Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons To Keep Birthright Citizenship Intact

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I. INTRODUCTION

With provocative rhetoric and emotionally charged messages, members of Congress throughout the United States are renewing the age-

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old debate about who has the right to be a citizen of the United States. While the principle of birthright citizenship is well-grounded in U.S. jurisprudence, many seek its repeal based on other equally embedded U.S. values and traditions. Scholars Peter Schuck and Rogers Smith, for example, argue that the United States should be a country whose citizenship policies are based upon mutual consent.[1] Others, such as Representative Jeff Flake (R-Ariz.), focus on the need to promote the rule of law.[2] Representative Dan Lungren (R-Cal.) believes that by continuing the practice of birthright citizenship, "we have depreciated the value of citizenship."[3] What do these arguments have to do with the ancient law that bestows the citizenship of a nation upon all who are born on its soil? In the modern U.S. context, the issue of birthright citizenship takes on a whole new meaning when applied to children of people who are illegally present within the United States. Or is this really such a new context?

This Comment will argue that the modern context of a vast number of undocumented Mexicans (and Central and South Americans) is not a unique situation in which the United States finds itself and is not one that should justify the repeal of birthright citizenship. Moreover, this Comment argues that opponents of birthright citizenship incorrectly assume that the repeal of such a foundational principal of equality will achieve the results they desire,[4] namely fewer illegal entries into the United States and a solution to the currently failing U.S. immigration system. Before addressing these two arguments, Part II will place them in the context of U.S. and international law and analyze the legal difficulties that would be involved if one sought to change the U.S. position on this issue.

II. LEGAL BACKGROUND

A. Current Political Context in the United States

The issue of birthright citizenship is gaining momentum as politicians seek to improve the U.S. immigration system. While the House of Representatives Committee on Rules disallowed provisions from recent proposals before the House of Representatives that denied birthright citizenship to the children of undocumented aliens (and would

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1. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 4 (1985).

2. Stephen Dinan, *GOP Mulls Ending Birthright Citizenship*, WASH. TIMES, Nov. 4, 2005, at A01.

3. *Id.*

4. *See id.*

have allowed pregnant women to be turned away at the border),[5] a recent proposal to eliminate birthright citizenship was backed by eighty members of the House.[6] The immigration reform bill introduced in the Senate in March 2006 made no mention of birthright citizenship but focused on immigration law enforcement provisions and the establishment of an increased temporary guest worker program.[7] According to a November 2005 Rasmussen poll, forty-nine percent of respondents "thought that the U.S.-born child of an illegal immigrant should not be entitled to U.S. citizenship while forty-one percent thought [that the child] should."[8] The elimination of birthright citizenship would replace the U.S. system of *jus soli* (the rule of country of birth) to *jus sanguinis* (the rule of descent or parentage).

B. Current Law of the United States

The Fourteenth Amendment of the United States Constitution, passed in 1868, reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[9]

In the landmark case *United States v. Wong Kim Ark*, the United States Supreme Court clarified the meaning of the Fourteenth Amendment's birthright citizenship clause.[10] Wong Kim Ark was born in San Francisco, California, to parents of Chinese ancestry who were legal permanent residents in the United States.[11] After his second temporary visit to China, Wong Kim Ark was denied reentry into the United States on the ground that he was not a citizen.[12] At the time, people born in China were prohibited by law from becoming citizens of the United States.[13] Justice Gray, writing for the majority, stated:

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5. *House Passes Border and Immigration Enforcement Bill: Immigrants, Noncitizens, Even Citizens Face Unprecedented Assault on Rights*, IMMIGRANTS' RTS. UPDATE (NAT'L IMMIGRATION LAW CTR.), Dec. 22, 2005, at 2, *available at* http://www.nilc.org/immlawpolicy/CIR/cir002.htm.

6. Holly Yeager, *Republicans Ready To Turn Immigration Screw: Issues Such as Birthright Citizenship Are Spurring Political Debate, but Hispanic Groups Are Mobilising*, FIN. TIMES USA, Dec. 15, 2005, at 10.

7. *See* Nat'l Immigration Law Ctr., *Senate Judiciary Committee Considering Flawed Immigration Reform Bill Today* (Mar. 2, 2006), http://www.nilc.org/immlawpolicy/CIR/cir005.htm.

8. Yeager, *supra* note 6.

9. U.S. CONST. amend. XIV, § 1, cl. 1.

10. 169 U.S. 649, 673-74 (1898).

11. *Id.* at 652.

12. *Id.* at 653.

13. *Id.* at 701.

> The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.[14]

In addition, the majority stated that the Fourteenth Amendment left Congress the power to regulate naturalization but it "ha[d] conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."[15]

Since then, these principles have remained entrenched in U.S. jurisprudence; citizenship by birth has remained a basic assumption in a multitude of cases and has never been challenged successfully.[16] The Supreme Court has yet to decide specifically whether this principle applies to a person whose parents are in the United States illegally.[17]

Despite this constitutional grounding, Representative Ron Paul (R-Tex.) recently proposed three amendments to a 2005 immigration bill "to end so-called 'birth-right citizenship.'"[18] Some academics, including Schuck and Smith, have suggested that it may be possible to achieve this goal through the legislature by passing a law that would interpret the phrase "subject to the jurisdiction thereof" to exclude children born to people illegally present within the United States.[19] However, allowing Congress to make such a decision would be contrary to the intent of the framers of the Amendment.[20] Only thirty years after the passing of the Amendment, the *Wong Kim Ark* Court noted that Congress thought it "unwise, and perhaps unsafe, to leave so important a declaration of rights

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14. *Id.* at 693.

15. *Id.* at 703.

16. For an example of a modern case, see generally *United States v. Schiffer*, 831 F. Supp. 1166 (E.D. Pa. 1993).

17. Michael Robert W. Houston, *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*, 33 VAND. J. TRANSNAT'L L. 693, 717 (2000). As mentioned above, Wong Kim Ark's parents were legal permanent residents. *Wong Kim Ark*, 169 U.S. at 652.

18. Rep. Ron Paul, *Small Steps Toward Immigration Reform* (Dec. 19, 2005), http://www.house.gov/paul/tst/tst2005/tst121905.htm.

19. SCHUCK & SMITH, *supra* note 1, at 117-18.

20. *Wong Kim Ark*, 169 U.S. at 675-76.

to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress."[21] At the time of the Fourteenth Amendment's ratification, it was not beyond the imagination of people that foreigners could be present on U.S. territory despite the objection of U.S. citizens. Further, the Amendment "was not intended to impose any new restrictions upon citizenship" other than those that existed at common law, exempting "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state."[22] Schuck and Smith also readily admit that the purpose of the Fourteenth Amendment was to "constitutionalize" the protections of the Civil Rights Act, "including the principle of birthright citizenship."[23]

While it may be argued that the intent of the Thirteenth, Fourteenth, and Fifteenth Amendments was to extend citizenship *only* to the newly freed slaves, Justice Miller in the *Slaughter-House Cases*, stated:

> We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. . . .
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> . . . [I]t is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.[24]

The dissenting justices in the *Slaughter-House Cases* also agreed on these points.[25]

Looking beyond the framers' intent, *Wong Kim Ark* holds that the plain meaning of the phrase "subject to the jurisdiction thereof" applies to all people who are *within* the jurisdiction of the United States.[26] It would be inconsistent to argue that aliens are subject to the jurisdiction of the United States in the sense that they can be brought into court, but the exact same words in the Constitution must be interpreted differently in the context of citizenship. It is true that some provisions of the Fourteenth Amendment have been interpreted beyond the context originally intended by its framers because of changing social circumstances, such as expanding the Equal Protection Clause in *Brown v. Board of Education of Topeka*, to hold that segregated public schools

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21. *Id.* at 675.
22. *Id.* at 676, 682.
23. SCHUCK & SMITH, *supra* note 1, at 75.
24. 83 U.S. 36, 72, 74 (1872).
25. *Id.* at 90-94 (Field, J., dissenting); *id.* at 122-23 (Bradley, J., dissenting); *id.* at 125-29 (Swayne, J., dissenting).
26. *Wong Kim Ark*, 169 U.S. at 696.

(which had changed substantially since the passing of the Fourteenth Amendment) are not equal.[27]

Some may argue that the modern welfare state has created such a radically different context from that envisioned in the late 1800s that the citizenship provision no longer holds the same meaning.[28] A notable difference that challenges the above argument is that the equal protection cases sought to *expand* the protection offered by the Fourteenth Amendment in light of developing norms of equality while opponents of birthright citizenship seek to *limit* the rights and protections offered to people who are undeserving because their parents broke the law by entering the country. While immigration laws were different during the framing of the Fourteenth Amendment, the framers saw no problem in granting citizenship to all children, regardless of whether their parents were naturalized citizens. As much as some scholars and politicians may prefer a citizenship system based on mutual consent where Americans can decide exactly who will join the ranks of the U.S. citizenry, the Constitution of the United States is quite clear that all people born in U.S. territory are citizens of the United States. Therefore, if proponents of abolishing birthright citizenship are serious, they must turn their focus toward amending the Constitution.

C. International Law

In *Wong Kim Ark*, the Court "held that a foreign state may define its own citizenship standards as an inherent right of sovereignty."[29] "This holding corresponds with international law and norms."[30] The Supreme Court concurred with this principle in *Fong Yue Ting v. United States*, when it held that "[t]he right to exclude or to expel all aliens" is an "inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."[31] But in the United States, this right is *implicit* in the notion of sovereignty while birthright citizenship is *explicitly* mandated in the Constitution.

At the time of the adoption of the Constitution, *jus soli* citizenship was the norm among European countries.[32] France changed its policy to

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27. 347 U.S. 483, 495 (1954).

28. *See* SCHUCK & SMITH, *supra* note 1, at 103-15.

29. Robert Bernheim, *Putting the "Alien" Back into Alienage Jurisdiction: Alienage Jurisdiction and "Stateless" Persons and Corporations After Traffic Stream*, 47 ARIZ. L. REV. 1003, 1018 (2005).

30. *Id.*

31. 149 U.S. 698, 711 (1893).

32. United States v. Wong Kim Ark, 169 U.S. 649, 666-67 (1898).

jus sanguinis with the adoption of the Code of Napoleon of 1807.[33] The United Kingdom's law changed more recently with the enactment of the British Nationality Act of 1981.[34] Germany and Sweden both base their citizenship on descent, with Germany notably making the least effort to transform those within its territory into citizens.[35] While many countries may have a parentage-based system, there is no international law that mandates that countries should follow either model. Rather, some argue, each sovereign should have the right to determine the definition of citizenship for itself, "without pressure from external influences."[36] Thus, while the United States may be among the minority of countries that retain a *jus soli* system, it should not conform to other nations for the sake of unity.

In contrast to Europe, both Canada and Mexico retain *jus soli* systems along with the United States.[37] In his introduction to *Immigration and the Politics of Citizenship in Europe and North America*, William Rogers Brubaker explains that this difference may be because some countries are nations built of immigrants and others are former colonial powers that had occasional immigration that was incidental to nation-building.[38]

International law dictates that "[e]veryone has the right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[39] Article 1 of the International Covenant on Civil and Political Rights guarantees the right to self-determination, and article 12 guarantees all people freedom of movement and freedom to choose a residence.[40] The Universal

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33. *Id.* at 667.

34. Houston, *supra* note 17, at 696. Great Britain has Parliamentary Supremacy that permits it to legislatively charge birthright citizenship. *Id.* at 697.

35. William Rogers Brubaker, *Introduction* to IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 25 (William Rogers Brubaker ed., 1989). In 1999, the Bundestag reformed the citizenship and nationality law, effective Jan. 1, 2000, making it somewhat easier for long-term resident immigrants and their German-born children to obtain German citizenship. Staatsangehörigkeitsgesetz [StAG] [Nationality Law], July 22, 1913, RGBI. at 583, *last amended by* Gesetz, Mar. 14, 2005, BGBI, at 721, art. 6, § 9 (F.R.G.).

36. Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 544 (2001).

37. Brubaker, *supra* note 35, at 25; Constitución Política de los Estadoes Unidos Mexicanos [Const.], *as amended*, art. 30, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex); Ley de Nacionalidad [Nationality Law], *as amended*, art. 12, Diario Oficial de la Federación [D.O.], 23 de enero de 1998 (Mex.).

38. *Id.* at 7.

39. Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 15, U.N. GAOR, 3d Sess., 183rd plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

40. International Covenant on Civil and Political Rights arts. 1, 12, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, and ratified by the United States June 8, 1992).

Declaration of Human Rights recognizes that conditions and limitations exist on the complete fulfillment of these rights and freedoms,[41] but that does not mean that any condition placed on them by a government is appropriate or reasonable.

The United States, along with most other countries, is a signatory to these declarations.[42] The openness and flexibility of these provisions seem to allow for policies based on either *jus soli* or *jus sanguinis*, as long as individuals are free to make reasonable choices and are not left without a nationality or the ability to participate in the government of the country to which they belong. The simplest way to guarantee that people are able to exercise these rights is by granting them citizenship where they are born, and, thus, where they likely will live. Countries that employ a *jus soli* system may arguably be more naturally-inclined to comply with these international instruments. It appears clear than neither system inherently violates nor is advocated by international law.

III. THE UNITED STATES IS NOT IN A UNIQUE HISTORICAL SITUATION THAT NECESSITATES REPEALING BIRTHRIGHT CITIZENSHIP

A. The United States Previously Attempted and Ultimately Failed To Limit Citizenship Rights for Specific Races or Ethnic Groups

The United States has a history of denying citizenship to disfavored groups. The first group clearly identified as ineligible for citizenship was the Native Americans, who technically maintained their own sovereignty as long as they gave allegiance to their respective tribes.[43] Following the common-law doctrine of birthright citizenship, this posed a problem because the tribes were considered under the protection of the United States.[44] The problem was temporarily resolved by Chancellor James Kent in the case of *Goodell v. Jackson*, where he explained that a state can be inferior to another "without losing its independence and sovereignty 'in certain respects'" and thus, while the Native American leaders were subordinate to the United States, they still possessed ultimate dominion of those born in their tribes.[45] All Native Americans born within the territory of the United States were finally granted U.S. citizenship when Congress passed the Indian Citizenship Act of June 2,

41. UDHR, *supra* note 39, art. 29.

42. Office of the High Comm'r for Human Rights, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights* (June 1996), http://www.unhchr.ch/html/menu6/2/fs2.htm.

43. SCHUCK & SMITH, *supra* note 1, at 63.

44. *Id.* at 63-64.

45. *Id.* at 64 (discussing Goodell v. Jackson, 20 Johns. 693 (N.Y. Gen. Term 1823)).

1924.[46] Being denied citizenship meant that Native Americans had restricted property and voting rights; restricted access to the courts; and less control over and ability to influence the legal systems that governed them.

Until the ratification of the Fourteenth Amendment, Blacks could also be denied citizenship. Previously, the South insisted on considering Blacks (whether slaves or not) to be at some status less than full citizens.[47] The Supreme Court, in the infamous case of *Dred Scott v. Sandford*, "held that no American of African descent, whether freeman or slave, could be a United States citizen by birth."[48] Schuck and Smith explained that the Court interpreted the constitutional framers' intent as only allowing those who were U.S. citizens when the original Constitution was adopted to pass citizenship status to their children.[49] This principle is contradictory to the common-law doctrine of *jus soli* citizenship.

With the plethora of litigation that continues to this day over equal rights, it is clear that the attempt to exclude Blacks was motivated by racial prejudice, stereotypes, and bigotry rather than by any rational sense that excluding this group from citizenship was fair, logical, pragmatic, or legal. Moreover, like the attempt to exclude Native Americans from citizenship, the attempts to exclude Blacks from citizenship (or any part of society) were ultimately unsuccessful. Relegating either of these groups to a lower legal status consistently failed.

Until recently, the United States limited the citizenship of people from Asia. While workers were accepted under various terms and conditions,[50] it was not until the mid-twentieth century that people born in China were allowed to become naturalized citizens.[51] Of course, as we saw in *Wong Kim Ark*, the children born in the United States to these temporary residents could not be denied citizenship.[52] For generations, it was assumed (or perhaps hoped) that the Chinese were only temporary

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46. An Act To Authorize the Secretary of the Interior To Issue Certificates of Citizenship to Indians (Indian Citizenship Act of 1924), Pub. L. No. 175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

47. SCHUCK & SMITH, *supra* note 1, at 69.

48. *Id.* at 72 (citing 60 U.S. 393, 404-05 (1856)).

49. *Id.*

50. 8 U.S.C. § 763 (1882) (repealed 1943).

51. BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 50, 94-95 (2004).

52. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).

residents and that each longed to return to China.[53] With the desire to stop the flow of Chinese workers, Congress enacted the first of the Chinese Exclusion Acts in 1882.[54] In the landmark case, *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), a Chinese laborer (and Chinese citizen) who possessed the appropriate travel certificate to reenter the United States after a visit to China was denied reentry on the grounds that "his right to land [was] abrogated."[55] The Court rationalized that even though the Burlingame Treaty[56] between the United States and China expressly permitted the flow of workers into the United States, the legislature could exclude aliens because jurisdiction over territory is essential to independence and sovereignty.[57] However the Court may have interpreted the Chinese Exclusion Acts, Representative Thomas Geary who sponsored the Acts explained the rationalization for the Chinese Exclusion Acts: "Of all the Chinese now here, more than one-third are not here by our invitation but contrary to our expressed wish."[58]

The argument espoused by Representative Geary for the creation of the Chinese Exclusion Acts parallels the contemporary argument of those in favor of ending birthright citizenship: there are people in the United States whom Americans do not want here. Does the fact that people in the currently undesired population are not citizens or legal permanent residents (like the parents of Wong Kim Ark) make a difference?

Before answering that question, a preliminary question should be addressed: "why are the undocumented people present in the United States not here legally?" Is it because they are too lazy to follow the proper procedures or because they prefer to live in an undocumented status? This question is important because the reality is that many of the undocumented people in the United States simply cannot obtain documentation. Meanwhile, there remains a high and unmet demand for manual labor. It can take years to obtain work authorization. The process can be equally as slow for people who are seeking to obtain legal status through family members who are legal permanent residents or citizens. If the reason for keeping people out of the United States is due to overcrowding or because immigrants make bad citizens, then our

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53. For a discussion of how Chinese workers intended to return to China because their "original allegiance has never been weakened," see Henry C. Ide, *Citizenship by Birth—Another View*, 30 AM. L. REV. 241, 250 (1896).

54. The Act of May 6, 1882, ch. 126, 22 Stat. 58.

55. 130 U.S. 581, 582 (1889).

56. *See generally* Burlingame Treaty, U.S.-China, July 28, 1868, 16 Stat. 739.

57. *The Chinese Exclusion Case*, 130 U.S. at 603.

58. R.G. Ingersoll & Thomas J. Geary, *Should the Chinese Be Excluded?*, 157 N. AM. REV. 53, 60 (1893).

focus in creating an immigration system would be quite different. The current shortage of legal workers arguably makes the United States responsible on some level for the arrival of the undocumented immigrants. The enforcement-heavy bills currently before Congress are unlikely to change this broken system. Should people who are drawn to the United States by labor recruiters and smugglers be punished with the threat that their children will not be able to become citizens of the country in which they are born and raised while there is no legal way for the parents to enter? Simply barring the entrance of more people only exacerbates the problem.

The Supreme Court has never held that the nationality and immigration status of a child's parent had any impact whatsoever on the citizenship of a child born on U.S. soil. The Court in *Wong Kim Ark* noted that "the Chinese Exclusion Acts . . . cannot control [the Fourteenth Amendment's] meaning, or impair its effect, but must be construed and executed in subordination to its provisions."[59] Similarly, any laws refusing legal immigration status to a child due to the illegal entry of his or her parent would be subordinate to the Constitution that grants citizenship to the child. The consistent principle is that laws affecting the status of the parent should be unrelated to the status of the child.

A final commonality between the *Chinese Exclusion Cases* and the current era is that in the Chinese Exclusion era, Congressman Geary "supported continuing exclusion through reference to a consensualist model; his method of justification demonstrates one inherent danger in Schuck and Smith's consent-based concept of citizenship—that consent will be suddenly and arbitrarily revoked."[60] The United States must avoid entering into another era like that of the Chinese Exclusion cases, upon which history will look back with shame. The circumstances, then and now, are sufficiently analogous to apply the lesson learned long ago, that exclusion is not legally supportable today.

B. The Current Attempt To Limit Birthright Citizenship Targeted at Undocumented Immigrants Is Functionally No Different and Should Not Be Treated Differently

While this history of exclusion may seem a relic of times past, the same sentiment is called to mind by contemporary arguments like that of

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59. United States v. Wong Kim Ark, 169 U.S. 649, 699 (1898).
60. Meyler, *supra* note 36, at 523.

Charles Wood[61] in his article *Losing Control of America's Future—the Census, Birthright Citizenship, and Illegal Aliens*, in which he argues that birthright citizenship should be repealed because it deprives Americans of the ability to determine the "cultural characteristics" of their own nation.[62] Others, like Representative Paul, appeal to the "sovereign right to retain a cultural identity."[63] While Mr. Wood and Mr. Paul most likely do not intend to be racist or elitist, these comments suggest that there is a hierarchy of cultural attributes, that some attributes are more desirable than others, and that it is natural and acceptable to choose among them. Such sentiments also rely on the assumption that there is a general consensus among Americans on which cultures contain these characteristics, or, at the least, that there is a consensus among those in Congress that can be followed in designing an immigration program. U.S. immigration policy was previously structured this way when it was based on a system of quotas.[64] The quota system was strongly influenced by principles of genetic selection designed "to direct the future of America along safe and sound racial channels."[65] Based on the eventual repeal of the quota-based act, it appears that the modern United States believes it is inappropriate to base admission systems on race or cultural characteristics.

Some journalists, politicians, and academics make the "anchor baby" argument to explain why the situation today is serious enough to necessitate repealing birthright citizenship.[66] The "anchor baby" argument holds that women intentionally come to the United States to have children in order to take advantage of the U.S. welfare system or other benefits that go along with having citizen children.[67] Not only do they want these benefits for their children, but opponents of birthright citizenship also argue, with emotionally charged rhetoric, that they are doing this in order to obtain citizenship for themselves through their

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61. Counsel to the United States Senate Judiciary Committee's Subcommittee on Immigration, 1995-97, 1985, 1979-82; Special Assistant, Office of Legal Policy, United States Department of Justice, 1986-89. Charles Wood, *Losing Control of America's Future—the Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465 (1999).

62. *Id.* at 494-95.

63. Paul, *supra* note 18.

64. MATTHEW J. GIBNEY, THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES 138 (2004) (citing Immigration Act of 1924, ch. 190, 43 Stat. 153, *amended by* 8 U.S.C. §§ 1101-1537 (2000)).

65. *Id.* (quoting MILTON D. MORRIS, IMMIGRATION: THE BELEAGUERED BUREAUCRACY 19 (1985)).

66. Dinan, *supra* note 2.

67. Wayne King, *Mexican Women Cross Border So Babies Can Be U.S. Citizens*, N.Y. TIMES, Nov. 21, 1982, § 1, at 1.

U.S.-born child.[68] While this undoubtedly has happened, this critique sounds strikingly similar to those made against "welfare moms" who intentionally have additional children in order to get more money from the government. Moreover, many politicians who put this argument in front of their constituents often fail to mention that children may not petition for legal permanent residency for a family member until they reach the age of twenty-one.[69] At that point, the adult child may file a petition, but even then it could take many more years before the parent could possibly obtain legal immigration status, provided they are not found to have entered the country illegally nor broken any immigration laws. That would mean that the parent would have to return to Mexico and pretend that they had been living there, that they had a visa during the brief time when the child was born in the United States, and that they did not overstay that visa. It might also be difficult to explain who took care of and supported the child until he or she grew up. The point of this hypothetical is that the myth of the "anchor baby" is simply that, a myth. Even if people attempt this scheme, it would be practically impossible for it to be successful as an anchor. Finally, even if this myth were completely accurate, it is not a *new* scenario that could not have happened in the past.

A final argument for why the United States is in a different situation now is the existence of a modern welfare state that did not exist when the Fourteenth Amendment was ratified.[70] Representative Paul wrote in his "Straight Talk" column that he introduced an amendment to a 2005 immigration bill to end social security payments to non-U.S. citizens (despite their having worked and paid into social security) and to prohibit illegal aliens from receiving food stamps, student loans, or other federally provided assistance.[71] Any student who has filed their Free Application for Federal Student Aid recently knows that one cannot apply for federal aid without having proper citizenship status. Likewise, any immigrant with a decent lawyer who has applied for cancellation from removal before an immigration judge knows that having benefited from food stamps (even those issued to a U.S.-born child) puts him or her at risk of being denied cancellation and removed. While it is hard to calculate the number of people who are illegally benefiting from government aid, presenting an image to constituents that the situation is drastically worse than they think (and probably worse than it really is) is

68. SCHUCK & SMITH, *supra* note 1, at 111.
69. Immigration and Nationality Act, 8 U.S.C.A. § 1151(b)(2)(A)(i) (2006).
70. *Id.* at 103.
71. Paul, *supra* note 18.

unethical. The assumption that immigrants cross the border primarily to exploit the United States is unfounded, especially in light of the vast number of low-paying and service jobs that are filled by such people. After Hurricane Katrina hit, did the immigrants who rushed to New Orleans go there to take advantage of the great social welfare benefits being distributed there? Clearly not. Even if one concedes that immigrants do benefit from the U.S. welfare state, the counterargument, which is conceded by the strongest opponents of birthright citizenship, is that many immigrants pay taxes that support the welfare state.[72] No conclusive evidence has been published that proves immigrants take more from the system than they contribute.[73]

The arguments for and against birthright citizenship are not new. It is not the first time the United States has faced a situation where an undesired population appears to be putting down roots beyond the control of those who would prefer to stem the tide of immigration. The United States goes through growing pains with each wave of newcomers, each with their own reasons (or perhaps not such unique reasons) for being disliked. The Irish were criticized for taking jobs and hurting the economy. The Chinese were criticized for "endanger[ing] the good order of certain localities."[74] These arguments are made time and again. Some may argue that they are true and that the United States is worse off for accepting these foreigners. For the most part, it seems that these groups gradually become settled and the antagonism against them subsides, only to flare up with the next wave of immigrants who come to "take American jobs" and impose foreign values. These points should cast a reasonable doubt on the assertions that children of undocumented Hispanic immigrants are somehow different and that now is the point in history when exclusion is justified.

IV. REPEALING BIRTHRIGHT CITIZENSHIP WILL NOT IMPROVE THE AMERICAN IMMIGRATION SYSTEM OR RESULT IN FEWER ILLEGAL ALIENS

A. Lessons Learned from Germany

Before attempting to amend the United States Constitution to eliminate birthright citizenship, it may be helpful to examine other countries that have a *jus sanguinis* system to consider how such a move could change the United States.

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72. SCHUCK & SMITH, *supra* note 1, at 113.
73. *See id.*
74. Act of May 6, 1882, 22 Stat. 58, *quoted in* Meyler, *supra* note 36, at 522.

Like many other nations, Germany's citizenship system is based solely on parentage.[75] Germany does not consider itself a nation of immigrants in the sense that the United States or Canada might, and thus, naturalization of foreigners has become the exception, rather than the rule in Germany.[76] But by as early as 1989 (and possibly earlier), Germany had "proclaimed a public interest in the naturalization of second-generation immigrants."[77] Despite this policy, a large number of people from Turkey and other nearby nations live permanently in Germany without citizenship.[78] One reason for the lack of naturalization of Turkish people (and thus also the lack of citizenship for their children) is that naturalization in Germany is based in part on cultural assimilation.[79] Immigrants from Turkey have remained somewhat separate in their own communities, with their own social customs, culture, and religion.[80]

The problem of dual citizenship (or the lack thereof) has also contributed to the creation of this unnaturalized population because

> many Turks in Germany, particularly those from rural areas, are reluctant to renounce their Turkish citizenship because this would prevent them from owning or inheriting land in Turkey and would be seen by their former neighbors in Turkey as a renunciation of Islam, thus diminishing social contacts and even marriage prospects for members of their families.[81]

Beyond this problem of dual citizenship, some have unsuccessfully recommended adopting a *jus soli* citizenship policy to ease concerns about having large groups of noncitizens present.[82] One reason for the lack of success of this argument may be fear existing in Germany from past experience with the violent political activities of the Turks (and also the Iranians).[83] This tension is not likely to decrease in the wake of September 11, 2001, since the world has become more alert to the serious nature of fundamentalist violence. But as a retort to those who would argue that violence should be a bar to birthright citizenship, one must consider whom it is easier to find and arrest. It is arguably easier to

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75. Kay Hailbronner, *Citizenship and Nationhood in Germany*, *in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA, *supra* note 35, at 67.

76. *See id.* at 67, 71.

77. Brubaker, *supra* note 35, at 9.

78. Hailbronner, *supra* note 75, at 71.

79. *Id.* at 74.

80. *Id.*

81. Joseph H. Carens, *Membership and Morality: Admission to Citizenship in Liberal Democratic States*, *in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA, *supra* note 35, at 47.

82. Hailbronner, *supra* note 75, at 77.

83. *Id.* at 69.

monitor and control the criminal behavior of those who have identities in the local legal system through the existence of records (such as drivers' licenses, employment records, phone book listings, school records, etc.) than someone who is undocumented and living in the shadows. It is also important to examine the source of the violence—is it the natural-born-citizen children of immigrants who are inciting fear? Some in the United States would cite the violence of Mexican gangs as a reason to limit the status of lawbreakers who enter the United States illegally. To fear violence is reasonable, but it is questionable whether birthright citizenship is related to immigrant violence and whether maintaining access to resources and constitutional protection by retaining birthright citizenship increases violence.

The primary barrier to assimilation and legal status to the Turks in Germany (and also for the undocumented people in the United States) is that their presence continues to be viewed and treated as temporary.[84] This is demonstrated by the presence of second- and third-generation German-born Turks in Germany[85] and the continuous presence of high rates of undocumented workers in the United States. The fact is that many immigrant workers do not go home. Political leaders need to take this into consideration when creating guest worker programs that do not lead to permanency if they truly hope to reduce the number of undocumented people. If Americans believe that ending birthright citizenship will encourage undocumented parents to return to their home country, we can look at the situation in Germany to verify that this plan will not work.[86]

The reasons why this will not work are not complicated. When people settle and create homes, have steady jobs, and have friends and family, they often do not just decide to get up and move. While this is true for many people who emigrated to another country, the argument is even stronger for those who are born in the receiving country. What ties do the Turkish children born in Germany really have to Turkey? This argument has been made clearly and consistently for at least 100 years in the United States. As Henry C. Ide wrote in his 1896 law review article, *Citizenship by Birth: Another View*: "The children of [alien] inhabitants born in the United States, are in most cases as thoroughly identified with

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84. Maria Echaveste, Univ. of Cal. at Berkeley Sch. of Law & Goldman Sch. of Pub. Policy, Keynote Address at the University of Texas School of Law: Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor (Feb. 10, 2005), *in* 40 TEX. INT'L L.J. 691, 708 (2005).

85. *Id.*

86. *Id.* at 708-09.

us as those born of our own citizens."[87] In the eyes of many, it does not make sense to withhold citizenship to the country to which individuals most relate. Whether a parent who broke the law or an innocent child of that parent *deserves* to remain in the country does not matter; chances are high that either or both of them will remain anyway.

While this discussion focuses on improving rights and creating a better immigration system by granting citizenship, Kay Hailbronner reminds us that we might better address the needs of immigrants by improving the legal status of permanent resident aliens not willing or able to apply for citizenship.[88] If the United States grants citizenship liberally, it will not deprive those who later desire to move to Mexico the freedom to do so because Mexico continues to grant citizenship to the children born to its citizens abroad.[89] This is helpful to keep in mind because not all people present or born within the United States even desire to be citizens. It is also important to note that the children of undocumented persons are not legal permanent residents; no matter their status, *all* people present within the United States need protection, not just those born to parents with a legal immigration status.

B. Pragmatic Reasons Why Ending Birthright Citizenship Will Not Work in the United States

After examining the situation in Germany, which has a permanent population of nonresidents, there are other similarly pragmatic reasons why denying birthright citizenship to those born in the United States would be a poor policy decision.

Primarily, "the *jus soli* model secures the rights of the individual and the immigrant against the incursions of a federal sovereignty."[90] From a human rights perspective, it is better to have more people whose rights are protected by the cover of citizenship. While all people physically present in the United States are guaranteed some rights, the plenary power of Congress over immigration law has the potential to intrude more deeply into the rights of noncitizens. The often-repeated words of the Supreme Court in *Mathews v. Diaz*, state that "[in] the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[91] With the high amount of media coverage of the detainees at

87. Ide, *supra* note 53, at 246.
88. Hailbronner, *supra* note 75, at 79.
89. *See supra* Part II.C.
90. Meyler, *supra* note 36, at 521.
91. 426 U.S. 67, 79-80 (1976).

Guantanamo Bay, Cuba, U.S. citizens cannot deny that how individuals are defined legally has a great impact on their rights.

Some may argue that additional congressional powers over foreigners are needed to protect the nation against terrorists. How that translates into denying foreigners due process, a right to counsel, or even freedom from torture is a murky legal question. How that would translate into denying rights to people born on U.S. soil, who are not technically "foreigners" by any traditional standard, is an even murkier question. Whatever the result, it is clear that the simplest way to avoid infringing on people's rights is to recognize the existence of those rights. The easiest way to do that here is by liberally granting citizenship.

Along similar lines, denying citizenship to people working within the United States sets the stage for private exploitation.[92] For example, people of any immigration status can sue their employers before the National Labor Relations Board (NLRB) for layoffs related to union activities.[93] In *Hoffman Plastic Compounds, Inc. v. NLRB*, an undocumented worker was fired for union-related activities.[94] The employer did not know at the time that the worker was not authorized to work.[95] The Supreme Court held that Hoffman must cease and desist from further violations of the National Labor Relations Act (NLRA) and post a notice to employees regarding this remedial order.[96] However, the Court further held that the alien would not be entitled to receive his due backpay because that "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy."[97] While denying the alien backpay may make sense for the justifications given by the Court, the message to employers is clear: if they get caught for violating the NLRA against an undocumented person, they will simply have to stop and notify their remaining employees that they did something bad. This decision provides little deterrence to employers who may be inclined to break the law and provides no restitution to the exploited alien. Creating a new class of undocumented workers by denying birthright citizenship will only increase the pool of people available for exploitation by unscrupulous employers.

Beyond these foundational protection concerns are other pragmatic reasons for continuing to grant birthright citizenship. The following

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92. Echaveste, *supra* note 84, at 703.
93. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).
94. *Id.* at 140.
95. *Id.*
96. *Id.* at 152.
97. *Id.* at 151.

arguments will be addressed in turn, that removing birthright citizenship will: (1) intentionally add to the number of illegal immigrants present in the United States, which is the very problem it purports to solve, and would not provide the desired deterrent effect; (2) promote the rejected principle of corruption of blood; (3) expand the shadow population or subclass; (4) fuel xenophobia; (5) create an administrative nightmare; (6) debase the rule of law; and (7) damage the U.S. political relationship with Mexico.

First, changing the current law on birthright citizenship to curb the number of people illegally within the United States will backfire. Assuming that this change does not encourage a significant number of people to exit the United States and that the United States cannot prevent the existing people from procreating, the people who remain will continue to give birth to children who will then also be illegally present in the United States. Our current laws have not had the desired deterrent effect on stemming the tide of immigration; they will certainly not deter children who do not make such decisions for themselves. According to a recent presentation before the United States Chamber of Commerce by Representative Flake, the restrictionists who seek to remove birthright citizenship have no plan for dealing with the estimated ten million-plus undocumented immigrants *currently* in the United States.[98] Ending birthright citizenship will create many more new illegal aliens every year and add to the very problem it purports to address.

Expanding upon the issue of deterrence, lawmakers are fully aware that employment draws undocumented immigrants to the United States. Denying citizenship to those workers' children completely misses the issue. If immigrants were unable to find employment, there would probably be few people who would travel just for the sake of having a baby born in the United States. With the high price of smuggling and the current enforcement system that pushes people to cross the border in the less-guarded desert areas, the lethal risks of crossing the border are not options for many people, especially pregnant women.

An aspect related to this argument is the question of whether many of these U.S.-born children would stay in the United States if the parents were caught and removed. While these children currently have the legal right as citizens to remain in the United States, that is not a factor that makes a difference in a parent's removal hearing in the absence of exceptional and extremely unusual hardship to the child.[99] Most likely, if

98. Deborah J. Notkin, *Using the Airwaves To Spread AILA's Message*, IMMIG. L. TODAY, Jan.–Feb. 2006, at 6.

99. Immigration and Nationality Act, 8 U.S.C.A. § 1229b(b)(1)(D) (2006).

the government is successful in removing the parents, the child will go with them rather than enter foster care. Perhaps parents would be willing to leave their children if they had family members who are legal permanent residents or citizens. Overall, such a policy would do little to reduce the number of illegal immigrants.

Second, in the U.S. justice system, an individual cannot be held liable or criminalized for an act of his parents. The Constitution states that "[t]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood . . . except during the Life of the Person attainted."[100] In *Plyler v. Doe*, the Supreme Court refused to allow states to deny education to undocumented children based on the Equal Protection Clause of the Fourteenth Amendment.[101] The Court explained that arguments for denying state benefits to those who entered illegally "do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. . . . [T]he children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'"[102] Similarly, here, to attempt to deter or punish the behavior of adults by stripping their children of a constitutional right and degrading them to the status of an illegal alien is neither just nor legal. Such a transition would lead the courts in a direction that few would like to see. Furthermore, such a move would not be justifiable because the children are more integrated into U.S. society than the society from which their parents came.[103]

The third argument is that removing birthright citizenship would "merely . . . drive these people further underground into an 'underclass' within our society."[104] Author William Rogers Brubaker argues along similar lines that as far as ideals and aspects of membership "state-membership should be *egalitarian*."[105] Many people would argue that the United States already has a subclass of people who work behind the scenes, in fields, in kitchens, on construction sites, and in hotel laundry rooms. Denying birthright citizenship would push more people into low-paying under-the-table employment, increasing the vulnerability to exploitation discussed above. The goal should be to legitimate people

100. U.S. CONST. art. III, § 3, cl. 2.
101. 457 U.S. 189, 230 (1982).
102. *Id.* at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).
103. Carens, *supra* note 81, at 39.
104. *See* Notkin, *supra* note 98.
105. Brubaker, *supra* note 35, at 3.

and allow them to fully participate in society rather than push them to the outskirts or underground.

Joseph Carens argues that individuals "have a moral right to be citizens of any society of which they are members."[106] Erring on the side of extreme examples, he might characterize what is happening with the Turks in Germany or migrant workers in the United States as similar to how slaves and freed Blacks were historically treated in the United States, the system of apartheid in South Africa, or the legal status of Jews under Nuremberg laws.[107] While these comparisons may seem exaggerated and appalling, this is the direction that is taken when states deny rights to people who are functional members of society. The United States has a proud tradition of representative government; thus, it would seem contrary to U.S. ideals to exclude long-term residents from political participation, especially if they did not come to the United States illegally (but were born here) and have no reason to move to the nation of their parents' origin.

Fourth, depriving birthright citizenship would fuel existing xenophobia. As mentioned earlier in this Comment, some academics and politicians are concerned that granting citizenship to people who have entered illegally deprives Americans of the ability to determine "the future of their own nation, including its demographic and cultural characteristics."[108] Wood also argues that it increases the number of citizens without traditional U.S. values.[109] What he does not explain is why it is a good thing for Americans to handpick favored cultural characteristics. The way this argument is articulated makes it sound like Americans are afraid that foreigners are going to push their way into the United States and transform it into a land of communists or criminals. This is similar to suggestions made as to why the Founding Fathers created the constitutional requirement that the President of the United States be born on U.S. soil.[110] Even if outsiders arrive with different values or ideas, the U.S. system of government is firmly in place and there are other protections such as law enforcement and constitutional guarantees that will maintain the structure of society. When making this argument, there is a noticeable lack of detail about which characteristics and values are so contrary to those of the United States that they are best

106. Carens, *supra* note 81, at 32.
107. *Id.*
108. Wood, *supra* note 61, at 494-95.
109. *Id.* at 496.
110. *See* Sarah P. Herlihy, Note, *Amending the Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle*, 81 CHI.-KENT L. REV. 275, 277 (2006).

excluded. Assuming that undocumented immigrants have common characteristics that can be lumped together, are they being accused of collectively having negative characteristics? Some will note that it is not only Mexicans who will be affected by such a law, and thus, it is not motivated by racism or xenophobia but is instead a national policy. In addressing that argument, one must question why

> when Senators Hillary Rodham Clinton and Charles E. Schumer declared their support for a new path to citizenship, and denounced criminal penalties recently passed by the House of Representatives, they did so not at the large, predominantly Hispanic immigrant march on Washington, but at the much smaller Irish rally held there the following day.[111]

There is little discussion in the media of the illegal Irish who come, take jobs, and impose their non-American values upon the United States. This is an issue that is perhaps not solely about race, but in which the issue of race at least must not be ignored.

Maria Echaveste, in her keynote address at the Working Boarders Conference, commented on the negative impact on society of having different groups living together but with different rights.[112] Not only will we not know who is who, but such practices can lead to racial profiling and have negative consequences for U.S. citizens who may be discriminated against for belonging to the ethnic groups that typically have fewer rights.[113] For example, an employer who is concerned about hiring people with fraudulent documentation might discriminate against anybody he suspects may have fake papers, whether or not that concern is justified.

Along a similar line to this argument is the fifth pragmatic concern: eliminating birthright citizenship will create vast administrative difficulties. What status, if any, will children born of undocumented parents receive? Will these children have access to hospitals for their births, and, if so, will they still be issued birth certificates? If so, will proving citizenship now require more than a birth certificate? Do we really want to involve hospital staff in the already complex world of immigration law? Will these illegal babies be reported and deported if discovered by hospital administration? If so, will pregnant undocumented women and their unborn children be put at greater health risks for the sake of immigration enforcement? If one goal of eliminating birthright citizenship is to prevent people from illegally

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111. Nina Bernstein, *An Irish Face on the Cause of Citizenship*, N.Y. TIMES, Mar. 16, 2006, at A1.

112. Echaveste, *supra* note 84, at 706.

113. *Id.*

accessing the benefits that accompany living in the modern welfare state, these extra administrative problems and costs may not save any money in the long run and in fact may endanger newborns. The enforcement measures already in place cost a great deal of money and may or may not actually deter unauthorized entry. With this new policy, there could be greater administrative costs related to the birth of every child because each would need to be properly documented. Or, would only children being born to poor Hispanic women in an attempt at racial profiling be suspect?

Administrative pragmatic concerns such as these were also addressed by the Supreme Court in *Wong Kim Ark* relating to the "inconvenience and danger" that such measures would impose:

> The reasons for not allowing to other aliens [beyond enemies in occupied land or diplomats] exemption "from the jurisdiction of the country in which they are found" were stated as follows: "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption."[114]

This excerpt demonstrates that courts have recognized for almost two hundred years that attempting to exclude people from birthright citizenship by excluding them from the definition of "subject to the jurisdiction thereof" would result in a slew of new problems. It would be difficult to argue that children born of illegal aliens are not subject to the jurisdiction of the United States for purposes of the Fourteenth Amendment but are subject to the jurisdiction of the United States in every other way. This problem would be admittedly less of a concern if the Constitution were to be completely changed by writing in the exception of children born to people illegally present in the country. Even with this limitation, enforcement would be tricky and would create a great deal of litigation for the already backlogged immigration courts. For example, what would Immigration and Customs Enforcement do with a child who was born to a mother who had a valid student visa (or any kind of visa) when she became pregnant but then violated the terms of her visa by working to earn money to prepare for the child's birth?

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114. United States v. Wong Kim Ark, 169 U.S. 649, 685-86 (1898) (quoting The Exchange, 7 Cranch 116, 144 (1812)).

Would that child be denied citizenship because the mother violated her immigration status and was technically removable at the time of the birth? Possibly. This and many other unanticipated scenarios would arise with no clear or easy answers.

A sixth pragmatic reason for not changing the current birthright citizenship system is that such action would debase the rule of law. Representative Flake argues that the current system does not promote the rule of law, presumably because it grants benefits to people who break the law.[115] The problem with this argument is that to deny citizenship to people born within U.S. territory is to add to the number of people who are living outside the law. Further, we would be treating people unequally based on the nationality of their parents when they had no choice in the matter and have little ability to change their situation until they are adults. The "law" is already broken in that the United States has an immigration system with a high demand for labor and insufficient legal means to obtain it. Employers hire undocumented workers but are only given a slap on the wrist if they are caught[116] (or blatantly encouraged to break the law such as during the period following Hurricane Katrina[117]). Meanwhile, politicians want to punish all future children of the workers who were lured to the United States by forever denying them the right to participate in the country in which they live and work to improve their situation. There is no rule of law in such a scenario.

The final pragmatic concern that policy makers should consider is the effect such a policy would have on the U.S. diplomatic relationship with Mexico. The legal status of foreigners is a political question that affects a state's relations with other states.[118] It is impossible to predict the exact outcome such a move would create, but stripping children of rights they have enjoyed since the ratification of the Fourteenth

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115. Dinan, *supra* note 2.

116. "The number of federal fine notices issued to employers for knowingly hiring illegal workers dropped from 417 in 1999 to three last year. Arrests of unauthorized workers dropped from 2,849 in 1999 to 445 in 2003." *Perfect Storm*, SAN JOSE MERCURY NEWS, Oct. 23, 2005, at A3.

117. Following Hurricane Katrina, the Bush Administration suspended employer sanctions in the Gulf Coast region that prohibit employers from hiring undocumented workers who were victims of Hurricane Katrina. *Easing Rules on Hiring Evacuees Spurs New Debate: Federal Action To Be Reviewed in 45 Days*, S. FLA. SUN-SENTINEL, Sept. 10, 2005, at 12B. Also, on September 8, 2005, President Bush issued an Executive order suspending the Davis-Bacon Act in the Gulf Coast region. Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005). The order removed restrictions on federal construction and public works projects of a certain value requiring employers to pay at least the local prevailing wage directly at the worksite. *Id.* So employers could now hire whomever they wished and pay them whatever wages they wished.

118. Hailbronner, *supra* note 75, at 75.

Amendment and prior to that through the common law is not likely to be well received. While those in Congress may be more focused on the immediate demands of their constituents, the Executive Branch needs to pay attention to the debate and be prepared to respond to the foreign affairs consequences.

V. CONCLUSION

The United States currently has an illegally present subclass who have citizen children. Making the children of these individuals also illegal will not solve the immigration problems that exist today. The practical consequences of making such a move will only result in fewer legal protections, greater stigma, and a push deeper into the shadows for a greater number of people. The United States must find other ways to alleviate the restrictionists' fears without harming its own society, which, for better or worse, is made of up of illegal immigrants.

Beyond the discussion above, there are certainly other rights that would be implicated by such a policy change. Would such a move be seen as regulating the reproductive rights (and thus the constitutionally-protected right to privacy) of a discrete population? Would denying citizenship to infants prevent a battered and undocumented mother from seeking police protection for fear of removal for both herself and her child or potentially result in the mother being removed without the child and the child being left with a citizen abuser? Ending birthright citizenship clearly has impacts beyond what has been anticipated by its proponents that need to be seriously considered. The issue of birthright citizenship should not be taken lightly, used to stir the emotions of an agitated population, or used to win a political campaign. Birthright citizenship has real and serious effects for many people. While there may be rational and legal arguments for building a nation on principles of mutual consent, these arguments are outweighed by the urgent and surpassing need to protect everyone within the territory of the United States from the whims of xenophobia. Finally, the fact that some people have abused the immigration system in the past has never been an excuse to deny protection to those who need and deserve it. Birthright citizenship should be left intact.