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AMENDING THE CONSTITUTION TO SAVE A SINKING SHIP? THE ISSUES SURROUNDING THE PROPOSED AMENDMENT OF THE CITIZENSHIP CLAUSE AND "ANCHOR BABIES"

Emily Kendall*

On April 23, 2010, Arizona Governor Jan Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act, popularly known as SB 1070. The ensuing legal battle that followed, including challenges to the bill’s constitutionality levied by the Department of Justice, catapulted this prospective legislation and the issue of undocumented immigration into the public spotlight, gaining national attention and generating heated debates, staunch protests, and impassioned demonstrations across the country. The bill’s most controversial proposition would have allowed Arizona law enforcement officers to inquire into any person’s immigration status if the officer feels a reasonable suspicion that the person is illegally present in the United States. However, at present SB 1070 remains unenforced as federal judge Susan Bolton issued an injunction preventing Arizona from implementing the bill’s most controversial provisions.

While Arizona’s SB 1070 has been tabled for now, another immigration reform movement is rapidly gaining momentum with amazing speed. This most recent reform may snowball into a much more drastic change in immigration policy, one that will affect not just one state in the Union, but rather all of them. The newest immigration reform movement centers on altering one of the very foundations of this country: Section One, Clause One of the Fourteenth Amendment—the Citizenship Clause.

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." Per this clause, any child born on United States soil and subject to the country’s jurisdiction becomes a United States citizen from the moment he or she is born. This method of bestowing citizenship is called

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5. U. S. CONST. amend. XIV.

6. The primary example of when a child is born in the United States but not subject to its
birthright citizenship. To be clear, birthright citizenship is the right by which nationality or citizenship can be recognized to any individual born in the territory of the related state. Called jus soli, or right of the soil, as explained in further detail below, birthright citizenship is the exception rather than the rule around the world.

Birthright citizenship is now one of the fountainheads of recent immigration reform efforts, due to the alleged dangers posed by anchor babies. “Anchor babies” is a newly contrived and arguably pejorative term used by opponents of birthright citizenship to refer to United States born, and thus United States citizen, children of undocumented immigrants. As this article explains, advocates of changing the Citizenship Clause aver that anchor babies threaten the economy, national security, and cultural fabric of the United States.

To address these perceived threats, proponents of altering the Fourteenth Amendment are lobbying Congress to amend the Constitution in order to make the Citizenship Clause explicitly restrict birthright citizenship to only those children born to United States citizens or legal permanent residents of this country. These proponents believe that such an alteration will reflect what the proponents believe is the true intent of the drafters of the Fourteenth Amendment—namely that only legally present immigrants and United States citizens are able to pass on their citizenship to their children at birth.

While line-editing the Fourteenth Amendment may seem to be an effective and easy solution to the supposed problems purportedly caused by anchor babies, a closer and more comprehensive examination of the resulting implications will demonstrate that this radical move should not be undertaken lightly, and questions whether this dramatic change should be made at all. To do so, Part One of this article provides a detailed history of birthright citizenship in the United States and explains relevant legislation and court cases regarding this aspect of national policy. Part Two offers an extensive comparison of birthright citizenship policies in other countries as well as explains the global efforts that affect citizenship. Part Three chronicles the recent movement to change birthright citizenship in the United States and provides a brief survey of the latest legislative efforts to affect these changes. Finally, Part Four hypothesizes on the implications of ending birthright citizenship in the United States. The article ultimately establishes that the Supreme Court’s interpretation of the Citizenship Clause is correct, and that repudiating the birthright aspect of the Citizenship Clause is not only ill-advised, but would also work to adversely affect the United States as a whole.

Citizenship carries with it the most important privileges a sovereign can bestow: the right to vote, work, and live in the country, the right to freely travel in and out of the country, and the right to enjoy the protection from foreign armies afforded by a national military. Such privileges form the cornerstone of one’s existence and should not be ripped away on the whims of the majority. This

jurisdiction, and thus not a citizen by birth, is when a child is born to a foreign diplomat on United States soil. Diplomats and their children are not subject to United States jurisdiction and therefore, the child is not accorded birthright citizenship.

8. Stephen H. Legomsky, Portraits of the Undocumented Immigrant: A Dialogue, 44 Ga. L. Rev. 65, 86, n.52 (2009). Due to its pejorative nature, the author will refrain from using the term anchor babies and in its place will use “U.S. citizens who are born to undocumented immigrants.”
9. Infra, section III.
examination into United States birthright citizenship will emphasize that birthright citizenship and the rights that flow from it are to be guarded closely—for it is these rights that define the very American culture that the proponents of repudiating birthright citizenship are attempting to protect.

PART I. CITIZENSHIP SINCE THE COUNTRY’S BIRTH: A HISTORY OF BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES

A. The Original ABCs—Acts of Birthright Citizenship

Citizenship has arguably been one of the most important and contentious issues in the entire history of the United States. Indeed, it is not a far intellectual reach to state that variations of the citizenship issue were at the crux of the American Revolution, namely in the form of the American colonists’ displeasure at having their rights as Englishmen denied to them by virtue of their residence across the pond. Therefore, because citizenship and the rights flowing from it have been firmly rooted in the American conscious, it comes as no surprise that numerous laws have been enacted concerning citizenship in the United States.

The first of these acts relating to citizenship is the Naturalization Act of 1790. Passed in the first Congressional session seven years after the conclusion of the Revolutionary War, the Naturalization Act of 1790 specifically defined the term “natural born citizen” to include a person born abroad to parents who are United States citizens, which implies that the Congress believed people acquired citizenship both at birth if they are born in the United States, and by birth if the person is born to United States citizen parents. Importantly, this Act also restricted birthright citizenship to only those children who were born to white men.

The next relevant piece of legislation that significantly affected birthright citizenship was not enacted until 1866 with the passage of the Civil Rights Act. However, in the interim, Congress passed several bills that trace the general evolution of citizenship in the United States.

For example, on January 29, 1795, Congress passed a second Naturalization Act. While this Act did not alter the birthright citizenship clause, it did change the residency requirement for naturalization from two to five years. Additionally, the Naturalization Act of 1798 increased the residency requirement to fifteen years, but Thomas Jefferson later repealed this Act in 1802. These three acts were the major pieces of legislation that dealt with citizenship prior to the enactment of the Fourteenth Amendment.

It is important to emphasize that while all three of these acts expressly provided for birthright citizenship, the United States restricted this right to only the

10. THE DECLARATION OF INDEPENDENCE (Jul. 4, 1776), “He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.”

12. Id.
13. Id.
offspring of white males. Additionally, as discussed in greater detail below, United States birthright citizenship has been controversial since it was first enacted. From its beginnings at the cusp of the Revolutionary War to its solidification in our law with the adoption of the Fourteenth Amendment, this aspect of American policy continues to tremendously impact both citizens and prospective citizens of the United States.

B. Reconstructing Birthright Citizenship—the Adoption of the Fourteenth Amendment

As one of the Reconstruction Amendments, the Fourteenth Amendment was passed shortly after the end of the Civil War on July 9, 1868. Arguably more than any other since its adoption, the Fourteenth Amendment has been the subject and basis of numerous contentious lawsuits and legal challenges that invariably find their way to the Supreme Court. Its provisions contain some of the most critical sections of the entire Constitution. Although the Citizenship Clause has been given short shrift in comparison to the Due Process or Equal Protection Clauses, the Citizenship Clause was no less controversial at the time of its passage.

It is widely believed that the impetus for the inclusion of a citizenship clause was the general mistreatment of blacks in the post-Civil War southern states, with specific atrocities including the Supreme Court’s Dred Scott decision. In Dred Scott v. Sandford, the Supreme Court ruled that Dred Scott did not have standing to challenge his status as a slave because the Constitution did not accord him citizenship due to the fact that he was of African descent. In the ensuing debate regarding the adoption of the Fourteenth Amendment, many Northern Congressmen cited this decision as the reason behind the ill-treatment of African-Americans after the war.

Congress’s first attempt to legislatively overturn the Dred Scott decision came with the Civil Rights Act of 1866. The Civil Rights Act granted United States citizenship to all persons born in the United States, as long as those persons were not subject to a foreign power. The framers of the Fourteenth Amendment later removed the provision regarding foreign power jurisdiction, instead replacing it with the requirement that those born in the United States be subject to the United States’ jurisdiction. It is also suggested that the Citizenship Clause was a legislative

16. Naturalization Act of 1790, ch. 3 §1, 1 Stat. 103, 103, (repealed 1795); Naturalization Act of 1795, ch. 20, §1,1 Stat. 414, 414 (repealed 1802); and Naturalization Act of 1798, ch. 54, §1, 1 Stat. 566-67 (repealed 1802).
17. U.S. CONST. amend. XIV.
18. Slaughter-House Cases (1873). “The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States.” See also U.S. v. Wong Ark Kim, 18 S.Ct. 456, 457 (1898). “[Its] main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Scott v. Sanford.”
19. SCOTT V. SANDFORD, 60 U.S. 393, 393 (1856); CIVIL RIGHTS ACT, 14 STAT. 27-30 (1866).
20. CONG. GLOBE, 39TH CONG., 1ST SESS. 499 (1866).
21. CIVIL RIGHTS ACT, 14 STAT. 27-30 (1866).
response to the Black Codes that southern states had passed in the wake of the Thirteenth Amendment. These Codes greatly limited the rights of African-Americans with regards to buying and owning property, obtaining gainful employment, and other critical functions.

In the wake of the Civil War, Congress created the Joint Committee on Reconstruction and tasked the committee with drafting resolutions to address the problems arising from the end of the war. The Joint Committee on Reconstruction found that only a Constitutional amendment could protect the rights and welfare of black people living in the Southern states. Along with the provisions of the Fourteenth Amendment, the committee introduced other bills aimed to cure the same discriminatory practices. For instance, Representative Pomeroy of Pennsylvania introduced legislation that would create an amendment to the Constitution that would "forever prohibit every State from making any distinction in civil rights and privileges among naturalized citizens of the United States on account of race or color." Ultimately, however, this protection was forged in the Fourteenth Amendment.

Although most of the ratification debates of the Fourteenth Amendment centered upon citizenship status for African-Americans, there was a good deal of conversation concerning what the amendment would mean for future immigrants. Senator Lyman Trumbull from Illinois, co-author of the Thirteenth Amendment, stated that he believed the matter had to be decided by an amendment to the Constitution, for the notion of citizenship affects not only African-Americans, but other "races that are now settling on our Pacific coast, and perhaps involves a future immigration to this country of which we have no conception." With this statement, Senator Trumbull lends support to the argument that, while their welfare was a large part of the impetus for the Fourteenth Amendment, African-Americans did not entirely eclipse all other issues regarding immigration and immigrants. Rather, it appears that at least a few members of Congress took a more holistic view towards the implications of adopting the Citizenship Clause and in fact carefully considered how it would impact the demographics of the United States, with a specific focus on the Chinese and the Native Americans.

Importantly, some quotations from members on the floor seem to indicate that they contemplated undocumented immigrants and their offspring when making decisions regarding the amendment. Regarding the proposed amendment, Representative Mr. Van Winkle stated, "... and I do not confine it to the African race alone, but I include the races on the Pacific coast that I have already mentioned, and others to which it is proposed to open the doors."
Perhaps because of this premeditation, the Citizenship Clause was the subject of heated debate in Congress and went through many alterations before it was adopted in the form we know today. The debate on the Citizenship Clause occurred between January and May of 1866. It was first proposed to read:

[t]hat all persons of African descent born in the United States are hereby declared to be citizens of the United States and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery.

Because the Senate could not agree on this language, Senator Trumbull withdrew it and altered the Amendment to read, "[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." With the introduction of this new language, the first question posed was whether the amendment would work to naturalize all the Native Americans of the United States. Senator Trumbull explained that because the United States negotiates with Native Americans through treaties, they are not considered subject to United States jurisdiction and therefore the amendment is not intended to include them. The second question presented was whether the Amendment would work to naturalize the Chinese and gypsies born in this country. The answer was "undoubtedly." This is particularly important because at that time, the Chinese were forbidden from becoming citizens, so the fact that the amendment would work to naturalize their children, by virtue of their birth, is strong and probative evidence of the original intent of the Amendment. Additionally, it was asserted on the floor that even under the naturalization laws in place at that time (before the passage of the Amendment), children who were born in the United States to parents who were not citizens were still born as United States citizens themselves.

Because Africans had been considered an "inferior race," there was never much discussion of how they belonged to a different culture than white Americans—not so with other races. For instance, once it was affirmed that the amendment would allow Chinese or gypsies who were born in the United States to be citizens at birth, several senators shared the concerns voiced by Senator Cowan when he stated, "...
sir, the day may not be very far distant when California, instead of belonging to the Indo-European race, may belong to the Mongolian, may belong to the Chinese, because it certainly would not be difficult for that empire to throw a population upon California that would overwhelm our race.\textsuperscript{40}

Others said that the amendment should not apply to the Chinese because they had no appreciation for a republican form of government and that it was obnoxious to their very nature to the degree that they do not understand or desire it.\textsuperscript{41} However, these racial prejudices were eventually overcome.

During the course of the debates, Congress discussed the importance of citizenship, with some members affirming that, "... there was no right that could be exercised by any community of society more perfect than that of excluding from citizenship or membership those who were objectionable."\textsuperscript{42} In the author's opinion, this statement seems to confuse the impetus behind the amendment as it centers on the exclusion, rather than inclusion, of potential citizens. In the author's opinion, many comments in favor of birthright citizenship were made during the debates as well. For instance, Senator Mr. Justin Smith Morrill stated:

\begin{quote}
[a]s a matter of law, does anybody deny here or anywhere that the native born is a citizen and a citizen by virtue of his birth alone? The grand principle both of nature and nations, both of law and politics, that birth gives citizenship of itself. That is the fundamental principle running through all modern politics both in the country and in Europe. Everywhere where the principles of law have been recognized at all, birth by its inherent energy and force gives citizenship. Therefore, the founders of the Government made no provision, of course they made none, for the naturalization of natural-born citizens. The Constitution speaks of 'natural born' and speaks of them as citizens in contradistinction from those who are alien to us. He forgets the general principle that every man owes allegiance to the country of his birth, and that country owes him protection. That is the foundation as I understand it of all citizenship and these are the essential elements of citizenship, allegiance on the one side and protection on the other.\textsuperscript{43}
\end{quote}

Notably, there was little to no discussion regarding the jurisdiction section of the clause, except concerning the Native Americans.\textsuperscript{44} It was taken as a given fact that the country's jurisdiction did not extend to foreign ambassadors or diplomats and therefore the entire focus of the discussion regarding that part of the clause centered on the Native Americans and their unique relationship with the country.\textsuperscript{45} Additionally, in other parts of the debate, the state of the Chinese was discussed at length. Although not a perfect comparison, the debates concerning the Chinese are

\textsuperscript{40} 39th Cong., supra note 38 (statements of Senator Cowan).
\textsuperscript{41} Id.
\textsuperscript{42} 39th Cong., supra note 38.
\textsuperscript{43} 39th Cong., 1st Sess. 570.
\textsuperscript{44} 39th Cong., 1st Sess. 2890 (Cong. Globe 1866). Mr. Howard stated that "it settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States."
\textsuperscript{45} See generally, 39th Cong., supra note 42.
illuminative of what Congress may have originally intended regarding undocumented immigrants. 46 During the time of the ratification, United States law forbade Chinese nationals from naturalization. 47 However, as clearly stated above, Congress arrived at the consensus that even though their parents could never be citizens, if Chinese children were born in the United States, the Fourteenth Amendment guaranteed their right to birthright citizenship.

Therefore, taken altogether, the debates surrounding the ratification of the Fourteenth Amendment seem to indicate that the original meaning of the Amendment was to encompass exactly what the plain meaning sought out to do: immediately confer citizenship on all persons born within the country's borders and subject to its jurisdiction (discussed below).

As demonstrated, opponents of birthright citizenship typically fall into two categories; those who believe that this was not the original intent of the Amendment's framers, and thus the fault lies with the Supreme Court for their erroneous interpretation, and those who agree that this was the intent of Congress and simply wish to edit the amendment accordingly. 49

C. And Subject to the Jurisdiction Thereof: The Court Decides on the Issue of Birthright Citizenship

Almost immediately upon its ratification, the Supreme Court has been called upon to interpret the Citizenship Clause on several occasions. These decisions and the context in which they were made help to shed light on the present birthright citizenship debate in two primary ways: first, by demonstrating that the issue has actually always been a contentious point and is not a new phenomenon, and second, by better contextualizing the different issues presented regarding the importance of citizenship and its acquisition. Therefore, the article next offers a brief survey of the most relevant cases in order to provide a better understanding of the current legal atmosphere regarding this highly important aspect of American policy.

Like many of America's legal principles, the United States tradition of citizenship is borrowed in large part from England. 50 This borrowing from the English is evident in one of the first cases to speak on the question of citizenship for emancipated slaves in the period after the Civil War once Congress passed the Civil Rights Act, which specifically qualified emancipated slaves as citizens, and the passage of the Fourteenth Amendment, which guaranteed this right to all persons born in the United States. This case is U.S. v. Rhodes and it was decided in 1866.

46. For instance, as explained above, the Chinese could not become citizens of the United States because the previous Naturalization laws restricted citizenship to "free, white persons." However, during the Fourteenth Amendment debates, it was discussed and agreed that United States-born Chinese children would be citizens by virtue of their birth in country—regardless of the citizenship status of their parents.

47. Recall that the Naturalization Act of 1790 restricted citizenship to free white persons. This act was still controlling the issue of citizenship at this time.

48. 39th Cong., supra note 42 (statements of Sen. Trumbull).

49. This categorization is not the product of any empirical analysis; rather, it was created by the author simply to better organize the current controversy of birthright citizenship for the narrow scholastic purpose of this article.

right after the passage of the very controversial Civil Rights Act. 51 In this case, a
victim of a burglary was denied by the laws of Kentucky the ability to testify against
the white defendants accused of the robbery for the sole reason that she was African-
American. 52 She brought suit alleging the Kentucky statute was violative of the
recently passed Civil Rights Act because it violated her civil rights to testify against
white persons. 53 In response, the defendants countered with the argument that the
Civil Rights Act was unconstitutional because Congress did not have the power to
accord citizenship. 54

The Court’s analysis proceeds first by pointing out that Congress has
exercised the power to make African persons citizens on several occasions, including
treaties it had enacted with the Choctaws and Cherokees, as well as with Guadeloupe
Hidalgo. 55 The Court then calls attention to three other provisions of the Constitution
that confer this power upon Congress. First, it cites Article One, Section Eight,
which states that Congress has power “to establish a uniform rule of
naturalization.” 56 Second, it explains that Article Fourteen, Section Two, which
states, “The citizens of each state shall be entitled to all the privileges and
immunities of citizens in several states,” was meant to confer general citizenship on
Americans because prior to the ratification, citizens of one state were often
prohibited from taking or holding real estate in other states. 57 Finally, the court points
to Article 4, Section 4 which guarantees “to every state in this Union a republican
form of government, and shall protect each of them against invasion [and against
domestic violence].” 58

The court’s analysis is built upon these three provisions but also is firmly
rested upon the Thirteenth Amendment and the totality of these provisions read
together. It does this by explaining that the Constitution, at the close of the
enumeration of the Congress’s powers, authorized that body “to make all laws which
shall be necessary and proper for carrying into execution the foregoing
powers.” 59 Thus, the court concludes that Congress was within its constitutional boundaries to
pass the Civil Rights Act, and since the Court also found the Kentucky statute
violative of this legislation, it rendered the statute void.

U.S. v. Rhodes is illustrative of how the Court is interpreting the term
citizen. In its dicta, the court explicitly states that, “all persons born in the allegiance
of the United States are natural born citizens. Birth and allegiance go together.” 60
Thus, even before the enactment of the Fourteenth Amendment, judicial
interpretation established that citizenship was naturally conferred by birth—regardless
of race and possibly by implication, alienage.

52. Id. at 785.
53. Id. at 786.
54. Id. at 788.
55. Id. at 790.
56. Rhodes, 27 F.Cas. at 790; see U.S. CONST. art. I, § 8.
57. Rhodes, 27 F.Cas. at 791.
58. Id. (explaining that this provision of the Constitution ensures that a tyrannical faction will
not rise up and usurp Congress’s power to enact laws regarding citizenship).
59. Id. at 790.
60. Id.
61. Id. at 789. Emphasis added by author.
Despite the Court’s determination in *U.S. v. Rhodes*, the subsequent case of *In re Look Tin Sing* demonstrates how the language of the amendment did not fully settle the question of who is a natural born American citizen. *In re Look Tin Sing*, decided in 1884, less than 20 years after the passage of the amendment, involved a Chinese-American who was born in California.\(^62\) He was born in 1870 and in 1879 briefly traveled to China, returning to the port of San Francisco in September of 1884.\(^63\) When he tried to enter the United States via this port, border officials denied him entry because of his Chinese heritage; the Plaintiff sued, alleging that the officials violated his right to enter the United States and that he was a citizen of the United States.\(^64\)

The crux of the Court’s analysis in this case centered on the “subject to the jurisdiction thereof” language of the Fourteenth Amendment and the Court decided that, because the petitioner was not a child of a diplomat and thus subject to the jurisdiction of the United States when he was born, the fact that he was born to Chinese immigrants who were not citizens of the United States had no bearing upon his own citizenship.\(^65\)

*In re Look Tin Sing* is a critical affirmation of the theory behind the Citizenship clause, which seeks to dispel the confusion between the status of one’s parents and one’s own personal status. In this case, the Supreme Court explained that even though the petitioner’s parents were not citizens, their relation to the United States had no effect on the citizenship status of their child. From the Court’s ruling in this case, it can easily be extrapolated that immigration status, thereby including both legal and undocumented immigrants, has already been contemplated by the Court as having no bearing on the citizenship of the United States-born child.

Similar to the aforementioned *U.S. v. Rhodes*, the ruling in *In re Look Tin Sing* is not actually what is of overriding importance to the birthright citizenship discussion, but rather it is what the court accepted as true premises in conducting its analysis. Of particular note is a case decided in 1844 the court references, which stated, “[there is no doubt] that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen.”\(^66\) Given the close proximity of this case to the ratification of the Fourteenth Amendment, this reference is probative evidence that the framers of the amendment, and indeed the general public, had contemplated that the amendment would encompass children born to illegally present parents.\(^67\) This view is echoed in perhaps the seminal case implicated in the birthright citizenship issue, *U.S. v. Wong Ark Kim*.

*Wong Ark Kim*, decided in 1891, concerned a writ of habeas corpus issued by the district court to the collector of customs at the port of San Francisco on behalf

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62. *In re Look Tin Sing*, 21 F. 905, 905-6 (C.C.Cal. 1884).

63. *Id.* at 906.

64. *Id.* (showing that during this time in U.S. law, the Chinese Exclusion Act was in effect that barred Chinese nationals from entering the country).

65. *Id.*

66. *In re Look Tin Sing*, 10 Sawy. at 353, see also *Lynch v. Clarke*, 1 Sandf. 583 (N.Y. 1844) (explaining precedent and applicability to this case).

67. Essentially, the absence of a public uproar or outrage suggests that Americans at that time did not abhor the idea of conferring birthright citizenship to children of undocumented immigrants.
of Wong Ark Kim on October 2, 1895. Mr. Kim was born to Chinese parents in California. He made a temporary visit to China and was refused permission to land in the United States at the port of entry in San Francisco because the immigration officer believed that Mr. Kim was not a citizen of the United States, and having no travel papers, was not allowed to enter the country. The United States argued that because Mr. Kim was of Chinese descent, the Chinese Exclusion Acts, which prohibited Chinese persons from entering the country without travel documents, applied to him and likewise prevented his entry. In response, Mr. Kim asserted that because he was a United States citizen the Chinese Exclusion Acts did not apply to him and could not operate to bar his admission. To decide the issue, the Court first provided an extensive history of the common law interpretation of birthright citizenship— all of which supported Mr. Kim’s argument that he was citizen of the United States by birth. The Court then looked to the intents, purposes and previous application of the Fourteenth Amendment. Specifically, the Court reasoned that the first words of the amendment, “All persons born,” restricted citizenship only “by place and jurisdiction, and not by color or race.” (This argument responded to the assertion that the 14th Amendment only meant to protect blacks and no other race.) The Court then quotes Mr. Justice Miller from a different case who stated, “We do not say that no one else but the negro can share in this protection [afforded by the 14th Amendment].” Ultimately, the Court decided that the Citizenship Clause clearly applied to Mr. Kim and he was admitted into the United States as a citizen.

Since Won Ark, the Supreme Court has not heard an equally defining case—in terms of solidifying who is accorded birthright citizenship. However, with the prospect of the repudiation of birthright citizenship the highest Court may soon find itself confronted with new cases and controversies surrounding who is able to claim the privilege of being an American, and who is not.

**PART II. LEADING THE WAY OR TRAILING BEHIND—A COMPARISON OF THE BIRTHRIGHT CITIZENSHIP POLICIES OF FOREIGN COUNTRIES**

With regards to birthright citizenship policies, the United States is the exception rather than the rule. Fewer than twenty percent of the world’s countries guarantee birthright citizenship to those who are born within their borders. In fact,

69. Id. at 458.
70. Id.
71. Id.
72. Id.
73. Id. at 459-60 (as explained in the preceding section, the Fourteenth Amendment debates established that Congress, or at least a large percentage of that body, passed the Amendment under the belief that it would automatically bestow citizenship on children born in the United States whose parents were not diplomats.).
74. Id. at 467.
75. Id.; see also Slaughter-House Cases, 83 U.S. 36, 72 (1872).
76. See Birthright Citizenship in the United States: A Global Comparison, BACKGROUNDER (Center for Immigration Studies, Washington, D.C.) Aug. 2010 at 14; see also Laura Gomez, Birthright Citizenship Looms as Next Immigration Battle, N.Y. TIMES, Jan. 4, 2011. The author would like to heavily emphasize that it is exceedingly difficult to obtain unbiased and accurate statistics on undocumented
many countries’ constitutions do not provide for birthright citizenship, including the United Kingdom, Australia, the Republic of Ireland, New Zealand, South Africa, France, Malta, India, and Japan. Instead, these countries have what is called *jus sanguinis* citizenship (as opposed to the above-described *jus solis*) and “modified” birthright citizenship. *Jus sanguinis*, or “right of blood” is the policy by which one’s citizenship is not determined by his place of birth but rather by the citizenship of his parents (which is a policy that the United States also maintains, specifically for its citizens who have children that are born overseas). Modified birthright citizenship is a combination of *jus solis* and *jus sanguinis* in that it accords citizenship to those who are born in the country if their parents are citizens or otherwise permanent residents. Since these policies are very different from that of the United States, and thus carry different implications, the next section offers a brief examination of the citizenship policies in other countries.

**A. By Blood or By Soil? How Nations Differ With Respect to Their Citizenship Requirements**

Most countries maintained birthright citizenship at least at one point in their history, mostly because it is one of the easiest ways to determine who is and is not subject to the king’s power and allegiance. However, in recent history more and more nations are choosing to forgo this policy in favor of a more restrictive practice. The reasons for this change in arguably a country’s most important law, vary from country to country and are very illuminating in the effort to appreciate the importance and impact of citizenship policies.

For instance, the constitution of the United Kingdom included a birthright citizenship policy similar to that of the United States (and arguably the former was the progenitor of the latter) until 1983. Specifically, prior to the change, a child’s birth in the UK was sufficient in itself to confer British nationality irrespective of the status of his/her parents. As of January 1, 1983, in order for a child born in the UK to become a British citizen, the child must be a British subject or have at least one parent who is a British citizen. The author would like to point out that there is no official term for this type of citizenship policy and that the name “modified” birthright citizenship was employed by the author purely to differentiate among the policies. Immigration laws have changed significantly since then, and the reader should consult multiple sources to appreciate the full spectrum, and degree of discrepancies, in these numbers.


79. The author would like to point out that there is no official term for this type of citizenship policy and that the name “modified” birthright citizenship was employed by the author purely to differentiate among the policies.

80. *Supra* note 79 (this phrase and explanation is offered for the convenience of the reader and is not to be considered a technical term).


83. British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. 5, c. 17 (U.K.) (amending the British Constitution’s birthright citizenship clause to require additional steps to confer citizenship on a child born in the U.K.).

to be accorded British citizenship, one of the child's parents must be either a British citizen or a "settled" person in the UK, meaning that the parent is a resident in the UK and has a permanent abode.  

As opposed to the United States, there was little criticism to the UK's change in birthright policy, but there was some criticism nonetheless. The primary impetus for the British Nationality Act of 1981 (which was to take into effect in 1983) was the desire of the British government to update its nationality code which had not been significantly amended since 1948. Notably, the amendment of the birthright policy was not the sole feature of the bill—as it is the focal point in the below-described American bills—but rather was just one segment of a comprehensive nationality reform. Therefore, while not particularly illuminating as a comparison to the proposition in the United States, the fact that the UK took any steps to restrict its birthright policy indicates other countries around the world are beginning to guard this privilege more closely. What remains to be discovered is why.

Perhaps Ireland holds the answer. The recent changes to the Republic of Ireland's birthright citizenship policies are of particular importance because the country's experience with this issue closely parallels the political fervor currently grasping the United States—Ireland's citizenship history is rife with controversies. Due to its constant wars and political strife with Northern Ireland, Ireland's citizenship policies fluctuated between restrictive and open. To illustrate, up until the 1990s, the only people constitutionally entitled to citizenship were the children of conferred Irish citizens whose citizenship was conferred before the dissolution of the Irish Free State. In 1998, as part of the Belfast Agreement to ameliorate the tensions between Northern Ireland and the Republic of Ireland, the Republic of Ireland adopted a 19th Amendment to its constitution provided that: "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland." With the passage of this amendment, the Republic of Ireland officially enshrined birthright citizenship as a national policy for the first time. It is possible, because this amendment was part of the Belfast Agreement, that the Republic of Ireland adopted this provision in order to create a more unified nation in the face of hundreds of years of turmoil and unrest. Thus, the Republic of Ireland's action to enact a constitutional amendment to specifically protect birthright citizenship is strikingly similar to the United States. Both countries pointedly took measures to unify their countries and promote patriotism after a war or conflict.

87. See generally British Nationality Act, 1981, c. 61, § 1 (U.K.) (includes provisions for acquisition of citizenship by birth, adoption, registration, and descent as well as renunciation of British Citizenship).
89. IR. CONST., 1922, art. 3.
90. IR. CONST., 1998, amend. XIX.
91. See supra section II, for a discussion of the Fourteenth Amendment citizenship clause in the wake of the American Civil War. Similar to the United States' Congress's decision to settle, without doubt, the citizenship status of the newly freed African-Americans, the Irish government took steps to
However, at least at the time of the publication of this article, the similarities between the United States and the Republic of Ireland end here, for in 2005 the country repudiated birthright citizenship. This policy change came subsequent to a storm of immigration controversies that were fueled by the Irish Supreme Court’s case decisions.

Soon after the adoption of the 19th Amendment, the Republic of Ireland experienced a historic influx of immigration that resulted in a large number of foreign nationals claiming the right to remain and settle in the country based on their Irish-born citizen children. Notably, between 1996 and February 2003, the Irish Department of Justice granted leave to remain (the Irish equivalent of relief from deportation in United States immigration law) for approximately 10,500 foreigners solely on the basis of their having an Irish born child.

Although there was much public outcry and castigation of the Department of Justice on account of the relief it granted to undocumented immigrants, the Department was simply acting in accordance with the Irish Supreme Court’s 1989 Fajujonu v. Minister for Justice decision. In Fajujonu, the court was confronted with the case of a foreign married couple who had been living illegally in Ireland for eight years. This foreign couple had given birth to three children while the couple was living in Ireland. These children, on account of their births in Ireland, were Irish citizens by birthright. When the parents were arrested and put into deportation proceedings, they argued their children, being of tender years, would have to accompany them when deported and as such would be robbed of their constitutional right to remain in Ireland as an Irish citizen. The Court agreed and prohibited the deportation of the foreign parents because the Irish citizen children had the constitutional right to remain in Ireland and also the right to the company, care and parentage of their parents.

The ruling in Fajujonu caused a considerable uproar because of its implications—now foreign parents were shielded from deportation and essentially their illegal entry and stay were forgiven as long as they had a child in Ireland. Possibly in part due to the public outrage surrounding the decision, in January 2003 the Irish Supreme Court attempted to shrink the confines of its prior ruling and distinguished the earlier Fajujonu decision by ruling in Osayande v. Minister for Justice that it was constitutional for the Irish government to deport the parents of children who were Irish citizens.

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93. Id. at 22.
95. Id.
96. Id.
97. Id.
98. These foreign parents were granted “leave to remain” which provided them with a residence permit and work permit. See generally DEBRA HAYES & BETH HUMPHRIES, SOCIAL WORK, IMMIGRATION AND ASYLUM: DEBATES, DILEMMAS, AND ETHICAL ISSUES FOR SOCIAL WORK AND SOCIAL CARE PRACTICE 203 (Jessica Kingsley Publishers 2004).
In Osayande, two cases were consolidated which involved a Czech couple who had been illegally living in Ireland for seven months and who had an Irish citizen child, and a Nigerian couple, also illegally living in Ireland for nine months and who had an Irish citizen child. The court, in a thinly veiled attempt to ameliorate the public and the rapidly escalating immigration protests regarding the mass "leave to remain" grants that followed Fajujonu, grasped at straws and arguably pushed the very limits of constitutional interpretation in order to arrive at its decision. The court distinguished the parents in this case from those in Fajujonu by stating that in the instant case, the parents had been staying in Ireland for a much shorter period of time (seven-nine months versus eight years) and that the couples only had one Irish citizen child (versus the three that were at issue in Fajujonu).

Applying these facts, the court ruled that in the instant case the sovereign's authority to regulate who was allowed to remain within its borders outweighed the children's constitutional rights to remain in Ireland.

Although the court's decision helped to quell some of the tension, it did not calm completely the political and societal unrest surrounding what then Minister for Justice Michael McDowell described as the "abuse of citizenship" plaguing legitimate Irish citizens. During a national debate on the issue, Minister McDowell expressed his displeasure with what he perceived as the government's acquiescence in conferring citizenship "on persons with no tangible link to the nation or the State whether of parentage, upbringing or of long-term residence."

In March of 2004, barely more than a year after the Osayande decision, the Irish government introduced for ratification the Twenty-seventh Amendment to its Constitution. The Twenty-Seventh Amendment did not change the wording of the citizenship clause found in the Nineteenth Amendment, but instead worked to insert a clause clawing back the power to determine the future acquisition and loss of Irish citizenship by statute. The Irish government also cited as its reasons for introducing this amendment, concerns about the Chen case, then before the European Court of Justice. In this case, a Chinese woman who had been living in Wales had traveled to give birth in Northern Ireland on legal advice. Mrs. Chen then pursued a case against the British Home Secretary to prevent her deportation from the United Kingdom on the basis of her child's right as a citizen of the European Union—derived from the child's Irish citizenship—to reside in a member state of the Union. The Irish government viewed this case as awakening another

100. Id.
101. Id.; see Fajujonu, [1989] 2 I.R. 151 (Ir.).
102. Supra note 99.; see also Claire Breen, Refugee Law in Ireland: Disregarding the Rights of the Child-Citizen, Discriminating Against the Rights of the Clinic, 15 INT'L J. REFUGEE L. 750, 775 (2003).
103. 583 DÁIL DEB. col. 1186 (April 21, 2004).
104. Id.
possibility of increasing the avenues of obtaining Irish citizenship. Both the proposed amendment and the timing of the referendum's ratification were contentious but the result was decisively in favor of the proposal; seventy-nine percent of those voting voted yes, on a turnout of fifty-nine percent.109

The Republic of Ireland provides an excellent comparison and possible premonition for the United States. In a similar political climate to the current one of the United States, the Republic's birthright citizenship policy was changed due to a public view that people were "abusing" the country's citizenship policy in order to relocate to the country. In Ireland, the precipitating events leading up to repudiating birthright citizenship included a contentious court case and immigration protests by the population. As explained in further detail below, the political climate in the United States may come to mirror that of Ireland, as legislation is introduced at both the state and federal level to repudiate birthright citizenship. The constitutionality of this legislation could surely be challenged in the courts. It is possible that the birthright citizenship policy in the United States would also first be challenged in the courts and then, depending on the outcome of that challenge, may be brought to the people to take a vote.

B. If a Village Raises a Child, Must the World Naturalize Him?

One of the least considered and arguably most serious implications of repudiating birthright citizenship is the increase in stateless people in the United States. In addition to their own nationality laws, many countries, the United States included, have signed global treaties and participated in conventions that address statelessness.110 Statelessness is the legal and social concept of a man or woman lacking legal resident status in any recognized state.111 Statelessness causes many problems because the ability to work, travel, and enjoy other rights is conditioned upon legal status in the country. For example, without citizenship a person cannot legally vote in the country in which he or she is living.112 International travel becomes almost impossible without a passport or other travel document.113 Because of this, some stateless people are undocumented immigrants wherever they go; they face prolonged or indefinite detention or being shuttled back and forth between states.

Many basic services are linked to nationality. For example, schooling, and health care provided by a country often require the recipient to be a national of that country.114 Additionally, many stateless people simply feel that they are outsiders.


110. The United States is a signatory to several Naturalization Conventions, which allow for citizens of the other signatory country to become citizens of the United States, including Belgium, Sweden, Norway, the United Kingdom, Peru, Portugal, Uruguay, and others.


114. UNHCR, Division of International Protection, UNHCR Action to Address Statelessness:
who have been rejected by the state. Discrimination is not only a root cause, but also a result of statelessness. Where large populations of stateless people are marginalized, the consequence is despair and frustration throughout the marginalized populace. Tensions can lead to unrest, conflict, forced displacement and regional instability. To prevent the serious consequences of statelessness for individuals and societies, the international community has agreed that all human beings should enjoy the right to a nationality.

In order to ensure that all people are afforded the opportunity to claim a nationality, and thus enjoy the rights accompanied by nationality, many countries have adopted resolutions and held conventions to secure these rights. For instance, in 1948 the United Nations adopted the Universal Declaration of Human Rights, which affirms in Article Fifteen that, “Everyone has a right to a nationality” and that, “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” In the years that followed, the United Nations deemed it appropriate to formally codify these ideals in the Convention on the Reduction of Statelessness in 1961 so that other nations could endorse them, and thus, be bound to protect and support them. The Convention’s aim was to create norms and confirm presumptions and principles of customary international law regarding nationality. These presumptions included the principle that states have absolute sovereignty to confer their nationality on any person for any reason and that otherwise stateless persons may take the nationality of the place of their birth or of the place where they were found. The Convention also established that contracting states that endorsed the Convention promised, among other things, that stateless people born on their territory would receive their nationality. As of December 11, 2010, there are thirty-seven countries that ratified or acceded to the Convention, including Canada, France and the United Kingdom. Notably, the United States has not ratified the Convention.

Like the United Nations, the European Union has taken steps to prevent statelessness. On November 6, 1997, the European Council convened the European Convention on Nationality in Strasbourg, France. The purpose of this Convention was to reduce global statelessness through international agreement. Such practices included the automatic assumption of a spouse’s nationality upon marriage. This resulted in the newly nationalized spouse losing the right to her previous country’s


115. See generally Kosinski, supra note 78.
117. UNHCR, Division of International Protection, supra note 112, at 299.
120. Id.
121. See id.
122. See id.
123. Id.
125. Id.
consular assistance and becoming subject the new country's citizenship obligations, such as military service, without the person's acquiescence. Article Five of the Convention provides that, "no discrimination shall exist in a state's internal nationality law on the grounds of sex, religion, race, color, or national or ethnic origin."

Additionally, Article Six provides for nationality by virtue of birth in the territory of the state. However, states may limit this to only children who would otherwise be stateless.

The United States has not taken any monumental steps to bind itself to any of the practices and policies of the international community with regards to the reduction of statelessness. In fact, United States policy had been virtually silent regarding statelessness until 2008 when Congresswoman Sheila Jackson-Lee introduced the first piece of legislation in the United States to reduce statelessness. However, this piece of legislation has not proven to be the progenitor of a United States movement to end statelessness. First, the bill has yet to be passed. Second, the bill focuses on those who are rendered stateless by human trafficking, a very small and highly specific group of stateless people. Notably, in March 2010, Senator Patrick Leahy introduced the Refugee Protection Act, which included a provision on statelessness, but this legislation has also not yet been passed.

Therefore, that the United States refrained from adherence to international measures to reduce statelessness could arguably, in the author's opinion, be deemed a policy in and of itself. Perhaps with its non-action, the United States is communicating to the global community that it will retain all of its sovereign power to control those who can be citizens of its country.

PART III. AMENDING THE CONSTITUTION TO SAVE A SINKING SHIP

Immigration has been at the forefront of public and congressional debate for decades. Since birthright citizenship has been a cornerstone of United State law from the country’s inception, its repudiation would have enormous implications, both predictable and unforeseeable. To best understand why the United States would want to repudiate this longstanding tradition, it is critical to ascertain the alleged problems caused by birthright citizenship, the motivations behind the movement to repudiate it, and examine the measures at both the state and federal level to do so.

A. How Birthright Citizenship is Implicated in Immigration Policy

Similar to the way that Irish Minister of Justice Michael McDowell used the phrase "abuse of citizenship" to describe the state of birthright citizenship in his country, opponents of birthright citizenship in the United States utilize an emotionally charged and, arguably, derogatory term to describe the phenomenon in their own country: anchor babies.

"Anchor babies" are children born in the United States to undocumented
immigrants.132 This term is factually a misnomer and a pejorative description that is rapidly finding its way into mainstream discourse as it is now even included in the dictionary.133 These children, by virtue of their birth in this country, are United States citizens. Therefore, the factually flawed argument is that these children can be used to “anchor” their parents into the United States, when otherwise their parents would be forced to leave once authorities discovered their undocumented status. The argument is that parents break the United States immigration laws by entering the country illegally, they then have a child who, by virtue of the Fourteenth Amendment, is a United States citizen, and then the baby is able to petition to have his or her parents become United States citizens as well.

However, the actual immigration law that applies in this scenario explicitly refutes this argument. Specifically, the Immigration and Nationality Act prohibits children from sponsoring their parents for immigration until the children reach twenty-one years old.134 Moreover, the child has to demonstrate that he/she makes 125% of the poverty line in order for his or her parents to immigrate to the United States. Admittedly, the Immigration and Nationality Act does provide for an undocumented parent’s relief from removal if he/she can obtain a waiver.135 The parents can only obtain this waiver if they can prove that it would impose exceptional and unusual hardship on their United States citizen child if the child were forced to accompany them if deported.136 Also, statutorily, only 4,000 of these waivers are permitted every year and much fewer than those are actually granted.137

It must be emphasized that it is exceedingly difficult to pinpoint the exact scope of the number of anchor baby births due to the inherent difficulty in calculating the amount of undocumented immigrants who enter the country and then give birth. One estimate by the Pew Hispanic Center states that approximately 340,000 children were born in the United States to undocumented immigrants.138 Taking this number to be correct, the birthright citizenship clause has allegedly operated to drastically shift the demographics of this country, from an Eastern-European majority to a growing Latino and Asian population.139 Whether the demographic shift is good or bad for the nation is obviously up for debate and outside the realm of this article—but it is undeniable that the shift is occurring.

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132. Steven W. Bender, Compassionate Immigration Reform, 38 Fordham Urb. L.J. 107, 117 (2010).
135. Id. at §240A(b)(1)(D).
136. Id.
137. Id. at 240A(e)(1).
B. Rocking the Boat—The Movement to “Save” the United States from Anchor Babies

This mandatory twenty-one year waiting period for parents to gain United States citizenship through their children has not ameliorated the concerns of those who oppose birthright citizenship. However, in the author’s opinion, the ends likely do not justify the means. Even accepting as true that these parents should be punished for breaking immigration laws, since their alleged goal of United States permanent residency will not come into fruition for twenty-one years, why is there such an explosion of violent rhetoric and revolutionary proposals, such as amending the United States Constitution? By looking to the proposed solutions we are able to also understand the supposed problems flowing from one of America’s most helpless populations.

1. State Initiatives to Address Birthright Citizenship

Several states have introduced initiatives through their respective legislatures that provide for different measures changing how the states recognize citizenship. However, before presenting the individual states’ measures, it should be highlighted that the states have joined together to form a coalition. Possibly operating under the oft-quoted principle that two heads are better than one, forty-one states (to the exclusion of Alaska, Hawaii, Louisiana, Nevada, North Dakota, Rhode Island, Vermont, Wisconsin and Wyoming) formed the coalition of State Legislators for Legal Immigration (SLLI). SLLI has committed itself to eliminate what its members view are economic attractions and incentives for foreign nationals to immigrate illegally, including welfare and other public benefits, education, and employment opportunities.

One of the largest of SLLI’s collective goals is to introduce nationwide initiatives designed to draw legal challenges to get the issue of birthright citizenship before the Supreme Court. To do so, they have proposed a two-pronged strategy. The first step is to introduce bills in state legislatures that revive the concept of state citizenship. Under these laws, only children of Legal Permanent Residents of United States citizens would be granted state citizenship. The states would not (because they cannot) prevent the federal government from recognizing the United States citizenship status of children of undocumented immigrants.

The second step requires a more direct challenge to the federal government’s authority to confer citizenship on the children of undocumented immigrants. This step utilizes a measure, known as a state compact, which distinguishes between the children of undocumented immigrants, those of legal immigration.
permanent residents, and those of United States citizens. A state compact is a measure that can become federal law without the signature of the President if it is passed by the states and approved by Congress. The states involved in the compact would issue different birth certificates to children of permanent residents and United States citizens, and the children born to undocumented immigrants, and to children of foreign nationals in the United States who are tourists and foreign students. The birth certificates would draw a distinction between those children whose parents are “subject to the jurisdiction of the United States,” and those children whose parents are not. However, because the states have different approaches and different ancillary goals, it is important to examine the states’ particular bills in order to gain broader and more in-depth insight into the collective consciousness on this issue.

a. Arizona

In the past year, Arizona has catapulted itself into the spotlight of American immigration policy through its many measures to restrict, combat, and address illegal immigration. Two such measures are SB 1308 and SB1309. SB 1308, “Interstate Compact—Birth Certificate,” directs Arizona’s governor to enter into the above-described state compact to create two sets of birth certificates, one for children whose parents are in the United States legally and one for those whose parents are in the country illegally. SB 1309, “Arizona Citizenship,” creates and defines the legal concept of Arizona citizenship. In this bill, Arizona citizenship has two requirements: the person must be born in the United States and subject to the jurisdiction thereof, and the person must be lawfully domiciled in the state of Arizona. The bill goes on to make a direct challenge to the Supreme Court’s current interpretation of the Birthright Citizenship Clause by defining “subject to the jurisdiction” as, “hav[ing] the meaning that it bears in Section One of the Fourteenth Amendment to the United States Constitution, namely that the person is a child of at least one parent who owes no allegiance to any foreign sovereignty.” Clearly this bill takes direct aim at what its drafters deem is an incorrect interpretation of the Fourteenth Amendment—namely that the Fourteenth Amendment bestows birthright citizenship regardless of the status of one’s parents. Therefore, if Arizona passes this law, a challenge to the laws constitutionality on the grounds of preemption and conflict with the Supremacy Clause is almost certain to follow.

b. South Dakota

Similar to Arizona, South Dakota has also introduced bills into its legislative bodies to enact the state compact. In early 2011 South Dakota
Representatives introduced House Bill No. 1199, “An Act to Provide for a Compact Concerning Citizenship.” This bill also calls for the governor to execute the state compact concerning birth certificates. The bill states that South Dakota shall make a distinction in birth certificates “between persons born in the state who are born subject to the jurisdiction of the United States and persons who are not born subject to the jurisdiction of the United States.” The bill also mimics the language concerning the definition of “subject to the jurisdiction thereof” contained in the Arizona legislation.

At the time of this article’s publication, the states’ initiatives have not yet been implemented and, thus have not been challenged either in their own state courts or in the federal courts. However, it appears that their bills will not pass constitutional muster because much of the legislation is built upon the ill conceived and incorrect premise that because undocumented immigrants are in the country illegally they are not under the jurisdiction of the United States, and, therefore, neither are their children. This assertion could not be further from the truth as the United States exercises its jurisdiction over undocumented immigrants every day through deportation and removal proceedings. In deportation proceedings the United States government, through an immigration judge, decides whether a foreign national is allowed to remain in the country or if the person must leave (i.e. be deported out of the country). This type of court proceeding could be seen as exercising the utmost personal jurisdiction as it controls where the person is allowed to travel/remain. A counter argument to this point is that the United States has jurisdiction to remove but not jurisdiction to permit to stay. This is incorrect, however, since many immigration statutes provide for the legal remedy of relief from removal, which allows foreign nationals to stay in the country even if they are otherwise deportable.

Additionally, pursuant to Article One, Section Eight of the Constitution, the ability to adopt laws regarding naturalization is solely within the purview of Congress. Therefore, if challenged, the states’ initiatives should be regarded as violative of the Constitutional grant of power to Congress and should, accordingly, be invalidated.

2. Federal Initiatives to Change Birthright Citizenship

Unlike the states, which have formed a compact in order to introduce legislation, there have been two individual federal initiatives to change birthright citizenship policy in the United States. One originated in the Senate and the other in the House. Senators Rand Paul and David Vitter propounded the Senate measure. Their resolution, entitled “Proposing an amendment to the Constitution of the United States Relating to United States Citizenship” was introduced into the Senate on

156. Id.
159. See 8 C.F.R. §§ 1240.48-53.
January 25, 2011. In contrast to the state measures, the bill at the federal level calls for an actual amendment to the Constitution which would rob a person born in the United States of American citizenship unless:

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

On the Senate floor, Senator Vitter expressed his reasons for introducing the resolution, stating that the impetus for the resolution comes from the “fundamental misunderstanding of the 14th Amendment”:

When it comes to U.S. citizenship, it is not just where an individual is born that matters, at least it should not be. The circumstances of the person’s birth and the nationality of his or her parents are of at least equal importance... Our practice of birthright citizenship is clearly an incentive to illegal immigration... With that automatic citizenship comes the full benefits thereof, including unlimited travel to the United States, educational benefits and the ability to settle here as an adult and eventually, down the line, the ability to grab back the parents and get them into U.S. citizenship.

With these remarks, Senator Vitter concisely explains many of the reasons often cited in support of the repudiation of birthright citizenship.

The House bill, introduced by Representative Steven King on January 5, 2011, is entitled “Birthright Citizenship Act of 2011” and is substantially similar to the aforementioned Senate bill. From the face of these bills it appears that the many representatives at the local and federal levels are in agreement that something radical must be done to amend the Constitution and edit the blanket birthright citizenship clause.

Given that multiple measures on both the state and federal levels have been introduced in order to amend the Constitution, it is useful to detail the reasons in support of these changes.

C. An Ocean of Justification But Not a Drop of Reason? The Rationale for the Repudiation of Birthright Citizenship

One of the most often quoted reasons for amending the Constitution is the argument that undocumented immigrants are aware of the United States birthright citizenship policy and that they are purposefully taking advantage of our open door/open soil policy in order to lock in United States citizenship for their
children. The 'abuse' of birthright citizenship has been used elsewhere in the world as a basis for abolishing it. In changing its birthright policy, Ireland cited this similar reason for its decision. Specifically, Ireland pointed to many problems resulting from illegally present immigrants' ability to stay in the country solely because their children were Irish citizens by virtue of this birthright.

In the United States, some estimate that the costs of services to children of undocumented immigrants total more than $133 billion every year, a figure that includes providing public school, food assistance, and other welfare programs for these children. Additionally, parents' work opportunities are limited due to lack of work authorization in the United States, stifling their capacity to earn a living and thus limiting their ability to financially contribute to their child's well-being. Regardless, the more citizens a country has, the more citizens the country has to provide for, especially in the United States with its welfare and Social Security programs. Given these economic considerations, according citizenship to every person born in the United States has the potential to inflate the country's social program costs.

This argument draws attention to the rise of a new sector of the United States economy called birth tourism. Birth tourism is the term used to describe the practice of women travelling to a country that provides for birthright citizenship for the express purpose of giving birth in that country so that their child will be citizens. Although many references to "anchor babies" associate this so-called phenomenon with women from Mexico, there is evidence that birth tourism is actually more popular among Korean, Hong Kong and Taiwanese nationals. Notably, within this group, Koreans may pursue birth tourism because non-Korean citizen men are able to avoid compulsory military service.

There are businesses that typically operate outside of the country, which assist pregnant foreign nationals in coming to the United States to have their children. These services are often all-inclusive packages with the tour guides arranging for accommodations at both a hospital and a hotel, and even sightseeing trips or other vacation activities. Many tour guides even assist the mothers in

166. Supra Part II.
167. Supra Part II.
173. Id.
obtaining their United States visitor visas. While there is no firm reliable data available to indicate the number of companies that provide these services, dozens of companies advertise birth tourism services and one representative in the industry commented that the industry has skyrocketed in the past five years.

Notably, engaging in birth tourism is expensive, with businesses charging as much as tens of thousands of dollars, which may not include the traveler’s living expenses while in the United States, or the medical care they receive to deliver and care for the newly born. The impetus for birth tourism to the United States is no different from any other past migration pattern. The prospect of a better life has lured immigrants to our country since its very inception. These parents believe that a United States passport is a powerful tool, especially in countries such as China where acceptance into a prestigious university or obtaining lucrative employment is often based on such a privilege. Parents from many countries may believe that as United States citizens, their children will be more likely to thrive in their home country.

Although the services provided by these “birth tour guides” may seem to have questionable legitimacy, these services comply with United States immigration laws. United States consular officers have confirmed that it is not a crime to travel to the United States to give birth, even if the trip is only to ensure that the child obtains United States citizenship. A spokesperson from the Beijing embassy cited United States embassy rules and affirmed that his officers cannot deny a United States tourist visa to a Chinese national, even if the officer knows the person is obtaining the visa solely to give birth to a child in the United States.

Birth tourism exemplifies a phenomenon that opponents of birthright citizenship consistently scorn—that foreign nationals from around the world come to the United States solely to benefit from United States immigration. These individuals who oppose immigration to the United States allege that there are many detrimental effects that flow from according everyone born on our soil American citizenship.

First, some opponents assert that because birthright citizenship increases the number of United States citizens by hundreds of thousands of people every year, the

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176. *Id.*


United States’s welfare costs also increase. Some cite the number of children born to undocumented women already in the country as the justification for removing birthright citizenship. Since exact numbers for such births are very difficult to obtain, the only figures presented are estimates. One estimate states that the number of children born to women not lawfully present in the United States is 300,000. However, these estimates often cannot be trusted because the only data available is the number of admissions into the United States as opposed to the number of people who are admitted. Therefore, when ten people enter the United States multiple times, their multiple entries dramatically augment such calculations, resulting in very unreliable figures.

Notably, the number of children born to foreign women who are in the United States lawfully is often overlooked. The United States grants many nonimmigrant visas such as O, J and F visas, which allow foreign nationals to lawfully live, study and work in the country for several years. Some groups estimate that approximately 200,000 children are born to parents lawfully admitted to the United States every year. The plan proposed by opponents of birthright citizenship will, in effect, strip away United States citizenship from children whose parents are here illegally, but also from those whose parents respected our immigration laws to the letter and were welcomed into the United States.

Second, some opponents challenge the validity of birthright citizenship as an overall policy because they assert that it allows people who broke United States laws to benefit from such laws without suffering the consequences. This argument is predicated on the above-described provision of United States law that allows United States citizens to petition for their parents to become lawful permanent residents. However, as explained above, this argument is not exceptionally compelling as the number of foreign nationals who actually benefit from this legislation is exceedingly small. Combined with the statutorily mandated twenty-one year waiting period, it seems that the entire controversy surrounding the anchor babies is ill conceived and, in the author’s opinion, greatly inflated.

This argument also emphasizes that undocumented parents, who would otherwise be ineligible to participate in welfare, food stamps and other public assistance programs, can access these through their United States citizen children.

185. Tony Bell, Welfare Costs for Children of Illegal Aliens Exceeds $50 Million, Apr. 19, 2010, antonovich.lacounty.gov/Pages/Press%20Releases/10/April/Illegal%20Immigration%2041910.html.
189. Id.
191. Id. at 1.
194. Id.
This argument has generated perhaps the most vociferous and heated debates and in fact spills over into many immigration reform debates. The procession of the argument is well summarized by Peter Brimelow of the National Review Magazine. In discussing general immigration reform, Mr. Brimelow centered on Birthright Citizenship and stated that, "by not closing [the Citizenship Clause] loophole, the federal government in effect rewards law-breakers... by [a]llowing illegal aliens to give birth to American citizens, in effect, makes citizenship a license for welfare."195

Many public benefits available in the United States are only afforded to citizens and not undocumented immigrants.196 However, programs such as Aid to Families with Dependent Children allow for eligibility based on the citizenship of a child.197 In California alone, "children born to illegal alien mothers constitute the largest case load increase in welfare applicants in counties across the state."198

A third prong of the movement against birthright citizenship focuses on national security. Opponents of more leniency-based immigration argue that United States citizen children of undocumented immigrants threaten the safety and security of our nation because these children are raised to secretly harbor a hatred for this country.199 Specifically, opponents argue that enemies of the United States will come to this country, give birth and have their children accorded citizenship, and then bring the children back to their home countries in order to train them in terrorist plots.200 Some contend that these children grow up to be sleeper agents of Al-Qaeda or other terrorist organizations with an anti-American agenda, lying in wait for the call to arms against the United States.201 Of course, the most compelling evidence in support of this argument is Anwar al-Awlaki, a United States citizen by birth, who was recently killed for allegedly encouraging and participating in attacks in the United States.202 This line of argument may prove the most difficult to address or refute as the war against terrorism continues to be waged.203 However, a country will always have enemies, so this is not be a persuasive reason to disrupt a national policy that has existed for more than a century.

Opponents of birthright citizenship have yet to address concerns about the

197. Id.
200. Id.
201. Id.
clause "subject to the jurisdiction thereof" in the Fourteenth Amendment. This clause currently operates to deny birthright citizenship to children of ambassadors and diplomats. Because of their parents' immunity, these children are also immune to United States laws and therefore do not fulfill the two prongs of the Fourteenth Amendment necessary to confer citizenship. However, according to common law, enemies of the state are considered aliens and would not be subject to the jurisdiction of the United States within the context of the Citizenship Clause. Specifically, in *Sailors* the Court explained that when enemies invade and occupy a territory, their children are not citizens of the occupied territory because they owe no allegiance to that country. Today, opponents of undocumented immigration have already made the comparison between undocumented immigrants and "enemies of the state," or foreign nationals who aim to harm the United States and/or its citizens, but have not yet done so in the context of the Fourteenth Amendment. For instance, Georgia State Representative John Yates stated that these immigrants "[are] invading us" and suggested that the Border Patrol operate under a "shoot to kill" policy at the Texas-Mexico border. Opponents of birthright citizenship may adopt this rhetoric in their next battle to overturn this policy.

PART IV. THE NEWEST AMERICAN REVOLUTION: THE IMPLICATIONS OF REPUDIATING BIRTHRIGHT CITIZENSHIP FOR ALL OF US.

Passed in 1864, the Fourteenth Amendment has been an integral part of American policy for more than one hundred years. Because the Citizenship Clause has literally affected the lives of every single American since its passage, the immediate and varied implications that would result from a change to this clause would revolutionize several facets of American life. In order to appreciate the results of repudiating birthright citizenship, this section will examine the prospective implications of overturning this policy.

A. Turning America into India: The Potential Rise of Multiple Classes of Citizens

As stated above, one measures proposed to address the problems surrounding "anchor babies" suggests that states issue multiple birth certificates. Such a policy has potential to create multiple classes of residents as well as have the consequence of creating an administrative nightmare and drastically increasing healthcare costs. First, the issuance of two birth certificates, one denoting United States citizenship and one indicating the state of birth but not recognizing the person as a citizen, will invariably create two classes of residents. American citizens would be divided into those who the respective state recognizes as being American citizens, and those who do not receive such recognition. In doing so, the United States would

205. Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. 99, 156 (1830).
206. *Id.*
establish a class-based society that the country has not seen since the era of slavery.

The “peculiar institution”\(^2\) of slavery resulted in the subjugation of millions of African-Americans who, having been born in the United States, knew no other home country but were not granted citizenship and therefore not allowed the same rights and privileges as the white population. Just as African-Americans could not vote, were subject to travel restrictions, and were generally treated as inferior, the proposed new class of ‘citizens’ whose standing in the country would be in constant debate, would similarly be subjected to prejudice and discrimination. Newly introduced state laws have added a new complication into the mix by requiring parents to establish that their child has United States citizenship or lawful residence prior to enrolling the child into school. On June 8, 2011, Alabama’s governor signed into law a new immigration bill that requires public schools to determine students’ immigration status and makes it a crime to knowingly give an illegal immigrant a ride in a vehicle.\(^2\) This new requirement imposed by Alabama illustrates the possible consequences of creating multiple classes of residents. A child may be suspected of being an illegal immigrant based on his suspected national origin. However, this child could be a native-born American citizen. As a result, because of his skin color, school authorities may investigate his and his parents’ immigration statuses, while not treating other students in the same way. Thus, the dangers associated with the creation of a class-based society should be seriously considered before the country decides to repudiate its birthright citizenship policy.

These state bills lack provisions explaining what actions states will take against those who are deemed to be not citizens under the state’s subjective test. Will these individuals be able to qualify for federal benefits but not for state benefits? Will they be able to obtain federal forms of identification such as social security cards, but not similar state documents such as driver’s licenses? Such questions will need to be answered in order to fully appreciate the implications of these proposed policies.

Second, the issuance of two birth certificates will likely prove to be an administrative nightmare and cause innumerable delays, identity confusions and other problems that will spill over into many aspects of American life. Opponents of birthright citizenship may not fully appreciate the fact that a change to the Constitution will affect all American citizens. For instance, the existence of two birth certificates may raise the evidentiary standard to establish one’s identity. Citizens may be required to present both birth certificates in order to confirm their identity so that they may obtain a driver’s license, passport, social security card, and many other critical documents necessary to live and work in the United States.\(^2\) Therefore, although increased scrutiny may have the effect of identifying more unlawfully present immigrants, it would concomitantly result in increasing the burden on

\(^{209}\) “Peculiar Institution” is a euphemism used by early Americans to describe slavery. See Randolph Campbell, An Empire for Slavery: The Peculiar Institution in Texas, 4 (Louisiana State University Press, 1989).


lawfully present aliens and American citizens in their attempts to obtain these critical documents.

Importantly, the possible addition of another mandatory identification document may actually facilitate identity theft. The more documents in circulation containing one’s identification information, the less secure this information becomes. Since opponents of birthright citizenship typically also rail against undocumented immigrants for stealing social security cards and forging birth certificates, these opponents may want to rethink the measures they propose for proving one is an American citizen within the confines of their own definitions.

Third, the required production of multiple birth certificates will likely increase healthcare costs, and these costs will be passed on to families upon the arrival of every new baby. In order to issue these birth certificates, hospitals may need to ask for multiple forms of identification from the parents. Additionally, the states’ proposals do not indicate who or what entity would be responsible for inspecting identity documents and issuing the birth certificates. It is unclear if hospitals will be required to employ immigration attorneys or if a new government or local agency will be created to dispatch officers to hospitals for the sole purpose of issuing birth certificates. These and other details of the states’ measures will need to be examined closely in order to fully appreciate the costs and implications resulting from their proposed legislation.

B. The Impact on Legal and Illegal Immigration

The repudiation of birthright citizenship would have a substantial impact on both legal and illegal immigration. First, simple logic dictates that once a path to legal status is blocked, the number of people in a country illegally will increase. However, it seems unlikely that repudiating birthright citizenship will have a substantial effect on a foreign national’s decision to come to the United States either legally or illegally.

Statistics demonstrate that unauthorized immigrants infrequently cite giving birth as a reason for coming to the United States. The vast majority of undocumented immigrants enter the United States in order to pursue employment. For decades, Congress has strived to enact policies that would prevent and deter all forms of undocumented immigration with the result that the number of undocumented immigrants continues to rise. This trend seems to indicate that rather than being the sole impetus for coming to the United States, birthright citizenship is a beneficial result of doing so.

Additionally, the United States presumes to welcome immigrants that it feels will have a positive impact on our country and our economy. The country allots 140,000 employment-based visas for aliens with extraordinary ability, whose work is deemed in the national interest, and entrepreneurs who will create jobs for American citizens. By adopting ever-increasing restrictive immigration policies, the United

214. See generally 8 C.F.R. § 204.5.
States may discourage from moving to our country those who could play a vital role in our nation's advancement and progress.

C. Reverberation throughout the World

One of the most significant implications of repudiating birthright citizenship often overlooked by its opponents is how this change may affect other countries. As explained above, a majority of nations do not maintain birthright policies such as that of the United States. Rather, these countries require more than birth location for a child to become a citizen. Many countries demand that children be born in the country and have parents who are citizens or otherwise lawful residents. What happens to children born in the United States if birthright citizenship becomes an ideal of the past? These children may not immediately become citizens of any country. Although their parents may obtain citizenship for them upon return to their home country, the children will not have passports or birth certificates, potentially causing great problems when they attempt to re-enter their parents' home country. Identification documents are becoming increasingly necessary to do anything in this world. Thus, by restricting citizenship policies, the United States may expand the number of children who will be born, and possibly remain, stateless.

D. Changing the Very Fabric of Our Country

The United States is a nation of immigrants. Opponents of immigration cite this idea as a weak and meaningless statement that misconstrues the issue because the Founding Fathers and their progeny came to the United States legally. Therefore, they argue, the American ideals of life, liberty and the pursuit of happiness should not apply to those who break our laws to enter our country.215

Some proponents of birthright citizenship disagree. They argue that a proposal that judges and excludes a person because of the actions of his or her parents or grandparents would be viewed as very un-American.216 Letting the sins of the father be visited upon the child is not a legal concept enshrined in the jurisprudence of the United States.

Notably, the trend towards restricting opportunities to become a citizen, and to make it increasingly difficult for foreigners to enter the country legally, reflects the history of immigration laws dating back to the founding of the United States. The circumstances surrounding a residency requirement for naturalization illustrate the fact that, since the beginning of the immigration debate, there have always been proponents of opening the country's borders and supporters of restricting them. Many early measures concerning citizenship increased the residency requirement from its original two years to five years, and then to fourteen years, making increasingly difficult and longer the process towards naturalization.217

This second increase in residency from five to fourteen years came in the

217. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795); Naturalization Act of 1795, ch. 20, 1 Stat. 414 (repealed 1798); Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802).
years immediately preceding Thomas Jefferson's presidency.\(^{218}\) Such a policy was repugnant to Jefferson and he expressed his firm disagreement in his first address as President when he stated:

> I cannot omit recommending a revisal of the laws on the subject of naturalization. Considering the ordinary chances of human life, a denial of citizenship under a residence of fourteen years is a denial to a great proportion of those who ask it, and controls a policy pursued from their first settlement by many of these States, and still believed of consequence to their prosperity. And shall we refuse the unhappy fugitives from distress that hospitality which the savages of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?\(^{219}\)

Jefferson repealed the Naturalization Act of 1798 shortly after taking office, restoring the residency requirement for citizenship to five years.\(^{220}\) Jefferson's sentiments and actions, and those expressed by Congress during the ratification debates of the Fourteenth Amendment, suggest that it is difficult to argue with certainty the original intent of the Citizenship Clause. It seems clear that neither side of the issue has all of the answers to the questions posed by this debate.

Such a drastic measure as amending the Constitution is a solution that should be applied sparingly. However, rather than work within the laws already in place, lawmakers continuously attempt to adopt more regulations and laws that complicate an already fractured and exceedingly complex system. Birthright citizenship seems to be one of the precious few aspects of American immigration law that can be easily understood. Its repudiation will have extreme anticipated and unanticipated consequences that its proponents have likely not considered. But these consequences will affect millions of people, citizens and foreign nationals alike. It would be disastrous if, in their ardent desire to keep out, Congress mistakenly robs citizenship from those it intended to keep in.

**CONCLUSION**

Birthright citizenship has experienced a contentious history across the world and is rapidly becoming a national issue in the United States. With the passage of the Fourteenth Amendment, the framers thought that they had settled the question of who is and who is not a natural born citizen of the United States. Citizenship is perhaps one of the most precious of ties, the one that connects a person to a country. It carries with it the indispensable right to vote, travel, live and work freely and also affords protection by the sovereign against other neighbors and nations. These gifts should not be taken away lightly. Those who really wish to affect different changes in the United States rather than simply shrinking the United States population, should reevaluate whether their ends will really justify their proposed means.

Canadian Prime Minster McKenize King once asked, "How many Jews

\(^{218}\) Naturalization Act of 1798, *supra* note 212.

\(^{219}\) Thomas Jefferson, First Annual Address, December 8, 1801.

\(^{220}\) Naturalization Act of 1798, *supra* note 212.
fleeing Nazi Germany should be allowed into this country?" An anonymous senior official in the government replied, "None are too many." After an extensive analysis of the real implications of repudiating birthright citizenship, hopefully the states and Congress will have the same reply to the question, "How many children should be born American citizens?"
