



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

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A Constitutional Guarantee**

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May 2009

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Birthright Citizenship: A Constitutional Guarantee

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Since its ratification in 1868, the Fourteenth Amendment has guaranteed 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.” Just a decade before this language was added to our Constitution, the Supreme Court held in *Dred Scott* that persons of African descent could not be citizens under the Constitution. Our nation fought a war at least in part to repudiate the terrible error of *Dred Scott* and to secure, in the Constitution, citizenship for all persons born on U.S. soil, regardless of race, color, or ancestry.

Against the backdrop of prejudice against newly freed slaves and various immigrant communities such as the Chinese and Gypsies, the Reconstruction Framers recognized that the promise of equality and liberty in the original Constitution needed to be permanently established for people of all colors; accordingly, the Reconstruction Framers chose to constitutionalize the conditions sufficient for automatic citizenship. Fixing the conditions of birthright citizenship in the Constitution—rather than leaving them up to constant revision or debate—befits the inherent dignity of citizenship, which should not be granted according to the politics or prejudices of the day.

Despite the clear intent of the Reconstruction Framers to grant U.S. citizenship based on the objective measure of U.S. birth rather than subjective political or public opinion, opponents of birthright citizenship continue to fight this constitutional guarantee. After the election of President Barack Obama, lawsuits were filed challenging his citizenship, including an action challenging President Obama’s citizenship at birth because, even though he was born in the United States to a U.S. citizen mother, his father was a citizen of Kenya. In Congress, bills have been introduced each year for more than a decade to end automatic citizenship for persons born on U.S. soil to parents who are in the country illegally.¹ In California, signatures are being gathered for a proposition that would create a sub-class of U.S.-born citizens by issuing different birth certificates to children born in the United States to undocumented immigrant parents.² Academics and national politicians have added to the movement’s momentum: in recent years, a small handful of academics have joined the debate and called into question birthright citizenship,³ and, in the 2008 presidential campaign, several Republican candidates expressed their skepticism that the Constitution guarantees birthright citizenship.⁴ Though the most

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¹ E.g., H.R. 6789, 110th Cong. (2008); H. R. Res. 46, 110th Cong. (2007); H.R. 1940, 110th Cong. (2007); H.R. 4192, 110th Cong. (2007); H.R. 3700, 109th Cong. (2005); H.R. 3938, 109th Cong. (2005); H.R. 698, 109th Cong. (2005); H.R. 7, 105th Cong. (1997); H.R. 346, 105th Cong. (1997); H.R. 1363, 104th Cong. (1995).

² The proposed initiative is entitled the California Taxpayer Protection Act of 2010. Its text is available at http://ag.ca.gov/cms_attachments/initiatives/pdfs/i801_initiative_09-0004.pdf.

³ E.g., Peter Schuck & Rogers Smith, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985); Charles Wood, *Losing Control of America’s Future*, 22 HARV. J.L. & PUB. POL’Y 465 (1999).

⁴ Joanna Klonsky, *The Candidates on Immigration*, NEWSWEEK, Jan. 3, 2008 (noting that Republican presidential candidates Ron Paul, and Tom Tancredo support ending birthright citizenship); Jim Stratton, *Thompson Angers State Hispanics*, ORLANDO SENTINEL, Sept. 29, 2007 (reporting that Fred Thompson publicly expressed support for rethinking birthright citizenship); *Romney Eyeing End to Birthright Citizenship*, July 22, 2007,

prominent proponents of ending birthright citizenship have been conservative, the effort has at times been bipartisan: Democratic Senator—and now Majority Leader—Harry Reid introduced legislation that would deny birthright citizenship to children of mothers who are not U.S. citizens or lawful permanent residents.⁵

Putting aside whether ending birthright citizenship is a good idea as a policy matter—and scholars, notably Margaret Stock,⁶ make compelling arguments that ending birthright citizenship would have disastrous practical consequences—the threshold question is whether Congress may properly consider ending automatic citizenship for persons born in and subject to the jurisdiction of the United States at all. (Proponents of ending birthright citizenship themselves seem to be unsure whether they need to amend the Constitution to achieve their goal, or may simply legislate around it—the sponsors of legislation to end automatic citizenship alternate between proposing amendments to the Constitution and simply proposing legislation that denies citizenship to children born in the United States to undocumented parents.)

A close study of the text of the Citizenship Clause and Reconstruction history demonstrates that the Citizenship Clause provides birthright citizenship to all those born on U.S. soil, regardless of the immigration status of their parents. Perhaps more importantly, the principles motivating the Framers of the Reconstruction Amendments, of which the Citizenship Clause is a part, suggest that we amend the Constitution to reject automatic citizenship at the peril of our core constitutional values. To revoke birthright citizenship based on the status and national origin of a child’s ancestors goes against the purpose of the Citizenship Clause and the text and context of the Fourteenth Amendment.

I. The Text of the Fourteenth Amendment

The Reconstruction Framers’ intent to grant citizenship to all those born on U.S. soil, regardless of race, origin, or status, was turned into the powerfully plain language of Section 1 of the Fourteenth Amendment: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” The text of the ratified Citizenship Clause embodies the *jus soli* rule of citizenship, under which citizenship is acquired by right of the soil (contrasted with *jus sanguinis*, according to which citizenship is granted according to bloodline). Birthright citizenship is a form of “ascriptive” citizenship because one’s political membership turns on an objective circumstance—place of birth. The text of the Fourteenth Amendment is not the only place in the Constitution that reflects the notion that citizenship can accrue from the circumstances of one’s birth: Article II of

<http://blogs.abcnews.com/politicalradar/2007/07/romney-still-lo.html> (explaining that Mitt Romney was looking into whether birthright citizenship could be ended legislatively or by constitutional amendment); Stephen Dinan, *Huckabee Retreats on Birthright Citizenship*, WASH. TIMES, Jan. 9, 2008 (noting that Mike Huckabee has at times expressed support for ending birthright citizenship).

⁵ S. 1351, 103d Cong., (1993); see James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367, 367-68 (2006) (discussing federal hearings and legislative proposals).

⁶ Margaret Stock, *Birthright Citizenship—The Policy Arguments*, 33 ADMIN. & REG. L. NEWS 7 (2007) (arguing that, even if the Fourteenth Amendment could be interpreted to allow a change from birthright citizenship, “such a change would be ill-advised from a policy perspective,” and there is no evidence that changing the rule would reduce illegal immigration).

the Constitution, provides that any “natural born citizen” who meets age and residency requirements is eligible to become President. Just as the Citizenship Clause sets forth birth on U.S. soil as the condition for citizenship—not race or bloodline—Article II specifies that the relevant qualification for the presidency of the United States is birth-conferred citizenship, not any particular ancestry.

This understanding of the Constitution’s treatment of citizenship has held for more than a century. Case law just after ratification of the Fourteenth Amendment interpreted the Citizenship Clause to confer automatic citizenship on persons born in the United States regardless of their parents’ immigration status. In the 1886 case of *Look Tin Sing*, the court held that a child of Chinese parents—who still retained their status as Chinese citizens, despite their presence in the United States—was a U.S. citizen under the Citizenship Clause because he was born on U.S. soil. As the court stated plainly, “It is enough that he was born here, whatever was the status of his parents.”⁷

Similarly, the U.S. Supreme Court has consistently read the Citizenship Clause to grant citizenship automatically to almost everyone born on U.S. soil.⁸ In the 1898 case of *United States v. Wong Kim Ark*, the Supreme Court carefully examined the history of citizenship generally and with respect to the Citizenship Clause. Based on this history and the text of the Fourteenth Amendment, the Court held that persons born within the United States, whose parents reside in the United States but remain citizens of a foreign country, are automatically U.S. citizens.⁹ The only exception to birthright citizenship recognized by the Court derives from the phrase “subject to the jurisdiction thereof,” which the Court reads to refer to the legal authority or control of the United States—a reading that excludes from automatic citizenship the children of foreign diplomats or hostile invaders, who are not subject to U.S. legal authority due to their diplomatic and combatant immunity.¹⁰

Under the Supreme Court’s longstanding reading, the “subject to the jurisdiction” language carves out from birthright citizenship only children of diplomats who are immune from prosecution under U.S. laws. Unquestionably, if undocumented aliens or their children commit a crime in the United States, they can be and are punished under U.S. law: they are subject to the jurisdiction of the United States.

This understanding of the Fourteenth Amendment has shaped our nation’s practices regarding citizenship for many decades, and guarantees that citizenship is based on an objective circumstance rather than on membership in any ethnic group or race. This reading of the text comports with the plain language of the Citizenship Clause and squares with the Clause’s legislative history.

⁷ *In re Look Tin Sing*, 21 F. 905, 910 (C.C.D. Cal. 1884).

⁸ *E.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁹ *Id.* at 655-93.

¹⁰ *Id.* at 655-58.

II. The History of the Citizenship Clause

The current debate over the meaning of the Citizenship Clause also stands in stark contrast to the legislative debates occurring at the time Congress approved it: perhaps the most remarkable feature of the legislative history of the Citizenship Clause is that both its proponents and opponents *agreed* that it recognizes and protects birthright citizenship for the children of aliens born on U.S. soil. The Reconstruction Congress did not debate the meaning of the Clause, but rather whether, based on their shared understanding of its meaning, the Clause embodied sound public policy by protecting birthright citizenship. For the most part, congressional opponents of birthright citizenship argued vigorously against it because, in their view, it would grant citizenship to persons of a certain race, ethnicity, or status that these opponents deemed unworthy of citizenship. Fortunately, these views did not carry the day. Instead, Congress approved a constitutional amendment that used an objective measure—birth on U.S. soil—to automatically grant citizenship to all those who satisfied this condition.

A. Origins: The Civil Rights Act of 1866

The Reconstruction Framers' views of what granting citizenship to all children born "subject to the jurisdiction" of the United States would entail can be discerned not only from the debates over the Fourteenth Amendment, but also from the debates that same year over the Civil Rights Act, which included a nearly identical citizenship provision.¹¹ These debates establish two points fatal to the claims against birthright citizenship: first, that the drafters of the Reconstruction Amendments understood citizenship to be conferred automatically by birth, and second, that any child born on U.S. soil was a citizen, regardless of whether his or her parents were aliens, citizens, or slaves brought illegally into the country.

The intent to include children of aliens within birthright citizenship is clear from the floor debates of 1866. Members of Congress specifically debated the impact automatic citizenship would have on various immigrant groups that had recently migrated to the United States in significant numbers, notably the Chinese population in California and the West, and the Gypsy or Roma communities in eastern states such as Pennsylvania. Much of the nineteenth century hostility toward Chinese and Gypsy immigrants is similar to the resentment and distrust leveled at immigrants today from Latin American countries: concern that immigrants would take away good jobs from U.S. citizens (while exhibiting a willingness to allow immigrants to take jobs perceived as undesirable);¹² fear of waves of immigrants "invading" or overtaking existing

¹¹ The citizenship language of the 1866 Civil Rights Act provided: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 Stat. 27 (1866).

¹² Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 358 (1995) (citations omitted):

Anti-Chinese sentiment was largely economically motivated; this is reflected in the Exclusion Acts, which were directed specifically at Chinese laborers. In the mid-1800s, Chinese laborers and gold prospectors entered a California economy where Native Americans and African-Americans were already seen as threats to free white labor. . . . Chinese entrepreneurs in the American West had experienced great early success in the cigarmaking and shoemaking industries, but the downturn in the Western economy in the 1870s, combined with anti-

American communities;¹³ and distrust of different cultures and languages.¹⁴ These fears were expressed by some members of the Reconstruction Congress but were not allowed to influence the requirements for citizenship.

For example, early in the debates, an opponent to birthright citizenship—Senator Edgar Cowan, often cited by modern opponents of birthright citizenship—objected to the citizenship provision by asking whether “it will not have the effect of naturalizing the children of the Chinese and Gypsies born in this country.”¹⁵ Senator Trumbull stated that it would, “undoubtedly.”¹⁶ As Trumbull stated clearly in the face of Cowan’s xenophobic remarks, “the child of an Asiatic is just as much a citizen as the child of a European.”¹⁷ Echoing Trumbull’s definitive statement, Senator Morrill asked the Congress, “As a matter of law, does anybody deny here or anywhere that the native born is a citizen, and a citizen by birth alone?”¹⁸ Morrill cited “the grand principle both of nature and nations, both of law and politics, that the native born is a citizen, and a citizen by virtue of his birth alone.”¹⁹ To erase any doubt, he went on to state that “birth by its inherent energy and force gives citizenship.”²⁰

President Johnson clearly shared this view of what Congress was attempting to achieve in the citizenship language of the Civil Rights Act—which was why he vetoed it. In his message informing Congress of his veto of the original civil rights bill, Johnson noted that the provision of the bill that “all persons born in the United States, and not subject to any foreign power...are declared to be citizens of the United States” “comprehends the Chinese of the Pacific States” and “the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood.”²¹ President Johnson understood the bill to provide that “[e]very individual of those races, born in the United States, is by the bill made a citizen of the United States.”²²

Chinese agitation from white competitors, drove the Chinese out of these businesses. The laundry business remained open to the Chinese because the whites considered it “menial and undesirable”.

¹³ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866) (statement of Sen. Van Winkle) (stating that the citizenship language is “one of the gravest subjects submitted to the people of the United States, and it involves not only the negro race, but other inferior races that are now setting on our Pacific coast, and perhaps involves a future immigration to this country of which we have no conception.”). See generally Walter Otto Weyrauch & Maureen Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* 103 YALE L.J. 323, 342 n.60 (1993) (noting that the United States adopted immigration policies in the 1880s to restrict the entrance of Gypsies).

¹⁴ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan) (arguing that, if the door to citizenship be opened to the “barbarian races of Asia and or of Africa. . . there is an end to republican government”).

¹⁵ CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866).

¹⁹ *Id.*

²⁰ *Id.* Senator Trumbull made similar statements, explaining that “birth entitles a person to citizenship, that every free-born person in this land, is, by virtue of being born here, a citizen of the United States.” CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866).

²¹ CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

²² *Id.*

B. Enactment: The Fourteenth Amendment

The Reconstruction Framers were undeterred by President Johnson's opposition. Not only did they re-enact the Civil Rights Act over the President's veto, but just two months after Johnson specifically vetoed the Act's citizenship provision, Congress ensured the permanence of birthright citizenship by incorporating it into the Fourteenth Amendment. On May 29, 1866, during Congress's debates over the Fourteenth Amendment, Senator Jacob Howard of Michigan proposed adding language that would ultimately be ratified as the Citizenship Clause. He explained that his proposed addition would declare "that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States."²³

Both opponents and supporters of the amendment shared the view that this language automatically granted citizenship to all persons born in the United States (except children of foreign ministers and invading armies).²⁴ In fact, opponents of the Fourteenth Amendment's Citizenship Clause objected to it precisely because they understood it to constitutionally protect birthright citizenship for children of aliens born on U.S. soil. For example, Senator Cowan expressed concern that the proposal would expand the number Chinese in California and Gypsies in his home state of Pennsylvania by granting birthright citizenship to their children, even (as he put it) the children of those who owe no allegiance to the United States and routinely commit "trespass" within the United States.²⁵

Supporters of Howard's proposal did not respond by taking issue with Cowan's understanding, but instead by agreeing with it and defending it as a matter of sound policy. Senator John Conness of California declared:

The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. . . . I am in favor of doing so. . . . We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of

²³ CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

²⁴ In addition, while the view was not held unanimously, the prevailing sentiment was that the Citizenship Clause did not apply to American Indians. In 1870, a Senate Judiciary Committee report on the impact of the Fourteenth Amendment on Indian tribes concluded that Indians who retained tribal status were not subject to U.S. jurisdiction within the meaning of the Amendment's citizenship provisions. S. Rep. No. 41-268 (1870). In 1884, the Supreme Court held that persons born into Indian tribes were not citizens by birth under the Fourteenth Amendment because, while the tribes were "within the territorial limits of the United States," they were "distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 99 (1884). Justice Harlan dissented, arguing that the majority's result was not what the Fourteenth Amendment had intended. *Id.* at 122 (Harlan, J., dissenting). The debate was resolved in the early 1900s, however, when, as the federal government dissolved the legal authority and independence of the Native American tribes, Congress extended citizenship to Indians. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 64 (2002).

²⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2890-91 (1866).

the United States to be entitled to civil rights and to equal protection before the law with others.²⁶

The legislative history of the Citizenship Clause demonstrates that the drafters of the Clause—and their political opponents—knew that the provision would grant automatic citizenship to persons born on U.S. soil regardless of their parents’ race, national origin, or status. Whether the members of the Reconstruction Congress understood the Citizenship Clause to be a welcomed turn toward equality—and voted for it—or a worrisome invitation to foreign migrants—and voted against it—both sides agreed on the enacted Clause’s meaning.

III. The Principles of the Fourteenth Amendment

While the text and history and of the Citizenship Clause demonstrate the intent and effectuation of the Reconstruction Framers’ desire to enshrine automatic birthright citizenship in the Constitution, the principles behind Reconstruction may be even more relevant to the current challenge to birthright citizenship.

Given the intensity of our national debate over immigration, it comes as little surprise that the special targets of the attacks on birthright citizenship are children of undocumented immigrants. Some observers contend that birthright citizenship provides a strong incentive to those outside our borders to enter the country illegally in order to give birth on U.S. soil and thereby secure automatic citizenship for their child. These undocumented aliens, the argument continues, often hope the United States will grant citizenship to them as well for the sake of the children. They argue that the Congress should pass legislation that prospectively denies citizenship to children of undocumented aliens.

At the time the Fourteenth Amendment was drafted, opinions on race and ethnicity were passionately held and forcefully debated. The *Dred Scott* decision—which was specifically overruled through the Citizenship Clause—demonstrates why the Reconstruction Framers drafted the Clause to place the class of persons eligible for citizenship beyond debate. Dissenting from the majority’s opinion that, under its view of the Constitution, “citizenship at that time was perfectly understood to be confined to the white race,”²⁷ Justice Curtis noted the potential dangers if Congress were empowered to enact at will “what free persons, born within the several States, shall or shall not be citizens of the United States.”²⁸ Curtis noted that if the Constitution did not fix limitations of discretion, Congress could “select classes of persons within the several States” who could alone be entitled to the privileges of citizenship, and, in so doing, turn the democratic republic into an oligarchy.²⁹

Even on the floor of the U.S. Senate, xenophobic and racist sentiments were freely expressed and some senators sought to have these beliefs reflected in the citizenship laws. The Framers of the Fourteenth amendment wisely rejected these attempts, and created a Constitution

²⁶ CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). See generally Ho, *supra* note 5, at 368-69 (discussing the Cowan-Conness exchange).

²⁷ 60 U.S. (19 How.) 393, 419 (1856).

²⁸ *Id.* at 577-78.

²⁹ *Id.*

that gave citizenship automatically to anyone, of any color or status, born within the United States. The provision of citizenship by birthright was constitutionalized to place the question of who should be a citizen beyond the mere consent of politicians and the sentiments of the day, and logically so.³⁰ After cataloguing the discriminatory enactments of the slaveholding states, it would have made no sense for the Reconstruction Framers to have made the citizenship of freed slaves open to easy revocation if these states regained legislative power.³¹ Indeed, Senator Hotchkiss specifically raised this fear with respect to the Fourteenth Amendment, which was originally drafted simply to allow Congress to enforce the protections of the Constitution rather than to enumerate the specific rights and guarantees it eventually embodied. He noted the possibility that “rebel states” could gain power in the Congress and strip away the rights envisioned by the Reconstruction Framers, unless these rights were “secured by a constitutional amendment that legislation cannot override.”³² The wisdom of the Reconstruction Framers in placing the conditions of citizenship above majority action was confirmed when exclusionary immigration laws were passed just after the Fourteenth Amendment was ratified. Had the racial animus of the Chinese Exclusion Laws, passed in the 1880s,³³ been incorporated into the text of the Citizenship Clause, the amendment would be a source of shame rather than an emblem of equality.

The current, inflammatory invocation of “anchor babies” by opponents to birthright citizenship further confirms the good judgment of the Framers of the Fourteenth Amendment in placing the question of citizenship beyond “consent” of the political majority at any given point in time. Indeed, claims of which immigrants were “worthier” of citizenship than others were present at the time the Citizenship Clause was enacted. In his veto message, President Johnson objected to the discrimination made between “worthy” foreigners, who must go through certain naturalization procedures because of their “foreign birth,” and conferring citizenship on “all persons of African descent, born within the extended limits of the United States” who Johnson did not feel were as prepared for the duties of a citizen.³⁴ The drafters of the Fourteenth Amendment rejected such distinctions, and instead provided us with a Constitution that guarantees equality and grants citizenship to all persons born in the United States, regardless of color, creed, or origin. The text of the Citizenship Clause grants automatic citizenship to all persons born on U.S. soil so that minority groups do not need to win a popular vote to enjoy the privileges and immunities of U.S. citizenship—they simply have to be born here.

³⁰ See 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (Thomas M. Cooley ed., 4th ed. 1873) (noting that the Fourteenth Amendment constitutionalized the conditions sufficient for citizenship because “the rights of a class of persons still suffering under a ban of prejudice could never be deemed entirely secure when at any moment it was within the power of an unfriendly majority in Congress to take them away by repealing the act which conferred them”).

³¹ See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

³² CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

³³ The first Chinese Exclusion Act, which, as the name suggests, singled out immigrants of Chinese origin, was passed in 1873. The anti-immigrant sentiment against the Chinese in the late nineteenth century is similar to the arguments made today against Latin American immigrants, both in terms of fears that the immigrant group would overtake the existing majority and perceived threats to labor (except for unwanted, menial jobs). See Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 535 (1984) (illustrating that as more Chinese arrived in the United States, resentment against them began to build).

³⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

IV. Debunking Modern Arguments Against Birthright Citizenship

Despite the strength of the argument—rooted in text, history, and long-standing Supreme Court precedent—that birthright citizenship applies to U.S.-born children regardless of the parents' immigration status, there is a growing audience for an argument that Congress may deny birthright citizenship to the children of undocumented aliens through legislation. Over the years, several bills and ballot initiatives have been proposed to accomplish exactly that.³⁵ Douglas Kmiec, a professor at Pepperdine University School of Law, and then an informal advisor to Governor Mitt Romney, reportedly concluded that there is a “better than plausible argument” that Congress may legislatively eliminate or adjust the practice of birthright citizenship.³⁶

A. The “Allegiance” Red Herring

The arguments for congressional authority to limit birthright citizenship are all reliant upon an expansive interpretation of the term “subject to the jurisdiction” of the United States. For example, some opponents of birthright citizenship dispute that the Citizenship Clause embodies the *jus soli* definition of citizenship and instead argue that it confers citizenship only to children of those who give their complete allegiance to the United States. Under this view, because citizens of foreign countries still owe “allegiance” to a foreign sovereign, children born on U.S. soil to non-U.S. citizen parents do not owe complete allegiance to the United States. This argument is misleading and based on flawed premises. To be sure, the congressional debates over the Citizenship Clause include occasional references to “allegiance,” which some commentators use to argue that the Citizenship Clause protects only the children of those who owe complete and exclusive allegiance to the United States. But, even if “allegiance” were the defining characteristic of birthright citizenship, the Reconstruction Framers understood allegiance to spring from the place of one’s birth, not the citizenship status of one’s parents. The 1866 debates show that allegiance is not inconsistent with birthright citizenship, because a person “owes allegiance to the country of his birth, and that country owes him protection.”³⁷ Similarly, one of the opinions from the *Dred Scott* decision, which was the backdrop against which the Citizenship Clause was drafted, acknowledged that “allegiance and citizenship spring from the place of birth.”³⁸

This understanding of allegiance deriving from one’s place of birth underscores the Reconstruction Framers focus on the *child* born within the United States, not the status of his parents. The text of the Citizenship Clause thus refers to “[a]ll persons born . . . within the United States” and not *all persons born of parents born within the United States*. The Reconstruction Framers expressly recognized this distinction: Senator Trumbull remarked that

³⁵ E.g., James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 TEX. REV. L. & POL. 161, 161 n.1 (2007) (citing examples).

³⁶ Teddy Davis, *Romney Weathers “Illegal Worker” Allegations*, ABC NEWS, Feb. 13, 2007, available at <http://abcnews.go.com/Politics/Story?id=2873594&page=1>.

³⁷ CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866).

³⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 586 (1856) (Curtis, J., dissenting) (explaining his belief that, because the Constitution did not provide the federal government with the power to determine which native-born inhabitants were citizens, this power was retained by the States, which could enact their own citizenship rules with regard to persons born on that State’s soil).

“the infant child of a foreigner born in this land is a citizen of the United States long before his father.”³⁹ Some even acknowledged that birthright citizenship could encourage immigration, noting that the civil rights bill was “not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.”⁴⁰

Case law from the period confirms this view. The case of *Lynch v. Clarke*, cited in the 1866 debates,⁴¹ stated that “children born here are citizens without any regard to the political condition or allegiance of their parents.”⁴² The court held that “every person born within the dominions and allegiance of the United States, *whatever were the situation of his parents*, is a natural born citizen.”⁴³ Ten years after the *Lynch* case, the then-Secretary of State Marcy wrote in a letter opinion that “every person born in the United States must be considered a citizen of the United States, notwithstanding one or both of his parents may have been alien at the time of his birth.”⁴⁴ Thus, even if the relevant measure of citizenship were “allegiance” rather than birth within the territory of the United States, birthright citizenship would still be the constitutional rule.

B. Excepting Foreign Diplomats Is Not The Same As Excepting All Foreigners

Opponents of birthright citizenship also cite a statement by Senator Howard, who introduced the language of the Citizenship Clause, that the amendment would “not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.”⁴⁵ But if Howard was intending to list several categories of excluded persons (*e.g.*, foreigners, aliens or families of diplomats) he could have said so. The language he used strongly suggests he was describing a single excluded class, limited to families of diplomats.

This interpretation of the Reconstruction Framers’ views on the classes of persons excluded from birthright citizenship is clarified by a statement made just six days prior to Senator Howard’s introduction of the Citizenship Clause. In an exchange on the Senate floor, Senator Wade acknowledged a colleague’s suggestion that some persons born on U.S. soil might not be automatically granted citizenship, stating “I know that is so in one instance, in the case of the children of foreign ministers who reside ‘near’ the United States, in the diplomatic language.”⁴⁶ He went on to explain that children of foreign ministers were exempt not because of an “allegiance” or consent reason, but because there is a legal fiction that they do not actually

³⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

⁴⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

⁴¹ CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).

⁴² 1 Sand. Ch. 583 (N.Y. Ch. 1844).

⁴³ *Id.* at 663 (emphasis added).

⁴⁴ Letter from March 1854.

⁴⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

⁴⁶ CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866).

reside on U.S. soil: “By a fiction of law such persons are not supposed to be residing here, and under that fiction of law their children would not be citizens of the United States.”⁴⁷

In light of the legislative history described above, it is highly unlikely that Senator Howard’s comment regarding foreign diplomats means what opponents to birthright citizenship claim. A single comment plucked out of context should not be used to sweep aside the overwhelming text, history, and principles that point to the opposite conclusion.

C. The Misguided “Consent” Theory

Finally, in a modification of the “allegiance” argument, some opponents of birthright citizenship contend that the phrase “subject to the jurisdiction thereof” was originally understood, and is best read, as incorporating into the Fourteenth Amendment a theory of citizenship based on mutual consent, which would exclude children of parents present in the United States illegally (because the United States has not “consented” to their presence). Not only does this consent theory require an impossibly distorted reading of the text of the Citizenship Clause, it is directly contrary to the principles of the Fourteenth Amendment. “Subject to the jurisdiction of” the United States is not the same as “subject to the consent of” the United States Congress. Rather than implying governmental consent, the term “jurisdiction” generally refers to legal authority or control, and the phrase “subject to the jurisdiction thereof” most naturally refers to anyone within the territory of a sovereign and obliged to obey that authority.⁴⁸

If the Reconstruction Framers truly intended to allow Congress to grant or withdraw its consent to citizenship for certain children born on U.S. soil, the actual wording of the Fourteenth Amendment was an exceedingly odd way of rendering it. If those who drafted and ratified the amendment wanted to leave the matter within the control and consent of the national legislature, as opponents of birthright citizenship contend, it would have been far more sensible to draft and ratify an amendment that expressly authorized Congress to establish citizenship requirements for those born on U.S. soil, rather than expressly conferring citizenship on all persons born in the United States and subject to the jurisdiction thereof. Or, if the Citizenship Clause was intended to confer citizenship according to the citizenship status or “allegiance” of a child’s parents, the Reconstruction Framers could have focused on conditions to be met by the parents, instead of specifying conditions sufficient for a child to automatically be granted citizenship. But the drafters of the Citizenship Clause were not poor wordsmiths and they chose to do none of those things. Instead, they devised a rule that is elegantly simple and intentionally fixed.

⁴⁷ *Id.*

⁴⁸ *E.g.*, WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY 1039 (1996) (defining “jurisdiction” as “the right, power, or authority to administer justice by hearing and determining controversies” and, more broadly, as “power; authority; control”). *See also Downes v. Bidwell*, 182 U.S. 244 (1901) (concluding that the phrase “subject to the jurisdiction” embraces U.S. territories); *United States v. Bevens*, 3 Wheat. 336, 386 (1818) (Marshall, C.J.) (“the jurisdiction of a State is coextensive with its territory.”); Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE WESTERN RES. L. REV. 147, 160 (2006) (suggesting “subject to the jurisdiction” refers to areas under U.S. military control, particularly in view of the condition of the southern States after the end of the Civil War).

Perhaps most importantly, the idea that the conditions of citizenship could be modified by the “consent” of Congress, as advocated by those who believe Congress may legislate away birthright citizenship for children born to undocumented immigrants, would have been anathema to the Reconstruction Framers. The Framers of the Fourteenth Amendment believed that providing citizenship to persons born in the United States without regard to race or color was a long-overdue fulfillment of the promise of inalienable freedom and liberty in the Declaration of Independence. Inalienable rights are not put to a vote, and thus the Fourteenth Amendment “conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.”⁴⁹ Rather than leaving it to the “caprice of Congress,” the framers of the Fourteenth Amendment intended to establish “a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation.”⁵⁰ The history of the Citizenship Clause demonstrates that the Reconstruction Framers constitutionalized the conditions sufficient for citizenship precisely to enshrine automatic citizenship regardless of whether native-born children were members of a disfavored minority group or a welcomed band of ancestors.

Not only do the arguments against birthright citizenship require utter disregard for the express provisions of the Constitution, they encourage us to abandon the precise reasons behind those enactments. The text, history, and principles of the Citizenship Clause make clear that we should not tinker with the genius of this constitutional design.

⁴⁹ *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).

⁵⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).