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Birthright Citizenship in the United Kingdom and the United States

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Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants

ABSTRACT

The common law concept of territorial birthright citizenship is the foundation for the Fourteenth Amendment's Citizenship Clause, which confers citizenship on those born within the United States and "subject" to its "jurisdiction." Likewise territorial underpinnings were the basis for over 375 years of birthright citizenship within the United Kingdom. Contemporary discourse with respect to territorial birthright citizenship, however, has shifted from its common law basis and now focuses on whether citizenship ought to inhere in children born to illegal immigrants. In the United Kingdom, the British Nationality Act of 1981 abandoned territorial birthright citizenship in favor of parentage based citizenship. The United States, however, while adopting the English common law concept of territorial birthright citizenship embodied in the Fourteenth Amendment to the U.S. Constitution, has never definitively articulated its position on children born to illegal immigrants.

Social and political controversy over the influx of illegal immigrants has increased activity aimed at altering the doctrine of territorial birthright citizenship. Efforts in the United States to legislatively redefine the Citizenship Clause to exclude children born to illegal immigrants from United States citizenship have failed and are probably unconstitutional should they succeed. This can be contrasted with the restriction of citizenship in those born to illegal immigrants. While the common law basis of the U.K.'s departure from territorial birthright citizenship is exemplified under "Parliamentary Supremacy," legislative alteration of the U.S. common law basis of territorial birthright citizenship may not occur by directly restricting the Fourteenth Amendment.

This Note investigates the development of territorial birthright citizenship in the United Kingdom and the United

States and critiques contemporary efforts in the United States to restrict citizenship of children born to illegal immigrants. This Note concludes that while the legislative efforts in the United States to restrict citizenship of children of illegal immigrants may be an acceptable political policy, it is unconstitutional and, therefore, other alternatives must be explored. These alternatives, premised on Congress' broad authority under the immigration and naturalization power, are traditionally reviewed deferentially by the judiciary. Thus, it would be far more efficacious and constructive for opponents of territorial birthright citizenship to concentrate their efforts at altering current immigration and border enforcement policies, rather than pursuing patently unconstitutional efforts to redefine the Citizenship Clause.

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I. INTRODUCTION

The common law concept of citizenship by birth within a sovereign's territory (territorial birthright citizenship) is vital to the Fourteenth Amendment of the U.S. Constitution, which confers citizenship on those born within the United States and "subject" to its "jurisdiction."¹ Likewise, territorial underpinnings were the basis for over 375 years of birthright citizenship within the United Kingdom.² Contemporary discourse with respect to territorial birthright citizenship, however, has shifted from its common law basis and now focuses on whether citizenship inheres in children born of illegal immigrants.³ In both the

1. The amendment, in relevant part, states "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1 (ratified 1868).

2. English law now dictates that a person is not a British citizen by birth unless "his father or mother is a British citizen; or settled in the United Kingdom." British Nationality Act, 1981, ch. 61, § 1 (Eng.) [hereinafter BNA].

3. The term "illegal immigrant" is used throughout this article to refer to a person who is neither present in the country with government permission nor a citizen. Scholars disagree as to the specific term that should be used for the aforementioned persons. See Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990's*, 30 CASE W. RES. J. INT'L L. 57, 59 n.21 (1998) (noting that the term "illegal" should not be used to define "undocumented" aliens until an INS administrative proceeding has ascertained the status to be illegal). "Immigrants" consist of all

United Kingdom and the United States, this issue continues to influence cutting-edge debate with respect to questions of nationality. Furthermore, this issue has been resolved differently in these two countries, despite a shared territorial common law basis. Principles grounding territorial birthright citizenship influence contemporary discussion of how to characterize children of illegal immigrants—that is, whether to characterize them as citizens or aliens. In the United Kingdom, the British Nationality Act of 1981 eradicated the last vestiges of territorial birthright citizenship.⁴ Increased political pressure to remedy the perceived problem of increased social service costs due to immigration ultimately led the United Kingdom to reject territorial birthright citizenship. Likewise, contemporary political pressure is forcing the U.S. Congress to address the issues of territorial birthright citizenship and illegal immigration along with the attendant costs and benefits. The United States, while adopting the English common law concept of territorial birthright citizenship in the Fourteenth Amendment to the U.S. Constitution, has never definitively articulated its position on children born of illegal immigrants. The question thus remains whether these children are citizens of the United States.⁵

Social and political controversy over the influx of illegal immigrants in the United States and the United Kingdom have increased activity aimed at altering the doctrine of territorial birthright citizenship. Most opponents of territorial birthright citizenship seek to proscribe illegal immigrants' children from becoming citizens merely by virtue of birth within a country's geographic boundaries. While efforts to legislatively redefine citizenship by birth within the United States have failed and are probably unconstitutional should they succeed, the United Kingdom abolished pure territorial birthright citizenship, thus denying citizenship to children of illegal immigrants. However,

aliens (those who are not citizens or nationals) except those falling into specific classifications (e.g., foreign diplomats and diplomatic staff, aliens having residences in foreign countries and having no intention of abandoning these residences, and transitory aliens passing through the country). See 8 U.S.C. § 1101(15) (1994). A non-citizen may be a "national" and therefore not an "immigrant" under current law. See 8 U.S.C. § 1101(3), (21) (1994) (a national is a person owing "permanent allegiance to a state").

4. BNA, § 1.

5. See Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 671 (1995) (noting the legal status of American-born children of illegal immigrants is "uncertain"); see also Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants*, 7 STAN. L. & POL'Y REV. 127, 128 (1996) (noting neither the U.S. Supreme Court nor the U.S. Constitution has answered the question whether children of illegal immigrants are citizens).

while the common law basis of the United Kingdom's departure from territorial birthright citizenship is exemplified under "Parliamentary Supremacy," legislative alteration of the U.S.' common law basis of territorial birthright citizenship may not occur by restricting the definition of citizenship in the Fourteenth Amendment. This conclusion introduces a dichotomy between United States and United Kingdom legal paradigms—"Parliamentary Supremacy" in the United Kingdom provides a constitutional basis to legislatively alter territorial birthright citizenship, while limits on Congress' enforcement power under § 5 of the Fourteenth Amendment and separation of powers doctrine reject such an outcome in the United States.

Part II of this Note will investigate the development of territorial birthright citizenship both in the United Kingdom and the United States. Part III will discuss the status of children born of illegal immigrants within these two countries. Additionally, Part III will examine and critique contemporary efforts in the United States to restrict citizenship of children born of illegal immigrants. Finally, Part IV will conclude that while the legislative efforts of the United States to restrict citizenship of children of illegal immigrants may be acceptable as a political policy, it is unconstitutional and therefore other alternatives must be explored. These alternatives, while not focused on the Fourteenth Amendment's Citizenship Clause, impute broad congressional authority under the immigration and naturalization power. The impact of these alternatives affects any person considering entering the United States.

II. CONFERRING CITIZENSHIP BY BIRTHRIGHT IN ANGLO-AMERICAN LAW

The principle of territorial birthright citizenship is the basis for citizenship law in both the United Kingdom and the United States. The U.K.'s reasons for ultimately rejecting the territorial basis of birthright citizenship in 1981 provide a useful reference point to compare against the continued adherence by the United States to territorial birthright citizenship. Additionally, because U.S. common law is rooted in English jurisprudence, analysis of the early history and development of territorial birthright citizenship in the United Kingdom is useful to provide a more complete understanding of the concept's application in the United States.

A. *The United Kingdom's Progress Toward Conferring
Birthright Citizenship Based on Lineage
of the Parent*

Under the British Nationality Act of 1981 (BNA), the U.K.'s rule of birthright citizenship changed from common law territorial birthright, whereby the place of birth determined citizenship, to one founded on the parent's citizenship.⁶ The foundation of the common law, while contrary to current British policy, establishes both the U.K.'s historical frame of reference for its ultimate rejection of the territorial birthright principle and the theoretical underpinning of the U.S. Constitution's Fourteenth Amendment Citizenship Clause.

1. Exposition of the Territorial Birthright Citizenship Principle:
Calvin's Case

Calvin v. Smith (Calvin's Case), decided in 1608, established the seminal exposition of territorial birthright citizenship.⁷ The question in *Calvin's Case* was "whether Robert Calvin . . . (being born in Scotland since the Crown of England descended to His Majesty) be an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England."⁸ Prior to Calvin's birth,⁹ the crown of England passed to Scotland's King James IV. The defendants posited that because the king held the crowns of England, Scotland, Ireland, and France, and had several distinct political capacities in several kingdoms, the ligeance¹⁰ of each separate political unit was

6. BNA, § 1.

7. 77 Eng. Rep. 377 (K.B. 1608) [hereinafter *Calvin's Case*]. This case was heard by all the justices of the King's Bench and Common Pleas, as well as the Lord Chancellor and barons of the Exchequer—14 justices in all. See Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case*, 9 YALE J.L. & HUMAN. 73, 82 (1997). All but two justices found in favor of Calvin. See *id.* While *Calvin's Case* embodies the quintessential explanation of common law territorial birthright citizenship, some historians have asserted that the concept dates back as early as 1290, in the case of Elyas de Rababyn. See *id.* at 92 n.109. (noting the rule was assumed to be that all persons born on English soil were the King's subjects). In *Elyas*, it was assumed that all persons born on English soil were the king's subjects. See *id.* (citing 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 75 (1926)).

8. See *Calvin's Case*, 77 Eng. Rep. at 379.

9. See *id.* Robert Calvin was born on November 5, in the third year of King James' reign, which began in 1603. See *id.*

10. Ligeance is "true and faithful obedience . . . to his Sovereign" due by a subject from birth. *Id.* at 382. The term ligeance, however, signifies a mutual relationship between the monarch and the subject because the monarch is obligated to maintain and defend his subjects. See Price, *supra* note 7, at 83-84

“several and divided.”¹¹ Therefore, according to the defendants, Calvin was an alien¹² to James’s crown in England, though not in Scotland, and unable to seek redress in English court for land in England.¹³

Lord Coke, writing for the court, rejected the defendants’ argument.¹⁴ He determined that persons born in Scotland subsequent to the English crown’s descent to James IV of Scotland were not aliens in England but natural born subjects.¹⁵ The characterization of Calvin as a natural born subject was quintessentially territorial:

There be regularly three incidents to a subject born. 1. That the parents be under the actual obedience¹⁶ of the King’s dominion. 2. That the place of birth be within the King’s dominion. And 3. The time of his birth . . . for he cannot be a subject born of one kingdom, albeit afterwards one kingdom descend to the king of the other.¹⁷

(analogizing the concept of ligeance to that of a master-servant or parent-child relationship). Functionally, this suggests a paternalistic theory of governance. See PETER SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT 30 (1985) (arguing that mutual consent is a component of birthright citizenship). Additionally, the common law exceptions to territorial birthright are important to the concept of ligeance because these concepts define “obedience” and impute a territorial basis to the concept of ligeance. See *Calvin’s Case*, 77 Eng. Rep. at 399; see also *infra* notes 16, 145 and accompanying text.

11. *Calvin’s Case*, 77 Eng. Rep. at 399; see also *infra* note 14.

12. An “alien” was defined in *Calvin’s Case* as a “subject that is born out of the ligeance of the King and under the ligeance of another.” 77 Eng. Rep. at 396. An alien cannot bring an action for or concerning land. See *id.*

13. See *id.*

14. The defendants argued King James had two capacities, a “natural body” as a descendent of the royal blood line, and a “politic body” identified separately with each kingdom under his dominion. *Id.* at 388-89. According to the defendants, Calvin was not a subject of King James’ realm of England because Calvin was not under the ligeance of the king’s body politic in England. See *id.* at 389. Rather, Calvin was a subject of James’ body politic in Scotland. See generally Price, *supra* note 7, at 85-86 (discussing the concept of the king’s two bodies).

15. Until the mid-twentieth century, England recognized two forms of “presence” for a person within the territory of England—either “alien” or “subject” status. See *id.* at 86. A subject owed allegiance to the monarch, whereas an alien, while not per se an enemy of the monarch was “born in a strange country.” *Id.* A “natural born subject” was, obviously, one born into the monarch’s allegiance by birth in England or in one of the territories held by the monarch. *Id.* at 87.

16. Though it may superficially appear otherwise, this component is also territorial. Actual obedience requires “actual possession” by the king of part of his kingdom. *Calvin’s Case*, 77 Eng. Rep. at 399 (“the first is termed actual obedience, because, though the King of England hath absolute right to other kingdoms or dominions . . . yet seeing the King is not in *actual possession* thereof, none born there since the Crown of England was out of *actual possession* thereof, are subjects to the King of England”) (emphasis added).

17. *Id.*

Accordingly, Coke found that Calvin fell within this model, for "Calvin was born under the King's power or protection; *ergo* he is no alien."¹⁸ Therefore, Calvin could assert a claim to inherit land within England.

Calvin's Case directs the analysis toward a territorial understanding of birthright citizenship, under both British and U.S. law.¹⁹ Historically, however, the concept of territorial birthright citizenship was practical. The rationale for territorial birthright citizenship has its basis in the feudal system of early England, where ligeance to a king or lord was a component of the feudal relationship.²⁰ The feudal system engraved into English governance the concept of *jus soli*,²¹ the formulation of a citizenship rule founded not on heredity or parentage but territorial birthright.²² Lord Coke acknowledged this basis in explaining the mutual relationship of the ligeance owed by the sovereign and the subject.²³

The common law rationale for territorial birthright citizenship embraces two corollary prohibitions limiting territorial birthright citizenship. The first prohibits children born of the Crown's enemies within the Crown's realm during time of hostility from becoming subjects; the second prohibits "issues" from foreign ministers or consuls, born in the Crown's realm, from becoming subjects.²⁴ These corollaries are components of the concept of ligeance described in *Calvin's Case*. As Lord Coke noted, "any place within the King's dominions without obedience can never produce a natural subject."²⁵ Thus, under certain circumstances, birth within the *de facto* territory of the sovereign will not lead to status as a natural born subject.

Coincidentally, Lord Coke's opinion indicates that the parent's nationality does *not* negatively impact the status of the

18. *Id.* at 407.

19. *See Price, supra* note 7, at 74 (noting *Calvin's Case* is the basis for the U.S. common law rule of territorial birthright citizenship).

20. *See id.* at 78 n.20 (quoting John W. Salmond, *Citizenship and Allegiance: Nationality in English Law*, 18 L. Q. REV. 49, 53 (1902)); *see also supra* note 10.

21. *See infra* note 67 and accompanying text.

22. *See Price, supra* note 7, at 78 n.20.

23. *Calvin's Case*, 77 Eng. Rep. 382 (noting that ligeance is akin to the connection "between lord and tenant that holdeth by homage" and the "King is called the liege lord of his subjects"). As explained *supra* in note 10, ligeance is implicitly territorial in nature.

24. *See id.* at 384 ("for if enemies should come into the realm, and possess town or fort, and have issue there, that issue is no subject of the King of England though he be born upon his soil"), 399 ("if any of the King's ambassadors in foreign nations have children . . . they are natural born subjects [of England], yet they are born out of the King's dominion").

25. *Id.* at 399; *see also* SCHUCK & SMITH, *supra* note 10, at 13 (discussing the limitation of "consent" on the ascriptive principle of territorial birthright).

“issue,” so long as the parent does not fit into one of the prohibited categories.²⁶ While the parent’s ligeance may be “momentary and uncertain,” there is sufficient obedience that a child will be a natural born subject.²⁷ This creates an opportunity for plausible subscription to the theory that children of illegal immigrants are thus citizens by fact of birth within the territory. However, Lord Coke noted that while the parent’s nationality itself may not be decisive of the child’s claim of status as a natural born subject, apparently the amity of the parent may be important.²⁸ The concept of amity has lead some scholars to question whether a child of an illegal immigrant parent can become a citizen under the general rule of territorial birthright citizenship.²⁹

Calvin’s Case stands for the proposition that, with certain limited exceptions founded on a ligeance requirement, a child born within a sovereign’s territory is a sovereign’s subject, or, in modern parlance, a citizen. This concept, which is the law followed in the United States, has been rejected in England.

2. Abdication of British Common Law Territorial Birthright Citizenship

Passage of the BNA resulted in abdication of the common law rule of territorial birthright citizenship, replacing territorial birthright citizenship with a parentage requirement.³⁰ Under the

26. See *Calvin’s Case*, 77 Eng. Rep. at 399 (finding that despite the parent’s transitory status, a child born in the realm of the sovereign has the status of natural born subject).

27. *Id.*

28. See *id.* at 384 (discussing a case where a Frenchman “in amity with the King, came to England . . . [and] he owed the King local obedience . . . [though] being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is a natural born subject”) (emphasis added).

29. See generally SCHUCK & SMITH, *supra* note 10. Schuck’s basic argument is that amity and the two traditional common law exceptions to citizenship by territorial birthright lean toward establishing a higher threshold than mere birth as a measure of whether citizenship should be conferred on children of illegal immigrants. See *id.* at 14. Schuck would utilize a consent component, whereby the sovereign’s consent or lack thereof to an immigrant would help determine the citizenship status of a child born to immigrants within a country’s territory. See *id.* at 94. Ostensibly, this would serve to exclude children born of illegal immigrants, since their presence is not consented to by the sovereign. This theory has particular difficulty describing just what consent means. This subject will be discussed in greater detail, *infra* Part III.B.1.

30. Statutory regulation largely superseded *Calvin’s Case* after 1844. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, 7 n.13 (1978). In certain contexts, however, Lord Coke’s opinion in *Calvin’s Case* was still considered authoritative. See *Isaacson v. Durant*, 17 Q.B. 54 (1886); *Attorney General v. Prince Ernest Augustus of Hanover*, App. Cas. 636 (1957). Previous

BNA, a person born within the United Kingdom is not a British citizen by birth unless the person's father or mother is either a British citizen or settled in the United Kingdom.³¹ The BNA is important for several reasons, among which is the elimination of the common law's territorial basis for birthright citizenship.³² Before addressing the BNA in detail, however, it is worthwhile to mention previous legislation and several factors motivating the BNA's passage.

The reason that the United Kingdom abdicated territorial birthright citizenship after 375 years is multifaceted. One purported reason was the increase in anti-immigrant sentiment in the United Kingdom following World War II.³³ Throughout the 1960s, 1970s, and 1980s, the United Kingdom continued to harbor protest of the immigration of many non-white immigrants.³⁴ The multiplicity of political, social, and economic factors contributing to the increase in anti-immigrant sentiment ultimately led to a series of alterations in the United Kingdom's citizenship laws.³⁵ The British Parliament passed four major

superseding statutes did not alter, to a great extent, birthright citizenship in the United Kingdom. Because this Note is concerned with contemporary issues affecting birthright citizenship, earlier statutory manifestations of citizenship are beyond the scope of this Note.

31. See BNA, § 1, cl. (1). The BNA in relevant part reads:

A person born in the United Kingdom after commencement shall be a British citizen if at the time of birth his father or mother is a British citizen; or settled in the United Kingdom.

Id.

32. Substantive changes to British law are also the result of complicated definitional distinctions that will be discussed *infra*, with respect to the terms "British citizen" and "settled."

33. See ZIG LAYTON-HENRY, THE POLITICS OF IMMIGRATION: IMMIGRATION "RACE" AND "RACE" RELATIONS IN POST-WAR BRITAIN 22-41 (1992). Layton-Henry argues there were several factors contributing to this anti-immigrant sentiment. Racism against non-white immigrants, fears of job loss to cheap labor, and a downturn in the economy all heightened the tension in Britain toward immigrants. See *id.* at 22. The end of World War II brought a large influx of immigrants to Britain, which for several years after the war offered an open door policy toward immigrants. See Kevin C. Wilson, Note, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons From Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 568 (1995). Part of the initial rationale for accepting high levels of immigration was due to post-war labor shortages and damage from the war—Britain simply needed labor to rebuild. See *id.*

34. See generally *id.* (providing analysis of social and political forces contributing to British immigration reform measures). Wilson argues the prime motivating factor with respect to alterations in British immigration and citizenship law is racism. See *id.* at 568. Significant immigration from British Commonwealth colonies, from where many non-white immigrants emigrated, was reported as a source of conflict. See *id.* at 569-70.

35. Economic factors, such as high unemployment in the post-World War II years, coupled with immigrants willing to work longer hours for less pay than

immigration laws: the Commonwealth Immigrants Act of 1962 (1962 Act), the Commonwealth Immigrants Act of 1968 (1968 Act), the Immigration Act of 1971 (1971 Act), and the BNA was passed in 1981.

The 1962 Act restricted "the immigration of all holders of Commonwealth passports except those born in the UK, those holding UK passports issued by the UK government, and those included on the passport of a person exempt from immigration control under the first two exceptions."³⁶ The government required immigrants not falling within one of these three categories to have a voucher issued by the Ministry of Labour before they were granted permission to enter the country.³⁷

Gaps in the 1962 Act precipitated passage of the 1968 Act.³⁸ The 1968 Act restricted immigration of Asians with British passports.³⁹ The 1968 Act asserted power to enforce immigration controls over any citizen of the United Kingdom or its colonies having a passport issued by the British government.⁴⁰ This regulation applied to all citizens of the United Kingdom "unless they, or at least one parent or grandparent, had been born, adopted or naturalized in the UK, or registered as a citizen of the UK or its colonies."⁴¹ Thus, under the 1968 Act, there were two

British nationals, lead to calls for immigration reform. *See id.* at 570. Politicians in the United Kingdom seized on this anti-immigrant tension and ran on anti-immigrant platforms. *See id.* at 572. For example, the Conservative Tory candidate Peter Griffiths actively campaigned under the anti-immigrant and patently racist slogan "If you want a nigger neighbor, vote Labour." *Id.* at 572 n.40. Significant anti-immigrant hostility was directed at African countries, such as Nigeria and Kenya. *Id.* at 573.

36. Commonwealth Immigrants Act, 1962, ch. 21, § 2 (Eng.).

37. *See* Wilson, *supra* note 33, at 585. Evidence suggests these restrictions did in fact reduce immigration from Asian and Caribbean Commonwealth countries. In 1964, 26,153 unskilled labor applications were processed from individuals of Indian nationality; the Department of Labour issued only 550 vouchers. *See id.* at 585 n.135 (citing COLIN HOLMES, A TOLERANT COUNTRY? IMMIGRANTS, REFUGEES, AND MINORITIES IN BRITAIN 46 (1991)). That same year, out of 19,292 Pakistani applications, only 532 were issued vouchers. *See id.*

38. The problems inherent in the 1962 Act became apparent in 1967, when a large number of Asian immigrants with British passports fled prosecution in Kenya. These Asian passport holders were not covered by the 1962 Act, and therefore were not within the 1962 Act's immigration controls. *See id.* at 586 (noting as British passport holders, these Asian immigrants were considered to be citizens of the United Kingdom under the 1962 Act).

39. *See* Commonwealth Immigrants Act, 1968, § 1 (Eng.).

40. *See id.*

41. *Id.* § 2(A). Some commentators cite this change as evidence of continued racist intentions under the guise of immigration policy. *See* Wilson, *supra* note 33, at 586; *see also* DAVID STEEL, NO ENTRY: THE BACKGROUND AND IMPLICATIONS OF THE COMMONWEALTH IMMIGRATION ACTS 137 (1969). In a February 1968 speech, conservative politician Duncan Sandys argued for tougher immigration laws, but advocated exceptions for New Zealanders and Australians because "they have got white faces." *Id.*

categories of citizens—those subject to immigration controls and those who were not.⁴²

The 1971 Act complimented the restrictions embodied in the 1962 and 1968 Acts. It established the British government's complete control over the immigration of people, without a close connection to the United Kingdom by either birth or descent, who were referred to as "non-patrials" in the 1971 Act.⁴³ Under the 1971 Act, patrials had the right to abode in the United Kingdom, whereas non-patrials did not.⁴⁴ Additionally, the 1971 Act replaced the voucher with a temporary work permit, which, unlike the voucher, did not carry the right of permanent residence.⁴⁵

The BNA further restricted Commonwealth immigration by ending the common law principle of territorial birthright citizenship, thus limiting British citizenship to those with close ties to the United Kingdom.⁴⁶ The BNA abolished the single citizenship category of "citizen of the United Kingdom and Colonies" and replaced it with three citizenship categories: British citizenship,⁴⁷ British Dependent Territories citizenship, and British Overseas citizenship.⁴⁸ Of these categories, only British citizens have the right to "abode" in the United Kingdom.⁴⁹ The definition of British citizenship is intended to comprise only those whose claim to British nationality arises from a connection with the United Kingdom, rather than from any other territory where the Crown is responsible.⁵⁰

While several methods of acquiring British citizenship are detailed in the BNA,⁵¹ its impact on territorial birthright citizenship is particularly noteworthy. In this regard, the BNA rejects the purely territorial emphasis and instead adds a parentage component to birthright citizenship.⁵² The parentage

42. See Wilson, *supra* note 33, at 587.

43. See Immigration Act, 1971, ch. 77 (Eng.).

44. See *id.* at § 2(1)(a).

45. See Wilson, *supra* note 33, at 587.

46. See *id.* at 588.

47. See *infra* note 49 and accompanying text.

48. See 4(2) LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND 3, British Nationality, Immigration and Race Relations, pt. I, para. 1(1) (4th ed., 1992).

49. See *id.* at para. 1(2). The right to abode is the right to live in the United Kingdom and to come and go without restriction. See *id.* at para. 64. While the right to abode is part of immigration and not nationality law, it has an inherent component of citizenship, as one cannot abode in the United Kingdom without British citizenship. See *id.*

50. See *id.* at para. 12.

51. British citizenship may be conferred by birth (with an additional parentage requirement), descent, or other form of naturalization under the BNA. See generally, BNA, §§ 1, 2, 3, 6, 7.

52. See *supra* note 49 and accompanying text.

component requires the "father or mother⁵³ [be] a British citizen or settled⁵⁴ in the United Kingdom."⁵⁵ This is a major policy shift from the territorial basis established in *Calvin's Case*,⁵⁶ because prior to the BNA, every person born in the United Kingdom⁵⁷ acquired British nationality.⁵⁸ The only exceptions to this rule were for the traditional common law exclusions of children born of diplomats or of enemy aliens in the Crown's enemy-occupied territory.⁵⁹

The term "settled" under this section of the BNA is defined such that a child is not a British citizen if born of a parent in violation of British immigration laws.⁶⁰ Thus, not only does the BNA fundamentally alter the traditional common law concept of birth within the territory as the basis for conferring citizenship, but it categorically excludes those in the United Kingdom who are termed "illegal immigrants."

B. U.S. Territorial Birthright Citizenship

The American method of conferring citizenship to those born within the United States is built on the foundation of English common law.⁶¹ The English common law notions of allegiance within a sovereign's jurisdiction played an integral part in the development of the English system of territorial birthright citizenship.⁶² Likewise, common law concepts traversed the Atlantic and were incorporated in the U.S. understanding of citizenship. American citizenship development can be placed into two historical categories: pre-Fourteenth Amendment and post-Fourteenth Amendment. The pre-Fourteenth Amendment period

53. A man is regarded as a father only of his legitimate children, while a woman is taken to be the mother of all children born to her. See HAILSHAM, *supra* note 48, para. 14 n.5.

54. The term "settled" requires the person reside in the United Kingdom, without being subject under British immigration laws to any restriction on the period for which the person may remain. See BNA, ch. 61, § 50(2).

55. *Id.* at § 50(1).

56. See 77 Eng. Rep. 377 (K.B. 1608).

57. Under the BNA, the United Kingdom is defined as Great Britain, Northern Ireland, the Channel Islands, and the Isle of Man. BNA, ch. 61, § 50(1).

58. See HAILSHAM, *supra* note 48, at para. 14 n.3.

59. See *id.*; see also *Calvin's Case*, 77 Eng. Rep. at 384, 399 (providing an early discussion of these exclusions).

60. See BNA, ch. 61, § 50(5).

61. See *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888) ("[t]here is no common law of the United States, in the sense of a national customary law, distinct from the common law of England."); see also Price, *supra* note 7, at 73 (contending the "roots of United States conceptions of birthright citizenship lie deep in England's medieval past").

62. See *supra* Part II.A.

can be characterized by the courts' synthesis of English common law into the citizenship jurisprudence of the United States. With ratification of the Fourteenth Amendment, the Citizenship Clause signifies a structural recognition of common law principles; thus, the effect of the Amendment is declarative, not creative.⁶³

1. The Common Law Basis of Birthright Citizenship

The resolution of *Calvin's Case*,⁶⁴ which is perhaps the most influential enunciation by an English court of the common law rule of territorial birthright citizenship, provides the basis for pre-Fourteenth Amendment judiciary interpretation of citizenship status under a territorial birthright paradigm. The importance of *Calvin's Case* was its assertion of English nationality under the common law, which was premised on the principle of "birth within the allegiance" of the king.⁶⁵ The principle included all persons born within the king's allegiance whether or not they were born of alien parents.⁶⁶ The key feature of this principle is the territorial component, for so long as one is born "within" the allegiance of the king, one is a citizen.⁶⁷ There are two common law exceptions where birth within the territory does not result in citizenship. First, where a child is born within the territory, but the child's parents are foreign ambassadors or diplomats, that child is not a citizen of the territory of birth; and second, where a child is born of alien enemies in an area of the territory under hostile occupation, that child will not be a citizen.⁶⁸

63. See *Wong Kim Ark*, 169 U.S. at 676.

64. 77 Eng. Rep. 377 (K.B. 1608).

65. *Id.* at 383 (asserting that "they that are born under the obedience, power, faith, ligealty, or ligiance of the King, are natural subjects, and no aliens").

66. See *Wong Kim Ark*, 169 U.S. at 655-56 (quoting *Calvin's Case*, 77 Eng. Rep. 377).

67. Price, *supra* note 7, at 77. The principle of acquiring citizenship by the mere fact of birth within the territory of a state is known as *jus soli*. See *id.* The other method of acquiring citizenship, *jus sanguinis*, relies on the status of at least one parent for determining citizenship. This method of citizenship has been established, both in the United States and United Kingdom, by statute. See *id.* at 78. Indeed, the concept of *jus sanguinis* is the basis of the U.S. Constitution's Naturalization Clause, which states "Congress shall have the power . . . [t]o establish an uniform Rule of Naturalization . . ." U.S. CONST. art. I, § 8, cl. 4. A discussion of Congress' naturalization power is generally beyond the scope of this Note but will be pursued to the extent it may offer an alternative to eradicating territorial birthright citizenship under the Fourteenth Amendment. See *infra* notes 207-36 and accompanying text.

68. See *Wong Kim Ark*, 169 U.S. at 656; see also *Rabang v. INS*, 35 F.3d 1449, 1457 n.5 (9th Cir. 1994) (noting the reason for these common law exceptions is that persons born under these circumstances do not owe allegiance to the sovereign nation); see also *supra* note 24.

The U.S. Supreme Court has accepted the English common law notion of territorial birthright citizenship. In *Inglis v. Sailor's Snug Harbour*,⁶⁹ the Court, while differing in its opinion on other points, unanimously agreed that both English and American courts recognized that persons born within the English colonies of North America were natural born British subjects.⁷⁰ Thus, development of the territorial birthright citizenship principle occurring prior to ratification of the Fourteenth Amendment was the product of judicial decisions.⁷¹ It was not until the Fourteenth Amendment's ratification that the common law ceased to be the only source of territorial birthright citizenship.⁷²

Court decisions prior to ratification of the Fourteenth Amendment point unambiguously to American acceptance of territorial birthright citizenship. As early as 1804, the Supreme Court assumed that all persons born in the United States were citizens of the United States.⁷³ In *The Charming Betsy*, Chief Justice Marshall stated "[w]hether a person *born within the United States* . . . can divest himself absolutely of that character otherwise than in a manner as may be prescribed by law, is a question which it is not necessary at present to decide."⁷⁴ Implicit in Justice Marshall's statement is an acknowledgment of the common law principle of *jus soli*, along with its acceptance in American jurisprudence.

Of equal import, the Court acknowledged the territorial basis for birthright citizenship regardless of the parents' status, even if the parents were aliens. U.S. courts accepted earlier English commentary that found the common law settled—regardless of whether a child's parents were English or foreign, so long as the

69. 28 U.S. 99 (1 Pet.) (1830). This case considered whether a citizen may expatriate without sanction of the state. The key question for resolution by the Court involved the ownership of land claimed by a child born of Irish parents in New York prior to 1783. See *id.* The Supreme Court, as well as at least two commentators, have noted the lack of clarity with respect to *Inglis'* holding, if there even was one. See *Wong Kim Ark*, 169 U.S. at 659 (noting the justices differed in their opinions on points *other* than citizenship); see also Price, *supra* note 7, at 138 n.347 (citing Charles Gordon, *The Citizen and the State: The Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 321-22 (1965) (noting *Inglis* "manifestly settled nothing, and the great question as to the right to expatriate was unresolved").

70. 28 U.S. at 120-21. This suggests that even prior to the ratification of the constitution, that is between July 4, 1776 and 1787, there was an understanding in the American colonies that citizenship could be secured by birth within the territory of the British crown. See *id.*

71. See Price, *supra* note 7, at 75.

72. See *id.* at 138.

73. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804); see also *Wong Kim Ark*, 169 U.S. at 658 (noting the Court in *Charming Betsy* assumed that those born in the United States were citizens).

74. 6 U.S. at 120 (emphasis added).

child was born within the "realm," and outside of the two common law exceptions, the child was a subject of the crown.⁷⁵

In *Inglis*, Justice Story expounded on the Court's recognition of territorial birthright citizenship.⁷⁶ He noted "that the children even of aliens born in a country, while the parents are there under the protection of the government, and owing temporary allegiance thereto, are subjects by birth."⁷⁷ This corollary has never been renounced by the Court and in fact has been upheld on numerous occasions.⁷⁸

Thus, prior to the Fourteenth Amendment's ratification, questions of birthright citizenship were answered by referring to the common law. After the Civil War's conclusion, new questions arose on how to incorporate previously enslaved African-Americans into the Anglo-American model of birthright citizenship. This national debate, which resulted in the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, also had an impact on the discussion of territorial birthright citizenship.⁷⁹

2. Explicit Recognition of a Territorial Paradigm for Birthright Citizenship Under the Fourteenth Amendment

The underlying theme of the Fourteenth Amendment's citizenship clause⁸⁰ is declarative, and it is not meant to substantively alter the already well-established common law citizenship doctrine.⁸¹ The Court approved this understanding in the 1898 case *Wong Kim Ark*: "as appears upon the face of the [Fourteenth] [A]mendment, as well as from the history of the times, this was not intended to impose *any new restrictions* upon citizenship . . . It is *declaratory* in form, and enabling and

75. See *Wong Kim Ark*, 169 U.S. at 657 (quoting Lord Chief Cockburn, *Cockb. Nat. 7* (1869)).

76. 28 U.S. at 164 (Story, J., dissenting).

77. *Id.*

78. See *Miller v. Albright*, 523 U.S. 420, 453, 456 (1998) (Scalia, J., concurring) (noting only Congress has the power to set requirements for citizenship by persons not born in the territory of the United States); *Plyler v. Doe*, 457 U.S. 202, 212 (1982); *Wong Kim Ark*, 169 U.S. at 657, 674; see also *United States v. Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151) (noting that "all persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together.").

79. A discussion of the Reconstruction Amendments (13-15) is beyond the scope of this Note, but will be mentioned only to the extent their passage, ratification, and implementation are important to the concept of birthright citizenship.

80. U.S. CONST. amend. XIV, § 1.

81. See *Wong Kim Ark*, 169 U.S. at 676.

extending in effect."⁸² The main purpose of the Fourteenth Amendment is to establish citizenship for free blacks, denied such in *Dred Scott v. Sandford*.⁸³ However, its scope is general, "not to say universal."⁸⁴ The only restrictions on the clause are place, "within the United States," and jurisdiction, "subject to the jurisdiction."⁸⁵

Prior to the Fourteenth Amendment, the Civil Rights Act of 1866 (CRA),⁸⁶ as originally drafted, prohibited state discrimination based on "race, color or previous condition of slavery."⁸⁷ It did not, however, mention citizenship.⁸⁸ Passage of the CRA was predicated on the Thirteenth Amendment's enforcement clause.⁸⁹ Despite this constitutional basis, there were practical flaws in tying it to the Thirteenth Amendment.⁹⁰ In an effort to save the CRA from constitutional uncertainty—or infirmity—Senator Trumbull introduced an amendment providing that "all persons of African descent born in the United States are hereby declared to be citizens of the United States."⁹¹ This amendment was incorporated in the CRA, which eventually became law.⁹² The final version declared "all persons *born in the United States*, and not subject to any foreign power, excluding Indians not taxed, are hereby . . . citizens

82. *Id.* (emphasis added).

83. 60 U.S. (19 How.) 393 (1856).

84. *Wong Kim Ark*, 169 U.S. at 676.

85. U.S. CONST. amend. XIV, §1.

86. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

87. *Id.*

88. The Act was proposed by Senator Lyman Trumbull on January 5, 1866. See Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1140 (1996).

89. See *id.* The Thirteenth Amendment was ratified December 6, 1865. In totality, the Thirteenth Amendment states, "Neither Slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII

90. See Maltz, *supra* note 88, at 1140-41. The Thirteenth Amendment grants Congress the power to eliminate slavery. U.S. CONST. amend. XIII. To do so, the authors had to conclude that the Thirteenth Amendment went beyond "mere dissolution of the master/slave relationship," such that the incidents of slavery were also sound basis for legislation. Maltz, *supra* note 88, at 1141.

91. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). This was done to tie the rights of newly freed slaves under the Thirteenth Amendment, denied citizenship under *Dred Scott*, to the Naturalization Clause. See Maltz, *supra* note 88, at 1141. The Naturalization Clause by its own text, however, only gives Congress power to implement citizenship with respect to those entering the country, not those born within the United States. See U.S. CONST. art. I, § 8, cl. 4 (Congress has the power to "establish an uniform Rule of Naturalization").

92. See Maltz, *supra* note 88, at 1141.

of the United States.⁹³ This was the first enunciation by Congress of a definition for citizenship.⁹⁴

Despite the CRA's enunciation of a statutory citizenship definition, there was anxiety that as a mere legislative enactment, the rights secured under it were fragile and subject to the whim of congressional repeal.⁹⁵ Thus, the introduction, passage, and ratification of the Fourteenth Amendment was partly a response to concerns that the CRA was only marginally protective of the rights it secured. While both the CRA and Fourteenth Amendment defined citizenship, the Fourteenth Amendment's treatment of citizens is notable because the Amendment confers greater constitutional protection to citizens than it does to non-citizens.⁹⁶

For example, the constitutional pronouncement that states shall not abridge privileges and immunities of the other states is secured only for citizens, thus exempting individuals who fall outside the constitutional definition of citizenship.⁹⁷ Comparatively, states cannot deprive a person, ostensibly including non-citizens, of life, liberty, and property without due process of law.⁹⁸ Nor may states deny any person in their territories the equal protection of the laws.⁹⁹ This analysis leads to the conclusion that citizens are guaranteed a broader class of rights than other residents.¹⁰⁰ While courts struggle to define the scope of privileges and immunities, there is a strong textual argument that privileges and immunities have some impact on the incidents of citizenship as defined in the Fourteenth Amendment.¹⁰¹ Thus, whether a person is a citizen is important because the imprimatur of citizenship bestows a greater quantum of constitutional protection under the Fourteenth

93. Act of April 9, 1866, ch. 31, § 1 (14 Stat. 27) (emphasis added).

94. Arguably this is not much of a definition, given its ambiguity. However, if one keeps in mind the development of common law in the United States with respect to territorial citizenship, the definition of citizenship in the CRA becomes noticeably clearer.

95. See *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898); see also CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 3 (1997) (noting that several authors of the Fourteenth Amendment believed repeal of the Civil Rights Act of 1866 was an actual concern, additionally there was a need to legislatively repudiate the Supreme Court decision in *Dred Scott*).

96. See Maltz, *supra* note 88, at 1143-44 (discussing the function of equal protection and due process in the Fourteenth Amendment and their application to citizens and non-citizens).

97. See U.S. CONST. amend. XIV, § 1.

98. See *id.*

99. See Maltz, *supra* note 88, at 1144 (quoting Senator Howard for the proposition that even non-citizens are afforded the right to equal protection of the laws); see also *infra* notes 238-41 and accompanying text.

100. See Maltz, *supra* note 88, at 1144.

101. See *id.*

Amendment than is granted to non-citizens. Therefore, a detailed analysis of the Fourteenth Amendment's Citizenship Clause is needed to define who are citizens, and specifically, whether children born to illegal immigrants fall under the clause's definition of citizenship.

The Fourteenth Amendment contemplates birthright citizenship limited by two concepts: place and jurisdiction.¹⁰² These two limits evidence infusion of the common law's territorial principles, and the Court has acknowledged this.¹⁰³ Indeed, the Fourteenth Amendment postulates citizenship by birth premised only upon the territorial birth "[with]in the United States" and "subject[ion] to" the jurisdiction of the United States.¹⁰⁴ If fulfilled, these two components "concur to create citizenship."¹⁰⁵

The place component of the Fourteenth Amendment—"in the United States"—has a fairly formalistic meaning. Only birth within one of the union's states will render one a citizen.¹⁰⁶ This was the rule explained in *Rabang v. INS*, in which the U.S. Court of Appeals for the Ninth Circuit held that birth in the Philippines during its period as a U.S. territory did not constitute birth within "the United States."¹⁰⁷ Relying on the previous limitation of the Revenue Clause's¹⁰⁸ term "the United States" in the *Insular Cases*,¹⁰⁹ the court similarly limited the phrase "in the United States" in the Fourteenth Amendment's Citizenship Clause.¹¹⁰

102. See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898).

103. See *id.* at 687 (discussing the jurisdiction requirement); see generally *Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1994) (discussing what "in the United States" means).

104. U.S. CONST. amend. XIV, § 1.

105. *Wong Kim Ark*, 169 U.S. at 659 (quoting *Inglis v. Sailor's Snug Harbor*, 28 U.S. 99 (1830) (Story, J., dissenting)).

106. See *Rabang*, 35 F.3d at 1452.

107. *Id.*

108. U.S. CONST. art. 1, § 8, cl. 1.

109. See *DeLima v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901). The holdings of the *Insular Cases* were reaffirmed by the Supreme Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990) (noting that not "every constitutional provision applies wherever the United States government exercises its power."). There is however, strong disagreement about the dicta in the *Insular Cases* with respect to its mention of citizenship. See Drimmer, *supra* note 5, at 704 n.12 (citing the dissent of Justice Marshall in *Harris v. Rosario*, 466 U.S. 651, 653 (1980) ("the present validity of the [*Insular Cases*] is questionable") (Marshall, J., dissenting)). Despite this, the Court has not overruled the holding of the *Insular Cases* and the attendant expansive power of Congress in the area of immigration policy. See *Verdugo-Urquidez*, 494 U.S. at 268-69.

110. See *Rabang*, 35 F.3d at 1452. The Court in *Downes* compared the Revenue Clause with both the Thirteenth and Fourteenth Amendments. 182 U.S. 244, 251 (1901). The Court noted the Fourteenth Amendment has "a limitation to persons born . . . in the United States which is not extended to persons born in any place 'subject to their jurisdiction'." *Id.* (emphasis added).

The court in *Rabang* imported the analysis of the *Insular Cases*, concluding that the Citizenship Clause expressly identifies a territorial limitation that precludes extension of birthright citizenship in every place where the United States maintains sovereignty.¹¹¹ Thus, "the United States" does not include all the territory under the political jurisdiction of the United States government.¹¹²

In addition to birth within the United States, the birth must be "subject to the jurisdiction" of the United States.¹¹³ In this regard, the case of *United States v. Wong Kim Ark* is illustrative of the Fourteenth Amendment's jurisdictional component.¹¹⁴ Born in San Francisco to Chinese immigrant parents,¹¹⁵ Wong Kim Ark was refused permission to reenter the United States after a temporary visit to China.¹¹⁶ This decision was made solely on the assertion that he was not a U.S. citizen.¹¹⁷ The United States argued Wong Kim Ark was not a citizen because "the mother and father . . . being Chinese persons, and subjects of the emperor of China" transferred their status as "Chinese subjects" to their son.¹¹⁸ The Court rejected this argument and, basing its decision on the Fourteenth Amendment Citizenship Clause, held Wong Kim Ark to be a citizen by virtue of his birth in the United States.¹¹⁹

In rejecting the government's argument that descent should be considered, the Court reasoned from the Citizenship Clause's "subject to the jurisdiction" component.¹²⁰ The Court focused on common law exceptions to jurisdiction first enunciated in *Calvin's Case* and noted Wong Kim Ark's parents did not fall within either common law exception.¹²¹ The Court determined that a parent's citizenship, where the parent was lawfully admitted into the

111. See *Rabang*, 35 F.3d at 1453.

112. See *id.* This does not mean U.S. citizenship is elusive of those residing in U.S. territories. Congress can confer citizenship under its constitutionally delegated naturalization power. U.S. CONST. art. I, § 8, cl. 4.

113. U.S. CONST. amend XIV, § 1.

114. 169 U.S. 649 (1898).

115. See *id.* Wong Kim Ark's parents were still "subject to the emperor of China," and, therefore, the government asserted that Ark's presence was unlawful. *Id.* at 650.

116. See *id.* at 653.

117. See *id.*

118. *Id.* at 650. Additional allegations related to the denial of Wong Kim Ark's reentry under the Chinese Exclusion Acts. See *id.* The Court rejected these assertions because determination of his citizenship by birth necessarily made the U.S. arguments under the Exclusion Acts moot. See *id.* at 704.

119. See *id.*

120. See *id.* at 663 (noting that analysis of the common law leads to the conclusion that "subject to the jurisdiction" applies to all persons born "within the territory" of the country).

121. See *supra* note 24 and accompanying text.

United States, was not determinative so long as the child's birth was in the United States and subject to its jurisdiction.¹²² Thus, *Wong Kim Ark* holds that children born in the United States "of resident aliens," with the exception of common law exclusions, come within the Fourteenth Amendment's affirmation of the "ancient and fundamental rule of citizenship by birth within the territory."¹²³

The parent's immigration status was not a bar to the child's citizenship status in *Wong Kim Ark*.¹²⁴ Left unanswered, however, is the question of whether this rule applies in circumstances in which the parents are not lawful residents of the United States. It is on this nominally unanswered question that opponents of birthright citizenship base their conclusion that children of illegal immigrants are not U.S. citizens. A perfunctory reading of *Wong Kim Ark*, however, indicates a parent's status is immaterial: the Court only lists the common law exceptions, "as old as the rule itself," as basis for denying citizenship to children born in the United States territory.¹²⁵ Under modern analysis, where substantial importance is placed on the legal status of the immigrant, it is unclear whether the formulation in *Wong Kim Ark* is applicable to children born of illegal immigrants. What is clear, however, is that the common law is the basis of territorial birthright citizenship in the United States under the Fourteenth Amendment.¹²⁶

C. *The Role of the Common Law in the English and American Systems*

The common law basis of territorial birthright citizenship is necessary to understand the contemporary issues associated with

122. *Wong Kim Ark*, 169 U.S. at 694. The court noted:

To hold that the Fourteenth Amendment . . . excludes from citizenship the children born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

Id. This passage, while elucidating the point that constitutional birthright citizenship is not determined by one's parents citizenship status, also points to a subtle racism indicating a "we could be next" concern.

123. *Id.* at 692.

124. *See id.* at 694.

125. *Id.* at 692; *supra* note 24 and accompanying text for discussion of common law exceptions to birth within the sovereign's jurisdiction.

126. *Wong Kim Ark*, 169 U.S. at 654 (where the Court noted "[t]he constitution nowhere defines the meaning of these words [the Fourteenth Amendment's Citizenship Clause] . . . it must be interpreted in the light of the common law . . .").

conferring citizenship on children born of illegal immigrants. The common law, however, functions in significantly different ways in the United Kingdom and the United States.

The United Kingdom's abandonment of pure territorial birthright citizenship and establishment of a parentage based citizenship requirement for British citizenship is itself a part of the dynamism characterizing U.K. common law.¹²⁷ Without a written constitution, the U.K. confluence of history, legislation, and court decisions form a true "living constitution" in the sense that the constitution itself evolves with each piece of legislation passing out of Parliament. Contrary to the design of America's constitutional republic, U.K. courts do not have authority to strike down legislation.¹²⁸ Thus, "Parliamentary Supremacy" denotes the power of the legislature in the United Kingdom to procure laws that fundamentally alter the national constitution,¹²⁹ an example of which is the BNA.

Under the rubric of a written constitution, the common law functions differently in the United States. The U.S. Supreme Court is the sole interpreter of the U.S. Constitution,¹³⁰ and the written Constitution places restrictions on the substance of legislation procured by Congress.¹³¹ Because the terms in the Fourteenth Amendment's Citizenship Clause are not explicitly clear,¹³² the Court has turned to common law principles and history.¹³³ Thus, in American jurisprudence, the common law serves the function of explaining written text in the Constitution.

Once again the question is asked—are children born in the United States of illegal immigrants citizens? Part of this modern dilemma focuses on the contemporary utility of the common law concept of territorial birthright and whether it is still cardinal to the Anglo-American model of birthright citizenship. The answer to this question and the modern utility of common law concepts

127. See BNA, ch. 61; see also *supra* Part II.A.2.

128. See Wilson, *supra* note 33, at 590; see also 4 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 186 (1937).

129. See HOLDSWORTH, *supra* note 128, at 186.

130. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1804) (establishing the concept of judicial review of acts of Congress to determine whether they comport to the constitution); see also *Cooper v. Aaron*, 358 U.S. 29 (1958) (formalizing the Supreme Court as the ultimate arbiter of constitutional questions).

131. See U.S. CONST. art. VI, § 2 ("[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land") (emphasis added); see also *United States v. Lopez*, 514 U.S. 549, 552 (1995) (holding that Congress exceeded its Constitutional grant of authority under the Commerce Clause when it passed the Gun-Free School Zones Act of 1990, and noting that the "Constitution creates a Federal Government of enumerated powers").

132. See *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).

133. See *id.*

have led states, politicians, and Congress to offer solutions spanning from cutting off aid to illegal immigrants and their children to legislative efforts to define the Citizenship Clause.¹³⁴ The answer to this question, however, is a constitutional one. And as a constitutional question, the answer lies with the Supreme Court.¹³⁵

III. THE MODERN DILEMMA: THE STATUS OF CHILDREN BORN OF ILLEGAL IMMIGRANTS WITHIN A COUNTRY'S TERRITORIAL JURISDICTION

While the citizenship status of children born of illegal immigrants in the United Kingdom is settled,¹³⁶ their status is by no means clearly defined in the United States.¹³⁷ This is because the specific issue has never been answered by the Supreme Court. Furthermore, the Court's omission has politicized the issue such that contemporary debate now focuses on political solutions to what is essentially a constitutional dilemma. The constitutional dilemma of whether children of illegal immigrants fall within the Fourteenth Amendment's definition of "citizen" does not mean, however, that political solutions to stem the flow of illegal immigration and the ancillary effects on children of illegal immigrants are per se unlawful, though they very well may be misguided as matters of public policy.

134. A discussion of alternatives and moves to restrict citizenship will be discussed *infra* Part III.B.3. Court-recognized congressional naturalization and immigration power is subject to limited review by the judiciary because exercise of this power is essentially a political question and implicates foreign policy powers. See *Miller v. Albright*, 523 U.S. 420, 434-35 (1998) (affirming that the Court has been traditionally deferential to the legislature and executive in the area of immigration policy); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (finding a "long recognized power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."). Thus, a better solution to the problem may be a more vigorous enforcement of Congress' expansive power under the Naturalization clause and immigration authority. This solution will be discussed in detail *infra* notes 207-36 and accompanying text.

135. Congress has no authority to define a provision of the constitution. See *Marbury*, 5 U.S. at 177 (noting that it is "the province and duty of the judicial department to say what the law is").

136. See BNA, ch. 61.

137. See Drimmer, *supra* note 5, at 671 (noting the legal status of American-born children of illegal immigrants is "uncertain").

A. U.K. Law Does Not Recognize Children of Illegal
Immigrants as Citizens

Legislation is part-and-parcel of the United Kingdom's common law. The theory of Parliamentary Supremacy dictates that the legislature is the primary institution to alter the U.K. constitution.¹³⁸ Thus, under the BNA, the settled rule is that children born of illegal immigrants are not British citizens.¹³⁹ The one major exception to this general rule is carved out for newborn infants "found abandoned in the United Kingdom."¹⁴⁰ In such circumstances, the presumption is that the child is a British citizen.¹⁴¹ The inclusion of abandoned children is a prudent one and corresponds to international goals to eradicate "statelessness,"¹⁴² whereby an individual is denied "the essential benefits of nationality to a State."¹⁴³

By altering common law territorial birthright citizenship, the United Kingdom made a policy decision defining British citizenship based on the child's bond to the United Kingdom as evidenced by the citizenship status of their parent.¹⁴⁴ The alteration of 375 years of common law signified a departure from the importance of the territorial component, as expounded by Coke in *Calvin's Case*, and an acceptance of the mutual bond theory that is the basis of Lockean consent theory.¹⁴⁵ The birth

138. See HOLDSWORTH, *supra* note 128, at 186-87.

139. See BNA, ch. 61, § 1(1).

140. *Id.* at § 1(2).

141. See *id.* (the abandoned child is "deemed . . . to have been born in the United Kingdom . . . and to have been born to a parent who at the time of birth was a British citizen or settled in the United Kingdom").

142. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 315 (1950) (discussing the International Bill of the Rights of Man, which states that "[e]very person shall be entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent"); see also Michael Gunlicks, *Citizenship as a Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States*, 63 GEO. WASH. L. REV. 551, 579-80 (1995) (analyzing the concept under U.S. law and noting that in international law there is a customary presumption against statelessness, reinforced in a number of treaties, to which the United States is not a party).

143. But see Satvinder S. Juss, *Nationality Law, Sovereignty, and the Doctrines of Exclusive Domestic Jurisdictions*, 9 FLA. J. INT'L L. 219, 228 (1994). Juss argues, however, the British Act as a whole is contrary to this principle because it has the effect of encouraging statelessness. See *id.* Thus, the British Act is contrary to the manifestation of subject status enunciated in *Calvin's Case* where Lord Coke asserted that a parent's status was irrelevant to the status of the child. See *supra* notes 27-28 and accompanying text.

144. See Wilson, *supra* note 33, at 586-88.

145. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1988). Lockean consent theory is premised on the assertion that individuals are not naturally subject to a sovereign. See Drimmer, *supra* note 5, at 674. Rather,

of a child within the territorial limits of the United Kingdom is not the sole factor to determine British citizenship because consent of the sovereign (or ligenance) is not established, that is, a child's parentage under the British Act is not established. Therefore, consent of the sovereign is absent, as evidenced in the express language in the BNA, which posits consent of the sovereign in terms of whether one of the children's parents is a British citizen.

B. *U.S. Law Recognizes the Citizenship of Children
Born of Illegal Immigrants*

Based on the plain text of the Fourteenth Amendment, the status of children born to illegal immigrants appears settled in favor of conferring citizenship on these children, particularly if common law precepts are acknowledged as the basis for the Amendment's phrasing. Some uncertainty remains, however, because the Supreme Court has never clarified the status of these children born to illegal immigrants.¹⁴⁶ Contemporary debate, therefore, focuses on whether the parent's status determines the child's citizenship status.

1. Caselaw, While Not Conclusive, Leans Toward Recognizing
Citizenship in Children Born to Illegal Immigrants

Opponents contend that conferring citizenship on children born to illegal immigrants is unconstitutional because their parents' illegal status renders these children outside the constitutional mandate requiring birthright citizens to be "subject to the [United States'] jurisdiction."¹⁴⁷ Therefore, such children

individuals consent to be governed and subordinate their natural freedom for protection by organized government. See LOCKE, *supra*, at § 129. Locke solved the problem of birth into an organized society by presenting the theory of "tacit consent," whereby consent was implied so long as the individual remained under the government's protection. See *id.* at § 118. Nevertheless, Locke did not believe that children could consent to the government under which they were born. See *id.* Consent did not manifest until adulthood, where a volitional choice could be made. See *id.*

146. See Drimmer, *supra* note 5, at 671; see also Stein & Bauer, *supra* note 5, at 128 (noting neither the Court nor the Constitution have answered the question of whether children of illegal immigrants are citizens).

147. See generally SCHUCK & SMITH, *supra* note 10. Schuck's basic premise is that the common law theory of *jus soli*, first enunciated in *Calvin's Case* and implanted in the Fourteenth Amendment's Citizenship Clause, has been mischaracterized. Schuck asserts that in addition to a territorial component, there is a strong elucidation of a consensual principle of citizenship in the common law derivation of *jus soli*. See *id.* at 13-15. The principle of consent requires both the allegiance of the sovereign to the subject and the allegiance of the subject to the sovereign. See *id.* at 15-16 (quoting *Calvin's Case*, 77 Eng. Rep. 377, 390 (K.B. 1604) ("When born he owes birthright allegiance and obedience to

are not citizens by birth because the requisite consent of the United States is absent.¹⁴⁸ Opponents' arguments have some force because the Court in *Wong Kim Ark*¹⁴⁹ did not identify how jurisdiction manifests itself with respect to non-resident alien parents. The Court apparently accepted the argument made originally in *Calvin's Case*—jurisdiction is exclusive and mutual between the government and the "subject."¹⁵⁰ The application of this principle in contemporary American jurisprudence, where the child's parents are in the country unlawfully, was never posed to the Court in *Wong Kim Ark*.

If this important component of whether the parent is lawfully admitted into the United States is missing in *Wong Kim Ark*'s analysis, as it appears to be, it begs the question: Is a parent's alien status, legal or illegal, a factor as to whether citizenship can inhere in a *child* born in the United States of such parents?¹⁵¹

A preliminary and arguably convincing answer to this conundrum is that a parent's status does not proscribe a child, born under sanction of the two components of the Citizenship Clause, from obtaining birthright citizenship.¹⁵² However, dicta in *Wong Kim Ark* suggests a requisite affirmative "permission" by the U.S. government in order to afford aliens protection and

his sovereign"). *But see Calvin's Case*, 77 Eng. Rep. at 399 (positing that "any place within the King's dominions may make a subject born, but any place within the King's dominion without obedience can never produce a natural subject" [obedience refers to common law exceptions to "birth within the jurisdiction"—children of foreign diplomats and children of foreign enemies born during a time of hostility]). Schuck places too much emphasis on the concept of consent. For instance, while the court in *Calvin's Case* did acknowledge a consent factor, it was premised on the principle of obedience, which was found to be manifest once a person entered the realm of the Crown and became subject to its laws. *Id.* at 384 (finding temporary obedience of the parent is sufficient to make a natural born subject of a child).

148. See discussion *supra* note 145. Lockean consent theory underpins Schuck's argument rejecting citizenship in children of illegal immigrants. See SCHUCK & SMITH, *supra* note 10, at 73, 76 (noting that the Founders were adherents to Lockean consent theory and individual rights, not feudal notions of property and citizenship).

149. 169 U.S. 649 (1898).

150. See *id.* at 694; see also *supra* notes 10, 23 and accompanying text.

151. Schuck argues the parents provisionally stand in the shoes of their children, such that their illegal presence is transferred to the child. See SCHUCK & SMITH, *supra* note 10, at 94-96. This theory is legally unsound in light of *Plyler v. Doe*, 457 U.S. 202 (1981) (arguing that undocumented children are not culpable for their parents bringing them into the United States). Additionally, Schuck's theory is in contravention to the "corruption of blood" principle, discussed *infra* at note 158.

152. See Gunlicks, *supra* note 142, at 572 (noting "little or no reason exists, however, to doubt the allegiance of the children when such an inquiry appears based solely on the questioned allegiance of the children's parents").

allegiance to the United States.¹⁵³ This theme finds support in an earlier case, *Elk v. Wilkins*.¹⁵⁴ There the Court found that the phrase "subject to the jurisdiction" did not mean mere subjection "in some respect or degree to the jurisdiction of the United States, but *completely* subject to their *political* jurisdiction, and owing them direct and immediate allegiance."¹⁵⁵ Those seeking to deny birthright citizenship to children born to illegal immigrants couch their position in the conjunctive nature of the Citizenship Clause, which requires both birth in the United States and subjection to its jurisdiction. While the child may be born in the United States, the child, under the opponents' theory, is not subject to the jurisdiction because his parent is not under the allegiance, or consent in modern parlance, of the U.S. government.¹⁵⁶

Despite this intellectual ammunition, those seeking to deny citizenship to children born in the United States of illegal immigrants are countered by several arguments. First, children born in the United States of illegal immigrants are morally blameless for the illegal actions of their parents and therefore should not be punished for their parents' actions.¹⁵⁷ This

153. 169 U.S. at 694. The Court suggested that non-citizens are entitled to protection from and owe corresponding allegiance to the United States "so long as they are permitted by the United States to reside there." *Id.*

154. 112 U.S. 94, 102 (1844).

155. *Id.* (emphasis added). The question presented in *Elk v. Wilkins* was whether "an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States . . . a citizen of the United States . . ." *Id.* at 99. This suggests something more than mere territorial jurisdiction is necessary to confer citizenship. See Gunlicks, *supra* note 142, at 568-70. *Wilkins* is the only post-Fourteenth Amendment case denying citizenship because of a deficiency of allegiance. See *id.* at 569-70. The opinion, however, itself acknowledges the unique nature of Native Americans in the United States. See *Wilkins*, 112 U.S. at 102; see also *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898) (distinguishing *Wilkins* in that it "only concerned members of the Indian tribes . . . and had no tendency to deny citizenship to children born in the United States of foreign parents"). The Fourteenth Amendment also recognizes this unique nature and mandates that Native Americans are not counted for the purpose of congressional apportionment. See U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed"); see also *Wong Kim Ark*, 169 U.S. at 680.

156. This is conceptually specious because the Citizenship Clause, while having two conjunctive requirements, holistically is premised on territorial requirements. The nature of the common law basis of birth within the "legiance" of the sovereign is essentially territorial, with the longstanding exceptions for those born of foreign diplomats and those born to hostile foreign occupying forces. See *supra* notes 10, 24 and accompanying text.

157. This theory has been termed the "corruption of blood" principle. See Robert J. Schulman, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 704-09 (1995). The corruption of blood principle has its origins in Anglo-Saxon jurisprudence. See *id.* (citing Max Stier, Note, *Corruption of Blood and Equal Protection: Why the*

articulation, known as the corruption of blood principle, has been made time and again by the Supreme Court.¹⁵⁸ In the context of illegal immigration, the Court, in *Plyler v. Doe*, accepted this principle as a component of its rationale, holding unconstitutional a Texas law prohibiting the use of state education funds for children who were not lawfully admitted into the United States.¹⁵⁹ Because "children can have little control," if any, over their parent's illegal entrance into the United States, it is "difficult to conceive of a rational justification for penalizing these children for their presence within the United States."¹⁶⁰ In *Plyler*, the corruption of blood principle was applied to children born outside the United States and unlawfully present in the United States. Corruption of blood has even more forceful meaning, however, when applied to children born within the United States to illegal immigrant parents. Even if one accepts the consent theory of jurisdiction,¹⁶¹ it would be contrary to the

Sins of the Parents Should Not Matter, 44 STAN. L. REV. 727, 729-30 (1992)). The concept finds explicit recognition in the following clause of the U.S. Constitution: "The Congress shall have the Power to declare the Punishment of Treason, but not Attainder of Treason shall work Corruption of Blood . . . except during the Life of the person Attained." U.S. CONST. art. III, § 3, cl. 2; see also *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (noting "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him . . .") (Jackson, J. dissenting).

158. See *Trimble v. Gordon*, 430 U.S. 762, 770 (1977) ("[P]arents have the ability to conform their conduct to societal norms" but children can "affect neither their parents' conduct nor their own status"); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("[Visiting] . . . condemnation on the head of an infant is illogical and unjust . . . Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent"). Additionally, Lord Coke's opinion in *Calvin's Case* lends credibility to the corruption of blood principle as it applies to territorial birthright citizenship. Coke found the parent's status irrelevant to securing a child's status as a natural born subject, limited by common law exceptions, of course. See *Calvin's Case*, 77 Eng. Rep. 377, 384 (K.B. 1608). While *Calvin's Case* rested on territorial principles, and not corruption of blood, the concepts certainly compliment each other where the child is brought into a country through no fault of his own.

159. 457 U.S. 202, 219-220 (1981). The Court's primary rationale was based in the Fourteenth Amendment's Due Process Clause. See *id.* at 230. The Court analyzed the illegal immigrant children's claim under an intermediate level of scrutiny, finding the state's interest in stopping illegal immigration was not substantial and additionally was preempted by plenary federal power over immigration policy. See *id.*

160. *Id.* at 220.

161. There is no binding authority requiring a court to accept the consent theory as a method to restrict a child born of illegal immigrant parents from becoming a citizen at the time of birth. At most, the consent theory offered by opponents of territorial birthright citizenship is a basis to reinterpret the Citizenship Clause.

corruption of blood principle¹⁶² for absence of U.S. consent in the parent's presence to transfer to the child.

Second, the Supreme Court has not found consent, at least in the formal sense of permission, dispositive with respect to whether one is subject to the jurisdiction under the Citizenship Clause. The consent inference, drawn from sparse wording in *Wong Kim Ark*,¹⁶³ and advocated by opponents of conferring birthright citizenship to children born to illegal immigrants, misconstrues the Court's long-held position of imputing common law elements into citizenship law.¹⁶⁴ Thus, consent theorists lose sight of the forest but for the trees by failing to account for the distinct primacy of the territorial component inherent in the "subject to the jurisdiction" phrase's meaning.¹⁶⁵ Furthermore, the U.S. rule of territorial birthright citizenship is fortified by *Calvin's Case*, which expounded the territorial nature of ligeance and manifests consent broadly,¹⁶⁶ limited only by the common law exceptions for children born of diplomats and children born of hostile occupying forces.¹⁶⁷ Despite the status of the immigrant

162. Unlike the consent theory, the corruption of blood principle has been accepted, time and again, by the Supreme Court. See *supra* notes 157-59 and accompanying text. If the circumstances warrant, it is possible the corruption of blood principle could be invoked to reject Congressional attempts to strip citizenship in children born of illegal immigrants solely based on their parents' wrongdoing.

163. *United States v. Wong Kim Ark*, 169 U.S. 649, 692 (1898).

164. See *id.* at 655. (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888) ("There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England")); see Price, *supra* note 7, at 73.

165. See *id.* at 657 (quoting Lord Chief Justice Cockburn that "[b]y common law of England, every person born within the dominions of the crown, no matter whether of English or foreign parents, and, in the later case, whether . . . settled, or merely temporarily sojourning . . . was an English subject" with the exception of children born of foreign ambassadors or children born of occupying hostile forces); see also *id.* at 682 (noting the real object of the Fourteenth Amendment's Citizenship Clause was to "exclude, by the fewest and fittest words . . . the two classes of cases . . . shown, by the laws of England, and by our own law" as recognized exceptions).

166. The jurisdiction of the United States within its own territory is absolute. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (noting "[i]t is an accepted maxim of international law that every sovereign nation has the power . . . to forbid the entrance of foreigners within its dominions"); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Ligeance subsists at birth for "as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign." *Calvin's Case*, 77 Eng. Rep. 377, 382 (K.B. 1608). This mutual nature of the ligeance—from where critics such as Schuck glean an essence of consent, in addition to Lockean theory—is quite ascriptive: ligeance "is the mutual bond and obligation between the King and his subjects . . . they are bound to obey and serve him; and . . . he should maintain and defend them." *Id.* (emphasis added).

167. See *id.* at 384.

parents, jurisdiction over the child is not absent so long as he is present within the territorial definition of the United States.¹⁶⁸

2. Constitutional Ambiguities Perpetuate Confusion as to Whether Children Born in the United States of Illegal Immigrants Are Citizens

Caselaw does not require formal consent by the United States to the parent's presence in order for children of illegal immigrants to be recognized as citizens. Neither, however, does the caselaw definitively state the converse proposition—that these children are, in fact, citizens. Common law precepts, though, militate toward this conclusion. An essential part of understanding the contemporary controversy is recognition that the Constitution does not definitively answer the question, it remains ambiguous. Proper analysis, though, leads to the conclusion that while the Court has been silent on the precise issue of children born to illegal immigrants, the principles enunciated profess solid application to the circumstances of these children.

Deriving the Framers' intent as to whether children, born in the United States to illegal immigrants, are included under the Citizenship Clause fails to elucidate the constitutional ambiguity. Opponents of conferring citizenship onto children born to illegal immigrants point to the Fourteenth Amendment's original purpose—repudiating *Dred Scott* and conferring citizenship to newly enfranchised blacks—as evidence for rejecting the constitutionality of granting citizenship to children of illegal immigrants.¹⁶⁹ Additionally, opponents argue that the Framers of the Fourteenth Amendment never anticipated the flow of illegal

168. Nor is jurisdiction absent over illegal immigrant parents, who are subject to the laws of the United States and the state where they are present. See *Plyler*, 457 U.S. at 215 (noting “a person's initial entry into . . . the United States, [even if] unlawful . . . cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws”); see also *Wong Kim Ark*, 169 U.S. at 685-86 (citing *The Schooner Exchange*, 11 U.S. at 144 (noting “When private individuals of one nation spread themselves through another as business or caprice may direct . . . it would be . . . dangerous to society . . . if such individuals or merchants . . . were not amenable to the jurisdiction of the country”)).

169. See *Wong Kim Ark*, 169 U.S. at 675; see also ANTIEAU, *supra* note 95, at 3. Opponents' argument proceeds as follows: the original purpose of the Citizenship Clause was to bestow citizenship on recently freed black slaves, an ostensibly narrow mission. Therefore, to expand the Citizenship Clause's meaning to include children born to illegal immigrants stretches the clause's meaning far beyond its original purpose.

immigrants, nor did they anticipate the problem of citizenship by children born to illegal immigrants in the United States.¹⁷⁰

Proponents of conferring citizenship, on the other hand, point out that the Framers' failure to foresee such a set of circumstances should not be used to justify a "restrictive interpretation of the Fourteenth Amendment."¹⁷¹ Furthermore, the Framers chose not to confine the Citizenship Clause by adding more restrictive language.¹⁷² Proponents' arguments are especially poignant in light of the Citizenship Clause's common law derivation, which was known by the Framers.¹⁷³ Because the Framers were aware of the territorial common law underpinnings of the Citizenship Clause, it seems dubious to infer lack of foresight for something existing in the common law for hundreds of years.

Thus, the disagreement over whether the phrase "subject to the jurisdiction" is territorial or consensual is predicated on the Citizenship Clause's textual ambiguity. This ambiguity has led to legislative efforts seeking to define the scope of the Citizenship Clause by narrowing it to exclude children born in the United States to illegal immigrants.¹⁷⁴ This endeavor must fail, however, because Congress has no power to define what a clause in the Constitution means,¹⁷⁵ that power is left to the Supreme Court alone.¹⁷⁶

170. See SCHUCK & SMITH, *supra* note 10, at 95, 100 (noting that for a large part of American history, unrestricted immigration was encouraged by the government because of the desire to populate a vast and expanding country); see also Gunlicks, *supra* note 142, at 570-71 (noting opponents argument that the framers never anticipated illegal immigrants giving birth to children in the United States).

171. Gunlicks, *supra* note 142, at 571.

172. See *id.*

173. See *Wong Kim Ark*, 169 U.S. at 675-77.

174. See *infra* Part IV.

175. Congress may legitimately enforce the substantive rights conferred in the Fourteenth Amendment, but it may not alter the substantive nature of the protected rights by redefining what those rights mean. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (holding that the Fourteenth Amendment's § 5 "enforcement" power does not include the power to decree the substance of rights secured under the 14th Amendment); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding the Religious Freedom and Restoration Act unconstitutional as applied to the states because it transcended Congress' legitimate power to enforce provisions of the Fourteenth Amendment and unconstitutionally ventured into the arena of dictating the substance of the rights secured thereunder).

176. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 144 (1803). Unlike the Naturalization Clause, *supra* note 91, where deference is given to Congress over how it implements its delegated immigration power, see *Miller v. Albright*, 523 U.S. 420, 434-35 n.11 (1998) (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (there is "a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization")), Congress does not have the same leeway with regard to the Citizenship Clause and its enforcement power under the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5 (stating "Congress shall have the power to

3. Distinguishing Constitutional from Political Dialogues: Methods to Restrict Territorial Birthright Citizenship

Ultimately, the discussion of whether citizenship subsists in children born to illegal immigrants deserts a constitutional paradigm and enters the arena of political dialogue.¹⁷⁷ This is evidenced by political maneuvers to alter what is essentially a constitutional issue.¹⁷⁸ While the constitutional issue, ambiguous as it may be, appears settled in favor of recognizing citizenship in children born in the United States to illegal immigrants, the political issues remain unsettled.¹⁷⁹ Contrary to some commentators' allegations, efforts to except children born of illegal immigrants from territorial birthright citizenship are not necessarily racist.¹⁸⁰ These efforts are premised on the conviction that illegal immigrants are a net cost to the United States—a product of dissatisfaction with receipt of social welfare benefits by illegal immigrants and failure of adequate border control—rather than on the status of innocent children born in the United States by no fault of their own.¹⁸¹ Characterized this

enforce, by appropriate legislation, the provisions of this article"). Congress' authority to alter the Citizenship Clause is unconstitutional because all attempts to alter the Citizenship Clause have taken the form of legislative efforts to define the phrase "subject to the jurisdiction." And Congress cannot define the Constitution. See *Marbury*, 5 U.S. at 177. Nor can Congress use its enforcement power under the Fourteenth Amendment to effect a substantive change to the rights protected in the amendment. See *Kimel*, 120 S. Ct. at 644 (recognizing that while the enforcement power is a grant of positive lawmaking power to Congress, it "also serves to limit that power"); *City of Boerne*, 521 U.S. at 519 (holding that "Congress cannot decree the substance of the Fourteenth Amendment's restrictions on the States The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.")

177. See Stein & Bauer, *supra* note 5, at 130 (noting that practical, financial, and political reasons militate toward rejecting territorial birthright citizenship). Dan Stein was Executive Director of the Federation for American Immigration Reform (FAIR), an organization dedicated to lobbying for the restriction of both legal and illegal immigration into the United States.

178. Legislative attempts to prohibit citizenship in children born to illegal immigrants are discussed *infra* notes 190-200 and accompanying text.

179. Highlighting the current political significance of the citizenship status of children to illegal immigrants, several bills have been introduced in the 106th Congress to eliminate the territorial basis of birthright citizenship. These bills are discussed in detail *infra* at notes 191-94.

180. See Drimmer, *supra* note 5, at 708 (stating "the community today still is unwilling to recognize racially and culturally distinct groups as members of the national polity"); see also Wilson, *supra* note 33, at 581 (asserting that those seeking to eradicate illegal immigration harbor racially exclusive motivations). The troublesome aspect of these assertions is that they are devoid of logical analysis with respect to the policy arguments made by opponents of territorial birthright citizenship. Such accusations—whether true or not—denigrate the entire level of debate to *ad hominem* attacks.

way, the political issues of immigration policy, which are clearly entrusted to Congress, conflate with constitutionally-defined citizenship in children who are innocent of their parents' wrongdoing.

As of 1999, the Immigration and Naturalization Service (INS) estimates five million illegal immigrants reside in the United States.¹⁸² However, due to the elusive nature of illegal immigrants, the estimates range between three and eight million.¹⁸³ This number represents roughly two percent of the U.S. population.¹⁸⁴ According to the INS, the current population of illegal immigrants is estimated to grow by 275,000 each year.¹⁸⁵ With specific reference to children born in the United States to illegal immigrants, the California Health and Welfare Agency reported that forty percent of births in California county-run hospitals, or 217,000 children between 1989 and 1993, were born to illegal immigrants.¹⁸⁶

The Supreme Court's silence with respect to whether these children are U.S. citizens fails to curb political efforts to restrict

181. Cost does not merely reflect monetary disbursements. There are enforcement costs as well.

182. Dena Bunis & Guillermo X. Garcia, *INS to Hire 1,600 New Workers: The Beefed-Up Staff is to Cut the Paperwork Logjam and Supplement the Border Patrol*, ORANGE COUNTY REG., Feb. 18, 1999. The INS reports that 2.1 million illegal immigrants were classified as "overstays," meaning they were lawfully admitted but remained after their visas expired. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT OF JUSTICE, *Statistics* (last modified Aug. 11, 1999) <<http://www.ins.doj.gov/graphics/aboutins/statistics/illegalalien/index.htm>>.

183. See *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1981) (quoting an estimate by the U.S. Attorney General that 3 to 6 million illegal immigrants reside in the United States); see also Drimmer, *supra* note 5, at 708 (noting research indicates 3 to 8 million illegal immigrants living in the United States). Because illegal immigrants are ostensibly present in the United States without the government's knowledge, it is difficult to get an accurate count of their exact numbers. Between 1991 and 1994, however, the concrete number of at least 4,878,502 illegal immigrants can be calculated as having entered the United States. See VERNON M. BRIGGS, *MASS IMMIGRATION AND THE NATIONAL INTEREST* 157 (1996) (citing the number of illegal immigrants actually apprehended by the INS). The use of apprehension data, however, must be viewed with the understanding that this number, while concrete, includes those illegal immigrants who have entered and been apprehended multiple times. See *id.* at 155. Nor, of course, does it actually indicate those who entered the country without apprehension. See *id.*

184. See IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 182 (noting 1.9% of the U.S. population consists of illegal immigrants); see also ROBERT SURO, *WATCHING AMERICA'S DOOR, THE IMMIGRATION BACKLASH AND THE NEW POLICY DEBATE* 49 (1996).

185. See IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 182. The INS reports that this growth estimate is 25,000 lower than was estimated in 1994. See *id.*

186. See Drimmer, *supra* note 5, at 709 (citing Richard Sybert, *Population, Immigration and Growth in California*, 31 SAN DIEGO L. REV. 945, 974 (1994) (alleging 62% of all births in Los Angeles County hospitals in 1991 were to illegal immigrants)).

territorial birthright citizenship, especially when data is presented showing a high number of births to illegal immigrants, arguably at taxpayer expense.¹⁸⁷ Because territorial birthright citizenship is a constitutional issue, taxpayer expense is immaterial to whether these children are citizens.¹⁸⁸ Thus, critics of conferring territorial birthright citizenship are generally criticizing U.S. policy decisions directed at immigration and social services, not the children themselves.¹⁸⁹

Responding to appeals to restrict the birthright citizenship clause, Congress has sought, heretofore unsuccessfully, to alter the Fourteenth Amendment.¹⁹⁰ The 106th Congress has two bills that, by different means, seek to deny citizenship to children born in the United States to illegal immigrants.¹⁹¹ The Citizenship Reform Act of 1999 is an attempt to amend the Immigration and Nationality Act¹⁹² by redefining "subject to the jurisdiction" under the act to deny citizenship at birth "to children born in the United States of parents who are not citizens of the United States or

187. See *id.* n.290. The net cost or benefit of illegal immigrants is beyond the scope of this Note. Suffice it to note that these studies purporting to show net costs or benefits are inconclusive. See *Immigrants Welfare*, RES. PERS. ON MIGRATION (Int'l Migration Pol. Program: Carnegie Endowment for Int'l Peace/Urb. Inst.) Sept./Oct. 1996 at 3 (noting that immigrant use of welfare has been rising despite how "immigrant" or "welfare" is defined but noting also that there is no "reputable evidence that prospective immigrants are drawn to the United States because of its public assistance programs"); see also JULIAN L. SIMON, IMMIGRATION: THE DEMOGRAPHIC AND ECONOMIC FACTS 42 (Cato Institute & National Immigration Forum 1996) (noting that per capita, illegal immigrants receive only 38% of the social welfare expenditures that natives receive and pay 46% of the taxes natives pay).

188. See U.S. CONST. amend. XIV, at § 1, cl. 1.

189. See Stein & Bauer, *supra* note 5, at 130 (arguing that rejection of the territorial birthright basis of the Citizenship Clause is necessary to stymie the "population explosion" and to protect the United States "limited resources" that are "already tremendously strained"); see also SCHUCK & SMITH, *supra* note 10, at 91.

190. See generally Stein & Bauer, *supra* note 5, at 130 (arguing that because the interpretation of "subject to the jurisdiction" is "open to debate" Congress should test the constitutionality of territorial birthright citizenship by legislating a definition that excepts children born of illegal immigrants). This argument is premised on the erroneous assumption that Congress may define provisions of the Constitution. It may not. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 517-19 (1997); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 187 (1803) (holding that the Supreme Court is the ultimate interpreter of the Constitution).

191. See H.R. 73, 106th Cong. (1999) (authored by Congressman Brian Bilbray); H.R. 319, 106th Cong. (1999) ("A bill to clarify the effect on citizenship of an individual of the individual's birth in the United States") (authored by Congressman Stump)). In the 105th Congress, H.R. 73 was submitted as the Citizenship Reform Act of 1995 with identical wording, but failed to move out of committee. H.R. 1363, 105th Cong. (1995).

192. 8 U.S.C. § 1401 (1994). The Act reads in relevant part: "The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof"

permanent resident aliens.”¹⁹³ Additionally, H.R. 319 has been submitted to “clarify the effect on the citizenship of an individual of the individual’s birth in the United States,” whereby Congress asserts its enforcement power under § 5 of the Fourteenth Amendment to define “subject to the jurisdiction” under § 1 of the Amendment.¹⁹⁴

These bills are essentially constitutional amendments under the guise of legislation. Instead of amending the Citizenship Clause through the traditional vote of a super-majority of both houses proposing and three-quarters of the states ratifying a constitutional amendment,¹⁹⁵ H.R.s 73 and 319 seek to do so by a simple majority vote of both houses of Congress and a presidential signature. The effect would be de facto amendment of the Citizenship Clause by the legislature, in clear violation of separation of powers¹⁹⁶ and *City of Boerne v. Flores*,¹⁹⁷ which recognized limits to Congress’ enforcement power¹⁹⁸ under § 5 of

193. H.R. 73, §§ 2, 3 (amending 8 U.S.C. §§ 1101, 1401).

194. H.R. 319 reprinted in full states:

In the exercise of its powers under section 5 of the Fourteenth Article of Amendment to the Constitution of the United States, the Congress has determined and hereby declares that any person born after the date of enactment of this Act to a mother who is neither a citizen or national of the United States nor admitted to the United States as a lawful permanent resident, and which person is a citizen or national of another country of which either of his or her natural parents is a citizen or national, or is entitled upon application to become a citizen or national of such country, shall be considered as born subject to the jurisdiction of that foreign country and not subject to the jurisdiction of the United States within the meaning of section 1 of such Article and shall therefore not be a citizen of the United States or of any State solely by reason of birth in the United States.

H.R. 319, 106th Cong. (1999). The formulation of this act is arguably more nefarious than H.R. 73, which only seeks to define another act of Congress. H.R. 319, on the other hand, is an attempt to alter the definition of the Constitution, under the enforcement clause of the Fourteenth Amendment. The enforcement clause, however, is limited to implementing the Fourteenth Amendment, not altering the substantive rights conferred thereunder. *See Kimel*, 120 S. Ct. at 644; *City of Boerne*, 521 U.S. at 519. In light of accepted common law principles that have become part and parcel of the Citizenship Clause’s jurisprudence, *see United States v. Wong Kim Ark*, 169 U.S. 649, 659 (1898), there is no constitutional basis for H.R. 319 because it seeks to substantively alter a right secured under the Fourteenth Amendment, namely citizenship.

195. *See* U.S. CONST. art. V (establishing requirements for amending the constitution).

196. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that a “law repugnant to the constitution is void” and it is “the province and duty of the judicial department to say what the law is”).

197. 521 U.S. 507 (1997).

198. *See id.* at 519; *see also Kimel*, 120 S. Ct. at 644. As discussed, *supra* notes 175-76, Congress does have the authority to enforce the provisions of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 5. While this power is broad, the federal enforcement power is limited to remedying and deterring state

the Fourteenth Amendment. Efforts to legislatively alter the Fourteenth Amendment can be distinguished from Congress' plenary authority under the Naturalization Clause and immigration power, where the role of the judiciary is deferential to Congress' exercise of power.¹⁹⁹ These bills are so contrary to the constitutional republic and established principles of citizenship common law that they could not survive judicial scrutiny should they become law.²⁰⁰

Legislative efforts to redefine the Citizenship Clause are in excess of the enforcement power conferred under § 5 of the Fourteenth Amendment and are therefore unconstitutional.²⁰¹ However, another option would be to amend the Fourteenth Amendment to obviate territorial birthright citizenship.²⁰² Indeed, this is precisely what some commentators and political leaders suggest.²⁰³ Former California governor and 1996 presidential candidate Pete Wilson promoted, though

governments from violating the rights secured under § 1 of the Fourteenth Amendment. See *Kimel*, 120 S. Ct. at 644. Congressional efforts to redefine the text of the Citizenship Clause, however, do not comport to the remedial or prophylactic character of the Enforcement Clause; rather, these efforts are substantive alterations to a constitutional protection. As such, they are constitutionally infirm and cannot be sustained from constitutional challenge.

199. See U.S. CONST. art. I, § 8, cl. 4; see also *Nishimura v. Ekiu*, 142 U.S. 651, 659 (1892) ("every sovereign nation has the power . . . to forbid the entrance of foreigners within its dominion . . .").

200. See *Marbury*, 5 U.S. at 177 (noting "the constitution is either a superior, paramount law, *unchangeable by ordinary means*, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it"). The effect of these acts would be to reject 375 years of territorial birthright citizenship. See generally *United States v. Wong Kim Ark*, 169 U.S. 649, 655-62 (1898) (accepting *Calvin's Case* as the basis of United States' birthright citizenship law).

201. See *supra* notes 175, 176, 196-98.

202. In 1999, Representative Mark Foley introduced a proposed constitutional amendment to prevent children born to illegal immigrant from being granted birthright citizenship. H.J.R. 10 was introduced in the 106th Congress and is reproduced in totality here:

SECTION 1. No person born in the United States after the date of the ratification of this article shall be a citizen of the United States, or of any State, on account of birth in the United States unless the mother or father of the person is a citizen of the United States, is lawfully in the United States, or has a lawful status under the immigration laws of the United States, at the time of the birth.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

H.J.R. 10, 106th Cong. (1999).

203. See Stein & Bauer, *supra* note 5, at 130 (inferring that constitutional amendment of birthright citizenship is a worthwhile option, but efforts to legislatively alter the Citizenship Clause should be pursued first).

unsuccessfully, this reformulation of the Citizenship Clause.²⁰⁴ Despite significant support for this alternative,²⁰⁵ the idea has not taken hold.²⁰⁶ Furthermore, it is not prudent to fundamentally alter the Constitution when vigorous enforcement of its other provisions, under the Naturalization Clause and immigration authority, would achieve a similar effect.

Barring the unlikely passage of a constitutional amendment abandoning territorial birthright citizenship, there are several alternatives that attack the perceived problem without actually affecting the status of children born to illegal immigrants. These alternatives include strict prohibition of federal services to illegal immigrants, stronger policing of borders, and expeditious deportation of illegal immigrants. These political solutions require judicial deference to the legislature under the Naturalization Clause and immigration authority,²⁰⁷ and thus, they are presumptively valid.²⁰⁸

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) limits both the entrance of illegal immigrants and the corresponding disbursement of public benefits for those in the country both legally and illegally.²⁰⁹ IIRIRA contains

204. See Pete Wilson, *Crack Down on Illegals*, USA TODAY, Aug. 20, 1993, at 12A.

205. See Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026, 1026 n.9 (1994) (citing Bruce W. Nelan, *Not Quite So Welcome Anymore*, TIME, Fall 1993, at 10, 12 (noting a study that indicated 49% of Americans favored amending the constitution to abandon territorial birthright citizenship)).

206. A bill offered in the 103rd Congress to amend the Fourteenth Amendment never passed out of the House of Representatives. See H.J.R. Res. 129, 103d Cong., 1st Sess. (1993). A similar proposed amendment is now in front of the 106th Congress. See *supra* note 202 and accompanying text.

207. U.S. CONST. art. I, § 8, cl. 4.

208. See *Miller v. Albright*, 523 U.S. 420, 434-35 n.11 (1998) (recognizing traditional deference to the legislature and executive in the area of immigration policy); see also *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (finding California Ballot Proposition 187, which prohibited illegal immigrants from receiving state social welfare benefits, unconstitutional because, among other reasons, "the federal government possesses the *exclusive power* to regulate immigration" and this power is embodied in the "*plenary authority*" of Congress under the Naturalization Clause, U.S. CONST. art. I, § 8, cl. 4) (emphasis added); *Plyler v. Doe*, 457 U.S. 202, 225 (1981) (noting Congressional power in the area of immigration is "plenary" and therefore, the "need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field").

209. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.). See generally IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT OF JUSTICE, SUMMARY: ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 (revised 1997) (hereinafter IIRIRA SUMMARY). Receipt of public benefits requires proof of citizenship, and verification of immigration status is required for Social Security and higher education assistance. See IIRIRA SUMMARY at 3.

provisions for expedited deportation of aliens engaged in fraud or misrepresentation, with exceptions for aliens who fear persecution or intend to apply for asylum.²¹⁰ Additionally, IIRIRA creates a higher threshold for the lawful admission of immigrants, placing the burden on the immigrant to show admissibility into the United States.²¹¹

In addition to reforming immigration procedures, the federal government's recent reform of welfare places restrictions on illegal immigrants' ability to receive federal welfare benefits.²¹² Generally, under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, illegal immigrants are denied "any retirement, welfare, health, disability, food assistance, or unemployment benefits."²¹³ Thus, those who oppose birthright citizenship for children born to illegal immigrants because it opens the door to social welfare services should take note that such a basis for objecting to birthright citizenship, while not illusory, is surely diminished. These measures are presumptively valid because the Supreme Court has consistently affirmed Congress' expansive power to regulate immigration and the receipt of public benefits.²¹⁴ Congress may,

210. See *id.* at 4 (amending § 235(b)(1) of the Immigration and Naturalization Act (INA)). The expedited deportation procedure pertains to circumstances when the illegal immigrant gains admission without valid travel documents or when fraudulent documents are used. See IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT OF JUSTICE, FACT SHEET: ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 *Expedited Removal Proceeding* (revised 1997) (hereinafter IIRIRA FACT SHEET). This procedure also applies in circumstances when the illegal immigrant uses fraudulent documents to receive state or federal social services. See *id.* All non-expedited removal proceedings are unified under the IIRIRA with narrower forms of relief from removal. See *id.*

211. See *id.*, *Grounds of Inadmissibility*.

212. See generally Jeffrey L. Katz, *For the Record: Welfare Overhaul Law*, CONG. Q. 2696 (Sept. 21, 1996) (discussing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996)).

213. *Id.* at 2701. There are exceptions to this general rule. For example, illegal immigrants may receive emergency medical services under Medicaid; likewise, immunization for communicable diseases is also exempted. See *id.* Non-emergency prenatal and delivery care, however, are not exempted. See *id.* State governments are prohibited from providing state or local benefits to illegal immigrants, unless the state enacts a law after August 22, 1996 explicitly allowing illegal immigrants to receive benefits. See *id.*

214. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (noting "many of the provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation"); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (noting "the fact that Congress has provided some welfare for citizens does not require it to provide like benefits for all aliens"). There is no constitutional obligation for Congress to provide any benefit to illegal immigrants, or its own citizens for that matter, and equal protection is not violated by discriminating against illegal immigrants in prohibiting their receipt of welfare benefits. See *id.* (finding no "illegal immigrant can advance even a colorable constitutional claim to a share in

in fact, "withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct."²¹⁵

Stricter enforcement of border controls is another alternative to abolition of territorial birthright citizenship. By halting illegal immigrant parents before they enter the United States, there would be a corresponding reduction in births. Between 1991 and 1994, the Immigration and Naturalization Service's Border Patrol apprehended 4,878,502 illegal immigrants.²¹⁶ This level of apprehension represents a ten-fold increase between 1965 and 1994 and suggests a corresponding increase in the number of illegal immigrants entering the United States.²¹⁷ While the precise number of illegal immigrants who enter the United States undetected is unknown,²¹⁸ increasing Border Patrol agents' presence on the borders would undoubtedly increase the number of apprehensions.²¹⁹ In fact, the Border Patrol received an appropriation of \$3.9 billion in 1999, which was partially used to enhance the border patrol ranks with 1000 new agents devoted to apprehension.²²⁰

Finally, a more assertive deportation procedure could be utilized to remove illegal immigrants already in the United States.²²¹ Like other areas of immigration policy delegated to

the bounty that a conscientious sovereign makes available to its own citizens and some of its guests"); see also *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1981) (rejecting the notion that illegal immigrant are a "suspect class" deserving of strict scrutiny because "entry into this class, by virtue of entry into this country, is the product of voluntary action . . . [in fact] entry into this class is a crime").

215. *Plyler*, 457 U.S. at 219 n.19. Of course, the problem perceived by critics of territorial birthright citizenship is that despite a parent's status, citizen children are entitled to welfare benefits.

216. See BRIGGS, *supra* note 183, at 157.

217. See *id.* at 155. Apprehension data must be viewed critically because this data contains multiple counts for repeat captures of the same individual. *Id.* Additionally, this data does not represent the number of those individuals who enter the country unbeknownst to the INS. See *id.*

218. See *id.*

219. See Bunis & Garcia, *supra* note 182.

220. See *id.*

221. In 1997, the INS deported 169,072 illegal aliens. See David G. Savage, *Ruling Eases Way for Deportation of Illegal Immigrants*, L.A. TIMES, Feb. 25, 1999, at A1. The Supreme Court noted the lackluster results of deportation in *Plyler*. See 457 U.S. at 218 (1981) (noting "lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens" has led to increases in illegal immigrants entering the United States). The problem is certainly one of enforcement, though recent efforts under IIRIRA are attempting to stave the enforcement problem, in the past presidential administrations have placed deportation on the backburner. See *id.* at 219 n.17 (quoting comments made by then-Attorney General William F. Smith to the House of Representative and the Senate that "[w]e have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become . . . members of the community") (emphasis

Congress under the Constitution, the judiciary has shown deference to the policy decisions of Congress.²²² Under the Immigration and Naturalization Act,²²³ deportation of illegal immigrants is under the purview of the Attorney General.²²⁴ Furthermore, determination of an immigrant's status is within the exclusive jurisdiction of the INS and immigration judges.²²⁵ The plenary nature of Congress' deportation power was reaffirmed in the 1999 case, *Reno v. American-Arab Anti-Discrimination Committee*.²²⁶ Writing for an eight-to-one majority, Justice Scalia upheld a provision of IIRIRA prohibiting judicial review of any cause of action arising under the Attorney General's discretion over certain non-final-order deportation decisions and actions of the INS.²²⁷

With such plenary power under the Naturalization Clause and immigration authority, Congress has the power to scrutinize more closely whether children are born of illegal immigrants. If so, the illegal immigrant parents could be deported

added)); see also Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 40-41 (1988) (noting that "citizen children . . . have not been successful in pressing the view that the deportation of their undocumented parents is tantamount to the de facto deportation of the child").

222. See *Miller v. Albright*, 523 U.S. 420, 450 (1998) (O'Connor, J., concurring) (recognizing "[j]udicial power over immigration and naturalization is extremely limited"); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (finding that precedent had "long recognized power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); see also Schulman, *supra* note 157, at 679 (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 n.21 (1976)); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (noting the civil penalty of deportation is subject to limited judicial review).

223. See 8 U.S.C. § 1101 *et seq.* (1994).

224. See 8 U.S.C. §§ 1227, 1252 (Supp. II 1996).

225. See *id.* § 1252(b).

226. 525 U.S. 471 (1999).

227. See *id.* at 488-91. The relevant section of IIRIRA, § 1252(g), reads:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g) (Supp. II 1996). According to the Court, the common sense rationale for this rule is to prevent abusive delay in the deportation procedure by illegal immigrants who use judicial review of every adverse ruling by the INS to perpetuate their remaining in the United States. See *Reno*, 525 U.S. at 490 (noting "the consequence of delay . . . in deportation proceedings . . . is to permit and prolong a continuing violation of United States law" and "[p]ostponing justifiable deportation . . . is often the principle object of resistance to a deportation proceeding" by the illegal immigrants).

accordingly.²²⁸ Undoubtedly, this is a tremendously harsh rule for children of illegal immigrants born in the United States. It would force them either to dissociate themselves from their parents to accept the benefits of U.S. citizenship or to remove themselves from the country where their citizenship inheres to remain with their family. Some statutory relief does exist, however, for citizen children facing this problem.²²⁹ The relief consists of suspending deportation and adjusting the status of illegal immigrant parents to that of a "lawfully admitted permanent resident."²³⁰ This relief requires the illegal immigrant to have physical presence in the United States for seven years prior to seeking the relief and is supplementary to the requirement of "good moral character."²³¹ Additionally, the illegal immigrant must demonstrate that deportation would result in "extreme hardship."²³² While courts may be sympathetic to the hardship imposed on the citizen child by deporting the illegal immigrant parent,²³³ mere assertion of a negative impact on the citizen child does not itself establish the extreme hardship necessary to cease the deportation.²³⁴ The Supreme Court has held that the INS has the power to narrowly construe the extreme hardship clause should they deem it wise to do so, and the courts generally do not encroach on that authority.²³⁵ Thus, apparently, even this relief measure is subject to the plenary power of the political branches.²³⁶

These alternatives underscore the pivotal political issues territorial birthright citizenship opponents recognize but seek to

228. The fact that the child is a citizen has not been found by the courts to require cessation of their parent's deportation. See *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (noting that the citizen child of illegal immigrants does not have her constitutional rights violated by the deportation of her parents). Deportation proceedings should not be halted because of a citizen child's birth to the illegal immigrant parents. See *id.* This would "open a loophole in the immigration laws for the benefit of those deportable aliens who have had a child born while they were here." *Id.*

229. See 8 U.S.C. § 1254(a)(1) (1994).

230. *Id.*

231. *Id.*

232. See *id.* The extreme hardship criterion may be established by either demonstrating the hardship effects on the alien or to the alien's citizen children. See *Piatt*, *supra* note 221, at 41; see also *Schulman*, *supra* note 157, at 701 (citing *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1222 (9th Cir. 1987)).

233. See *Wang v. INS*, 622 F.2d 1341, 1346-47 (9th Cir. 1980) (arguing that hardship requires the inquiry be broadened to look at the effects of deportation on other persons), *rev'd on other grounds*, 450 U.S. 139 (1981).

234. *Id.* at 1348 (noting that removal of the citizen child from the United States is not sufficient to establish the requisite level of hardship).

235. See *id.* at 1344-45 (holding that the Attorney General and his delegates have authority, under the immigration and naturalization power, to define the phrase "extreme hardship").

236. See *id.*

alter through constitutional methods. Legislation defining the Citizenship Clause will ultimately fail, either in the legislative arena or by judicial review.²³⁷ Given the Supreme Court's current common law interpretation of the Citizenship Clause, only efforts within Congress' plenary jurisdiction under the Naturalization Clause and immigration power will yield the outcome desired by opponents of territorial birthright citizenship. Thus, any effort to reduce the costs associated with births in the United States to illegal immigrants will require an attack collateral to the Citizenship Clause, by legislating to enforce border policing, restricting benefits, and expediting deportation.

Whether IIRIRA's terms will reduce the flow of illegal immigrants and the corresponding birth of their children within the territorial jurisdiction of the United States has yet to be determined. This effort, however, illustrates a procedure for dealing with the concerns of opponents of territorial birthright citizenship without treading on the constitutional framework by directly assaulting the Fourteenth Amendment. Alterations of the benefit structure and increased border enforcement are the best methods for restricting births within the United States. This is due to the Supreme Court's consistent affirmation of Congress' expansive power to regulate immigration and the receipt of public benefits.

Several obstacles, however, limit the broad power of Congress under its authority to control the borders. Constitutionally, Congress and the states may not deprive non-citizens under their respective jurisdictions of the equal protection of the laws; nor may non-citizens' due process rights be denied.²³⁸ Thus, the term "persons" in the Fifth and Fourteenth Amendments has been found to include non-citizens, even if present in the country illegally.²³⁹ While due process and equal protection concerns

237. See *supra* notes 175-76, 196-98 and accompanying text.

238. See *Plyler v. Doe*, 457 U.S. 202, 212 (1981) (noting the equal protection and due process provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction"); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (finding that the Fifth and Fourteenth Amendments protect "every one of these persons from deprivation of life, liberty, or property without due process of law . . . [e]ven one whose presence in this country is unlawful") (emphasis added); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950) (*holding disaffirmed legislatively for other reasons*, 64 Stat. 1044, 1048); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (finding the Equal Protection and Due Process clauses "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences . . . of nationality") (emphasis added); see also Statement of Senator Jacob Howard, CONG. GLOBE, 38th Cong., 1st Sess. 2765 (1866) (describing the Fourteenth Amendment's protection as applying not "merely [to] a citizen of the United States, but to any person . . .").

239. U.S. CONST. amends. V & XIV; see also *Plyler*, 457 U.S. at 210 (noting "even aliens whose presence in this country is unlawful, have long been

serve to limit application of the Naturalization Clause and congressional immigration authority, the standard of scrutiny is more deferential than for traditional suspect classes.²⁴⁰ So while due process and equal protection will apply to illegal aliens, the scope of this protection is itself limited because the national government has vast inherent power over immigration.²⁴¹

The practical obstacle of limited resources decreases the appeal of using the plenary power of the political branches under the Naturalization Clause and immigration authority. The Court has taken judicial notice of the costs associated with aggressive enforcement.²⁴² Likewise, executive agencies are aware of the high costs of energetic enforcement.²⁴³ Decisively, the issue of whether the resources exist with which to provide spirited immigration authority enforcement is undermined by an inability and unwillingness by Congress and executive enforcement branches to halt illegal immigration and the attendant result of reduced births by illegal immigrants.²⁴⁴ Part of the reason for this course of inaction is that some see a tolerable level of illegal

recognized as 'persons' guaranteed due process of law under the Fifth and Fourteenth Amendments").

240. See Curran, *supra* note 3, at 84 n.64 (noting Congress has "tremendous latitude" in enacting immigration policies). In *Plyler*, the Court found, for the purpose of striking down a state regulation under the Fourteenth Amendment Due Process Clause, that illegal immigrants were *not* a suspect class and, therefore, strict scrutiny did not apply. 457 U.S. at 219 n.19.

241. See *id.* (noting that "alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation").

242. See *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (noting the IIRIRA's removal of court jurisdiction for certain non-final-orders was to streamline the deportation procedure, ultimately leading to reduced costs); see also *Plyler*, 457 U.S. at 218-219 (noting the government has permitted a pervasive "shadow population" of illegal immigrants due to "sheer incapability and lax enforcement").

243. See *Reno*, 525 U.S. at 490. Prior to enactment of IIRIRA, the INS regularly used its discretion to abandon deportation proceeding for "humanitarian reasons or simply for its own convenience." *Id.* at 484 n.8 (noting the INS had abandonment guidelines that included factors such as whether the proceeding would generate bad publicity for the INS); see also *Plyler*, 457 U.S. at 219 n.17 (discussing comments by former Attorney General William Smith that "we [the INS] have neither the resources . . . nor the motivation to uproot an deport millions of illegal aliens").

244. While prior inaction was due to unwillingness by enforcement agencies to strictly uphold immigration laws, the trend may be changing. Recently, 1,700 illegal immigrants were fired in Washington state due to an INS documentation audit. See Kim Murphy, *INS' Fight on Illegal Labor is Big Jolt for Yakima Valle*, L.A. TIMES, Feb. 26, 1999, at A1. The INS has also recently targeted employers in Nebraska, Seattle, Florida, and San Francisco. See *id.* The illegal immigrants, after they are fired, however, are not deported. See *id.* In 1996 documentation audits resulted in the firing of 21,217 illegal immigrants in seven states in the western region. See *id.*

immigrants as a net benefit to the United States, though this assertion is heavily disputed by critics of territorial birthright citizenship.²⁴⁵ Illegal immigrants are frequently characterized as a source of "cheap" labor, whose "presence is tolerated" or perhaps even welcomed.²⁴⁶

Thus, a tension exists. The goals of restricting territorial birthright citizenship and reducing the net costs to the United States associated with children born of illegal immigrants are potentially outweighed by the increased cost of achieving that goal by constitutionally permissible means, such as increased border patrol efforts, expedited deportation, and reduced social welfare benefits. Unlike efforts to legislatively repeal territorial birthright citizenship, however, these alternatives are the result of majoritarian policy decisions in an area the courts have found to be within Congress' exclusive power—naturalization and immigration.

C. *The Practical Differences Between the British and American Systems*

The starkest contrast between the United Kingdom and the United States is the differing constitutional methodology for enacting change in the concept of territorial birthright citizenship. The United Kingdom's abandonment of territorial birthright citizenship, long recognized in the common law, was the result of Parliament's constitutional supremacy.²⁴⁷ Though the structure of parliamentary supremacy is inherently different from the separation of powers and congressional Fourteenth Amendment § 5 enforcement authority models, the United Kingdom's abandonment of territorial birthright citizenship is similarly based in the political volatility due to increases in illegal entries into the United Kingdom.²⁴⁸

245. See *Reno*, 525 U.S. at 484-85; *Plyler*, 457 U.S. at 219 n.17.

246. *Plyler*, 457 U.S. at 219 n.17 (quoting former Attorney General William Smith's comments to Congress). Until 1964, a temporary worker program, known as the Bracero Program, operated to augment shortages in the domestic United States workforce in factories and agriculture. See Schulman, *supra* note 157, at 684-85. The Bracero Program and the current illegal immigrant population often work in sectors of the economy where citizen workers are unwilling to work. See *id.* at 685 n.106.

247. See HOLDSWORTH, *supra* note 128, at 186; see also Wilson, *supra* note 33, at 590.

248. See generally Wilson, *supra* note 33, at 567-75 (discussing the abandonment of territorial birthright citizenship in the United Kingdom as a result of anti-immigrant tension).

Comparatively, the U.S. Constitution does not permit legislative alteration of the Constitution.²⁴⁹ The United States could use the Naturalization Clause and immigration power to achieve a result similar to the United Kingdom, while not formally amending the Citizenship Clause of the Fourteenth Amendment. The result would affect the aspects of territorial birthright citizenship with which critics are actually concerned: increased costs in the social welfare system. To this end, recent U.S. legislation applies this theory.²⁵⁰ Energetic implementation by the executive enforcement branches is required. However, enforcement of existing policies, to the extent that enforcement would accomplish the desired effect opponents of territorial birthright citizenship seek, would require the expenditure of precious resources.²⁵¹ This expenditure may be a greater cost than the effort is worth to ameliorate critics' desires.²⁵²

Thus, the ultimate practical difference between legislative curbs in the United Kingdom and the United States is that the United Kingdom can constitutionally attack territorial birthright citizenship directly. The United States, on the other hand, must resort to collateral legislative efforts, requiring substantial, and perhaps prohibitive, costs.

IV. CONCLUSION: SHOULD THE UNITED STATES DENY CITIZENSHIP TO CHILDREN OF ILLEGAL IMMIGRANTS?

The answer to the question presented in the heading above is "No," because common law concepts, though ambiguous,²⁵³ militate toward recognizing territorial birthright citizenship in children of illegal immigrants in the United States. While the

249. This would violate separation of powers and the concept of judicial review. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1804). Additionally, any effort to alter the constitutional definition of citizenship in the Fourteenth Amendment would be unconstitutional under *Boerne v. Flores* because while Congress may not alter the substantive nature of the rights secured under the Fourteenth Amendment, 521 U.S. 507, 519, 536 (1997), it certainly may not use its enforcement power to remove constitutional protections that already exist. Nothing could be farther from the intent of § 5's enforcement power, which was incorporated into the Fourteenth Amendment to provide Congress with authority to protect the secured rights against state governments who were hostile to the concept of equal rights for all. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (discussing the scope of Congress' enforcement power).

250. See generally IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

251. See discussion *supra* notes 242-46 and accompanying text.

252. See *id.*

253. See Drimmer, *supra* note 5, at 671; see also Stein & Bauer, *supra* note 5, at 128.

United Kingdom's system of governance sanctions fundamental changes in its constitution by acts of Parliament,²⁵⁴ the U.S. Constitution precludes legislative fiat of the judicial function to define the Constitution's meaning.²⁵⁵ For this reason, Congressional efforts to abandon the Fourteenth Amendment's territorial birthright citizenship regime are unconstitutional. This can be contrasted with the United Kingdom's renunciation of territorial birthright citizenship after 375 years.²⁵⁶ In opting for British citizenship based on parentage, the United Kingdom repudiated the territorial basis of common law birthright citizenship, a principle to which the United States still adheres.

It would be far more efficacious and constructive for opponents of territorial birthright citizenship to concentrate their efforts on altering current immigration and border enforcement policies. Rather than pursuing patently unconstitutional efforts to redefine the Citizenship Clause, use of the Naturalization Clause and immigration power would offer presumptively valid alternatives. Also, because curbing illegal immigration is part of a mainstream political agenda, such efforts would be more likely to receive bipartisan support and the support of the American public.

Direct assault on the Citizenship Clause, absent constitutional amendment, is not within Congress' power. A more energetic use of the Naturalization Clause and immigration authority, however, may be a better implement with which to stem the flow of illegal immigrants and the associated births within the United States. Nevertheless, energetic use of the Naturalization Clause and immigration power carries its own problems. Limited resources and inconclusive cost-benefit analysis suggest a plausible conclusion that expending resources to eradicate costs may actually be greater than the cost itself.

*Michael Robert W. Houston**

254. See HOLDWORTH, *supra* note 128, at 186.

255. See *Marbury*, 5 U.S. at 177.

256. See BNA, ch. 61.

* *In memoriam* Rodney O. Houston (1936-1993)—father, best friend, educator.