject that rule.

Judge Richard Posner——

Mr. GOWDY. Professor, I don't want—I don't want to interrupt you. If you—if you could maybe conclude. I hate to interrupt law professors.

Mr. GRAGLIA. Judge Richard Posner, one of the most influential men—Justice of the country agreed Congress, he said, should rethink awarding citizenship to everyone in the United States, including children of legal illegal immigrants whose only chance is to come here.

In my opinion, a law ending birthright citizenship for the children of illegal aliens should and likely would survive constitutional challenge.

Thank you.

[The prepared statement of Mr. Graglia follows:]

Birthright Citizenship for Children of Illegal Aliens, an Irrational Public Policy

Lino A. Graglia*

It is difficult to imagine a more irrational and self-defeating legal system than one that makes unauthorized entry to this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry a grant of American citizenship. How can such a legal system have come to be and be permitted to continue? The answer, its defenders will tell you, is "the Constitution." Justice Robert Jackson's famous reply to this argument was that the Constitution is not a "suicide pact."

The basis of the constitutional claim of birthright citizenship is the Citizenship Clause of the Fourteenth Amendment, which 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." Not everyone born in the United States is automatically a citizen; only those "subject to the jurisdiction" of the United States.

How should this jurisdiction requirement be interpreted? Like any writing, or at least any law, it should be interpreted to mean what it was intended to mean by those who adopted it, the ratifiers of the Fourteenth Amendment in 1868. They could not have meant to grant birthright citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868, because there were no restrictions on immigration. The purpose of the Fourteenth Amendment was to constitutionalize the 1866 Civil rights Act which begins with the statement from which the Citizenship Clause of the Fourteenth Amendment is derived: "All persons born in the United States *and not subject to any foreign power* are hereby declared to be citizens of the

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United States." The phrase "and not subject to any foreign power" seems clearly to exclude children of resident aliens, legal as well as illegal. The Fourteenth Amendment Citizenship Clause substituted the phrase "and subject to the jurisdiction thereof," but there is no indication of an intent to change the original meaning.

Senators Lyman Trumbull of Illinois and Jacob Howard of Ohio, the principal authors of the citizenship clauses in both the 1866 Act and the Fourteenth Amendment, both stated that "[s]ubject to the jurisdiction of the United States" means "[n]ot owing allegiance to anybody else." This would seem clearly to exclude birthright citizenship for the children of legal resident aliens and, *a fortiori*, of illegal aliens. It appears, therefore, that the Constitution, far from requiring the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant.

The Supreme Court has never ruled directly on the question, but it has spoken to similar issues. In the 1873 *Slaughter-House Cases*, it stated, in dicta, that "the phrase 'subject to the jurisdiction thereof' was intended to exclude from [birthright citizenship] children of ministers, consuls and *citizens or subjects of foreign States*, born within the United States." More important, in 1884 in *Elk v. Wilkins*, the Court held that a child born to members of an Indian tribe did not have birthright citizenship, because although born in the United States, it was not born "subject to the jurisdiction thereof." "[N]o one," the Court said, can become a citizen of a nation without its consent." There cannot be a more total or forceful denial of consent to a person's citizenship than to make that person's presence in the nation illegal.

A possible impediment to this conclusion is the Court's 1898 decision in *United States v Wong Kim Ark,* holding that the Citizenship Clause granted birthright citizenship to children

born in the United States of legal resident aliens. Two dissenting justices argued correctly that "the rule making locality of birth the criterion of citizenship" is based on ancient English common law and did not survive the American Revolution. Every European country, including Great Britain has now rejected that rule.

Whatever the merits (or lack of merit) of *Wong Kim Ark* as to the children of legal resident aliens, it does not settle the question of birthright citizenship as to children of *illegal* resident aliens or of children born of legally admitted aliens who have overstayed their visa. Although there is no Supreme Court decision on that question, it has been referred to in some dicta, most importantly in *Plyler v. Doe*, a 1982 five to four decision, in which the Court in a footnote interpreted *Wong Kim Ark* as holding that "no plausible distinction … can be made between legal and illegal resident aliens." That statement cannot settle the matter, however, because it is not only pure dictum but is based on a mistaken understanding of *Wong Kim Ark*.

The Federal Government's apparent assumption that the children of illegal aliens have birthright citizenship as a constitutional right is, therefore, clearly subject to challenge. A recent scholarly study of the issue concluded that "[t]he framers of the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship," and that Congress has the authority to reject that rule.

Judge Richard Posner agrees: "Congress," he said, "should rethink … awarding citizenship to everyone born in the United States … including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children." "We should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children." He concluded, that "Congress

would not be flouting the Constitution if it amended the *Immigration and Nationality Act* to put an end to the nonsense."

In my opinion, a law ending birthright citizenship for the children of illegal aliens should and likely would survive constitutional challenge. The Constitution should not be interpreted to require an absurdity.

ATTACHMENT

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BIRTHRIGHT CITIZENSHIP FOR CHILDREN OF ILLEGAL ALIENS: AN IRRATIONAL PUBLIC POLICY

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BIRTHRIGHT CITIZENSHIP FOR CHILDREN OF ILLEGAL ALIENS: AN IRRATIONAL PUBLIC POLICY

LINO A. GRAGLIA*

I. INTRODUCTION 2
II. CONSTITUTIONAL AND STATUTORY DEFINITIONS OF CITIZENSHIP 5
III. JUDICIAL INTERPRETATIONS OF CITIZENSHIP 8
IV. CONCLUSION 13

I. INTRODUCTION

One of the most serious problems the country faces today, in the opinion of most Americans, is the problem of illegal immigration.[1] The usual estimate is that nearly twelve million illegal aliens,[2] mostly from Mexico,[3] are now in the United States. This problem is so serious that it has driven the nation to the extreme solution of beginning construction of a fence or wall along the 2,000 miles of our southern border at the cost of billions of dollars.[4] Popular opposition to illegal immigration is so strong that both major-party presidential candidates in the recent election found it necessary to affirm their opposition.[5]

At the same time, there is the apparent paradox that American law, as currently understood, provides an enormous inducement to illegal immigration: namely, an automatic grant of American citizenship to the children of illegal immigrants born in this country. As a result, it has been estimated that over two-thirds of all births in Los Angeles public hospitals,[6] more

1. *See, e.g.*, The Federation for American Immigration Reform (FAIR), Immigration Facts, Public Opinion Polls on Immigration, http://www.fairus.org/site/PageNavigator/facts/public_opinion/ (last visited Dec. 16, 2009) (listing a variety of poll statistics on U.S. voters' opinions about immigration).

2. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW at i (2008), http://pewhispanic.org/files/reports/94.pdf.

3. JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS: BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 4 (2005), http://pewhispanic.org/files/reports/46.pdf (stating that 59% of illegal immigrants are from Mexico).

4. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL REQUESTERS: SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 3 (2009), http://www.gao.gov/new.items/d09896.pdf.

5. *See, e.g.*, *Where Clinton, Obama, and McCain Stand on Immigration*, U.S. NEWS & WORLD REP., Mar. 17, 2008, http://www.usnews.com/articles/news/campaign-2008/2008/03/17/where-clinton-obama-and-mccain-stand-on-immigration.html (last visited Dec. 16, 2009) (discussing the candidates' different views and agreements on different issues related to immigration).

6. *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: J. Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the Comm. on the Judiciary*, 104th Cong. 22 (1995) [hereinafter *1995 Joint Hearing*] (statement of Rep. Elton Gallegly) (pointing out that an estimated 250,000 citizens were children of illegal alien mothers in Los Angeles County and that for "the

than one-half of all births in Los Angeles,[7] and nearly 10% of all births in the nation in recent years were to illegal immigrant mothers.[8] Many of these mothers frankly admitted that the reason they entered illegally was to give birth to an American citizen.[9]

A parent can hardly do more for a child than make him or her an American citizen, entitled to all the advantages of the American welfare state.[10] Nor need doing so even be entirely altruistic. Illegal alien parents with an American-citizen child remain subject to deportation, but that deportation becomes less likely. They will be able to appeal to an immigration judge, an administrative court, and ultimately a federal court to argue that deportation would subject the American-citizen child to "extreme hardship," a recognized ground for suspension of deportation, as it would potentially deprive the child of the benefits of his or her American citizenship.[11]

Perhaps even more importantly if the deported parents opt to take the American-citizen child with them, the child can return to this country for permanent residence at any time. The child can then, upon becoming an adult, serve as what is known in immigration law as an "anchor child," the basis for a claim that his or her parents be admitted and granted permanent resident status. The parents will then ordinarily be admitted without regard to quota limitations.[12]

Illegal immigrant parents also benefit, of course, from the welfare and other benefits to which their citizen child is entitled. One court has held, for example, that the benefits that were due under the Aid to Families with Dependent Children Act to a birthright citizen living in a family with illegal aliens had to include the needs of the illegal alien mother and siblings.[13]

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7. *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 2 (2005) [hereinafter *2005 Hearing*] (statement of Rep. Lamar Smith).

8. *Id.* at 1 (statement of Rep. John Hostettler).

9. *1995 Joint Hearing*, *supra* note 6, at 35.

10. *See id.* at 25 (statement of Rep. Brian P. Bilbray) ("[O]ver 96,000 babies of illegal aliens were born in California in 1992. These children then qualify for benefits including Medicaid, AFDC, WIC, and SSI.").

11. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 110–11 (Yale Univ. Press 1985).

Nearly half of illegal-immigrant households are couples with children,[14] 73% of which have an American-citizen child.[15]

The apparent arbitrariness of birthright citizenship came to public attention recently in the case of Yaser Esam Hamdi. In 2001, Hamdi was captured as a fighter for the Taliban in a battle with United States-supported forces in Afghanistan.[16] He was held as an enemy combatant in military prisons in Afghanistan and then transferred to the United States Naval Base in Guantanamo Bay, Cuba.[17] It was subsequently discovered that Hamdi was born in Louisiana in 1980 to citizens of Saudi Arabia who were residing in the United States on a temporary visa.[18] Shortly after his birth, he returned with his parents to Saudi Arabia and never returned to this country. On the assumption that he was an American citizen,[19] he was released from Guantanamo and transferred to a naval brig in Norfolk, Virginia.[20] From there, he was able to wage a legal battle that ultimately reached the United States Supreme Court, which held that he had a habeas corpus right to challenge his detention.[21]

It is difficult to imagine a more irrational and self-defeating legal system than one which makes unauthorized entry into this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry. How can such a legal system have come to be and be permitted to continue? The answer, its defenders no doubt will tell you, is the Constitution, the last resort for defenders of untenable positions.[22] Justice Robert Jackson's famous reply to this argument was that the Constitution is not a "suicide pact."[23]

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14. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 5 (2009), http://pewhispanic.org/files/reports/107.pdf.

15. *Id.* at i.

16. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

17. *Id.*

18. *Id.*; Howard Sutherland, *Citizen Hamdi: The Case Against Birthright Citizenship*, THE AM. CONSERVATIVE, Sept. 27, 2004, http://www.amconmag.com/article/2004/sep/27/00021/ (last visited Dec. 6, 2009).

19. *Hamdi*, 542 U.S. at 510; *But see Id.* at 554 (Scalia, J., dissenting) (referring to Hamdi as only a "presumed American citizen.").

20. *See 2005 Hearing*, *supra* note 7, at 59–61 (statement of John C. Eastman).

21. *Hamdi*, 542 U.S. at 533–34.

22. For example, in a television debate on school busing for racial integration some years ago, I asked Arthur Fleming, then Chairman of the United States Civil Rights

II. CONSTITUTIONAL AND STATUTORY DEFINITIONS OF CITIZENSHIP

The basis of the constitutional claim of birthright citizenship is the Citizenship Clause, the first sentence of the first section of the Fourteenth Amendment, which 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."[24] Not everyone, therefore, born in the United States is automatically a citizen, but only those "subject to the jurisdiction" of the United States. The basic question becomes what that phrase—the jurisdiction requirement—is properly understood to mean. The Immigration and Nationality Act repeats the Citizenship Clause, making it a provision of statutory law, but not clarifying its meaning.[25] Regulations issued by the Department of Homeland Security and the Department of Justice Executive Office for Immigration Review provide: "[a] person born in the United States to a foreign diplomatic officer accredited to the United States, as a matter of international law, is not subject to the jurisdiction of the United States. That person is not a United States citizen under the Fourteenth Amendment to the Constitution."[26] The apparent assumption is that this is the only limitation on birthright citizenship created by the jurisdiction requirement. No statute, regulation, or other official document, however, explicitly addresses the question of birthright citizenship for children born here of resident illegal aliens.

How, then, should the jurisdiction requirement of the Citizenship Clause be interpreted in regard to that question? Like any writing, or at least any law, it should be interpreted to mean what it was intended or understood to mean by those who adopted it—the ratifiers of the Fourteenth Amendment. They could not have considered the question of granting birthright

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opinion, apparently, made the irrationality of the requirement irrelevant. Debate at Dunbar High School, Washington, D.C. (1976), https:/redaudio.cc.utexas.edu;8080/asxgen/law/depts./media/Reels/Graglia1976.wmv (last visited Dec. 16, 2009).

23. Terminiello v. City of Chi., 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

24. U.S. Const. amend. XIV, § 1.

citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868, when the amendment was ratified, because there were no restrictions on immigration.[27] It is hard to believe, moreover, that if they had considered it, they would have intended to provide that violators of United States immigration law be given the award of American citizenship for their children born in the United States.

The intended purpose of the Fourteenth Amendment and the Citizenship Clause is not in doubt. In 1856, in the infamous case of *Dred Scott v. Sanford*,[28] the Supreme Court held that blacks, even free blacks, were not citizens of the United States and that a state could not make them citizens. It also held that Congress could not prohibit the extension of slavery to the territories, thereby invalidating the Missouri Compromise.[29] Instead of settling the slavery question, as the Court foolishly thought it was doing, this decision precipitated the Civil War. The Thirteenth Amendment, adopted in 1865, prohibited slavery and involuntary servitude and granted Congress the power to enforce the prohibition by "appropriate legislation."[30] Following emancipation, the Southern states adopted laws, known as "black codes," that limited the basic civil rights of their black residents in many respects.[31] Congress responded by enacting our first civil rights legislation, the Civil Rights Act of 1866.[32] The purpose of the Act was: first, to overrule *Dred Scott* by defining national and state citizenship so as to include blacks and, second, to guarantee those black citizens the same basic civil rights as white citizens.

Congress found authority to enact the 1866 Act in its power to enforce the Thirteenth Amendment.[33] President Andrew Johnson vetoed the act on the ground, among others, that it exceeded Congress's Thirteenth Amendment power.[34] Congress, in the control of the Radical Republicans and with representatives of the South excluded, easily overruled the veto,

27. SCHUCK & SMITH, *supra* note 11, at 95.

28. 60 U.S. 393 (1856).

29. *Id.*

30. U.S. Const. amend. XIII, § 2.

31. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 425 (Thomson/West 2nd ed. 2005).

32. Civil Rights Act of 1866, 14 Stat. 27 (1866) (repealed 1866).

but then proposed the Fourteenth Amendment to remove all doubt as to the Act's validity.[35] The Fourteenth Amendment constitutionalized the 1866 Act in two senses: first, it made clear that Congress was authorized to enact it; and second, it made the Act in effect part of the Constitution, protecting it from repeal by a later Congress.

The 1866 Act begins with a statement from which the Citizenship Clause of the Fourteenth Amendment is derived: "[A]ll persons born in the United States, *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States . . ."[36] The phrase "and not subject to any foreign power" seems clearly to exclude children of resident aliens, legal as well as illegal. The Fourteenth Amendment Citizenship Clause substituted the phrase "and subject to the jurisdiction thereof," but there is no indication of intent to change the original meaning.

In the 39th Congress, which enacted the 1866 Civil Rights Act and proposed the Fourteenth Amendment, the question arose of how to avoid granting birthright citizenship to members of Indian tribes living on reservations.[37] The issue was whether an explicit exclusion of Indians should be written into the Citizenship Clause as it was in the above-quoted first sentence of the 1866 Act.[38] It was decided that this was not necessary, because, although Indians were at least partly subject to the jurisdiction of the United States, they owed allegiance to their tribes, not to the United States.[39]

Senators Lyman Trumbull of Illinois and Jacob Howard of Ohio were the principal authors of the citizenship clauses in both the 1866 Act and the Fourteenth Amendment.[40] Senator Trumbull stated that "subject to the jurisdiction of the United States" meant subject to its "complete" jurisdiction, which means "[n]ot owing allegiance to anybody else."[41] Senator Howard agreed that "jurisdiction" meant a full and complete jurisdiction,

35. *Id.* at 423–54.

36. 14 Stat. 27, ch. 31, § 1 (emphasis added).

37. *See* JOHN C. EASTMAN, HERITAGE FOUNDATION, FROM FEUDALISM TO CONSENT: RETHINKING BIRTHRIGHT CITIZENSHIP 2 (2006), http://www.heritage.org/Research/LegalIssues/upload/95590_1.pdf.

38. *Id.*

39. *Id.*

the same "in extent and quality as applies to every citizen of the United States now."[42] Children born to Indian parents with tribal allegiances were therefore necessarily excluded from birthright citizenship, and explicit exclusion was unnecessary.[43] This reasoning would seem also to exclude birthright citizenship for the children of legal resident aliens and, *a fortiori*, of illegal aliens.[44] It appears, therefore, that the Constitution, far from clearly compelling the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant.

III. JUDICIAL INTERPRETATIONS OF CITIZENSHIP

Our constitutional law, however, comes not from the Constitution, but from the Supreme Court. As Charles Evans Hughes, later Chief Justice of the United States, once famously put it, "We are under a Constitution, but the Constitution is what the judges say it is."[45] The question, therefore, is less what the Constitution means than what the Supreme Court is likely to say it means. The answer to that question, as to all litigated constitutional questions, depends almost entirely on the policy preferences of the Justices making the decision. The Supreme Court has never ruled directly on the question of birthright citizenship for the children of resident illegal aliens, but it has spoken to similar issues.

In 1873 in the *Slaughter-House Cases*,[46] the first case to come before the Court involving the then newly enacted Fourteenth Amendment, the Court stated, in dicta, that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from [birthright citizenship] children of ministers, consuls, and

42. *Id.* at 2895.

43. *Id.*; SCHUCK & SMITH, *supra* note 11, at 81–82.

44. Earlier, however, in response to a question, Senator Trumbull stated, inconsistently, that citizenship would be granted to the American-born children of Chinese and other legal resident aliens. Schuck and Smith point out that this statement was based on "the expectation that its actual effect would be trivial. On several occasions during the debates, Congress was assured that the number of children of alien parents who would qualify for birthright citizenship under the clause would be *de minimis* and thus of no real concern. This *de minimis* argument could not be credibly made with regard to the Indians, as several senators made clear." SCHUCK & SMITH, *supra* note 11, at 77–79.

citizens or subjects of foreign States born within the United States."[47] Much more important, in 1884 in *Elk v. Wilkins*,[48] the Court adopted the view of Senators Trumbull and Howard that a child born to members of an Indian tribe did not have birthright citizenship. Such a child was born in the United States, but not born "subject to the jurisdiction thereof," because that requires that the child be "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."[49]

It made no difference that the plaintiff "had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States,"[50] because it did not appear that "the United States accepted his surrender."[51] He could not change his status as an Indian by his "own will without the action or assent of the United States."[52] "To be a citizen of the United States is a political privilege that no one, not born to, can assume without its consent in some form."[53] "[N]o one can become a citizen of a nation without its consent."[54] The decision seemed to establish that American citizenship is not an ascriptive (depending on place of birth), but is a consensual relation, requiring the consent of the United States as well as the individual. This would clearly settle the question of birthright citizenship for children of illegal aliens. There cannot be a more total or forceful denial of consent to a person's citizenship than to make the source of that person's presence in the nation illegal.

The only impediment to this conclusion is the Court's next decision, *United States v. Wong Kim Ark*,[55] in which a divided Court took the opposite approach. The Court explicitly adopted, contrary to *Elk v. Wilkins*, the ascriptive view of the English common law, according to which a person born within the King's realm was necessarily a subject of the King, with only

47. *Id.* at 73 (emphasis added).
48. 112 U.S. 94 (1884).
49. *Id.* at 102.
50. *Id.* at 94.
51. *Id.* at 99.
52. *Id.* at 100.
53. *Id.* at 100.

the children of ambassadors and occupying enemy aliens excepted. Thus, the Court held, the Citizenship Clause grants birthright citizenship to children born in the United States of legal resident aliens.

It would seem that the Court was mistaken in interpreting the Citizenship Clause on the basis of the common law ascriptive view, which arose in the feudal context of the position of subjects in a monarchy. That view was based on the assumption that the King's relation to his subjects was as that of father to children, to whom the subject owed perpetual allegiance, which precluded the possibility of expatriation or denaturalization.[56] The American Revolution, however, by definition, rejected the notion of perpetual allegiance.

Two dissenting justices in *Wong Kim Ark* argued that "the rule making locality of birth the criterion of citizenship . . . no more survived the American Revolution than the same rule survived the French Revolution."[57] The dissenters also pointed out, that both the naturalization law of the time and a treaty with China precluded Chinese persons from becoming naturalized citizens.[58] It did not seem credible that by merely giving birth here, a parent could grant the child a citizenship that by both law and treaty Congress and China meant to prohibit.

Whatever the merits of *Wong Kim Ark* as to the children of legal resident aliens and however broad some of its language, it does not authoritatively settle the question of birthright citizenship for children of *illegal* resident aliens. In fact, the Court's adoption of the English common law rule for citizenship could be said to argue *against* birthright citizenship for the children of illegal aliens. Even that rule, the Court noted, denied birthright citizenship to "children of alien enemies, born during and within their hostile occupation" of a country.[59] The Court recognized that even a rule based on soil and physical presence could not rationally be applied to grant birthright citizenship to persons whose presence in a country was not only without the government's consent but in violation of its law.

56. *See* SCHUCK & SMITH, *supra* note 11, at 2 ("[B]irthright citizenship is something of a bastard concept in American ideology . . . [it] originated as a distinctively feudal status intimately linked to medieval notions of sovereignty, legal personality, and allegiance.").

57. 169 U.S. at 710.

This also would seem to preclude the grant of birthright citizenship to the children of illegal aliens. The same, it should be added, is true of children born of legally admitted aliens who have overstayed their visa period or otherwise violated its restrictions.

Although there is no Supreme Court decision on the issue of birthright citizenship for children of illegal aliens, it is referred to in the dicta in a few cases. The most important is *Plyler v. Doe*,[60] a 1982 five-to-four decision, in which the Court reached the remarkable conclusion that Texas is constitutionally required to grant free public education to the children of illegal aliens.[61] The opinion of the Court was by Justice William J. Brennan Jr., perhaps the most liberal-activist Justice in the history of the Court and the source of most of the Court's remarkable innovations in the last half of the twentieth century. The decision, like the grant of birthright citizenship to children of illegal aliens, makes a mockery of our immigration laws, but Justice Brennan never let law, fact, or logic stand in the way of a decision he wanted to reach.[62] He agreed with President Barack Obama that the function of the court was to decide challenging cases on the basis of "empathy."[63]

In a footnote, Justice Brennan interpreted *Wong Kim Ark*[64] as holding that "no plausible distinction . . . can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."[65] That statement cannot settle the matter, however, because it is not only a pure dictum—a gratuitous statement unnecessary to the decision of the case—but also based on the mistaken premise that *Wong Kim Ark* decided the case of illegal aliens.[66]

The Immigration and Naturalization Service's assumption that the children of illegal aliens have birthright citizenship as a

60. 457 U.S. 202 (1982).

61. *Id.*

62. *See* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 68–74, 178–85 (Cornell Univ. Press 1976).

63. Then-Senator Obama explained that he voted against confirmation of Chief Justice John Roberts due to his belief that judges should decide "truly difficult" cases on the basis of "the depth and breadth of one's empathy." Jess Bravin, *Barack Obama: The Present Is Prologue*, WALL ST. J., Oct. 7, 2008, at A22, *available at* http://online.wsj.com/article/SB122333844642409819.html?mod=article-outset-box.

64. 169 U.S. at 649.

constitutional right is, therefore, clearly subject to challenge and is increasingly being challenged. For example, it was prominently challenged in a 1995 book, CITIZENSHIP WITHOUT CONSENT by Yale law professor Peter Schuck and political science professor Roger Smith.[67] "[B]irthright citizenship's historical and philosophical origins," they argued, "make it strikingly anomalous as a key constitutive element of a liberal political system."[68] "[T]he framers of the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship."[69] "The question of the citizenship status of the native-born children of illegal aliens never arose for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter."[70] There simply were no restrictions on immigration until the late nineteenth century.[71] Before that time, "birthright citizenship could plausibly be understood as one ingredient of an integrated national strategy to encourage immigration,"[72] but "'[c]ontrol of our borders', not encouragement of immigration, now dominates contemporary policy discussions."[73] Schuck and Smith conclude that Congress has the power "to define the contours of birthright citizenship . . ."[74] "If Congress should conclude that the prospective denial of birthright citizenship to the children of illegal aliens" is good policy, then "the Constitution should not be interpreted in a way that impedes that effort." [75]

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is perhaps the most cited and most influential federal judge not on the Supreme Court.[76] Arguably, he is the nation's leading public intellectual. In a concurring opinion written in 2003, he argued that "Congress should rethink . . . awarding citizenship to everyone born in the United

67. SCHUCK & SMITH, *supra* note 11.

68. *Id.* at 90.

69. *Id.* at 96.

70. *Id.* at 95.

71. *See* Jonathan H. Wardle, Note, *The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery*, 58 VAND. L. REV. 1963, 1966 (2005) (stating that Congress enacted virtually no immigration restrictions until 1875).

72. *Id.* at 92.

73. *Id.* at 93.

74. *Id.* at 121.

75. *Id.* at 99.

States (with a few very minor exceptions . . .) . . . (citation omitted) including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children."[77] He quoted an article that concludes, "The situation we have today is absurd . . . For example, there is a huge and growing industry in Asia that arranges tourist visas for pregnant women so they can fly to the United States and give birth to an American."[78] "We should not," Judge Posner argued, "be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children."[79] Citing and agreeing with Professors Schuck and Smith, he concluded that "Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense."[80]

IV. CONCLUSION

There have been several proposals in Congress in recent years to end birthright citizenship for children of illegal aliens by statute or constitutional amendment,[81] but none has ever come out of the House Judiciary Committee. Such a statute would probably be challenged as unconstitutional—as are most similar statutes—and the result may depend, as is usual today in controversial cases, on how Justice Anthony Kennedy votes, which is hard to predict.[82]

Constitutional restrictions on policy choices should not be favored in a democratic society. New restrictions should not be created and existing ones should not be expanded. It should not be controversial to assert—although, unfortunately, it is—that a policy choice by elected representatives should not be disallowed by judges as unconstitutional unless it clearly is—"clearly" because in a democracy the view of elected legislators should prevail over the view of judges in cases of doubt. By that

77. Oforji v. Ashcroft, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring opinion).

78. *Id.* (citing John McCaslin, *Inside the Beltway: Rotund Tourists*, WASH. TIMES, Aug. 27, 2002, at A7).

79. *Id.*

80. *Id.*

test, a law ending birthright citizenship for a child of an illegal alien would easily survive. Indeed, its survival should require no more than recognition by the Supreme Court that the Constitution should not be interpreted to require an absurdity.

Mr. GOWDY. Thank you. Thank you, Professor.

Now Mr. Feere.

TESTIMONY OF JON FEERE, LEGAL POLICY ANALYST, CENTER FOR IMMIGRATION STUDIES

Mr. FEERE. Thank you, Chairman Gowdy, Ranking Member Lofgren, and the distinguished Members of the Subcommittee for allowing me to speak before you today on the very interesting issue of birthright citizenship.

Every year, approximately 350,000 to 400,000 children are born to illegal immigrants in the United States. To put this in perspective, this means that 1 out of 10 births in the U.S. is to an illegal immigrant mother. The executive branch automatically recognizes these children as U.S. citizens, despite the foreign citizenship and illegal status of the parent. And, because the executive branch automatically recognizes them as U.S. citizens, they provide them Social Security numbers and U.S. passports. The same is true of children born to tourists and other aliens who are in the country in a legal status but in a temporary status.

It is unlikely that Congress intended such a broad application of the 14th Amendment citizenship clause. And the Supreme Court has only held that children born to citizens or permanently domiciled immigrants must be considered U.S. citizens at birth. Some clarity from Congress would be helpful in resolving this ongoing debate.

In recent decades, the issue has garnered increased attention for a number of reasons. First is the mass illegal immigration this country has experienced. The population of U.S.-born children with illegal alien parents has expanded rapidly in recent years from 2.7 million in 2003 to 4.5 million by 2010. Under the immigration enforcement priorities of the Obama administration, illegal immigrants who give birth to U.S. citizens have become low priorities for deportation.

Furthermore, the President's DAPA program, Deferred Action for Parents of Americans and Lawful Permanent Residents program, a program currently held up in the courts, would provide benefits to illegal immigrants who give birth here and allow them to "stay in the U.S. without fear of deportation." That is from the Administration. The broad interpretation of the citizenship clause forms the basis for these policies.

Second is the issue of chain migration. A child born to illegal aliens in the United States can initiate a chain of immigration when he reaches the age of 18 and can sponsor an overseas spouse and unmarried children of his own. When he turns 21, he can also sponsor his parents and any brothers or sisters. Approximately two-thirds of our annual immigration flow is family-based. And that's part of the reason, not the entire reason, but part of it. And this number continues to rise every year because of the every expanding migration chains that operate independently of any economic downturn or labor need.

Third, the relatively modern phenomenon of affordable international travel and tourism has increased the opportunity for noncitizens to give birth here, raising questions about the appropriate scope of the citizenship clause. According to the Department of

Homeland Security, in 2013, there were 173 million nonimmigrant admissions to the United States. This includes people entering for tourism, business travel, and other reasons, but it also includes those who are engaging in birth tourism, which is a growing phenomenon that has arisen in direct response to our government's broad application of the citizenship clause.

Birth tourism is the practice of people around the world traveling to the United States to give birth for the specific purpose of adding a U.S. passport holder to the family while misrepresenting the true intention of their visit to the United States. An entire birth tourism industry has been created, and the phenomenon has grown largely without any debate in Congress or the consent of the American people. Birth tourism is becoming much more common with every passing year, and I do think at some point Congress will have to address it.

Fourth is the sense among many Americans that the United States is falling behind the global trend on birthright citizenship, as many countries which once had such policies have ended them in recent years. The United States and Canada are the only two advanced economies as rated by the IMF to grant automatic citizenship to children of illegal aliens. For these reasons and others, there has been a bipartisan effort to end birthright citizenship legislatively here, even in Canada as well.

Multiple legislative efforts to clarify the appropriate scope of the citizenship clause have been proposed by both Republican and Democrat politicians as there remains much debate about who should be considered subject to the jurisdiction of the United States. In 1993, Senator Harry Reid, Democrat from Nevada, introduced legislation that would limit birthright citizenship to the children of U.S. citizens and legally resident aliens. And similar bills have entered—been introduced by other legislators in nearly every Congress since, I believe.

Some clarification from Congress on this issue would certainly be welcomed and perfectly appropriate. I would be happy to take any questions on these and other issues. Thank you.

[The prepared statement of Mr. Feere follows:]

U.S. House of Representatives Committee on the Judiciary

Subcommittee on Immigration and Border Security

April 29, 2015

Statement of Jon Feere
Center for Immigration Studies

Thank you, Chairman Gowdy, Ranking Member Lofgren and distinguished Members of the Subcommittee for the opportunity to testify on the issue of birthright citizenship.

Every year, 350,000 to 400,000 children are born to illegal immigrants in the United States. To put this another way, as many as one out of 10 births in the United States is now to an illegal immigrant mother. Despite the foreign citizenship and illegal status of the parent, the Executive Branch automatically recognizes these children as U.S. citizens upon birth, providing them Social Security numbers and U.S. passports. The same is true of children born to tourists and other aliens who are present in the United States in a legal but temporary status. It is unlikely that Congress intended such a broad application of the 14th Amendment's Citizenship Clause, and the Supreme Court has only held that children born to citizens or permanently domiciled immigrants must be considered U.S. citizens at birth. Some clarity from Congress would be helpful in resolving this ongoing debate.

While it is unclear for how long the U.S. government has followed this practice of universal, automatic "birthright citizenship" without regard to the duration or legality of the mother's presence, the issue has garnered increased attention for a number of reasons.

First, the mass illegal immigration this country has experienced in recent decades has raised the question of whether Congress intended that the 14th Amendment's Citizenship Clause would operate to turn children of illegal aliens into U.S. citizens at birth. The population of U.S.-born children with illegal alien parents has expanded rapidly in recent years from 2.7 million in 2003 to 4.5 million by 2010.[1] Under the immigration enforcement priorities of the Obama administration, illegal immigrants who give birth to U.S. citizens have become low priorities for deportation; furthermore, under the president's DAPA program (the Deferred Action for Parents of Americans and Lawful Permanent Residents program) — a program currently held up in court — would provide benefits to illegal immigrants who gave birth here and allow them to "stay in the U.S. without fear of deportation."[2] The broad interpretation of the Citizenship Clause forms the basis for these policies.

Second is the issue of chain migration. A child born to illegal aliens in the United States can initiate a chain of immigration when he reaches the age of 18 and can sponsor an overseas spouse and unmarried children of his own. When he turns 21, he can also sponsor his parents and any brothers and sisters. Family-sponsored immigration accounts for most of the nation's growth in immigration levels; approximately 2/3 of our immigration flow is family-based. This number continues to rise every year because of the ever-expanding migration chains that operate independently of any economic downturns

or labor needs. Although automatic and universal birthright citizenship is not the only contributor to chain migration, ending it would prevent some of this explosive growth.

Third, the relatively modern phenomenon of affordable international travel and tourism has increased the opportunity for non-citizens to give birth here, raising questions about the appropriate scope of the Citizenship Clause. According to the Department of Homeland Security, in 2013 there were 173 million nonimmigrant admissions to the United States.[3] This includes people entering for tourism, business travel, and other reasons, but also those entering to engage in "birth tourism", a growing phenomenon that has arisen in direct response to our government's broad application of the Citizenship Clause. Birth tourism is the practice of people around the world traveling to the United States to give birth for the specific purpose of adding a U.S. passport holder to their family, while misrepresenting the true intention of their visit to the United States.

Birth tourism is becoming much more common with every passing year and Congress will have to address it. Part of that discussion will include a focus on birthright citizenship and whether children born to people in the country on a temporary basis should be considered U.S. citizens. An entire "birth tourism" industry has been created and the phenomenon has grown largely without any debate in Congress or the consent of the public. While many birth tourists currently making news are from China, it certainly is not limited to that country. Birth tourists come from all corners of the globe, from China to Turkey to Nigeria. The Nigerian media reported a few years back that the phenomenon of Nigerians traveling to the United States to give birth is "spreading so fast that it is close to becoming an obsession." The article was in response to congressional legislation aimed at ending birth tourism; the article's title: "American Agitations Threaten a Nigerian Practice."

Birth tourism is also no longer just for the wealthy. The *Los Angeles Times* reports that "the practice has become particularly popular in recent years with the newly wealthy Chinese middle class."[4] Similarly, a Chinese news article associated with Time Magazine noted that "Giving birth to a child abroad is not a privilege reserved to the stars and the very wealthy. An increasing number of expectant middle-class parents also fancy giving their children passports that they can feel proud of."[5]

Though the number is very difficult to calculate, we estimate that the number of birth tourists coming to the United States each year is very roughly around 35,000 to 36,000 people based on the limited governmental data available.[6] If Congress does not address this, there is every reason to believe the number will grow.

Fourth is the issue of taxpayer-subsidized benefits. Most benefits Americans would regard as "welfare" are not accessible to illegal immigrants. However, illegal immigrants can obtain welfare benefits such as Medicaid and food stamps on behalf of their U.S.-born children. Many of the welfare costs associated with illegal immigration, therefore, are due to the Executive Branch's current interpretation of the Citizenship Clause. Put another way, greater efforts at barring illegal aliens from welfare programs will not significantly reduce costs because their citizen children can continue to access the benefits.

Currently, 71 percent of illegal-alien headed households with children make use of at least one major welfare program. Of illegal-alien headed households with children where the household head is from

Mexico, 79 percent make use of at least one major welfare program. By comparison, of households with children headed by a native-born American citizen, 38.7 percent make use of at least one major welfare program.[7]

For these reasons and others, there has been a bipartisan effort to end birthright citizenship legislatively. Multiple legislative efforts to clarify the appropriate scope of the Citizenship Clause have been proposed by both Republican and Democrat politicians, as there remains much debate about who should be considered "subject to the jurisdiction" of the United States. In 1993, Sen. Harry Reid (D-Nev.) introduced legislation what would limit birthright citizenship to the children of U.S. citizens and legally resident aliens, and similar bills have been introduced by other legislators in nearly every Congress since.

Few Countries Grant Automatic Citizenship to Children of Illegal Immigrants

Only 30 of the world's 194 countries grant automatic citizenship to children born to illegal aliens.[8]

Of advanced economies, as rated by the International Monetary Fund, Canada and the United States are the only countries that grant automatic citizenship to children born to illegal aliens.

No European country grants automatic citizenship to children of illegal aliens.

The global trend is moving away from automatic birthright citizenship as many countries that once had such policies have ended them in recent decades. Countries that have ended universal birthright citizenship include the United Kingdom, which ended the practice in 1983, Australia (1986), India (1987), Malta (1989), Ireland, which ended the practice through a national referendum in 2004, New Zealand (2006), and the Dominican Republic, which ended the practice in January 2010.

The reasons countries have ended automatic birthright citizenship are diverse, but have resulted from concerns not all that different from the concerns of many in the United States. Increased illegal immigration is the main motivating factor in most countries. Birth tourism was one of the reasons Ireland ended automatic birthright citizenship in 2004.[9] If the United States were to stop granting automatic citizenship to children of illegal immigrants, it would be following an international trend.

Some countries which currently recognize automatic birthright citizenship are considering changing the policy. For example, Barbados is struggling with large amounts of immigration (relative to its size), both legal and illegal, and is contemplating ending birthright citizenship for children of illegal aliens. The country initiated an illegal alien amnesty in 2009 which gave illegal aliens six months to legalize their status. Anyone still in the country illegally after December 1, 2009, faces deportation. The amnesty had a number of conditions, and any illegal alien with three or more dependents could not automatically qualify. Consequently, the question of what to do with children born to illegal aliens became central to political debate. A series of changes have been recommended by the nation's immigration department, and one proposed change is the end of birthright citizenship.

Not too far from Barbados, a similar discussion has been taking place. Antigua and Barbuda, one of the few nations that currently grant automatic birthright citizenship to children of illegal aliens, in 2010

outlined a series of enforcement-minded recommendations aimed at tightening their citizenship, immigration, and work permit policies. In a government report, the authors note that "the so called 'open door' policy relative to immigration should be discontinued as there is a significant risk of Antigua and Barbuda nationals being displaced in the job market by 'non-nationals' whose willingness to work hard for low wages makes them attractive to prospective employers." The authors also note that work visa issuance should "have as priority the 'importing' of skills needed in Antigua and Barbuda for the growth of the economy." Although the report does not call for a change to birthright citizenship policies, it does note that the "citizenship of Antigua and Barbuda should be treated as a thing of value and worth." Interestingly, when asked about Antigua and Barbuda ending birthright citizenship for illegal aliens, a consular officer with whom I spoke while investigating the issue stated, "probably they might look at it down the road."[10]

There are varying approaches to citizenship throughout the world. Many countries require at least one parent to be a citizen of the country in order for their child to acquire the country's citizenship. Some countries make a distinction between whether that citizen parent is the mother or father. There are other variations as well. In Australia, a country that does not recognize automatic birthright citizenship, a child born to illegal immigrant parents may obtain Australian citizenship at age 10 if he was born after 1986 and has lived in Australia for the entire 10 years.[11] An Australian official explained to me that the child must still petition the immigration minister, who conducts fact-finding to verify the claim. The official also added that it would be "extremely unlikely" that illegal aliens would be able to remain in Australia for the necessary ten-year period, meaning that the grant of citizenship rarely happens.[12]

It is important to remember that while a country may officially recognize birthright citizenship, it does not mean that the country is necessarily easy on illegal immigration. Paraguay, for example, has a birthright citizenship policy, but it has serious laws against illegal immigration which not only bar the employment of illegal aliens, but also prohibit owners of hotels and guesthouses from providing illegal aliens with accommodations.[13]

Mexico has a unique citizenship policy in that the country's constitution grants automatic nationality to anyone born in Mexico, but not automatic citizenship. This is true even of children born to Mexican citizens. When a Mexican reaches the age of 18, they then acquire citizenship. Mexican government officials with whom I spoke were uncertain how often their country grants nationality or citizenship to children born to illegal immigrants. The effort Mexico makes to discourage immigration indicates that this may be a rare occurrence. For example, the Mexican Constitution, among other things, allows the government to expel any immigrant for any reason without due process.[14] The constitution also severely limits the property rights of immigrants and requires immigrants to get permission from the government to own land; even if permission is granted, the immigrant can never own land within 100 kilometers of land borders nor land within 50 kilometers of the coasts.[15] An immigrant wishing to change these rules will have difficulty as the Mexican Constitution states that only citizens are entitled to participate in Mexico's political affairs.[16] Even with Mexico's form of birthright citizenship, any child born to illegal immigrants or even legal immigrants in Mexico is barred from becoming president of Mexico; not only must the Mexican president be born in Mexico, but so must at least one of his parents.[17] While Mexico

may grant citizenship to children born to illegal aliens, the nation's constitution clearly imputes a second-class status on children of immigrants.

Additionally, many countries which do recognize birthright citizenship are not necessarily quick to grant citizenship to all people within their jurisdiction. Some countries are the focus of human rights groups because they do not grant citizenship to indigenous people. For example, Peru, a country with a birthright citizenship policy, has an indigenous population that makes up approximately 45 percent of the nation's total population, but the indigenous do not have access to Peruvian citizenship. Unlike the United States, some countries' birthright citizenship policies come with exceptions.

It is also important to remember that some of the countries which do automatically grant citizenship to children of illegal immigrants may not have much illegal immigration at all. For this reason, comparing countries like Fiji to the United States, for example, may be somewhat disingenuous; Fiji has an estimated illegal immigrant population of 2,000 people, while the United States has an estimated illegal immigrant population of up to 12 million.[18]

Moreover, not all countries which recognize birthright citizenship allow the child to initiate chain migration by petitioning to have additional family members enter. Consequently, some countries are able to avoid some of the problems associated with birthright citizenship experienced in the United States.

Perhaps most instructive is the clarity with which most other nations have authored their respective citizenship laws. Most countries' citizenship laws contain very little ambiguity and do not require one to conduct a historical analysis or seek judicial clarification for the purpose of determining intent. For example, Brazil's constitution confers citizenship on "those born in the Federative Republic of Brazil, even if of foreign parents," Australia's statutory law declares a person born in Australia an automatic Australian citizen "if and only if a parent of the person is an Australian citizen, or a permanent resident, at the time the person is born," while the Dominican Republic's new constitution denies birthright citizenship to "foreigners who are in transit or who reside illegally in Dominican territory."[19]

To the extent there remains any debate over birthright citizenship, it would be helpful for Congress to clarify the scope of the Citizenship Clause of the 14th Amendment.

A Constitutional Amendment Is Not Necessary To Change the Scope of the Citizenship Clause

A constitutional amendment would likely be necessary if the 14th Amendment's Citizenship Clause clearly directed citizenship be granted to children of temporary aliens. However, there is no evidence that Congress intended that children of tourists or illegal aliens, for example, be included within the scope of the Citizenship Clause.

Some argue that Congress cannot pass legislation relating to matters addressed in the Constitution in an attempt to change the scope or interpretation of amendments. Of course, Congress routinely considers

legislation relating to constitutional amendments and a clear example would be any number of pieces of legislation aimed at the 2nd Amendment designed to clarify the appropriate scope of gun rights.[20]

When it comes to the 14th Amendment's Citizenship Clause, there are volumes of writings on the meaning of "subject to the jurisdiction thereof", which would seem to open up the door to some legislative clarification. Furthermore, in the case of the Citizenship Clause, the Congress that authored the amendment had never contemplated the phenomenon of illegal immigration or birth tourism, making it hard to conclude that the Citizenship Clause was designed to include the children of such individuals.

Influential U.S. Court of Appeals Judge Richard Posner has spoken on this topic and included his thoughts on the matter in a case in 2003. He feels that a constitutional amendment would not necessarily be needed to end the practice in the United States and that legislation would be sufficient. He explained: "A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it."[21]

Posner concluded: "Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense." He reasoned that the policy is one that "Congress should rethink" and that the United States "should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children."[22]

In fact, there has been a bipartisan effort to end birthright citizenship legislatively. Multiple legislative efforts to clarify the appropriate scope of the Citizenship Clause have been proposed by both Republican and Democrat politicians, as there remains much debate about who should be considered "subject to the jurisdiction" of the United States. In 1993, Sen. Harry Reid (D-Nev.) introduced legislation what would limit birthright citizenship to the children of U.S. citizens and legally resident aliens, and similar bills have been introduced by other legislators in nearly every Congress since.

It may be the case that even legislation is not necessary to change birthright citizenship policy. It is arguable that the Executive Branch could change the way in which the 14th Amendment is applied, particularly in light of President Obama's recent unilateral actions on immigration. The current situation of children born to birth tourists and illegal aliens receiving citizenship has happened due to some past administration allowing agencies to treat these children like the children of U.S. citizens; federal agencies under the watch of the president have granted these children Social Security numbers and U.S. passports for many years. It is unclear whether this has happened by design or whether the agencies simply never gave the issue any consideration. But since Congress has never given any explicit direction on the issue of birthright citizenship as it relates to children of aliens temporarily in the country, it might be reasonable for a president who wants to narrow application of the Citizenship Clause to direct Executive Branch agencies to not consider such children U.S. citizens at birth. Though a president could argue that interpretation and application of the Constitution is part of the president's responsibilities, it is possible that such action would result in litigation which, in turn, would likely result in the Supreme Court weighing in on the matter.

I authored a detailed analysis of the history of birthright citizenship in the United States in a Center for Immigration Studies report titled, "Birthright Citizenship in the United States: A Global Comparison."[23]

Birth Tourists, the Obama Administration's Policies, and Fraud

Birth tourists interpret the 14th Amendment as a means to obtain residency for anyone who travels to the United States on any type of visa. Obviously, our visa systems were not designed to operate in this manner, but there are two things to consider.

First, it has become the case under the Obama administration's immigration enforcement priorities that a person in the country illegally who has a U.S. citizen child is not a top priority for deportation, unless they commit some sort of violent crime. In an administrative and very real sense, giving birth on U.S. soil does allow non-citizens to ignore the parameters of their original visa. They can overstay and have a high level of confidence that they will not be deported.

Second, because of existing immigration law explained earlier, the birth tourist can become a permanent resident of the United States by having their U.S.-born child fill out a petition for them when the child turns 21. Oftentimes the parents will not return to the United States until they are planning on retirement. In a legal sense, engaging in fraud and becoming a birth tourist has become a means to obtaining U.S. citizenship. It is difficult to imagine that the Congress which authored the 14th Amendment and the States which ratified it intended this outcome.

What irks Americans about this situation is that birth tourists are effectively taking control over U.S. immigration and citizenship policy by turning a grant of *temporary admission* into a *permanent* stay. The practice of granting automatic birthright citizenship allows a seemingly temporary admission of one foreign visitor to result in a permanent increase in immigration and grants of citizenship that were not necessarily contemplated or welcomed by the American public.

The growth of the birth tourism industry illustrates how the executive branch's broad application of the Citizenship Clause can have the effect of transferring control over the nation's immigration policy from the American people to foreigners.

And there is broad agreement within the immigration debate that birth tourism does constitute fraud. My organization—which supports better enforcement and lower levels of immigration—considers birth tourism to be an act of fraud, as does the Center for American Progress, a group that generally holds positions on immigration that differ from ours.[24] "It's not necessarily illegal to come here to have the baby, but if you lie about your reasons for coming here, that's visa fraud," said Claude Arnold, special agent in charge of Homeland Security Investigations for Los Angeles.[25]

While it is fraud for a person to travel here as a tourist and conceal their real purpose, namely to add a U.S. passport holder to their family, it is unclear whether the federal government has prosecuted such a crime in the case of birth tourism. In the recent case in California, there's no evidence that the

government is prosecuting the actual *birth tourists* for fraud. Instead, prosecution seems to be aimed entirely at those operating birth tourism centers.

The statutes that the U.S. could use to go after birth tourists include, but are not limited to:

> **Fraud and False Statements (18 U.S.C. § 1001).** It is common for birth tourists to make false statements to immigration officials during investigations, and to misrepresent themselves and their travel intentions to the government, generally. Any false statement or fraudulent act may be prosecuted under 18 U.S.C. § 1001 as a felony. The falsification does not have to be made directly to a government official; it must simply relate to and affect a relationship "within the jurisdiction" of the federal government.[26] It is broad in scope, and as the courts have noted, §1001 is "intended to serve the vital public purpose of protecting governmental functions from frustration and distortion through deceptive practices, and it must not be construed as if its object were narrow and technical."[27] A person faces a fine and up to five years imprisonment for knowingly and willfully violating this statute.
>
> **Fraud and Misuse of Visas, Permits, and Other Documents (18 U.S.C. § 1546).** Illegal immigrants often use fraudulent documentation as a means to enter the United States, procure a job, or to obtain certain benefits. As such, this law is frequently used in immigration prosecutions. It may have applicability in birth tourism prosecutions as well since it contains a perjury provision that it applies to anyone who uses a false statement with respect to a material fact in any application or other document required under immigration laws. For example, it has been invoked where an alien has provided false information on an entry form.[28] A basic violation of this law can result in a 10-year jail sentence and/or fine, provided it does not involve terrorism or a drug trafficking.
>
> **Conspiracy to Commit Offense or to Defraud the United States (18. U.S.C. § 371).** Oftentimes a birth tourist will work with others in order to enter the United States and commit fraud. In such an instance, each party might be violating a conspiracy offense related to defrauding the United States. Specifically, if two or more individuals "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof" and one or more of the individuals makes even one small act in furtherance of the conspiracy, each can be fined and/or imprisoned up to five years.[29] This statute has been invoked where illegal aliens have conspired to falsify entry documents,[30] and in the context of illegal aliens transporting and harboring illegal aliens,[31] for example. The government can charge the alien with both conspiracy and the underlying, substantive offense.

Birth Tourism Fraud Results in Additional Fraud

It is often the case that those engaging in illegal activity covered by one area of immigration law also commit other violations of law. In the case of the recent enforcement efforts at birth tourism centers in California, the government found evidence of tax evasion, false tax returns, and willful failure to report foreign bank and financial accounts. The government found that the organizers earned hundreds of

thousands of dollars in unreported income from the immigration fraud scheme. According to the affidavit, one organizer received more than $500,000 in wire transfers and his partner received more than $1.5 million from bank accounts in China.[32]

But the actual birth tourists also are alleged to have defrauded hospitals and taxpayers. In one case, a birth tourist paid just $4,080 of a $28,845 hospital bill, taking advantage of health care meant for the indigent. Investigations revealed that their bank account had charges at Louis Vuitton, Rolex, and the Wynn Las Vegas hotel-casino.[33]

The *Wall Street Journal* explained how some birth tourism operators advertised their services:

> "The website touts the advantages of having a U.S.-born child, including free K-12 education, low tuition and low-interest loans 'to save over 1 million Yuan in four years in college over a foreign student,' government jobs reserved for U.S. citizens, legal immigration to the U.S. for family members who can later enjoy retirement benefits, and less pollution, among many others."[34]

These benefits is why one organizer of birth tourism told one of Time Magazine's partner news agencies that "The return on investment is higher than robbing a bank."[35] The article also detailed the methodologies that birth tourists use to sneak into the United States:

> "When Liu Li boarded a plane for the United States, she had a little bit of makeup on, was wearing a loose dress, and had her hair up. She tried to hold her handbag in front of her belly in a natural way, just as the middleman had taught her. She was trying to look as calm as any wealthy Chinese lady would look when travelling abroad. But Liu Li couldn't help feeling terribly nervous: she was six months pregnant when she left for the United States, where she wanted to give birth to an American citizen.
>
> "Liu Li knew that going through customs would be a lot easier than obtaining a U.S. visa. In order to obtain the tourist visa that enabled her to go to America for the delivery, she had to carefully choose her clothes, and spend a lot of time practicing her walking and interview techniques. She memorized a host of details about her hotel booking and about famous sight-seeing spots so as to convince the Embassy officer that she was just another Chinese woman going shopping in the States."[36]

In other words, the birth tourist was deceiving U.S. officials and engaging in fraud. These techniques are often taught to intending birth tourists by the organizers of the practice. In the recent enforcement effort in California, for example, Chinese birth tourists were told to travel through Hawaii before arriving in Los Angeles so as to give the appearance of tourism travel.

The government's affidavit explains more detail of the recent enforcement effort and is available online.[37] It also notes that several of the birth tourists discovered in the recent effort are employed by the Chinese government.

The question of assimilation and whether Children of Birth Tourists Consider Themselves American

It is very important for people we allow in on a permanent basis who obtain citizenship to think of themselves as Americans. It is equally important for Americans to think of them as Americans. Assimilating new U.S. citizens is a critical part of our immigration system as it helps maintain the social fabric of America. But a broad interpretation of our nation's birthright citizenship clause is creating situations that threaten to break down the nation's social cohesion.

Meet Jennifer Shih, a UC Davis college student born in New York who tells the *Sacramento Bee*, "I'm Taiwanese more than American."[38] Back in 1989, Shih's mother boarded a jet bound for New York, tourist visa in hand. She didn't arrange her travel in order to take in Broadway show, however; she was eight months pregnant and the goal was to add a U.S.-passport holder to her family. In other words, she was engaging in fraud as admitted by Mr. Shih, who cited the quality of American schools as the impetus. Two months after giving birth Mrs. Shih "returned to Taiwan with her U.S. passport-bearing daughter in tow".

In 2004, when Jennifer reached the age of 15, she returned to the United States to take advantage of U.S.-taxpayer subsidized high schools in Idaho, Utah, and college in California. Understandably, Jennifer — who didn't speak English when she arrived — describes the United States as a "foreign country". The reporter who interviewed her notes that "even after eight years", Jennifer says she still "thinks about Taiwan every day" and visits nearly every year. Jennifer's honesty highlights the absurdity of a lax birthright citizenship policy and raises significant questions of allegiance and assimilation.

Jennifer's father has since moved to the United States, presumably as a result of chain migration, which allows individuals to sponsor parents and siblings upon turning 21 years of age. Jennifer says she is interested in having kids of her own who will go to college in America. This is a perfect example of how one instance of fraud from a temporary alien can result in a permanency that was never welcomed by the American public. Birth tourism effectively puts U.S. citizenship policy into the hands of foreigners.

Despite the fact that no one in Jennifer's family has been paying taxes to support the University of California system, she will be treated like every other California student whose parents have been subsidizing the system for decades. As a result of her mother's fraud, Jennifer will pay a tuition rate that is much less than she otherwise would have as a foreign student. And every social welfare program available to Americans will also be available to Jennifer and her father.

Congress should consider whether birth tourists gaming our tourist system in this manner harms the concept of citizenship.

There are Possibly 36,000 Birth Tourists Per Year

It is difficult to estimate the total number of birth tourists who arrive in the United States each year. There are a few different ways one might come to an estimate, however.[39]

One potential source of data on birth tourism is birth certificate records. The data contained on the forms is based on self-reporting of parents while at the hospital shortly after the baby is born. The data includes their place of birth and their address. No agency verifies the mother's place of birth, address, or any other information on the birth certificate form.

The Centers for Disease Control and Prevention (CDC) reports that 896,363 women who gave birth in 2012 indicated that they were born outside of the United States. If only 2 or 3 percent of these births were to women who are engaging in birth tourism, it would mean the United States sees 18,000 to 27,000 births annually. While this number would be less than 1 percent of the roughly four million annual births in the United States, the aggregate number of birth tourists babies would still be large, especially the cumulative effect over a number of years.

One source of information often cited in the birth tourism debate is likely less helpful than it first appears: the address mothers provide when giving birth. This is the address where mothers want the birth certificate mailed.

In 2012, the government reports that 7,955 women gave an overseas address when filling out their birth certificate paperwork. This number is not helpful for a couple of reasons.

First, it is not at all clear that those engaging in birth tourism provide an overseas address. It is important to remember that those engaging in birth tourism typically stay in the United States with friends, family, or in some other residential setting arranged by those "selling" birth tourism services immediately before and after they have their babies. There is some anecdotal evidence that birth tourist mothers provide the address they stay at before or after giving birth, rather than an address in the mother's home country. The reason for this is that mothers generally seek a U.S. passport for the child and they need the birth certificate to obtain one. This seems to be a common occurrence. In March 2015, CNN reported that one birth tourist used an address in "a high-end Irvine, Calif., apartment complex where one birth tourism company had rented a number of homes" for her newborn's passport application.[40] A *USA Today* report on the investigation notes that the birth tourists were "promised Social Security numbers and U.S. passports for their babies before flying back home."[41] On page 76 of the warrant used in the recent enforcement effort, the government lists "California birth certificates" as one of the items to be seized.[42] While there is evidence that birth tourists provide local addresses to obtain birth certificates, we simply do not know what share of birth tourist mothers provide a U.S. address instead of their overseas address.

Second, some share of those providing an overseas address for the mailing of the birth certificate are U.S. citizens living abroad who returned home to have their child on U.S. soil. These are people who obviously would not be considered birth tourists.

Another way to possibly estimate the prevalence of birth tourism is to compare administrative data and Census Bureau data. The American Community Survey (ACS), collected annually by the Bureau asks women if they had a child in the prior 12 months. The survey is designed to reflect the U.S. population as of July 1 of the year the survey was taken, so the survey is recording the number of women living in

the country at mid-year who had a child in the last half of the prior year and the first half of the year of the survey.

The public-use file of the 2012 ACS shows that there were 863,407 foreign-born women who indicated that they had a child in the prior 12 months.

In the second half of 2011 and the first half of 2012, the CDC reports 898,975 births to foreign-born mothers.

The difference between these two numbers is 35,568 and implies that about 36,000 foreign-born women gave birth in the United States in the 12 months before July 1, 2012, but were no longer in the country. While there are a number of important caveats about this number, this comparison provides some idea of the possible number of babies born to birth tourist mothers.

Some of the caveats to consider include: (1) it is unknown what share of births are not recorded in state birth records compiled by the CDC; (2) there is both a margin of error in the ACS and some undercount of foreign-born women in that data; (3) some foreign-born women may have had a child and left the country, but they did so after many years of residence and perhaps would not be considered birth tourists; (4) a person who comes as a birth tourist but has a miscarriage is not included in the birth records as only live births are included in the state birth data collected by the CDC. However, such a person should still be considered a birth tourist.

Birthright Citizenship for Children of Foreign Diplomats?

Amid the debate over the proper scope of the 14th Amendment's Citizenship Clause, there is one area of solid agreement among advocates on all sides: In the least, children born to foreign diplomats are not "subject to the jurisdiction" of the United States and are therefore not to be granted U.S. citizenship.

But a lack of direction from Congress has resulted in children born to foreign diplomats on U.S. soil receiving U.S. birth certificates and Social Security numbers (SSNs) — effectively becoming U.S. citizens in the eyes of some government agencies— despite the limiting language within the Citizenship Clause of the 14th Amendment.

It may be the case that the limiting language in the Citizenship Clause has nearly no practical effect. This issue was the focus of two of my reports, "Birthright Citizenship for Children of Foreign Diplomats?" and "Why the Citizenship Clause Should Be Taken More Seriously."[43]

There is no federal requirement that hospitals ask new parents if they are foreign diplomatic staff. State agencies do not instruct hospitals to differentiate between children born to diplomatic staff and those born to U.S. citizens or temporary or illegal aliens. Hospitals issue the same birth certificates to all newborns.

The Social Security Administration (SSA) does not investigate whether SSN requests are for children of foreign diplomats. Although the agency does recognize that U.S.-born children of foreign diplomats are not eligible to receive SSNs, and although they admit it should not be happening, there is no mechanism in place for preventing such issuance.

In order to end the practice of granting automatic U.S. citizenship to children of foreign diplomats, Congress could author regulations requiring declaration of parental diplomatic status on birth certificate request forms. As an alternative, Congress could require parents to have SSNs before a U.S. birth certificate or SSN is issued to a newborn. While this latter proposal might create better results and be more easily administered, it would have the effect of ending automatic birthright citizenship not just for children of diplomats, but also for children of illegal aliens and temporary aliens — an outcome that is arguably more aligned with the intended scope of the 14th Amendment than the outcome created by current practices.

The birth certificate and SSN are so critical to verifying identification in the United States that it behooves Congress to direct federal agencies to be a little more careful in issuing documents that, when combined, create the appearance of U.S. citizenship. If children born to foreign diplomats are, as the State Department told me, "entitled" to U.S. birth certificates, then Congress should consider requiring use of different birth certificates for those not born "subject to the jurisdiction" of the United States. Better regulation of SSN issuance is also necessary.

The State Department appears to have some difficulty keeping track of children born on U.S. soil to foreign diplomats. I have spoken with a number of attorneys and other officials at the State Department (in a number of offices), and they explained that they do not keep track of children born to foreign diplomats. An official at the Office of Foreign Missions (OFM), which some researchers have argued keeps track of children born to foreign diplomats, explained that his office has not been tasked with maintaining a database of children born to foreign diplomats. The official explained that there are data sets that may contain the names of children born to foreign diplomats on U.S. soil, but that it would be completely dependent on the parent alerting the State Department's Office of Protocol to the fact that the diplomat had a child. The OFM official explained, "We all share the same data system, but we [the OFM] don't input that data and we don't directly have authority over that issue."

Officials at the Office of Protocol, which seemed to have the most information on the subject (and an office to which I was directed a number of times while researching the matter), explained that a list of children born to foreign diplomats would be "impossible to compile." I pressed again, asking whether there was any kind of list maintained by that office. The official's response:

> "No, no, no. We don't keep a list. What we do is register any employee working at an embassy or consulate... But when it comes to dependents, like in this case when the children are born here, we send a memo to the Office of American Citizen Services, they follow up with our case, they are the ones who make the determinations."

I asked, "I guess it also depends whether or not the foreign diplomat even alerts you to them having a child, right?"

The official's response: "Exactly."

I spoke with Office of American Citizen Services, which directed me to a section of their department called the Office of Overseas Citizenship. That office was surprised that the inquiry had been directed to them and felt that it was the Protocol Office that might be compiling a list of children born to foreign diplomats: "I believe, my strong suspicion is that that is the Office of Protocol. If someone from the Office of Protocol told you that, that would be interesting." And later: "I have to say it would be Protocol making that list. It would not be us. I'm quite sure. If someone told you to come to us, and if I'm telling you to go to them, I wonder if there is such a list, and I'm dubious."

Multiple officials in this office shared the same sentiment. From my research, it does not seem that any government agency is keeping track of children born to foreign diplomats. The question, then, is whether the limiting language in the 14th Amendment's Citizenship Clause has any practical effect.

A key issue is that some government agencies consider U.S. birth certificates and SSNs to indicate U.S. citizenship, despite the fact that children of foreign diplomats are receiving them. According to the U.S. Citizenship and Immigration Services, a "birth certificate provides proof of citizenship."

I spoke with the Office of Personnel Management (OPM) which oversees employment for government jobs requiring U.S. citizenship. In an e-mail, the agency explained, "OPM does not utilize the Department of State for verification of U.S. citizenship for persons born in the United States." The problem, of course, is that some people born in the United States are not to be considered U.S. citizens — children born to foreign diplomats (if not others), and the State Department seems to be the only agency that might begin to have the capacity to keep track. Since children born to foreign diplomats have U.S. birth certificates and validly-issued SSNs, they do not raise any red flags for the OPM, even though they certainly should. If the children were issued birth certificates that read, "Not Evidence of U.S. Citizenship" and if they were not automatically granted SSNs, they would not be able to acquire a job reserved for U.S. citizens as easily as they may be able to do so today.

Since the U.S. is granting documents that give the appearance of U.S. citizenship to anyone and everyone at birth, the only option for OPM (and underlying agencies seeking employees) at this point would be to run the names of all job applicants through the State Department before clearing a person as an authorized U.S. citizen. Of course, this would be a significant undertaking, and it would depend on the State Department having a complete list of all children born to foreign diplomats — something that does not appear to be happening. Multiple officials at the State Department explained that they have never heard of the OPM coming to their agency for vetting purposes. Stopping such careless issuance of documents at the outset might be the best way to make sure non-citizens are not acquiring jobs that require U.S. citizenship.

There are more problems with this lack of focus on the birthright citizenship issue as it relates to children of foreign diplomats and they are detailed in the reported mentioned earlier, but one more point is worth noting: USCIS considers children born to foreign diplomats to be Legal Permanent Residents (LPR) at birth, though that was not always the case (8 § C.F.R. 1101.3). A couple of unpublished, decades-old court decisions made this so, and it is a questionable grant, not just because it

raises plenary power issues (i.e. the right of the political branches to set immigration policy), but also because it seems to go against the intent of the 14th Amendment. Prior to these decisions, the government considered these children non-immigrants. As LPRs, these children become eligible for naturalization after five years.

The State Department is currently rewriting the agency's guidelines on birthright citizenship, signaling a possibly significant departure from current 14th Amendment jurisprudence. In 1995, the State Department's "Foreign Affairs Manual" (FAM) straightforwardly declared that children born on U.S. soil to foreign diplomats are not to be considered U.S. citizens:

> "Under international law, diplomatic agents are immune from the criminal jurisdiction of the receiving state. Diplomatic agents are also immune, with limited exception, from the civil and administrative jurisdiction of the state. The immunities of diplomatic agents extend to the members of their family forming part of their household. For this reason children born in the United States to diplomats to the United States are not subject to U.S. jurisdiction and do not acquire U.S. citizenship under the 14th Amendment or the laws derived from it."[44]

While the reasoning attempts to push the idea that being "subject to the jurisdiction thereof" means the same thing as being susceptible to police force, such an interpretation is implausible.[45]

Nevertheless, the conclusion is correct and no serious scholar or immigration advocacy organization has argued that children born to foreign diplomats should be granted citizenship.

Despite the clarity of this guideline, the Obama administration has been developing new rules on the issue of children born to foreign diplomats. The most recent FAM has eliminated the language above and replaced it with a promise of new guidelines:

> "Children of Foreign Diplomats: 7 FAM 1100 Appendix J (under development) provides extensive guidance on the issue of children born in the United States to parents serving as foreign diplomats, consuls, or administrative and technical staff accredited to the United States, the United Nations, and specific international organizations, and whether such children are born 'subject to the jurisdiction of the United States.'"[46]

An inquiry into the status of Appendix J made mid-2011 revealed that the State Department was expecting to publish the changes by the end of 2011. However, it appears as if the Appendix was never created or at least never made available to the public.

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[2] "Executive Actions on Immigration", U.S. Citizenship and Immigration Services. http://www.uscis.gov/immigrationaction

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[6] Steven Camarota, "There Are Possibly 36,000 Birth Tourists Annually", Center for Immigration Studies. April 2015. http://www.cis.org/camarota/there-are-possibly-36000-birth-tourists-annually

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[8] Jon Feere, "Birthright Citizenship in the United States: A Global Comparison," Center for Immigration Studies, Aug 2010. http://cis.org/birthright-citizenship

[9] See, e.g., "Citizenship tourists," The Economist, Jun. 3, 2004. http://www.economist.com/node/2734580

[10] Ms. E. Ann Henry et al., *Report on Review of Matters Pertaining to Immigration, Work Permits, Citizenship and Electoral Reform*, Gov't of Antigua and Barbuda, Feb. 9, 2010, www.ab.gov.ag/gov_v3/pdf/immigration_report.pdf

[11] Automatic acquisition of citizenship on 10th birthday "A child born in Australia on or after 20 August 1986, who did not acquire Australian citizenship at birth, automatically acquires it on their 10th birthday if they have been ordinarily resident in Australia for 10 years from birth. This provision operates regardless of the parent/s immigration or citizenship status," www.immi.gov.au/media/fact-sheets/17nz.htm.

[12] Conversation with Rose Lacey, Citizenship and Migration Officer, Australian High Commission, May 31, 2010.

[13] Para. Const. art. 69.

[14] Mex. Const. tit. I, ch. III, art. 33, http://info.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf.

[15] Mex. Const. tit. I, ch. I, art. 27.

[16] Mex. Const. tit. I, ch. I, art. 9.

[17] Mex. Const. tit. III, ch. III, art. 82.

[18] Kalinga Seneviratne, "Islanders welcome Chinese cash, but not Chinese," Asia Times Online, Sept. 17, 2002, http://www.atimes.com/atimes/China/DI17Ad04.html.

[19] Braz. Cont. tit. II, ch. III, art. 12, http://www.v-brazil.com/government/laws/titleII.html; Australian Citizenship Act 2007, pt. II, div. 1 (2007), http://www.comlaw.gov.au; Dom. Rep. Const. ch. V, § 1, art. 18, http://www.jmarcano.com/mipais/politicos/title1.html.

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[21] Oforji v. Ashcroft, 354 F.3d 609, 620-1 (2003).

[22] Id.

[23] Jon Feere, "Birthright Citizenship in the United States: A Global Comparison," Center for Immigration Studies, Aug. 2010. http://www.cis.org/birthright-citizenship

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[26] *See* United States v. Munoz, 392 F. Supp. 183 (E.D. Mich. 1974).

[27] Ogden v. United States, 303 F.2d 724, 742 (9th Cir. 1962). *See also* United States v. Rodgers, 466 U.S. 475 (1984) (upholding a broad interpretation of the scope of § 1001); *see also* Brogan v. United States, 522 U.S. 398 (1998).

[28] *See, e.g.*, United States v. Wiggan, 673 F.2d 145 (6th Cir. 1982).

[29] 18 U.S.C. § 371 (2013). Note: If the offense toward which the conspiracy is aimed is a only a misdemeanor, the punishment for such conspiracy will not exceed the maximum punishment provided for such misdemeanor.

[30] *See, e.g.*, Shimi Miho v. United States, 57 F.2d 491 (9th Cir. 1932).

[31] *See, e.g.*, Matter of Roman, Interim Decision #3095, A-37431891, December 16, 1988.

[32] Miriam Jordan, "Federal Agents Raid Alleged 'Maternity Tourism' Businesses Catering to Chinese," Wall Street Journal, Mar. 3, 2015. http://www.wsj.com/articles/us-agents-raid-alleged-maternity-tourism-anchor-baby-businesses-catering-to-chinese-1425404456

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[36] Id.

[37] http://i2.cdn.turner.com/cnn/2015/images/03/03/birth.tourism.pdf

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[42] http://i2.cdn.turner.com/cnn/2015/images/03/03/birth.tourism.pdf

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[45] Jon Feere, "Birthright Citizenship in the United States: A Global Comparison," Center for Immigration Studies, Aug. 2010. http://www.cis.org/birthright-citizenship

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Mr. GOWDY. Thank you, Mr. Feere.

They have called votes. But, Mr. Cohen, I am going to let you give your opening, and then we will recess for votes after that.

Mr. Cohen.

TESTIMONY OF J. RICHARD COHEN, PRESIDENT, SOUTHERN POVERTY LAW CENTER

Mr. COHEN. Thank you, sir.

It's an honor, a great honor to be here today. Birthright citizenship is a core value enshrined in the first sentence of our—of the 14th Amendment. With the exception of children of diplomats, members of Indian tribes, and hostile enemy occupiers, the birthright citizenship clause provides that all children born in this country are citizens entitled to the full blessings of our democracy. The immigration status of their parents is irrelevant.

The view of birthright citizenship that I've just expressed is compelled by the plain language of the 14th Amendment, by its legislative history, and by Supreme Court precedent. Those offering a contrary view must bear a heavy burden of persuasion.

The birthright citizenship clause, as a number of you have noted, provides that all persons born or naturalized into the United States and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. On its face, the clause makes no distinction on the basis of one's parents' immigration status. From a commonsensical point of view, children born in this country are subject to the jurisdiction of the state: They must obey our laws. They must pay taxes if they earn income. They can be jailed or removed from their homes and placed in foster homes.

As Professor Graglia noted, *Plyler* adopted this commonsensical view, although he apparently believes it's wrong.

In the seminal case of Wong Kim Ark, the Supreme Court made it clear that the blessings of birthright citizenship do not turn on the immigration status of one's parents. As this Committee knows, the case concerned the status of someone born in this country to Chinese parents. Under the law at the time, his parents were ineligible for citizenship. The court pointedly noted that the parents were subjects of the Emperor of China. Nevertheless, the court ruled that Wong Kim was subject to the jurisdiction of this country under the 14th Amendment and, therefore, a citizen by virtue of having been born here.

The legislative history of the 14th Amendment powerfully supports this understanding. During the debate of the proposed amendment in the Senate, Senator Cowan focused on gypsies in an effort to persuade his colleagues not to support birthright citizenship. He described gypsies as pariahs. He said that, and this is a quote, "They were trespassers wherever they go." Trespassers. That is about as close as it gets in 1866 to so-called illegal immigrants.

No one in the Senate took issue with Senator Cowan's stereotypic description of gypsies. No one claimed that they were not trespassers. But what other Senators did make clear was that the birthright citizenship clause would confer citizenship on the children of gypsies.

The Supreme Court, in *Wong Kim Ark*, took note of this fact. The Wong Kim Court emphasized that the 14th Amendment granted—

that the 14th Amendment's grant of birthright citizenship is very broad. The Court also emphasized that, while Congress may have plenary authority over immigration, including the authority to legislate against those who were unpopular, it is powerless to limit birthright citizenship by ordinary legislation. The only way that that can be done is by constitutional amendment. That is the course that those who oppose birthright citizenship must pursue.

Let me use one of our cases to illustrate why I hope those who want to change the law are not going to be successful. Recently, we had the privilege of representing a young woman named Wendy Ruiz. She was born in Florida and lived there all her life. Yet the State was denying her the possibility of in-state tuition because she couldn't prove that her parents were here legally. We sued and won the case. And the court, citing *Plyler*, emphasized that we shouldn't visit this supposed sins of the parents on their children.

Last fall, after attending college, Wendy spoke at the Dexter Avenue Baptist Church. That's the church from which Dr. King and his allies launched the modern civil rights movement. She told a deeply, deeply American story. She talked about the struggles of her farm worker parents. She talked about the determination to get—her determination to get an education. She talked about her dream of becoming a lawyer so she could give back to the community. One day, I hope that she gets to testify before this Committee.

It is simply inconceivable to me that our country would deny the blessings of citizenship to the Wendy Ruizes of the world. Our immigration system may be broken, but we should resist the calls to roll back the constitutional guarantee of birthright citizenship in an effort to fix it. The clause expresses a fundamental principle of our democracy that there are no second-class citizens, that all persons born in this country, regardless of the status of their parents, are equal citizens under the law.

I appreciate it, Mr. Chairman. I look forward to your questions.

[The prepared statement of Mr. Cohen follows:]

Testimony of J. Richard Cohen,
President, Southern Poverty Law Center
Before the
Subcommittee on Immigration and Border Security
Committee on the Judiciary
United States House of Representatives
April 29, 2015

My name is Richard Cohen. I am an attorney and the president of the Southern Poverty Law Center. I have appeared in many state and federal courts, including the Supreme Court of the United States, and have testified on two prior occasions before congressional judiciary committees. I am honored to have been asked to testify today on the issue of birthright citizenship, and I hope that my testimony will be helpful to the subcommittee.

Founded in 1971 in Montgomery, Alabama, the birthplace of the modern civil rights movement, the Southern Poverty Law Center was founded to make the promise of the Fourteenth Amendment and the civil rights acts passed in the 1960s a reality in the Deep South. Since that time, we have represented tens of thousands of persons in cases ranging from racial desegregation to gender discrimination, from prison reform to children's rights, and from economic justice to LGBT equality.

In 2004, we established a project to address the needs of recent immigrants to our country. Since then, we have litigated numerous cases on behalf of exploited guest workers,[1] cases challenging harsh state laws designed to push undocumented persons to deport themselves,[2] and cases involving the parental rights of immigrants. We also have had the privilege of representing children who owe their citizenship to the Citizenship Clause of the Fourteenth Amendment.

Wendy Ruiz was one such child. She was born and raised in Florida and graduated from a Florida high school. When she pursued her own American dream, Florida's public universities demanded that she pay higher tuition rates because her parents were undocumented.

Fortunately, Wendy was protected by one of the bedrock principles of our Constitution – the principle of citizenship by birth that is as old as this nation.[3] In 2012, the U.S. District Court for

[1] *See, e.g.*, Andy Grimm, *Indian Workers in Labor Trafficking Lawsuit Win $14 Million in New Orleans Federal Court*, NOLA.com, Times-Picayune (Feb. 18, 2015, 4:32 PM), http://www.nola.com/crime/index.ssf/2015/02/federal_jury_in_new_orleans_aw.html.

[2] *See, e.g.*, *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236 (11th Cir. 2012) (finding that a provision of Alabama's H.B. 56 substantially burdened a constitutional right of undocumented children).

[3] In 1830, the Supreme Court wrote that if a person "was born [in the independent United States], he was born an American citizen, whether his parents were at the time of his birth British subjects or American citizens. 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." *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. 99 (1830).

the Southern District of Florida recognized the rights of Wendy and other children of undocumented parents, holding that demanding higher tuition was against "a fundamental principle of American jurisprudence," that children should not be punished for the actions of their parents. *Ruiz v. Robinson*, 892 F.Supp.2d 1321, 1330 (S.D. Fl. 2012). The court went on to explain that "[o]bviously no child is responsible for his birth and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent." (citing *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).

The "fundamental principle of American jurisprudence" to which the court in *Ruiz* referred finds expression in the Bible, *see e.g.*, Ezekiel 18:20, and, perhaps more importantly, for purposes of today's hearing, in the Fourteenth Amendment.

Passed in the aftermath of a war that claimed more than 600,000 lives, the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The Amendment was intended, of course, to overrule the infamous *Dred Scott* decision and to ensure that former slaves born in this country would not be relegated to second-class citizenship. But the congressional debate surrounding the Citizenship Clause makes it absolutely clear that its reach was never intended to be limited solely to those persons previously held in servitude.

On May 29, 1866, amid debate in the Senate, Senator Jacob Howard of Michigan introduced an amendment clarifying that birthright citizenship would apply to everyone born within the United States with the exception of the children of foreign diplomats. Howard said that his amendment was "simply declaratory of what I regard as the law of the land already." This point was made clear during Senate debate over whether birthright citizenship would apply to children of all races and ethnicities. Cong. Globe, 39th Cong. 1st Session, 2890-92.

Just thirty years later, the Supreme Court interpreted the Citizenship Clause in a case involving the son of Chinese immigrants. Wong Kim Ark was born in San Francisco and had spent his entire life in the United States. When he was about 17, he traveled to China for a visit before returning home to San Francisco. When he returned to the United States after a second visit four years later, he was denied entry on the basis that he was allegedly not a citizen. Even though Congress had prohibited individuals of Chinese descent from becoming citizens, the Supreme Court held that the Fourteenth Amendment granted citizenship to all who were born in this country:

> The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country . . . . 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. The fourteenth amendment . . . 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.

United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

Nearly a century later, the Supreme Court relied on *Wong Kim Ark*'s interpretation of the Citizenship Clause in holding that, under the Equal Protection Clause, undocumented children are entitled to a public education. *Plyler v. Doe*, 457 U.S. 202 (1982). Although the majority in *Plyler* was a narrow one, the Court was unanimous in its conclusion that undocumented children in Texas were "within its jurisdiction" for purposes of the Equal Protection Clause of the Fourteenth Amendment. *Compare* 457 U.S. at 210-15 (opinion of the Court) *with* id. at 243 (dissent). In its analysis, the Court found that the meaning of the phrase "person within its jurisdiction" in the Equal Protection Clause is the same as "subject to the jurisdiction thereof" in the Citizenship Clause. Both, the Court said, are meant in a geographic sense, applying to anyone within the physical boundaries of the country. The Court quoted *Wong Kim Ark*'s finding 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; or to hold that persons 'within the jurisdiction' of one of the States of the Union are not 'subject to the jurisdiction' of the United States." *Plyler v. Doe*, 457 U.S. at 211 n. 10 (quoting *Wong Kim Ark*, 169 U.S. at 687).

Various legal scholars have made interesting arguments offering a different interpretation of the birthright citizenship clause.[4] But, to their credit, they have acknowledged that their arguments would require us to reject the understanding of the Citizenship Clause that has prevailed for more than 100 years.[5] Given that the Fourteenth Amendment was intended to put the issue of birthright citizenship beyond the reach of congressional legislation,[6] it would be quite anomalous at this late date to attempt to diminish or change the meaning of birthright citizenship other than by a constitutional amendment.

Amending the Constitution is a serious matter, one that requires great caution. Since the adoption of the Bill of Rights in conjunction with the Constitution's original ratification, our Constitution has been amended only 23 times in over 200 years. Before we take the momentous step of amending it again in order to limit birthright citizenship, we should carefully consider the reasons why the citizenship clause was originally enshrined in our Constitution.

From the beginning, our society has grappled with efforts to exclude certain categories of people from American citizenry. During the 1866 debate, Senator Edgar Cowan of Pennsylvania raged

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[4] *See, e.g.*, Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*, (New Haven: Yale University Press 1985); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 Tex. Rev. L. & Pol. 1 (2009); John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, Legal Memorandum (The Heritage Foundation), Mar. 30, 2006, *available at* http://www.heritage.org/research/reports/2006/03/from-feudalism-to-consent-rethinking-birthright-citizenship.

[5] *See* Peter H. Schuck, *Birthright of a Nation*, N.Y. Times, Aug. 14, 2010, at A19 ([T]he Fourteenth Amendment has "traditionally been interpreted to give automatic citizenship to anyone born on American soil, even to the children of illegal immigrants."); Graglia, *Birthright Citizenship*, at 2 ("American law, as currently understood, provides an enormous inducement to illegal immigration: namely an automatic grant of American citizenship to the children of illegal immigrants born in this country."); Eastman, *From Feudalism* ("It is today routinely believed that under the Citizenship Clause of the Fourteenth Amendment, mere birth on U.S. soil is sufficient to obtain U.S. citizenship.").

[6] *See Wong Kim Ark*, 169 U.S. at 703 ("The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. . . . 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.").

against the idea of children of Chinese immigrants and Gypsies becoming citizens by virtue of being born here, warning of a "flood of immigration of the Mongol race," an "inva[sion] by a flood of Australians or people from Borneo, man-eaters or cannibals," and Gypsies who "live nowhere, settle as trespassers wherever they go, and whose sole merit is a universal swindle." Senator Cowan urged his colleagues to restrict citizenship to people who resembled him, saying that "[i]f I desire the exercise of my rights I ought to go to my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions, and not thrust myself in upon a society of other men entirely different in all respects from myself." Cong. Globe, 39th Cong. 1st Session, 2890-91.

Senator John Conness of California rose in defense of the Amendment. He conceded that "it may be very good capital in an electioneering campaign to declaim against the Chinese." But he described Chinese immigrants as an "industrious people … now passing from mining into other branches of industry and labor" including in "kitchens of hotels … as farm hands in the fields … [and] in building the Pacific railroad." Their children and those of Gypsies born in this country should be "regarded as citizens of the United States," he said. No person "claiming to have a high humanity," he argued, could take a contrary position. Cong. Globe, 39th Cong. 1st Session, 2892.

When the Supreme Court addressed birthright citizenship in *Wong Kim Ark*, the decision came during a period of tremendous backlash to Chinese immigration. Just 16 years earlier, President Arthur had signed the Chinese Exclusion Act, stopping the flow of Chinese laborers into the United States. It was the first such law to prevent a specific ethnic group from entering the country. Two major California papers expressed concern over the Supreme Court's decision. The *San Francisco Chronicle* warned that it "may have a wider effect upon the question of citizenship than the public supposes" because, the paper warned, "it is to be feared" that the birthright citizenship guarantee "may apply to Indians as well as Chinese."[7] A Los Angeles paper doubted the longevity of the decision, warning that it would only have an effect "if it remains the authoritative interpretation of the fourteenth amendment" and predicted that "[i]t is apparent that this decision will not be freely accepted as the last word on the subject."[8]

As *Wong Kim Ark* reflects, there has been tension in our country's history between the egalitarian principle underlying the Constitution's birthright citizenship clause and our nation's immigration policy. The former is animated by egalitarian ideas; the latter, all too often, has been animated by distinctions based on race and ethnicity. See Pres. Lyndon B. Johnson, Remarks at Signing of Immigration Bill, Liberty Island, N.Y. (Oct. 3, 1965) ("immigration policy of the United States has been distorted by the harsh injustice of the national origins quota system"). Today, we are witnessing another backlash to our nation's changing demographics and are engaged in serious debates about our immigration policy. Regardless of one's position

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[7] *Questions of Citizenship*, S.F. Chron., March 30, 1898, *available at* http://upload.wikimedia.org/wikipedia/commons/0/08/Wong_Kim_Ark_editorial_San_Francisco_Chronicle_1898-03-30.png.

[8] Enoch Knight, *Citizen Wong Kim Ark*, The Herald, July 24, 1898, 17, *available at* http://chroniclingamerica.loc.gov/lccn/sn85042461/1898-07-24/ed-1/seq-17/#date1=1897&index=0&rows=20&words=ARK+KIM+WONG&searchType=basic&sequence=0&state=California&date2=1899&proxtext=%22Wong+Kim+Ark%22&y=8&x=19&dateFilterType=yearRange&page=1.

on immigration policy questions, the sanctity of the birthright citizenship clause should not be disturbed. Any other course would risk creating a new class of second-class citizens.

This past fall, Wendy Ruiz, our client in the Florida tuition case I mentioned earlier in my testimony, spoke at the Dexter Avenue King Memorial Baptist Church, the church from which Dr. King and his allies launched the modern civil rights movement, the Second American Revolution. She told a deeply American story, one about her family's struggles and her commitment to get an education to help others in her community. It is simply inconceivable to me that our country would deny the blessings of citizenship to the Wendy Ruizes of the world.

Thank you.

Mr. GOWDY. Thank you, Mr. Cohen.

We will recess or adjourn briefly to go vote, and then we will all come back. And we thank you for your patience while we are gone.

[Recess.]

Mr. GOWDY. The Committee will come to order. I thank our witnesses for your patience as we went to vote. And I will ask my questions, and then I will turn it over to Congressman King, and then he will recognize Congresswoman Lofgren.

But I want to start by saying to all of them, but in particular I have the openings of Mr. Cohen and Mr. Eastman in mind, and I was talking to a colleague on the way to votes about what an interesting, perhaps even fascinating, legal argument it is and the way that you both approach the law. There was no demagoguery, and there were no personal attacks. And nobody suggested that anybody loved the country more or less than the other. And I want to compliment all four of you for your openings, but Dr. Eastman and Mr. Cohen, in particular, those of us who like the law and are fascinated by the law, it is—it is a legal inquiry to me.

So, against that backdrop, Mr. Cohen, as I read the 14th Amendment and the conjunctive "and," all persons born and subject to the jurisdiction, do you assign meaning to the phrase "subject to the jurisdiction," and if so, what meaning do you assign to it?

Mr. COHEN. Of course, I do, and I would assign it the meaning that the Court gave in the *Wong Kim Ark* and in *Plyler*. It has predominantly a geographic meaning. And the Court in *Plyler* was unanimous in that regard. There is another aspect to it, and that is that we know that "subject to the jurisdiction" excluded persons who were the children of foreign diplomats, it excluded members of Indian tribes that had been recognized, and it also excluded what were called hostile enemy combatants or, you know, alien enemies in hostile occupation of the country. Those are the three groups that the language excluded.

Mr. GOWDY. Now, Dr. Eastman, what would you do with Mr. Cohen's analysis and how would yours be different?

Mr. EASTMAN. Well, I think it does that, but it also does much more.

And the reason the Indian example is so important and the Supreme Court's holding in *Elk v. Wilkins* in 1884 is so important is they were neither ambassadors and they were not foreign invaders occupying our territory. They were born in the United States, but the Supreme Court held that they did not owe allegiance to the United States because they owed allegiance to another power. And it's that question, "do you owe allegiance to another power," which those who are here visiting temporarily on tourist visas or temporary work or student visas and particularly those who are only here illegally continue to owe allegiance to a foreign power and, therefore, are not subject to the jurisdiction in that broader sense. And to read that clause as narrowly as Mr. Cohen does, as the dicta in *Wong Kim Ark* did, as the footnote in *Plyler v. Doe* and is not a holding at all in that case, I think is to make that clause largely redundant.

The main force it would do under that view is to protect—to exclude the children of ambassadors, but they are already considered not born in the United States because of the fiction of

extraterritoriality, that you know, the sovereignty of the ambassador follows him wherever he goes. And so it doesn't even do any work on that thing. You know, all of the original understanding, the debates in the 14th Amendment, the early Supreme Court cases and what have you, all added this allegiance piece, that it was subject to the complete jurisdiction, not what we call the mere territorial or partial jurisdiction.

Mr. GOWDY. I was somewhat critical. I think it was the Roper case where the Supreme Court relied upon what other countries are doing in the area of capital punishment. I think it was *Roper v. Simmons*, if I am not mistaken. So it is a little disingenuous for me to cite what other countries are doing as a reason for us to do it, so I'm not doing that. I'm simply asking why did the other countries to the extent they changed their citizenship policy, what informed and instructed the changes that they went through?

Mr. EASTMAN. You know, Mr. Feere may have a broader answer than I do. My suspicion is that they recognized that automatic citizenship was a powerful magnet to avoid the immigration laws of the country. It's not as powerful as the welfare state, and it's not as powerful as the employment magnet, I'll concede that. But it is the third most powerful one. And if you're going to have, as I testified at the beginning, if you're going to have anything other than just a free open border, if you're going to have rules about lawful immigration, you have to address those magnets. And I don't think our Constitution compels that we address it in the way we have, and that's the big fight.

Mr. GOWDY. Mr. Feere, I'll give you a couple of minutes, and then I want to give Mr. Cohen a chance to finish up, and then I'll be out of time.

Mr. FEERE. Yeah, the research I looked at in terms of what other countries are doing on birthright citizenship, I was able to include dealing with other government officials, looking at other constitutions, that about 30 of the world's 194 countries do grant automatic citizenship to children of illegal aliens. As I mentioned earlier, only two advanced economies in the world, United States and Canada, have that practice.

And the truth is when you start to look at other countries that claim to have it, it comes with exceptions. You know, there are certain countries that say, "Yeah, we welcome citizenship for everyone," but you look at their actual population, you discover that, you know, 45 percent of their population is made up of indigenous people who have no right to citizenship.

You discover that some of these countries are very quick to enforce their immigration laws, never actually end up giving grants to children of illegal immigrants. Mexico, for example, tells me they are not aware of any situation where that's actually happened, even though they claim to have automatic birthright citizenship. On top of it all, if you want to look at Mexico a little bit more, you know, they have a very different situation than us. If you are born here in the U.S., you could grow up to be President of the United States. Not so in Mexico. You'll never grow up to be president of Mexico because their Constitution requires that not only are you born in Mexico but your parents are, at least one of your parents is as well.

So there is still a second-class status for a lot of folks in these other countries, but the global trend certainly is moving away from automatic birthright citizenship. Many of the countries which once had them ended it in recent decades. The U.K. ended it in 1983. Australia in 1986. India in 1987. Malta in 1989. Ireland ended the practice through a national referendum in 2004, and their biggest concern was birth, tourism, people coming there to game the system

New Zealand in 2006. The Dominican Republican ended it in January 2010, and I think that it's important for Congress to provide specific clarification on this issue. There is plenary power at issue here. This is something that's not just for the courts the decide. The political branches do have a say on immigration.

Mr. GOWDY. I am out of time, but I promised Mr. Cohen that he would be able to address it. If you have any insight—and again, I am not often quick to cite what other countries are doing—but if you have anyinsight into why the trend is going in that direction, be happy for the Committee to take it.

Mr. COHEN. If I could also, just one quick moment, speak to a point that Professor Eastman raised, the *Elk* case. That was written by Justice Gray, who also wrote the opinion in *Wong Kim Ark*. And Justice Gray said that the *Elk* opinion had no application outside of the Indian context. And I think that's very, very important because much of the language that we use or that Mr. Eastman and Professor Graglia use is drawn from the context where Congresspersons, Senators were talking about Indians, which is a much different case. That's the first point I would make.

In response to the other issue, I would agree with you that sometimes looking at foreign law is perhaps not the best thing to do. And I would also say that our Constitution, you know—and I hope that America is exceptional in this regard—it embeds this egalitarian, this deeply egalitarian notion of all citizens being equal by virtue of being born here. And I just think that's such an important principle.

And for those who want to shoulder the burden of changing it, they ought to shoulder it by pursuing a constitutional amendment, not by suggesting that, you know, they can do it in any other way.

Mr. GOWDY. Well, I apologize for my colleagues for going over, and I am sure that Mr. King will rectify that as we switch spots, and he recognizes my friend from California.

Mr. COHEN. Thank you, sir.

Mr. KING [presiding]. The Chair would recognize the Ranking Member of the Immigration Subcommittee, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. I thank you. In your written testimony, Professor Graglia, you say that the two dissenting Justices in the *Wong Kim Ark* case, "argued correctly that the rulemaking locality of birth the criterion for citizenship is based on ancient English law and did not survive the American Revolution."

I was interested today, when I opened up to the Politico online, there is an article, and they have, you know, "What Happened on This Day." And what happened on this day in 1789 was the very first contested election in the history of the House of Representatives. The House Committee on Elections rejected a challenge to

William Loughton Smith's eligibility to represent Charleston, South Carolina. The challenge, brought by David Ramsay, was based on the fact that Smith could not satisfy the Constitution's 7-year citizenship requirement for serving in the House.

Now, in Smith's defense, James Madison himself argued, and this is a direct quote: "It is an established maxim, that birth is a criterion of allegiance. . . . Mr. Smith founds his claims upon his birthright; his ancestors were among the first settlers of" of South Carolina. Mr. Smith was seated and allowed to serve.

And I would ask unanimous consent to put that very interesting article into the record.

Mr. KING. Without objection, so ordered.

[The information referred to follows:]

The first contested election case, April 29, 1789

By ANDREW GLASS

4/29/15 12:00 AM EDT

On this day in 1789, the House Committee on Elections, a panel created only 16 days earlier, reported its first contested election case, thereby establishing a precedent for procedures that have largely remained in place through the present day. First, the committee would gather evidence and render a judgment. Then the House would decide whether more evidence was needed and, if not, vote on the committee's report.

South Carolina's David Ramsay disputed William Loughton Smith's eligibility to represent Charleston in the House under the Constitution's seven-year citizenship requirement. In the November election, Smith had carried all but one of the district's parishes, capturing 600 votes. Ramsay, running as an anti-slavery candidate, had come in third with 191 votes.

Although Smith was born in Charleston, he had lived in Europe from 1770 to 1783. With the exception of a sojourn in Switzerland from 1776 to 1779, Smith made London his home, having earned his law degree there.

Despite the fact that he had lived abroad when the United States was founded, the House upheld Smith's election by the most lopsided vote recorded on any issue in the First Congress. Rep. Jonathan Grout of Massachusetts cast the only "no" vote, while two other members abstained.

"It is an established maxim, that birth is the criterion of allegiance," said Rep. James Madison of Virginia in Smith's defense during the prior debate. "Mr. Smith founds his claim upon his birthright; his ancestors were among the first settlers" of South Carolina.

Smith served in the House until 1797, when he became the U.S. minister to Portugal. As chairman of the Ways and Means Committee, Smith acted as a Federalist floor leader and was a close political ally of Treasury Secretary Alexander Hamilton. He died in Charleston in 1812 at age 53.

SOURCE: OFFICE OF THE HOUSE HISTORIAN AND CLERK OF THE HOUSE OFFICE OF ART AND ARCHIVES

http://www.politico.com/story/2015/04/this-day-in-politics-april-29-1789-117427.html#ixzz3Yhxx0WFV

Ms. LOFGREN. In reading the testimony, Mr. Graglia, I think that you believe *Wong Kim Ark* was incorrectly decided 117 years ago. Would that be a fair statement of your belief on that case?

Mr. GRAGLIA. You're asking me, do I think *Wong Kim Ark* was incorrectly decided? As I said, yes, I do.

Ms. LOFGREN. Okay. What about *Plyler v. Doe* that guaranteed the undocumented children to a right to public education. Do you think that was wrongly decided as well?

Mr. GRAGLIA. *Plyler v. Doe*?

Ms. LOFGREN. Yeah.

Mr. GRAGLIA. Yes, I do. You see, I take a very limited view of the power of the Supreme Court. I think these decisions——

Ms. LOFGREN. Right. In reading through some of your other writings, I thought I saw that you believed that *Brown v. Board of Education*, that declared separate but equal educational facilities were unequal, was also wrongly decided. Is that correct?

Mr. GRAGLIA. No.

Ms. LOFGREN. Okay. Well, I'm glad to clarify that.

You know, I think that it's important to not only listen to what our witnesses say but to consider the source, and so I did do some reading and came across this in the New York Times: "Professor Graglia himself has stirred up plenty of controversy before," they stated in their 1997 article. In 1986, he was considered a finalist for a spot on the Federal Appeals Court but later affirmed the *Hopwood* decision, but the Reagan administration backed away from his nomination after a controversy over his use of the word "pickaninny" in the classroom and his apparent urging of Austin residents to defy a court-ordered bussing plan.

I would ask unanimous consent, Mr. Chairman, to put this New York Times article in the record.

[The information referred to follows:]

The New York Times

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ME AND EARL AND THE DYING GIRL

September 16, 1997

Texas Law Professor Prompts A Furor Over Race Comments

By SAM HOWE VERHOVEK

HOUSTON, Sept. 15— The three top officials at the University of Texas issued an unusual statement today harshly condemning a law professor at the school for his "abhorrent" remarks and reaffirming that the university "belongs to all the people of this state" and should be "fully representative of the marvelously rich diversity of the people of Texas."

The professor, Lino Graglia, said at a news conference last week that black and Mexican-American students were "not academically competitive" with white students at the nation's top universities.

The Rev. Jesse Jackson, who plans to attend a campus rally for diversity on Tuesday, said the professor's remarks reflected a "fascist ideology," while an official with one of the state's largest groups representing Hispanic citizens said the professor in question had an "Archie Bunker mentality" and called on him to resign.

Meanwhile, at least one of his colleagues has come to his defense, saying he should not be made a victim of "left-wing McCarthyism," and the American Civil Liberties Union in Texas said today that efforts to silence the professor "threaten academic freedom and free speech."

These reactions are just a sampling of the bitter and tumultuous fallout on campus and beyond, over the comments by Professor Graglia, a professor of constitutional law at the school for 31 years. He was speaking at the news conference announcing the formation of a new campus group, Students for Equal Opportunity, that opposes any race-based preferences in admissions criteria. He is a faculty adviser for the group.

The minority students' inability to compete, Professor Graglia said, "is the result primarily of cultural effects. They have a culture that seems not to encourage achievement. Failure is not looked upon with disgrace."

The storm of condemnation that has greeted Professor Graglia's comments comes at an extremely sensitive time at the law school, which was at the center of a landmark legal case that in effect banned Texas universities from using race as a factor in admissions and scholarship decisions.

The Supreme Court last year allowed lower court rulings in the so-called Hopwood case to stand,

and minority enrollment at the school dropped sharply this year: there are 4 black and 26 Mexican-American students in the first-year law school class of 468 students, down from 31 black and 42 Mexican-American students last year.

Professor Graglia himself has stirred plenty of controversy before. In 1986, he was considered a finalist for spot on the Federal appeals court that later affirmed the Hopwood decision, but the Reagan Administration backed away from his nomination after a controversy over his use of the word "pickaninny" in the classroom and his apparent urging of Austin residents to defy a court-ordered busing plan.

Mr. Graglia, who is of Italian descent, has staunchly defended his recent comments, insisting in an interview that he did not believe minority students were intellectually or genetically inferior. Instead, he said, he was trying to find the "least controversial, the most congenial response" to the question of why they did not do as well as white students in a race-blind admissions process.

"So I said there is a cultural factor at work," he said in a telephone interview. "It appears to be the case that somehow, some races see to it that their kids are more serious about school. They cut less and they study more."

Nearly the entire faculty at the law school has signed a statement condemning the professor's remarks. "As far as we know, Professor Graglia stands alone on the law faculty in his position on these matters," the statement said.

While the professors said Mr. Graglia had "a right to hold and express his views," several state lawmakers have called for his dismissal, and the University of Texas student government president and two black student leaders have filed racial-harassment complaints against him.

"He should not continue to represent the state of Texas or educate the future leaders of our state," said Hugo Berlanga, a Democratic state representative from Corpus Christi. "We do understand First Amendment rights, but at the same time, the University of Texas must insure that their professors are rational and competent in their classrooms and in public."

Law school officials, while condemning the remarks, say they believe there is no basis for disciplining Professor Graglia for "even these offensive and painful words."

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Back to Top

Ms. LOFGREN. And now I would turn to Mr. Cohen. You have read the statements of all of the other witnesses. Would you care to comment or react to any of those statements?

Mr. COHEN. I would. Thank you. As Professor Graglia pointed out or acknowledged, he believes that the *Wong Kim Ark* decision was wrong. I think that's akin to walking into the machine guns at this point in time.

Professor Eastman, I think, has a more heroic explanation to try to defend the case but ultimately one that is equally unsuccessful.

Professor Eastman argues that Wong Kim Ark's family tried to become as subject to the jurisdiction of the country as they could, but his argument is that it requires complete jurisdiction. And he acknowledges that the family in *Wong Kim Ark* did not have complete jurisdiction in the sense that he uses the term. So I think the argument is contradictory.

The other point I would make about both of their testimonies is that they quote Mr. Trumball and Mr. Howard, two Senators, with words like "allegiance," "complete understanding," that kind of—"complete jurisdiction." And, again, as I indicated earlier, all of those references come from the very unique context of Indians. It has no applicability here.

Finally, I think they both rely almost—very heavily on the language of the 1866 act, "not subject to any foreign jurisdiction." And the language of the 14th Amendment is quite different. It was passed or came out of a different committee. And it was drafted by different persons, and the *Wong Kim Ark* case makes it clear that, you know, that language was—in the 14th Amendment was intended to be broader, so those would be the basic differences I have with their testimony.

Ms. LOFGREN. Thank you, Mr. Chairman.

My time is expired, and I yield back.

Mr. COHEN. Thank you.

Mr. GRAGLIA. You know, I might say that I think my position on *Brown* has very little to do with this, and your bringing up things like that in this alleged mistaken "pickaninny" is in the nature of a slur. I don't know why you are bringing up a these insulting things that has nothing to do with what I'm testifying for here.

Ms. LOFGREN. Mr. Chairman, I would ask unanimous consent to be granted a minute to engage Mr. Graglia to explain why.

Mr. LABRADOR. I object.

Mr. KING. Hearing an objection, the gentleman has been heard.

And we'll yield the 5 minutes to the gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman.

Mr. Cohen, this is really an interesting issue for me. And maybe I'm going back to my law school years because I'm hearing good arguments on all sides. I have long been a defender of the 14th Amendment and birthright citizenship, but I'm hearing some issues that need to be addressed by Congress and need to be addressed in some way. So I'm seeing this as two separate questions that we need to address today.

First, is the policy of birthright citizenship the right policy for the United States?

Second—actually three questions. Second, was that policy inherent in the 14th Amendment when it was first passed?

And third, if we want—if we decide that it's not the right policy, how do we change it? Do we need an actual constitutional amendment, or can we do that through statutes?

So, as I listen to all the arguments, I heard, I think it was Dr. Eastman saying that at the time of the 14th Amendment, there was no illegal immigration in the United States. Is that correct?

Mr. COHEN. Yes.

Mr. LABRADOR. So don't you think that makes your argument a little bit invalid that the 14th Amendment actually grants birthright citizenship to the children of people that are here without documentation?

Mr. COHEN. I do not, and I can explain.

Mr. LABRADOR. Please.

Mr. COHEN. Okay. If you look at the era that *Wong Kim Ark* was decided, there is no illegal or——

Mr. LABRADOR. Let me stop you there.

Mr. COHEN. Sure.

Mr. LABRADOR. I agree with you that the Supreme Court decided the issue with regards to the children of legal permanent residents.

I agree with you, and I disagree actually with Mr. Graglia that it was incorrectly decided, or at least I believe it's the law of the land at this time. And I'm not going to make an argument about that.

But it did not decide whether the children of undocumented aliens are granted birthright citizenship. Would you at least agree with me on that?

Mr. COHEN. Well, I would try to make two points, and because I grew up in Richmond, I speak very slowly, so give me a——

Mr. LABRADOR. Me, too. I grew up in Puerto Rico, and I speak—English is my second language——

Mr. COHEN. Okay. We're even then.

Mr. LABRADOR [continuing]. And I speak very slowly as well.

Mr. COHEN. The point I'm trying to make about *Wong Kim Ark* is that there was neither legal nor illegal immigration at the time, but what we do know is Wong Kim's parents weren't eligible for citizenship. That was their stain, right.

Mr. LABRADOR. Right. So we know they were not eligible, but we do know that they entered legally, they obtained their legal——

Mr. COHEN. There was no legal or illegal about it.

Mr. LABRADOR. Correct. So there was no illegality about any of their actions.

Mr. COHEN. But the point is that their disability was the fact that they could not become citizens. In that era, I would argue that that was analogous to being, you know, illegal.

The second point I would make is, you know, the——

Mr. LABRADOR. I just don't agree with that. I don't think you can analogize going through the process and not going through the process as the same thing.

Mr. COHEN. Well, there was no process. That's my point. And the second——

Mr. LABRADOR. There's always a process, sir. You became a legal permanent resident by going through a process of legal—I was an immigration lawyer.

Mr. COHEN. I will tell you then——

Mr. LABRADOR. I studied—but then——

Mr. COHEN [continuing]. In 1866, there was not. That's the point.

Mr. LABRADOR. But they didn't become legal permanent residents by just showing up. They actually had to go to a naturalization center. They had to go through the process of legal——

Mr. COHEN. There was no legal or illegal immigration in 1866.

Mr. LABRADOR. But just being in the United States was sufficient?

Mr. COHEN. Well, it was——

Mr. LABRADOR. Are you sure about that? I am not sure that I am.

Mr. COHEN. I believe that I am.

Mr. LABRADOR. Okay.

Mr. COHEN. The second point I would make was, you know, the group of people who were perhaps the most analogous to what we think of as illegal immigrants today would have been gypsies. They were described, you know, in very harsh terms, you know, pariahs on the land, described as trespassers where ever they go. To me, that's as close as one can get, and it was without question clear that those, the children of gypsies, were intended to be children—or intended to be citizens if they were born in this country. I think that is as close as one can possibly get.

Mr. LABRADOR. Wasn't that pursuant to a treaty with China, though?

Mr. COHEN. No. We're talking about gypsies.

Mr. LABRADOR. Yeah, but——

Mr. COHEN. No, I don't believe it was. I believe that the debate in Congress between Senator Cowan and Senator Conness has no reference to that whatsoever. The—and the Court in Wong Kim made that same point.

Mr. LABRADOR. Dr. Eastman, this is what I'm having a hard time with, because again, I may actually disagree with you on this issue, but I really find it interesting that we had—there was no illegal immigration when the 14th Amendment came into being. And to extrapolate from that that today it means that if you're the child of an undocumented alien, that you are then therefore an illegal—a citizen of the United States, I don't see how you can do that. Can you——

Mr. EASTMAN. I agree with you, Congressman, and the point of the Indian exchange is because that was where the question of your sovereign allegiance was risen.

Indian tribes were domestic sovereigns. They were domestic dependent sovereigns, and so if that was not sufficient, they owed ultimate allegiance through their tribe to the United States and that was held not to be sufficient to confer automatic citizenship, then almost by definition, somebody who doesn't even have that intermediate connection to allegiance to the United States would not be covered by the 14th Amendment. That's why that discussion is so relevant.

And this exchange about gypsies. I want to real clarify. Representative—or Senator Cowan thought that it would not apply to gypsies. When he's talking about they're trespassers, he's not talking about them being trespassing in the United States. He's talking about them trespassing on private land wherever they go. And the answer was, of course, their children are going to be citizens because they are here lawfully otherwise and they owe allegiance to the United States. Senator—he said Senator Cowan said if a traveler comes here——

Mr. LABRADOR. Well, their parents were here legally.

Mr. EASTMAN. That's right. And he says if a traveler comes here, he gets the protection of our laws. That's the partial territorial jurisdiction of which Mr. Cohen claims is what the phrase means. Senator Cowan—Conness responds: I fail to see how that has anything to do with our 14th Amendment discussion because we're not talking about territorial jurisdiction. We're talking about the allegiance owing jurisdiction, and of course, if they're here lawfully, they owe the allegiance. That was the key for them.

And so when you introduce a group of people who do not have that allegiance, by virtue of the fact that there is no consent that they be here, that they are here unlawfully, that clause in the Constitution simply doesn't mean that they have automatic citizenship.

Mr. LABRADOR. Thank you. My time has expired.

Mr. KING. The gentleman's time has expired.

The Chair will recognize the gentleman from Illinois, Mr. Gutierrez, for 5 minutes.

Mr. GUTIERREZ. Thank you very much.

Mr. Graglia, I'd like to ask you, in 2012, you made some comments that raised a lot of eyebrows explaining why you feel African American citizens are not competitive in college admittance, you told a BBC reporter, I quote: "I can hardly imagine a less beneficial or more deleterious experience than to be raised by a single parent, usually a female, uneducated and without a lot of money."

Things turned personal when the reporter told you that since he was Black and was raised in a single-parent family, you are saying the less "likely" not as smart as a White person of the same age.

In response you said, "Well, from listening to you and knowing what you are and what you've done, I'd say you're rather more smart. My guess would be that you are above usual smartness for White, to say nothing of Black."

Can you explain to us that comment?

Mr. GRAGLIA. I don't understand what this line of questioning, like Representative Lofgren's, has to do with this. It seems to me some kind of a sleazy underhanded move is being made here.

Mr. GUTIERREZ. You know——

Mr. GRAGLIA. Those are difficult questions.

Mr. GUTIERREZ. You don't want to explain this to us?

Mr. GRAGLIA. Excuse me?

Mr. GUTIERREZ. You don't want to explain this?

Mr. GRAGLIA. I'm sorry. Give me the——

Mr. GUTIERREZ. You don't want to explain your comment?

Mr. GRAGLIA. Comment?

Mr. GUTIERREZ. Yeah, the comments that you made to the journalist from the BBC.

Mr. GRAGLIA. Explain what you——

Mr. GUTIERREZ. My guess would be that you, referring to the journalist from the BBC, are above usual smartness for White, to say nothing of Black.

Mr. GRAGLIA. I'm not sure I understand that or that I made the—I'm not sure I made the comment.

Mr. GUTIERREZ. Oh, you made the comment.

Mr. GRAGLIA. I'm not sure I heard the question.

Mr. GUTIERREZ. You made the comment. Clearly I think it is very important. When people are raising issues about changing the Constitution of the United States and saying that their motivation is one, I think it is very clear to raise issues and statements that they have made in the past, especially when it comes to issues such as this. But since you don't want to speak about it, I'll let it go.

Mr. GRAGLIA. I have—if I can explain the comment, I have never made a comment that in any way implied the inferiority of any group to other groups.

Now, I did say that, you know, sometimes it's very controversial that affirmative action is based on the proposition that other groups are not competitive and to get into selective schools require preferences. Now that just is a statement of fact, but it still is very controversial and very emotional. But it's got nothing to do with the quality of people that I think you're implying.

Mr. GUTIERREZ. I ask unanimous consent—it's titled "UT Law Professor Raises Pulses on Race in Admissions," by Rose Cahalan, in 40 Acres, Special, on December 12, 2012. So it's right around the corner, just 3 years ago: In 1997, Texas Monthly called UT's Lino Graglia the most controversial law professor in America. This week he's living up to the title by raising pulses with his comment in BBC radio interview on race in admissions. In the interview, Graglia tells the BBC reporter that he believes African American students can't compete in college admissions.

Do you believe African American students can't compete in college admissions?

Mr. GRAGLIA. No, I do not believe they can't compete.

I do say the reason you have race preferences to selective institutions is that by equal competition, you get very few proportional representation. And I'm explaining what affirmative action is about. That's what it's about.

Mr. GUTIERREZ. I would like unanimous consent that it be put in the record. Chairman?

Mr. KING. There's a unanimous consent request to place a document into the record. Do I hear any objections?

Mr. GUTIERREZ. Thank you.

Mr. SMITH. I would like to know——

Mr. GUTIERREZ. I want to go——

Mr. SMITH [continuing]. The nature of the document. Meanwhile, I'll reserve the right to object.

Mr. KING. Sure. The gentleman reserves the right to object. Please proceed

Mr. GUTIERREZ. Pass that over to my colleague from Texas.

I would like to now go to Mr. Cohen for a moment. There are those that look at today's hearing and think that there's a relationship with today's hearing and the 13th and 14th Amendments to

the Constitution of the United States. How do you see today's hearing?

Mr. COHEN. I am so sorry, but I could not hear you.

Mr. GUTIERREZ. I'm sorry. There are those who believe that today's hearing has serious implications, historical implications, in relationship to the 13th Amendment to the Constitution and the 14th Amendment to the Constitution. How do you see the relationship of today's hearing vis-a-vis those two amendments of the Constitution?

Mr. COHEN. Well, I think whenever we talk about amending the Constitution, it's something that we have to do so with great caution. You know, the Constitution, since the enactment of the Bill of Rights simultaneously with the ratification of the Constitution, has only been amended 23 times in over 200 years. And so, first, I think we have to have a darn good reason to do it.

When we talk about amending our Constitution to take away some core rights that relate to equality and the egalitarian ethos that animates our country, I think we ought to be particularly concerned.

Mr. GUTIERREZ. Thank you. And can you—how would I say this—weaken, abridge birthright citizenship without challenging the 14th Amendment to the Constitution of the United States?

Mr. COHEN. No. It's clear—the Court made clear in *Wong Kim Ark* that the only way that it could be done would be by a constitutional amendment.

Mr. GUTIERREZ. Okay. So really what we're having here is a conversation that has to lead to a change in the Constitution of the United States.

Mr. COHEN. I would agree if that's the course that the proponents want to take.

Mr. GUTIERREZ. I guess we are going to have birthright citizenship for a long time. Thank you so much.

Mr. COHEN. Thank you.

Mr. KING. The gentleman yields back.

And the Chair would request if the gentleman from Texas would consider his reservation on the point of order.

Mr. SMITH. Mr. Chairman, I am going to withdraw my objection simply because Professor Graglia has already answered an editorial comment by a magazine writer and who offered no direct quotes by the professor. So I think the professor has already adequately answered any question about a nongermane subject to this hearing.

Mr. KING. Since the gentleman from Texas has withdrawn his reservation, the documents requested by the gentleman from Illinois will be entered into the record.

[The information referred to follows:]

UT Law Professor Raises Pulses on Race in Admissions

BY ROSE CAHALAN IN 40 ACRES, SPECIAL ON DECEMBER 12, 2012 AT 5:11 PM / 0 COMMENTS

In 1997, *Texas Monthly* called UT's Lino Graglia "the most controversial law professor in America." This week, he's living up to that title by raising pulses with his comments in a BBC Radio interview on race in admissions.

In the interview, Graglia tells the BBC's Gary Younge that he believes African-American students can't compete in college admissions. Graglia cites single-parent households as one cause of this, saying that nearly three-quarters of African-American children are now born to a single parent: "I can hardly imagine a less beneficial or more deleterious experience than to be raised by a single parent, usually a female, uneducated, and without a lot of money." Then the interview takes a personal turn.

Younge: I'm black. I was raised in a single-parent family. You're saying I'm likely not as smart as a white person of the same age.
Graglia: Well, from listening to you and knowing what you are and what you've done, I'd say you're rather more smart. My guess would be that you are above usual smartness for whites, to say nothing of blacks.

The exchange was swiftly picked up by *Gawker*, the *Huffington Post*, and the *Washington Post*, among other outlets, while the Texas League of United Latin American Citizens (TX-LULAC) called for Graglia's resignation. "As far as I'm concerned, his statements are racist," TX-LULAC Deputy Director Marcelo Tafoya tells the *Alcalde*.

University officials were quick to defend Graglia's right to academic freedom, but also cautioned that his comments do not reflect the views of UT. "Professor Lino Graglia's recent comments to the BBC do not represent the position of the law school," said UT Law Dean Ward Farnsworth, "but we stand by his right to discuss his views."

Graglia is standing by his comments, and he says the reaction to them has been a surprise. "I don't know what's controversial about saying that being born to a single parent is disadvantageous," he says. "I'm certainly not against single mothers. My wife was raised by a single mother and she graduated from Columbia Law School."

When asked whether he believes that intelligence varies inherently among racial groups, Graglia answers: "That's what I avoid saying and I'll never say. Reporters inevitably ask me, is it genetic or is it cultural? I'm not an expert on that, so I can't say."

Gregory Vincent, vice president of UT's Division of Diversity and Community Engagement, called Graglia's comments "a simplistic view of a very complex issue."

"Professor Graglia's assertions don't represent the whole picture," Vincent says. "For example, UT Law has produced more Hispanic and African-American graduates than any other law school in the country outside of historically black universities. Students of color are graduating from UT Law at very high rates, very close to those of Anglo students.

"[Professor Graglia] concentrates on differences in SAT scores, but that's only one part of the picture of each student," Vincent adds. "Students of color are not only qualified to attend UT, they are excelling."

When it comes to race in admissions, all eyes remain on UT: a decision on the high-profile *Fisher v. The University of Texas* case, which could ban the consideration of race in admissions, is expected this spring.

Editor's Note: The Texas Exes does not have a position on the use of race in admissions. We neither support nor condemn Prof. Graglia's comments. Our aim is always to report on news relating to the University thoughtfully and with balance.

Illustration by John Krause. Graglia photo courtesy UT Law.

http://alcalde.texasexes.org/2012/12/ut-law-professor-raises-pulses-on-race-in-admissions/

Mr. KING. And the Chair will recognize the gentleman from Texas for 5 minutes.

Mr. GUTIERREZ. It's in the record.

Mr. SMITH. Thank you, Mr. Chairman.

One, I just want to point out this is a very significant hearing, and I think we all know that. Somebody else has already mentioned that this is the first hearing on this important subject in 10 years. Also, I want to mention a recent Rasmussen poll, which showed that a majority of the American people do not support automatic birth citizenship, and I think that is significant as well.

Now, we also have the trend among industrialized Nations away from birthright citizenship. There is only one other country now, beside the United States, that doesn't require at least one parent to be in the country legally, and I think that is a positive—positive trend.

Now, let me say that I feel that the only way you can justify saying that a constitutional amendment is required to clarify the 14th Amendment is if you ignore the Constitution itself, which gives the power to Congress to set immigration policy. You can only justify a constitutional amendment if you ignore the intent of the Senator who introduced the 14th Amendment, who clearly said on the Senate floor at the time of debate on the 14th Amendment that it "did not apply to foreigners." And I think you can only justify the constitutional amendment route if you raised the distinction between legal and illegal immigration, none of which I feel that you should do.

And I just wanted to make sure that we have on the record that Dr. Eastman and Professor Graglia and Mr. Feere all feel that we could clarify the 14th Amendment by statute alone. And, presumably, that would be challenged and then go to the Supreme Court, but to my knowledge, the issue at hand, birth citizenship has never reached the Supreme Court and is likely to do so because of the standing problem only if the statute is passed by Congress. So I guess I have a twofold question.

Do you all—do all three of you agree that we could clarify the 14th Amendment by statute, and do you feel that that's the only way we will actually resolve the issue, or is there another way for someone to get standing?

Mr. EASTMAN. Representative Smith, I agree. And I will say this, if Mr. Cohen was correct, that the 14th Amendment was clear, then the only way you can remove birthright citizenship would be by a constitutional amendment. The dispute here is whether that phrase "subject to the jurisdiction" is clear, and I think that the legislative record, the early Supreme Court cases, make clear that it doesn't mean automatic birthright citizenship for everybody, but it's at least ambiguous.

And Congress weighing in on what it understands that phrase to mean would be an important step. *Wong Kim Ark* clearly does not settle the question for the children of illegal immigrants, neither does the *Plyler v. Doe*. And it's important to understand how high the floor that the Constitution set and how much it intruded on your power over naturalization when we adopted the 14th Amendment because the further higher up we read that phrase, the less

power the Congress has under its naturalization clause. And so there's a direct conflict here that needs to be sorted out.

Mr. SMITH. And, Professor Graglia, do you agree with that, too?

Mr. GRAGLIA. I would like to say that the central question here, obviously, is how should this jurisdictional clause be interpreted. I teach a course currently called "Statutory Interpretation," and certainly a prime principle is you should never interpret or can't interpret a statute to reach an absurd result. And if the—if the jurisdictional clause provides for birthright citizenship of illegal aliens, what you've done is you say you have a situation where, on the one hand, it's illegal to enter the country without permission, but what this law means that if you do it, you're a citizen.

I would say that can't mean that. You know, as Justice Jackson said, if anyone makes an argument like that, the Constitution requires an absurd result, that can't be. And bolstering that is what Professor Eastman said. The Constitution says you have to be born and jurisdiction. Born puts you under some jurisdiction. So, unless the jurisdictional clause is redundant, it has to add something.

Mr. SMITH. Right. I agree. I think to allow the birth citizenship—by the way, I don't think we ought to say birthright. I don't think it's a right. It think it's just automatic birth citizenship. I think it defies logic and defies common sense.

Mr. Feere, I think I have time for one more question, and that goes to the cost of birthright citizenship. You've done some research on that issue, as I understand it, and give us an idea beyond what you have already as to the cost of government benefits as a result of a policy that seems to allow 10 percent of the births in the country to be to an illegal parent.

Mr. FEERE. I mean, it's hard to measure cost. It depends on how you want to look at it. We do estimate, the Pew Hispanic Center also estimates that somewhere between 350,000 and 400,000 children are born to illegal immigrants every year. It's difficult to estimate how many birth tourists there are. We have a very rough estimate. It could be as high as 35,000, 36,000 people per year as birth tourists. And, of course, those do come with costs, you know. Any type of cost that a person generates is going to be factored into these—this analysis.

But for the example of children born to illegal immigrants, we, obviously, as a Nation, we provide them public education paid for by the taxpayer, and the—since per-student expenditures in the United States are roughly about $10,000 per year, it's likely that somewhere around $13 billion goes toward the education of illegal immigrants in public schools.

Now, if you look—just looking at U.S.-born children of illegal immigrants, the cost is approximately $26 billion per year, and I don't think any Americans would say that we shouldn't try and educate those who are here in our country, but the reality is it does come with actual cost——

Mr. SMITH. It does have a cost.

Mr. FEERE [continuing]. That don't really get addressed.

Mr. SMITH. Thank you, Mr. Feere.

Thank you, Mr. Chairman.

Mr. KING. The gentleman from Texas yields back.

And the Chair would recognize the gentlelady from Texas for 5 minutes, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you, Mr. King. Thank you for presiding at this time.

Let me thank the Ranking Member for her presence and leadership on these very important issues.

First of all, let me welcome Mr. Cohen. We've spent a lot of good time together. Thank you for enormous leadership on any number of important issues.

Mr. COHEN. Thank you.

Ms. JACKSON LEE. You know, I was—I was just—I have a question for the professor, and I was just listening by way of my staff of the overall view of the gentleman that are, I think, to your left or right but sitting alongside of you, and I thought I would pull out the 14th Amendment and read it as I had interpreted it. And it has not been contravened, I don't believe. And that is—and Mr. Cohen, you can just shake your head. I'm not going to come to you right, but I wanted you to be prepared where I'm going. Is that 14th Amendment has the issue of naturalized—the 14th Amendment has the issue—I mean, I'm not coming to you right now, but I'm laying the prep—a sort of a groundwork for the question.

The 14th Amendment has all persons born or naturalized in the United States and subject to the jurisdiction are citizens. But it goes on to say that individuals have due process rights. There is an argument at the table here as to whether or not undocumented visa holders are under the jurisdiction. I think that question fails to their—to their loss because we have due process rights, whether you are statused or not, and you are subject to police jurisdiction for sure and the ability to be arrested for a variety of things beyond your status, or to press charges or a number of things that are jurisdictional and then just subject to the jurisdiction of the laws of this land.

But let me—I'll come to you, Mr. Cohen. I just wanted you to be prepared of what my thinking is. I wanted to raise this question with Professor Graglia. In the law review article that you attach to your testimony, you wrote that *Wong Kim Ark* decision to adopt the English common law rule for citizenship argues against birthright citizenship for the children of undocumented immigrants. This follows, you said, from the Supreme Court's recognition that under common law, children of alien enemies born during and within their hostile occupation of a country do not obtain citizenship in the occupied country.

Do you think a student who overstays his visa is an enemy of the United States, is number one? When a mother who was previously deported, reenters the country unlawfully to join her husband and children, is she part of an invading army? Is she engaged in a hostile occupation of our land? Occasionally we hear people refer to the act of illegal immigration as an invasion. John Tanton, who essentially founded the modern anti-immigrant movement, has a long history of racist and nativist remarks, wrote a book 20 years ago called "The Immigration Invasion."

Do you similarly believe that people who enter the country legally are for all intents and purposes invading our country? Did you get all three of those, Mr.—Professor Graglia?

Mr. GRAGLIA. I'm afraid I didn't get the question.

Ms. JACKSON LEE. Do you think a student who overstays his visa is an enemy of the United States?

Mr. GRAGLIA. Do I think that a student——

Ms. JACKSON LEE. That overstays his visa is an enemy of the United States?

Mr. GRAGLIA. No, not necessarily an enemy, by no means, no.

Ms. JACKSON LEE. Do you think a mother who is coming back to be with her family and was deported, do you think that she is—invades a hostile occupation of the land?

Mr. GRAGLIA. No, ma'am. Why would I say a thing like that?

Ms. JACKSON LEE. I appreciate you saying that you don't believe that.

And, then, do you believe that individuals who come back into the country after being deported, who are seeking to be with their family, do you believe that they are invading our country?

Mr. GRAGLIA. You know, I don't understand the basis of these questions. The answer is no. That sounds like a silly thing.

Ms. JACKSON LEE. Well, I'm glad. I agree with you, it sounds very silly.

Mr. GRAGLIA. Okay.

Ms. JACKSON LEE. That's why I want to go to Mr. Cohen.

Mr. GRAGLIA. Well, I mean, I hope you're not implying I've said or implied any such thing.

Ms. JACKSON LEE. I—I want to make the record clear that you don't believe that these are hostile invaders.

May I go to Mr. Cohen, please.

Mr. GRAGLIA. I do not believe they're hostile invaders. I'm very clear about that.

Ms. JACKSON LEE. Thank you, professor.

Let me go to you, Mr. Cohen. You know the 14th Amendment is reminiscent of a bad history in the United States, one of slavery. And, certainly, we know this is the 150th year of the 13th Amendment.

But how would you answer any legitimate reason or basis to take away a birthright from an individual born in the United States on the basis of the 14th Amendment and, also, our right to due process?

Mr. COHEN. Well, I don't think an argument could be made from the current Constitution. The point that you made earlier is the point that a unanimous Supreme Court made in the *Plyler* case. *Plyler* was a 5-to-4 decision on the question of whether undocumented children were entitled to a free public education, but all nine Justices agreed that persons who were undocumented were within its jurisdiction for purposes of the due process and equal protection clause. All nine Justices also agreed that that word—that phrase "within its jurisdiction" would be interpreted in a predominant geographic sense, just as the term "subject to the jurisdiction" is in the first sentence of the—of the 14th Amendment.

That is exactly the same decision or interpretation that was given in the *Wong Kim Ark* case. So, unless one does radical surgery on the 14th Amendment, I don't think that one could accommodate some of the views that we've heard here today.

Ms. JACKSON LEE. So our Constitution, then, really supports the policy which this question asks, Is that citizenship birthright a right policy? I could——

Mr. COHEN. It embodies——

Ms. JACKSON LEE [continuing]. Answer it any other way but yes.

Mr. COHEN. It embodies it, yes.

Ms. JACKSON LEE. I thank you. I thank the gentlemen, and I yield back. Thank you very much.

Mr. KING. Gentlelady from Texas has yielded back.

And we're going to stick with the Texas theme and recognize the gentleman from Texas, Mr. Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman.

I'd like to thank the witnesses for being here today to talk about this very important issue. The 700,000 Texans that I have the opportunity to represent, like most Americans, are deeply concerned about the impacts of illegal immigration in this country.

Before coming to Congress, I had the opportunity to serve many of these same constituents in my role as the United States attorney for the Eastern District of Texas. Back in April of 2008 in that role, I arrested some 300 illegal aliens that had committed Social Security fraud and identity theft against hard-working Americans. Now, my actions in that regard were not a matter of choice. I had taken an oath to faithfully execute the laws of the United States. That, by the way, is the same oath that the President takes, to faithfully execute the laws of the United States.

And so many of my constituents are frustrated with what they are seeing right now as a willful disregard for the rule of law in this—in this country. And, given that broader context, my constituents are concerned that the 14th Amendment that we're talking about today, the citizenship clause of the Constitution, is interpreted in a way that gives children of illegal aliens citizenship at birth.

So many of the folks that I represent feel that the current policy encourages folks to come to the United States solely for that purpose, and there is ample evidence out there of this fact. Just back in March, the Wall Street Journal reported that Federal agents had raided several sites in California that were connected to different multimillion dollar birth tourism businesses or anchor baby businesses. And I think Mr. Eastman, I believe, or maybe Mr. Ferre talked about the fact that this is an industry where maybe 350,000 to 400,000 children are being born to illegal immigrants in the United States, and that just really brings this issue into focus for so many.

So I'd like to start, Mister—Dr. Eastman, with a question for you. I've understood your testimony to be here today the same as Mr. Graglia and Mr. Feere that Congress does have, in your opinion, the ability to deal with this issue statutorily, as Mr. King would like to do, as opposed to requiring a constitutional amendment. Is that correct?

Mr. EASTMAN. That is correct.

Mr. RATCLIFFE. All right. So, given that, I'd like to—for you to comment on the importance, from your perspective, of Congress moving forward and settling this issue once and for all and exercising its constitutionally provided power over naturalization.

Mr. EASTMAN. Sure. And if I may incorporate an additional brief response to Representative Jackson Lee in that because I think it's important to get beyond the gotcha game that's going on here.

The reason even illegal immigrants are protected by the due process and equal protection clause is because those phrases use the word "person," all persons. There's nobody that claims that they are equally protected by the privileges and immunities clause, which applies only to citizens.

The question for the citizenship clause is in which box illegal immigrants fall. Are they citizens entitled to all three protections in the 14th Amendment or persons who are not citizens that get due process and equal protection rights as well?

And it's my contention and Professor Graglia's contention that the "subject to the jurisdiction" clause raises an additional requirement than mere birth on U.S. soil. Clarifying that to what the floor of the Constitution actually requires is critically important so that you can address the policy questions on whether it makes any sense whatsoever to have limitations on immigration and yet, if you flout our laws, you get the Holy Grail of American citizenship. And I don't think the Constitution prevents you from addressing that fundamental policy question. And the notion that it does, I think is absurd. And that's what we're trying to clarify here.

Mr. RATCLIFFE. Thank you, Dr. Eastman.

Mr. Cohen had testified earlier and talked about—and I'm quoting here, the "principle of citizenship by birth that is as old as this nation" and cited in connection with an 1830 Supreme Court case, *Inglis v. Trustees of Sailor's Snug Harbor*. Are you familiar about that case at all?

Mr. EASTMAN. Yes, I am.

Mr. RATCLIFFE. Okay. And so do you agree with Mr. Cohen's testimony?

Mr. EASTMAN. No. I don't. And, quite frankly, I'm stunned—and Representative Lofgren made the same error. The language that they're both quoting, in his testimony and her opening statement, is from the dissenting opinion in that case.

The majority actually held that the individual was not a U.S. citizen, despite the fact that they were born in New York. Justice Story goes on to offer further explanation in his dissenting opinion, and he says this: To constitute a citizen, the party must be born not only within the territory—that's birth within the United States—but within the legiance of the government. That's exactly the point I've been making about what the 14th Amendment requires.

Mr. RATCLIFFE. Thank you, Dr. Eastman.

Gentlemen, I appreciate all of you being here. I have questions for all of you, but they didn't give me enough time.

So I will yield back.

Mr. KING. The gentleman from Texas yields back.

And the Chair recognizes himself for 5 minutes. And I thank the witnesses for your testimony here today.

I'm just recapping how this works to me. Two questions out there. One is the policy question, and the other is the constitutional question.

Now, if we could just take this to the policy question for a moment—and I'll just speak to that—that when I look around the world and I see countries that have a policy like this and the list of countries that have a policy like this, the only one in the modern industrialized world that seems to retain this policy is Canada, plus the United States. And the rest of them, I don't know if anybody has lined up in any long lines to get into those other countries that do have a birthright citizenship as part of their policy.

I listened to people—representatives from the Dominican Republic talk about what's happening with Haiti being their neighbor and how they essentially analyzed their constitution and found a way to reverse that a few years ago to their benefit.

And so I don't think I'm hearing an argument as to why it would be a good idea to grant automatic citizenship to any baby that could be born in the United States to any mother who could find a way to get into the United States. That hands over the immigration policy to everybody except Americans. And so I don't know that that's even a debate before this Committee, unless you want to expand your political base by any means necessary.

Second thing comes back to, then, is the constitutional question, which I was confident of when I walked in this room today and I remain confident of that position, but the question to pose really is: How do we get the constitutional question answered? And the way to get the constitutional question answered is, is anybody going to litigate today? I don't think so. We have to have a statute in order to trigger that constitutional litigation.

And, as I examine through this, if that's the case, I don't know what's left out here to be answered by this Committee or by the witnesses if—if it's the majority opinion of this Committee that it's not a good policy to grant automatic citizenship to any baby born on U.S. soil for any reason whatsoever, other than a couple of light exceptions, if it's not a good policy, then how do we get to a good policy to rescind and reverse this practice that has grown?

And so I just go—I would turn to Mr. Cohen and I wanted to ask you for the record, watching the President's policies on immigration that have emerged from the Oval Office, I presume, on DACA and DAPA and the Morton memos and these components that have put this country through this strife that we have, you have looked at those constitutionally—and I don't want to editorialize on those—but could you just give me kind of a yes or no or a general idea whether you believe that they are constitutionally founded?

Mr. COHEN. You know, I don't feel confident to offer an opinion on that subject——

Mr. KING. Okay.

Mr. COHEN [continuing]. Quite frankly.

Mr. KING. And that's fine. That wasn't a subject to come before this Committee, and I appreciate that.

I just make the point that the President is making up immigration laws as he goes. I don't think that there's a solid argument that the President has the authority to legitimate. And Article I says all legislative powers herein shall be granted—shall be vested in a Congress of the United States. And that's the House and the Senate. And so that's the statutory part of this.

But I would pose this to Mr. Eastman: On the same premise that the President asserts that he has a constitutional authority to, I would call it, legislate an immigration power and grant a "lawful presence"—and I put that in quotes—to the DAPA recipients, the DACA recipients and the others that are picked up in the Morton memos, on that premise, could not the next President of the United States end birthright citizenship based on the same rationale?

Mr. EASTMAN. Well, I suppose based on the same rationale. I would hope the next President of the United States would take more seriously the obligations of the Constitution than, I think, this President has manifested on that precise issue. I don't think he has the constitutional authority to do that.

And I'll go back to what I said before. If—if Mr. Cohen is right that the Constitution mandates birthright citizenship for everyone born in the United States no matter what the circumstances, it would take a constitutional amendment to revise that. I believe he's wrong about that. I believe all the evidence strongly supports that he's wrong about that. That's the issue that remains open and that needs to be tested.

Mr. KING. Thank you.

And, Mr. Feere, I didn't hear from you. And if you'd go a little more broadly on the—on the policy side of this——

Mr. FEERE. Right.

Mr. KING [continuing]. And the effects of this to society. Is there—is there a limitation that we could expect if this practice goes on and, say, the next Congress and the next President simply—or if there's a constitutional amendment that guarantees this birthright citizenship, can we—I want to say, can we confer citizenship on people that don't even want it and how do—what—what happens to the demographics of America if this policy is not reversed?

Mr. FEERE. Well, one of my concerns is that this whole debate is the result of a phenomenon that is sort of happening without anyone at the helm. No one is really clear exactly when the first illegal immigrant was entered into the country. No one is really clear as to when the first birth tourist came here.

But the Administration—some Administration decided to say, you know what, go ahead and give them a Social Security number, give them a U.S. passport. And it just sort of happened at some point. And no one really knows when.

And I think Congress hasn't addressed problem. And, as a result of not addressing it, we rely on floor statements from 100 years ago. We're relying on a footnote from a Supreme Court case in 1982. And I think some clarification on the issue from Congress would help a lot.

And to the issue—to the idea that Congress can't legislate on constitutional matters, one of the Committee Members, Congresswoman Jackson Lee this session, I believe, has a bill that would narrow the scope of the Second Amendment. It would raise the gun ownership from 18 to 21, I believe. So she clearly believes that Congress has a role in, you know, interpreting and deciding the scope of constitutional amendments. As I mentioned in the opening, Senator Harry Reid believes the same thing, at least, did at one point. So I think——

Mr. KING. We'll get that quote into the record.

As my clock is ticking, Mr. Feere, I'd like to just turn the last question to Mr. Cohen.

And, Mr. Cohen, you heard Mr. Graglia testify that the reward for committing the crime of unlawful entry—the reward for committing the crime of unlawful entry into the United States is conferring automatic citizenship on the child that you might give birth to in the United States.

Can you give another example of a reward for law breaking—for committing a crime, specifically a crime, and a reward that's conferred in any aspect of U.S. law?

Mr. COHEN. No, I can't.

But the reward is not—or the penalty is not something that should be borne by the innocent child. That would be the argument I make. And I would say the argument is as old as Bible.

Mr. KING. And reclaiming my time—and I appreciate the gentleman's response—and I would say that if we had that same sentiment applied to the people who are locked up in our prisons, there wouldn't be anyone in our prisons.

So I appreciate the testimony that we received today. It concludes today's hearing. And I want to thank all our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is now adjourned.

[Whereupon, at 3:31 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration and Border Security

Post-Hearing Statement of Rep. Zoe Lofgren
"Birthright Citizenship: Is it the Right Policy for America?"

May 4, 2015

During the hearing on the topic of whether birthright citizenship is "the right policy for America," several Members including myself raised concerns about disturbing comments on the issue of race made by one of the Majority's witnesses. Professor Lino Graglia was twice found "not qualified" to serve as a federal judge by the American Bar Association and was dropped from consideration by President Ronald Reagan for a seat on the Fifth Circuit Court of Appeals in 1986 due, in part, to statements that he made in 1979 encouraging residents of Austin, Texas, to frustrate a court-ordered busing plan designed to desegregate Austin schools. [1] Professor Graglia reportedly also acknowledged at the time that he had referred to African-Americans by the derogatory term "pickaninnies."[2]

In 1997, Professor Graglia reportedly expressed the view that African-American and Mexican-American students are "not academically competitive" with white students at the nation's top universities.[3] This, he said, "is the result primarily of cultural effects. They have a culture that seems not to encourage achievement. Failure is not looked upon with disgrace."[4] When questioned about this statement, Professor Graglia explained that he cited cultural factors in an effort to provide the "least controversial, the most congenial response. . . . It appears to be the case that somehow, some races see to it that their kids are more serious about school. They cut less and they study more."[5] Professor Graglia further stated that, "I don't know that it's good for whites to be with the lower classes. I'm afraid it may actually have deleterious effects on their views, because they will see people from situations of economic deprivation usually behave less attractively."[6]

More recently, in 2012, Professor Graglia told a reporter for BBC Radio that African-Americans are not competitive in the college admissions process and score lower on the SAT because so many African-Americans are raised in single-parent households. He stated "I can hardly imagine a less beneficial or more deleterious experience than to be raised by a single parent, usually a female, uneducated, and without a lot of money."[7] The reporter, Gary Younge, then informed Professor Graglia that he was black and was raised in a single-parent family and that the professor seemed to be saying that Mr. Younge was "likely not as smart as a white person of the same age."[8] Professor Graglia responded by stating, "Well, from listening to you

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[1] Tom Wicker, *In the Nation; Splendid for Starters*, N.Y. Times, May 6, 1986; Philip Shenon, *Conservative Law Professor Fades as Nominee for Bench*, N.Y. Times, Aug. 7, 1986.

[2] George E. Curry & Trevor W. Coleman, *Hijacking Justice*, Emerge (Oct. 1999).

[3] Sam Howe Verhovek, *Texas Law Professor Prompts A Furor Over Race Comments*, N.Y. Times, Sept. 16, 1997.

[4] *Id.*

[5] *Id.*

[6] Sue Anne Pressley, *Texas Students Protest Remarks on Minorities*, Wash. Post, Sept. 17, 1997.

[7] Gary Younge, *Positively Flawed? Affirmative Action and the Future of America*, BBC Radio, Dec. 6, 2012.

[8] *Id.*

that the witness had appended to his own testimony. On page 10 of that article, Professor Graglia wrote:

> Whatever the merits of *Wong Kim Ark* as to the children of legal resident aliens and however broad some of its language, it does not authoritatively settle the question of birthright citizenship for children of *illegal* resident aliens. In fact, the Court's adoption of the English common law rule for citizenship could be said to argue *against* birthright citizenship for the children of illegal aliens. Even that rule, the Court noted, denied birthright citizenship to "children of alien enemies, born during and within their hostile occupation" of a country. The Court recognized that even a rule based on soil and physical presence could not rationally be applied to grant birthright citizenship to persons whose presence in a country was not only without the government's consent but in violation of its law. This also would seem to preclude the grant of birthright citizenship to the children of illegal aliens. The same, it should be added, is true of children born of legally admitted aliens who have overstayed their visa period or otherwise violated its restrictions.[13]

It appeared from this article that the witness was drawing an analogy between children born to undocumented immigrants in the country and children born to invading armies during an occupation. Because Professor Graglia's written and oral statements to the Subcommittee omitted this argument by analogy, the Congresswoman's questions were intended to determine whether the witness continued to hold this belief and, if so, how he would defend it.

I was disappointed that the Majority chose to call as a witness someone whose prior statements and actions, as described in press reports and as reflected in his own words, appear to reflect prejudices against African-Americans and Latinos. The Fourteenth Amendment, forged after the Civil War that ended slavery for African-Americans, is forever tied to the legacy of slavery and racism in America. But the drafters of the Amendment ensured that its scope would extend far beyond that racist legacy to ban future caste systems and breathe life into the promise of equality at the heart of this Nation. To refuse to confront this history in the discussion of repealing or altering the Fourteenth Amendment reflects either willful blindness or overwhelming ignorance.

[13] Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, Tex. Rev. of L. & Pol., Fall 2009, 10 (quoting United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898)).

Written Testimony of the Latino Leadership Council

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

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

April 27, 2015

Chairman Gowdy, Ranking Member Lofgren, and members of the Subcommittee on Immigration and Border Security: Thank you for the opportunity to submit testimony.

The Latino Leadership Council (LLC) is a collaborative of Latino academics, professionals, and advocates who are dedicated to promoting public policy that creates positive opportunities for Latinos in Southern Nevada. We work with a broad coalition of Republicans, Democrats, Labor, and Nonprofit leaders throughout Southern Nevada in an effort to ensure Latinos in the state have a voice and representation on the issues that impact their lives.

LLC strongly opposes any changes to the birthright citizenship provisions of the Fourteenth Amendment to the Constitution. United States Federal law (8 U.S. Code § 1401) defines that a U.S. citizen is "a person born in the United States, and subject to the jurisdiction thereof." Following the direct mandates of the Constitution, federal law ensures citizenship rights and provides for equal protection under the law for all those born in the United States.

As a legal issue, throughout the history of the United States the foundational legal principle that has governed the right to citizenship has been that one born within the territorial limits of the United States confers United States citizenship. This legal principle has stood as the hallmark for conferring the right to citizenship to millions of Americans. More importantly it symbolizes and stands as the defining justification and validation for America as a "land of immigrants." To implement Congressional or state-level legislation that attempts to alter birthright citizenship and impose additional requirements would change the very fabric and makeup of America and forever change its defining characteristic as "nation of immigrants."

In addition, such proposed legislation would also deny the historical context in which the United States was founded. Since its inception the United States has been a refuge for immigrants fleeing persecution. To limit citizenship status to only children whose parents are a citizen or legal permanent resident denies the purpose and underpinnings of this great nation. As Franklin D. Roosevelt once said, "Remember, remember always, that all of us, and you and I especially, are descended from immigrants and revolutionists."[1] Defending birthright citizenship is of vital concern to the Latino population who have fought and built the United States since its beginnings, to be a welcoming nation for all.

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[1] Franklin D. Roosevelt: "Remarks to the Daughters of the American Revolution. Washington, D.C.," April 21, 1938. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=15631.

The Latino Leadership Council is a community group based in Southern Nevada focused on policy advocacy for the benefit of Latino and other historically underrepresented communities. The Latino Leadership Council is composed of academics, professionals, business owners, and advocates with varying political affiliations, all working towards creating positive change for our communities and families.

Lastly, denying citizenship to individuals born in the U.S. is reminiscent of a prejudicial time in U.S. history when immigration laws discriminated against populations and interposed additional requirements for immigration and citizenship based on heritage and country of origin. The Chinese Exclusion Act denied persons born in the United States citizenship status due to their heritage and the Johnson-Reed Act established a national origins quota system. Both are two examples that have had a negative impact on the United States.[2] Both sought to establish hierarchies of difference for preferential treatment of certain populations that were allowed to become citizens of the U.S. These attempts are nothing short of heinous discriminatory practices. Similarly, proposed legislation that seeks to amend the Constitution or seek judicial challenge to its interpretation pose the same danger of heinous discriminatory practices. These proposed legislations undermine our core national values and judicial precedents that clearly prevent any discriminatory practices toward individuals born in the U.S. The judicial precedents that uphold birthright citizenship protect the integrity of America as a nation that values rights of its citizens and equal opportunity for all.

Thank you for allowing us to submit testimony. For the reasons given, the LLC supports the Constitutional provisions of birthright citizenship and Federal law that ensures citizenship rights (that provide equal protection) through these provisions and strongly opposes any legislation attempting to change Constitutional rights of U.S. citizens.

Signed,

Al Martinez
Latino Leadership Council Chair

Dr. Sylvia Lazos
Latino Leadership Council Vice-Chair

Dr. Nicholas Natividad
Social Justice Committee Co-Chair

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[2] Ngai, M. M. (2004). Impossible Subjects: Illegal Aliens and the Making of Modern America. Princeton, N.J.: Princeton University Press.

The Latino Leadership Council is a community group based in Southern Nevada focused on policy advocacy for the benefit of Latino and other historically underrepresented communities. The Latino Leadership Council is composed of academics, professionals, business owners, and advocates with varying political affiliations, all working towards creating positive change for our communities and families.

STATEMENT OF

Andrea Senteno
Legislative Staff Attorney
The Mexican American Legal Defense and Educational Fund
(MALDEF)

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY

AT A HEARING ENTITLED
"BIRTHRIGHT CITIZENSHIP: IS IT THE RIGHT POLICY FOR AMERICA?"

PRESENTED
APRIL 29, 2015

Chairman Gowdy, Ranking Member Lofgren, and members of the Subcommittee. Thank you for the opportunity to submit this testimony on behalf of MALDEF (Mexican American Legal Defense and Educational Fund), regarding the topic of today's hearing on birthright citizenship. For the reasons outlined below, we ask the subcommittee to oppose any efforts to change the longstanding principles held in the Fourteenth Amendment's Citizenship Clause by restricting the right to citizenship by birth.

My name is Andrea Senteno and I am a Legislative Staff Attorney with MALDEF. Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Often described as the "law firm of the Latino community," MALDEF promotes social change through legislative and regulatory advocacy, community education, and litigation in the areas of education, employment, voting rights, and immigrant rights.

I. History of the Citizenship Clause

Following the conclusion of the U.S. Civil War and ratified within the following five years of the war's end, the Fourteenth Amendment – one of three constitutional amendments introduced after the war – provides for a number of individual rights.[1] Section 1 of the Fourteenth Amendment, known as the Citizenship Clause, states that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[2] Efforts to challenge the longstanding jurisprudence and interpretation of the Citizenship Clause seek to dispute the meaning of phrase "subject to the jurisdiction thereof."

The Citizenship Clause's is rooted in the aftermath of the Supreme Court's decision in *Scott v. Sandford*,[3] (famously known as the *Dredd Scott* case) as it provided for the type of citizenship that was denied by the court in *Scott*.[4] In *Scott*, citizenship was denied to free African Americans slaves on the premise that State citizenship rights were not transferable across state lines to another state where a freed slave traveled to or moved.[5] In adopting the Citizenship Clause of the Fourteenth Amendment, Congress guaranteed uniform U.S. citizenship, irrespective of race or ethnicity, which transfers between states and is based solely on residence.

The phrase "subject to the jurisdiction thereof," found in the Fourteenth Amdendment, was interpreted by the Supreme Court in 1898, in *United States v. Wong Kim Ark*,[6] concerning a native-born Chinese American whose parents resided in the U.S. but were prohibited from naturalizing because of their national origin. The court held that the Fourteenth 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."[7] The Citizenship Clause, thus, has long been interpreted to have only a narrow exclusion of citizenship by birth for those children born to diplomatic personnel or to an occupying force during any foreign occupation.[8]

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[1] U.S. Const. Amend. XIV.
[2] *Id.*
[3] *Scott v. Sanford*, 60 U.S. 393 (1856).
[4] *See United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898).
[5] *Scott*, 60 U.S. at 405.
[6] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).
[7] *Id.* at 693.
[8] *Id.* at 682.

II. Proposals to Deny Citizenship or Undermine Citizenship by Birth

Efforts to restrict the right of citizenship under the Citizenship Clause of the Fourteenth Amendment are a significant and serious threat to the civil rights of Latinos in the United States. A policy that disrupts current interpretation and application of the Citizenship Clause would further restrict the ability of Latinos to fully enforce their civil rights protections and result in an underclass of individuals, reminiscent of a pre-Civil War era.

Previous attempts to limit citizenship to certain individuals with at least one parent who is a U.S. citizen, lawful permanent resident parent, or an immigrant in active military service, have been contemplated before, either in the form of constitutional amendments or legislative proposals. Similar attempts have also been made at the state and local level, where some jurisdictions have sought to issue different kinds of birth certificates based on the parents' immigration status.[9]

Recently, Representative Stephen King introduced H.R. 140, the Birthright Citizenship Act of 2015 in the House of Representatives to amend the Immigration and Nationality Act that would restrict citizenship to those born in the U.S. to a parent who is a citizen, lawful permanent resident, or on active duty in the armed forces.[10] It would deny citizenship to infants born in the United States to undocumented parents, as well as lawfully present individuals, such as certain survivors of domestic violence, or individuals with student or employment visas. This bill seeks to undermine long-standing legal doctrine and is a misguided attempt to circumvent the constitutional process and to challenge the strongly held values that the Fourteenth Amendment embodies. The result would be instant confusion regarding the citizenship of millions of children born in the United States every year.

The intent of the Birthright Citizenship Act – and proposals like it – is to overturn *Wong Kim Ark* without a Supreme Court decision or duly ratified constitutional amendment. If successful, a legislative proposal such as this, would upset century-old precedent and the requirement of a constitutional amendment. It would represent a broader attack to the Separation of Powers that serves as the foundation of our government, by allowing for one branch alone to call the Supreme Court's power to interpret the Constitution into question.

III. Impact of Restricting the Right to Citizenship on the Latino Community

Restricting the right to citizenship by birth to certain individuals would have a large and detrimental impact on all Americans, and the impact would be particularly harmful to the Latino community.

At the administrative or local level, implementing a policy that distinguishes those born within our borders based on the citizenship or immigration status of the child's parents would result in heavy costs to localities and individuals trying to prove citizenship, many of whom would be Latino. For instance, issuing separate birth certificates or requiring supplemental documentation to prove citizenship would not only create heavy administrative burdens on localities but would make it difficult or even impossible for some individuals to prove their citizenship. It would also lead to widespread confusion among local registrars and state and local officials. As a result, there is likely to be a particular disparate effect on Latinos and Latinas, many of whom are perceived,

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[9] *See* City of Hazleton Illegal Immigration Relief Act Ordinance, Hazelton, PA, July 2006.
[10] H.R. 140, 114th Cong. (1st Session 2015).

regardless of actual status, to be undocumented.

Moreover, these policies are likely to result in a large underclass of Latinos and Latinas, who would be subject to discrimination or other adverse treatment based on ethnicity, national origin, and race, but without the protections of citizenship. This population of stateless individuals would be those children born and raised in the U.S. but who will have none of the rights and obligations that citizenship confers. Instead of addressing the problems in our country's immigration system, changes the right to citizenship would result in a dramatic increase in the "undocumented" population by creating a caste of people unable to prove citizenship based on their birth place, just as the number of mixed status families continues to grow. Attacks on the Latino community, such as the Birthright Citizenship Act of 2015, would only undermine our fundamental understandings of justice and equality. MALDEF is committed to opposing any proposal that seeks to return this country to an antebellum era by altering the foundation of the Citizenship Clause of the Fourteenth Amendment.

In closing, I would like to take this opportunity to call for the vigorous rejection of any effort to undermine the constitutional values and traditions we have relied on for over a century regarding the Fourteenth Amendment and the Citizenship Clause. Proposals to limit citizenship to certain individuals represents a threat to the civil rights of Latinas and Latinos in the U.S. and the ability of the Latino community to fully participate in this country's legal system. Legislative efforts would be better served in working to address our nation's immigration laws, and provide a mechanism for millions of individuals living in our borders to earn legal status and citizenship. MALDEF looks forward to engaging with Congress to address the serious challenges that face our immigrant communities and to work toward comprehensive immigration reform.

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NHLA National Hispanic Leadership Agenda

PRESS RELEASE
FOR IMMEDIATE DISTRIBUTION
April 29, 2015

LATINO LEADERS: UNDERMINING BIRTHRIGHT CITIZENSHIP WOULD BE DISASTROUS

Denying birthright citizenship would abandon constitutional principles of equality and liberty, reinstate widespread discrimination

WASHINGTON, D.C. — The National Hispanic Leadership Agenda (NHLA), a coalition of 39 of the nation's preeminent Latino organizations, issued the following statement in advance of Wednesday's hearing in the Judiciary Committee of the U.S. House of Representatives which will misguidedly question the role of "birthright citizenship" in our constitutional democracy. NHLA has consistently opposed proposals to abandon our country's most sacred values and constitutional principles by altering how citizenship is granted to those born in the United States.

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

"Birthright citizenship proposals seek to undermine well-established precedent by altering the legal interpretation and application of the Citizenship Clause of the Fourteenth Amendment to the Constitution. These proposals would deny citizenship to an entire class of infants born in the United States based on the immigration status of their parents.

"Such legislation would result in an underclass of Latinos that would be subject to disparate and adverse treatment based solely on their ethnicity, the national origin and race of their parents, and signal a return to a pre-Civil War constitutional era.

"The introduction of H.R. 140, the Birthright Citizenship Act of 2015 by Rep. Steven King (R-IA), and proposals like it, represent only the latest efforts to undermine well-settled constitutional and civil rights values in an attempt to eliminate and curtail the rights of Latinos. These proposals must be vigorously rejected.

"Efforts to implement a birthright citizenship policy represent a threat to the civil rights of Latinas and Latinos in the U.S. and the ability of the Latino community to fully participate in this country's civil society. Rather than waste valuable time considering such divisive policy proposals, we urge Congress to consider bipartisan approaches to reforming our broken immigration system that will allow the 11 million undocumented immigrants in our nation, including DREAMers and agricultural workers, to earn legal status and then citizenship."

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Established in 1991, the National Hispanic Leadership Agenda (NHLA) brings together Hispanic leaders to establish policy priorities that address, and raise public awareness of, the major issues affecting the Latino community and the nation as a whole. In 2013, NHLA launched the Latinos United for Immigration Reform campaign. For more information, please visit www.nationalhispanicleadership.org and follow @NHLAgenda.

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Opening Statement of the Honorable Steve King
Subcommittee on Immigration and Border Security
Birthright Citizenship: Is it the Right Policy for America?
Wednesday, April 29, 2014

I first would like to thank Chairman Gowdy and Ranking Member Lofgren for holding this important hearing on birthright citizenship. Also, I would like to thank our distinguished panel of witnesses for taking time to be here and speak on this crucial issue concerning our national sovereignty. The subcommittee's timing is impeccable. We are in an immigration enforcement crisis. As the President and his administration refuse to enforce immigration law, even more responsibility falls to the Congress to do its best to find ways to eliminate pull factors for illegal immigrants. I have a bill that can restore our citizenship policy to the original meaning of the 14th Amendment and return some control to our borders.

Currently, a misguided reading of the 14th Amendment grants automatic birthright citizenship to the children of illegal immigrants. Section 1 of that Amendment states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside." The key provision for our purposes is "subject to the jurisdiction thereof."

By its own terms, the language in the amendment precludes the notion of universal automatic birthright citizenship. If the drafters of the 14th Amendment intended on granting citizenship automatically to anyone being born in the United States, the Citizenship Clause would not have included the qualifier "subject to the jurisdiction thereof." It would have simply stated that all persons born or naturalized in the United States are citizens.

Proponents of universal, automatic birthright citizenship will say that children born to illegal immigrant parents in the United States are subject to the jurisdiction thereof under the Constitution. By virtue of being born on U.S. soil, they claim, the child is, as a matter of fact, subject to the laws of the United States. However, this renders the language, "subject to the jurisdiction thereof," redundant and superfluous. Why would the drafters say a person had to be both born in the U.S.

and subject to the jurisdiction thereof if they thought being born in the U.S. automatically meant one was subject to the jurisdiction thereof?

Clearly, there is more required by the Constitution to be granted birthright citizenship than simply being born in the United States. A look at the history of why the 14th Amendment was drafted provides further proof that the clause was not intended to grant automatic birthright citizenship to children born of parents of illegal immigrants. The primary focus of the Citizenship Clause was to overrule the *Dred Scott* holding that stated former slaves could never be citizens of the United States. In addition, it was designed to protect Native Americans from losing status within their tribes. Most newly-freed slaves had been born in the U.S. and had no ties to any other nation while Native Americans were interested in preserving their tribal status. Before the 14th Amendment, Republicans passed the Civil Rights Act that granted citizenship to all persons born in the U.S. and "not subject to any foreign power." This threaded the needle to include African Americans as citizens and exclude the Native Americans that wanted their tribal status.

During Congressional debate of the Citizenship Clause it was made clear that the drafters did not intend automatic birthright citizenship for all persons born in the U.S. Senator Jacob Howard, a drafter of the 14th Amendment, in floor debate said of the Clause:

> "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."[1]

Senator Howard also made clear that simply being born in the U.S. was not enough to be a citizen when he opposed an amendment to specifically exclude Native Americans from the Citizenship Clause. He said, "Indians born within the limits of the United States and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States."

[1] The Congressional Globe, May 30, 1866. Debate on the Senate Floor. Remarks of Senator Howard. http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=11.

Notice the reasoning deployed there, Native Americans maintain their tribal relations so they are not "subject to the jurisdiction thereof." Senator Edgar Cowan said, "It is perfectly clear that the mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power."[2] Senator Lyman Trumbull said:

> "The provision is, that 'all persons born in the United States and subject to the jurisdiction thereof, are citizens. That means, "subject to the *complete* jurisdiction thereof. (emphasis added)"[3]

He further elaborated, "What do we mean by subject to the jurisdiction of the United States? Not owing allegiance to anybody else."

There was still more discussion of the language by Senator Reverdy Johnson. He said:

> "Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power for that, no doubt, is the meaning of the committee who have brought the matter before us, shall be considered as citizens of the United States."[4]

So there is ample legislative history demonstrating the drafters of the Citizenship Clause in the 14th Amendment believed that the clause "subject to the jurisdiction thereof," meant more than being born in the territory of the United States. And it is clear that to be subject to the jurisdiction of the U.S. meant not being subject to the jurisdiction of another country. Illegal immigrants fall within the group of people that are subject to a foreign power and are therefore not included in the Citizenship Clause.

This makes sense from the policy perspective. To assume that someone can enter the United States illegally and grant citizenship to any children they birth is to declare that the ultimate arbiters of citizenship are the illegal parents as opposed to

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[2] The Congressional Globe, May 30, 1866. Debate on Senate Floor. Remarks of Senator Cowan. Available at http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=11.

[3] The Congressional Globe, May 30, 1866. Debate on Senate Floor. Remarks of Senator Trumbull. *Available at* http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=14.

[4] The Congressional Globe, May 30, 1866. Debate on Senate Floor. Remarks of Senator Johnson. *Available at* http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=14.

the government. The moment you declare birthright citizenship for any child born in the United States, you have surrendered sovereignty of immigration policy to the people that have the ability to sneak into the country illegally.

Now, more than ever, it is clear how damaging this type of policy is on the nation. The Center for Immigration Studies estimates that between 300,000 and 400,000 children are born each year to illegal immigrants in the United States.[5] All of these children are currently granted automatic birthright citizenship. Once the children reach the age of 21 they can sponsor spouses, unmarried children and parents for a green card.[6]

With automatic citizenship and the ability to legalize relatives, it is no wonder that the number of people entering illegally for the purposes of giving birth is growing. Just last month, the Washington Post reported on the booming "birth tourism" industry where women are flown to luxury "maternity hotels" designed to allow them to live comfortably as they buy their unborn child U.S. citizenship and a ticket for the parents and siblings future legal status in the country as well.[7] The article estimated that it cost between $40,000 and $80,000 per illegal visitor. Yet, once it is time to give birth, women are taken to local hospitals and claim to be unable to pay despite the fact that they paid thousands of dollars to get to the United States.

And make no mistake; this policy is being exploited at an ever-increasing and unsustainable rate. The population of citizens with illegal immigrant parents increased from 2.3 million in 2003 to 4 million just five years later in 2008.[8] This is crucial because illegal immigrant parents can then claim Medicaid and food stamps on behalf of their citizen children. This is reflected in 2011 CIS data that shows illegal immigrants have higher rates than natives for food assistance and

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[5] Jon Feere, Birthright Citizenship in the United States: A Global Comparison, Center for Immigration Studies, *available at* http://cis.org/birthright-citizenship.

[6] Green Card for a Family Member of a U.S. Citizen, *available at* http://www.uscis.gov/green-card/green-card-through-family/green-card-family-member-us-citizen.

[7] Abby Phillip, Inside the shadowy world of birth tourism at 'maternity hotels,' Washington Post March 5, 2015, *available at* http://www.washingtonpost.com/news/post-nation/wp/2015/03/05/the-shadowy-world-of-birth-tourism-at-californias-luxury-maternity-hotels/.

[8] *See*, Footnote 5.

Medicaid.[9] So, without a change to our birthright citizenship policy, efforts to cut federal benefits to illegal immigrants will never be successful and there will be constant temptation to enter illegally for those rewards.

These types of incentives for illegal entry that exploit welfare policies have not been lost on the rest of the modern industrial countries. In the past decade three countries: Ireland, New Zealand and Australia have repealed birth right citizenship joining: Portugal, the United Kingdom, Malta, India and France since the 1980's as countries that have recognized the problematic policy's consequences.[10]

For reference, countries that still grant birthright citizenship, along with the United States, include: Canada, Pakistan, Mexico, Panama, Peru, El Salvador, Brazil, Costa Rica, Venezuela and Guatemala. In total, NumbersUSA counts 32 nations, including the U.S., that still have birthright citizenship.[11] The full list does not inspire confidence in the success rate of nations adopting the birthright citizenship policy. As an aside, other than the United States and Canada, do any of these other countries really have mass numbers of people attempting to gain citizenship?

Other nations with abundant resources and major economies do not find it wise to entice illegal immigrants with the prospect of citizenship for children born within their borders. Nations like Japan, Germany, and China do not share our policy. Our friends on the other side of the aisle that praise Western Europe must acknowledge that those countries do not share the birthright citizenship policy we have. In this particular policy area, I will say the United States should follow the cue of Western Europe.

And there was a time our friends in the Democratic Party shared our understanding that birthright citizenship was a disaster. Senator Harry Reid introduced legislation

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[9] Steven A. Camarota, Welfare Use by Immigrant Households with Children, Center for Immigration Studies April 2011, *available at* http://www.cis.org/sites/cis.org/files/articles/2011/immigrant-welfare-use-4-11.pdf.
[10] Nations Granting Birthright Citizenship, NumbersUSA August 6, 2014, *available at* https://www.numbersusa.com/content/learn/issues/birthright-citizenship/nations-granting-birthright-citizenship.html.
[11] Notes and Citations Regarding Birthright Citizenship Laws, NumbersUSA, *available at* https://www.numbersusa.com/content/node/7628.

to end automatic birthright citizenship in 1993.[12] Speaking on the Senate floor on September 20, 1993, Senator Reid remarked:

> "If making it easy to be an illegal alien is not enough, how about offering a reward for being an illegal immigrant? No sane country would do that, right? Guess again. If you break our laws by entering this country without permission and give birth to a child, we reward that child with U.S. citizenship and guarantee full access to all public and social services this society provides. And that is a lot of services. Is it any wonder that two-thirds of the babies born at taxpayer expense in county-run hospitals in Los Angeles are born to illegal alien mothers?"[13]

In a 1994 LA Times piece he wrote in support of his bill:

> "Americans have sat freely around a bountiful dinner table. Now, the table is becoming overcrowded. People are squeezing in and elbowing each other to get what they want. Unless changes are made, our dinner table eventually will collapse, and no one will have security and opportunity."[14]

All of this forms an elegant consensus around the disastrous elements of birthright citizenship policy. The Constitution and the history of the 14th Amendment point clearly to the idea that children born to illegal immigrants are not citizens. The industrial world and clear statistics demonstrate the inability to sustain such a policy. Even our Democratic friends have seen the pain this policy causes, albeit they have backslid in recent times.

In aid of curing what ails the country on this matter, I have introduced H.R. 140, the Birthright Citizenship Act. This bill amends the U.S. Code to make clear the Constitution's meaning that "subject to the jurisdiction thereof" means one of your parents was a citizen, a legal permanent resident or an alien in active service in the armed forces. The bill does not retroactively strip citizenship from those that have

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[12] S. 1351, the Immigration Stabilization Act, pg. 75, Section 1001-Basis of Citizenship Clarified, Senator Harry Reid, *available at* http://www.gpo.gov/fdsys/pkg/BILLS-103s1351is/pdf/BILLS-103s1351is.pdf.

[13] Senator Harry Reid, Remarks on the Floor of the United States Senate, September 20, 1993.

[14] Senator Harry Reid, Cut Legal Admissions by Two-Thirds : Immigration: A senator offers a 'stabilization' bill, Los Angeles Times August 10, 1994, *available at* http://articles.latimes.com/1994-08-10/local/me-25434_1_legal-immigration.

already been granted. This is a commonsense bill to restore the original understanding of the 14th Amendment and bring sanity to a current counterproductive policy.

Some are concerned that my legislative approach is not appropriate to correct the problem surrounding our birthright citizenship policy. They think only an amendment to the Constitution can fix the problem. However, the Supreme Court has never ruled that the Citizenship Clause demands citizenship for children of illegal immigrants. So my bill does not run counter to a Supreme Court decision. Instead, my bill uses the power the 14th Amendment grants Congress in Section 5 to enforce the Citizenship Clause.

Of course, this bill would be challenged in the courts. I welcome that challenge. The text of the Constitution and the history of the 14th Amendment's drafting can withstand judicial scrutiny. However, I wonder why those that oppose the bill often resort to *ad hominem* attacks to try and silence any debate on the issue. If they are confident that they are right, then they should welcome debate and an oral argument at the Supreme Court.

Also, this bill will be called bad policy for the country and some will even call it mean-spirited. Those critics will have to denounce the entire modern industrial world as nativist and mean-spirited. So I welcome this challenge as well because the facts are on my side. The promise of citizenship for any child born clearly encourages illegal immigration and birth tourism. Once the citizenship is granted federal funds flow to the illegal immigrant parents and eventually they can be rewarded for their law-breaking with legal status of their own. No country can hope to control their borders and naturalization process with such a policy in place. To support the current birthright citizenship policy is akin to supporting open borders and citizenship on demand from any and all people from everywhere across the globe.

I have been to naturalization ceremonies and welcomed new Americans to the country that I love.[15] It is always moving for me to be there and see people that did

[15] Justin Wan, Rep. Steve King Speaks at Naturalization Ceremony, Sioux City Journal March 6, 2015, *available at* http://siouxcityjournal.com/gallery/rep-steve-king-speaks-at-naturalization-ceremony/collection_1ed664a6-65dc-50f0-b97d-62639a00dbd4.html#0.

things the right way be rewarded for their actions. Our current birthright citizenship policy perverts that incentive. It rewards people that flout our laws and makes a mockery of all legal immigrants that love and respect our country and our institutions.

Our choice is whether we want to reward those that follow the law and respect our institutions or reward those that defy the law and exploit our institutions. No nation seeking to construct a society built on a foundation of law can hope to survive with policies that undermine its foundation. We are reaching a tipping point where the country's political identity of a government of laws and not of men is in peril. Together, we can still return to our roots and spurn lawlessness, but it cannot happen parallel to policies like our current birthright citizenship position. In closing, I look forward to hearing the testimony and exchanging ideas on this timely topic.

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