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Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment's Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures

William S. Stevens

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COMMENTS

JURISDICTION, ALLEGIANCE, AND CONSENT: REVISITING THE FORGOTTEN PRONG OF THE FOURTEENTH AMENDMENT'S BIRTHRIGHT CITIZENSHIP CLAUSE IN LIGHT OF TERRORISM, UNPRECEDENTED MODERN POPULATION MIGRATIONS, GLOBALIZATION, AND CONFLICTING CULTURES†

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Prologue:

Various questions lead me to this Comment. I began by asking what makes a nation? What grants sovereignty? What limits sovereignty? Does a border define a nation, or the nation define the border? Further, does a nation have a sovereign right to define and enforce a border? Is the border meant to include or exclude? Who is included, or excluded? Are we citizens by virtue of the border, or does something else define both citizenship and a border? What is citizenship? Exploring those questions, of course, will not fit in a single law review Comment. While I touch on some, I have left many topics for future writings.

The Fourteenth Amendment's "Citizenship Clause"[1]

> "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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2]
>
> —Passed by Congress June 13, 1866. Ratified July 9, 1868.

> "If mutual consent is the irreducible condition of membership in the American polity, it is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens. The parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law. They are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership. And if the society has refused to consent to their membership, it can hardly be said to have consented to that of their children who happen to be born while their parents are here in clear violation of American law."[3]
>
> —Peter H. Schuck & Rogers M. Smith, 1985

1. For brevity hereafter, and consistent with common use, the Author uses "Citizenship Clause" to refer to the first sentence of Section 1 of the Fourteenth Amendment.

2. U.S. CONST. amend. XIV, § 1.

3. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 94 (1985) [hereinafter SCHUCK, CITIZENSHIP WITHOUT CONSENT].

I. INTRODUCTION

A. *Discussion*

We discuss it across the nation.[4] It makes and breaks political careers.[5] Foreign nationals are a fact today, working side by side with Americans in a growing economy, but many are here illegally, with the number of illegal aliens[6] rivaling that of aliens here legally.[7] How do we manage the burgeoning population of illegal aliens and the burden their changing demographics place on the nation's resources?[8] Viewed in the light of massive illegal immigration and the debate on border control "the eternal question surrounding citizenship—how

4. *See, e.g.,* Victor Davis Hanson, Commentary, *The Shifting Debate Over Illegal Immigration*, CHI. TRIB., Oct. 6, 2006, at 31, *available at* 2006 WLNR 17314280; Helen McClafferty, Letter to the Editor, *Shoe on the Other Foot*, STAR LEDGER (Newark, N.J.), Sept. 28, 2006, (editorial reader forum), at 16, *available at* 2006 WLNR 16821038; Eugene J. Micek, Letter to the Editor, *Seal the Borders, for Sake of Country*, SAN JOSE MERCURY NEWS, Nov. 1, 2006, at A2, *available at* 2006 WLNR 18927224; Al Montgomery, Letter to the Editor, *Blame Politicians, Not Immigrants*, MEMPHIS COM. APPEAL, Nov. 19, 2006, at V5, *available at* 2006 WLNR 20137422; Coy Prather, Letter to the Editor, *You Don't Get Half of It*, DALLAS MORNING NEWS, Oct. 6, 2006, at 20A, *available at* 2006 WLNR 17342333 ("Once these guest workers are here legally, it means more children born as citizens using U.S. services free of charge.").

5. *See, e.g.,* Editorial, *Straw That Broke the Elephant's Back: Republican Party Executive Director Steps Down After Embarrassing Minutemen E-mail*, LAS VEGAS SUN, Oct. 6, 2006, at A4, *available at* 2006 WLNR 17343389 (explaining that Hispanic Republicans are disturbed by state party plank to end citizenship for children born to illegal aliens). For discussion on the issue's prominence in politics, see Frank Davies, *Feinstein Pitches in for Fellow Democrats*, MONTEREY COUNTY HERALD (Cal.), Oct. 6, 2006, *available at* 2006 WLNR 17314559 (stating that Republican Dick Mountjoy opposes Feinstein, seeks to block citizenship for children of undocumented aliens); Linda Espenshade, *Santorum, Casey Seize on Immigration Issue*, INTELLIGENCER J. (Lancaster, Pa.), Nov. 2, 2006, at A1, *available at* 2006 WLNR 19035121; Judy Gibbs Robinson, *Immigration Issues Debated: Complexities Come Down to Justice, Economics*, DAILY OKLAHOMAN, Nov. 1, 2006, *available at* 2006 WLNR 18948191; Robin Stein, *Debate's a Study in Differences*, ST. PETERSBURG TIMES (Pasco Times ed.), Nov. 11, 2006, at 5, *available at* 2006 WLNR 18983727.

6. This Comment uses the term "illegal alien" as defined by Texas State Representative Leo Berman: "an individual who is not a citizen or national of the United States and who has entered the United States without inspection and authorization by an immigration officer." Tex. H.B. 28, 80th Leg., R.S. (2007) (full text provided in Appendix A).

7. *See* Robert Rector, Importing Poverty: Immigration and Poverty in the United States: A Book of Charts (Oct. 25, 2006), http://www.heritage.org/research/immigration/SR9.cfm (reporting that the most widely accepted analysis concluded that some 10.3 million illegal immigrants lived in the U.S. in 2004, but noting the possibility that the illegal population was much larger in 2004).

8. *See, e.g., id.* (noting costs of influx on welfare and social conditions); Andy Miller, *Medicaid Rolls Decline as New State Rules Begin*, ATLANTA JOURNAL-CONSTITUTION, Sept. 30, 2006, at A1, *available at* 2006 WLNR 16945234 (reporting that Georgia program lost almost 70,000 from rolls after new rules to control fraud); Rebecca Boyle, *Legislator Questions Family's Citizenship*, GREELEY TRIB. (Colo.), Oct. 7, 2006 (questioning citizenship after deaths in car wreck, readers noting "masses of illegals" putting drivers and children at serious risk because they drive without training and without insurance).

and by whom it is to be acquired, and what rights and duties it is to imply—assume a rather different aspect than they have in earlier debates."[9] Over the course of my adult life, from the 1980s to today, the levels of immigration, both legal and illegal, have led to what Margaret Lee refers to as a sporadic re-examination of the long-held (but rarely questioned) belief that a person born in the United States and *subject to its jurisdiction*, is a citizen of the United States regardless of the race, ethnicity, or alienage of his parents.[10] Today, this belief is routinely held to mean that we bestow American citizenship on any child born in the United States on account of nothing more than the mother's mere physical presence on American soil at the time of the child's birth.[11] However plausible this interpretation may seem as understood in common language, "it is incompatible not only with the text of the Citizenship Clause (particularly as informed by the debate surrounding its adoption), but also with the political theory of the American Founding."[12] Further, although many assume the Citizenship Clause guarantees birthright citizenship *ex proprio vigore*,[13] the legislative history of the Fourteenth Amendment suggests otherwise.[14]

"The war on terror . . . further heightened attention and interest in restricting automatic birthright citizenship."[15] Persons claiming American citizenship merely by birth location may pay no allegiance to America. Consider aliens with a child born in the United States, who then return to their home country, and then the child later claims United States citizenship after growing up in a foreign country, speaking a foreign language. Consider Yaser Esam Hamdi, an ostensibly ordinary enemy combatant captured on the battlefield. An ordinary Saudi-American "dual" national captured in Afghanistan? Hamdi was captured while he fought alongside Taliban forces,[16] forces at war with the United States.

After Hamdi was transferred to a military prison, interrogators discovered that Hamdi was born to Saudi parents, but Hamdi's mother

9. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 93–94.

10. *See* Margaret Mikyung Lee, *U.S. Citizenship of Persons Born in the United States to Alien Parents*, REPORT FOR CONGRESS (Congressional Research Service, The Library of Congress), September 13, 2005, at Summary (emphasis added) (noting that this "tenet" is thought to be codified in the Fourteenth Amendment of our Constitution and §301(a) of the Immigration and Nationality Act [INA] (8 U.S.C. §1401(a))).

11. John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 18, 1 (March 30, 2006), http://www.heritage.org/research/legalissues/lm18.cfm [hereinafter Eastman, *From Feudalism to Consent*].

12. *Id.*

13. BLACK'S LAW DICTIONARY 621 (8th ed. 2004) (meaning "by their or its own force").

14. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 95.

15. Lee, *supra* note 10, at Summary.

16. *Id.*

gave birth to him while in Louisiana.[17] His father, Esam Fouad Hamdi, a Saudi expatriate, worked as a chemical engineer in Baton Rouge on a project for Exxon.[18] "When U.S. officials learned that Hamdi was born in Louisiana, they transferred him to the Naval Brig in Norfolk, Va., treating him as a U.S. citizen. Under the generally accepted interpretation of the 14th Amendment's citizenship clause, mere birth on U.S. soil automatically confers citizenship."[19] Even though Hamdi returned to Saudi Arabia with his parents while he was an infant and never returned to the United States until he was brought here as an enemy combatant, he claimed citizenship from the very nation he took up arms against and was then afforded rights not available to "foreign" enemy combatants.[20]

Who then is, and is not, and should be, and should not be, recognized for birthright citizenship? Mere birth of a child to foreign nationals who happen to be on American soil for some temporary purpose, such as the case of "Hamdi the Taliban," should not result in citizenship.[21] It was Hamdi's case that prompted the Center for American Unity to ask:

> [w]hether a person, born in the United States of alien parents in this country on a temporary work visa, who leaves the United States as an infant, never returns, declares himself a citizen of another country, and takes up arms in a conflict against forces of the United States, and otherwise demonstrates no allegiance to the United States and demonstrates allegiance to foreign powers, was ever "subject to the jurisdiction" of the United States under the Fourteenth Amendment's Citizenship Clause.[22]

Such a recognition of ineligibility would not be a complete departure from current practice. Children born to diplomats stationed in the United States have no claim to United States citizenship.[23] Likewise,

17. *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*: Hearing on Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty Before the H. Comm. on the Judiciary, 109th Cong. (2005) (statement of John C. Eastman, Professor of Law, Chapman University School of Law) [hereinafter Eastman, *Born in the USA?*].

18. *Id.*

19. John C. Eastman, *Citizen by Right, or by Consent?*, ESSAY (The Claremont Institute For the Study of Statesmanship and Political Philosophy) (Jan. 2, 2006), *available at* http://www.claremont.org/publications/pubid.464/pub_detail.asp.

20. Lee, *supra* note 10, at Summary; Eastman, *Born in the USA?, supra* note 17.

21. Eastman, *Born in the USA?, supra* note 17.

22. Brief for Center for American Unity, et al. as Amici Curiae Supporting Affirmance, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), *available at* http://cfau.org/hamdi/amicusmerits.html.

23. Early English writers widely agreed that neither the children of diplomats nor those of foreign invaders could be considered subjects of the Realm. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 9–41 (describing history and political theories developed in England and Europe prior to and contemporaneously with the founding of the United States); LUELLA GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES 18 (1934) (referencing Justice Gray's opinion in *Wong Kim Ark*).

per English common law, children born to foreign invaders are denied citizenship.[24] Diplomats and invaders are both examples of a foreign national physically within the borders of the United States, but with allegiance to another sovereign. What of the allegiance of an illegal alien who enters the United States in violation of one or more laws, who still has family and citizenship in another country, who may return home to vote in her country or vote absentee, who may send money back to her home country, and who later gives birth to a child within the borders of the United States? Children of diplomats, here legally, have no claim to citizenship. How can the child of an alien here illegally have a claim superior to that of one here legitimately? How much different is a foreign national who enters illegally from a foreign invader?[25] Indeed, some say there is no difference.[26] Veteran journalist David Kupelian warns that "America literally has been invaded, and we are at war."[27]

B. *Definitions*

> **Birthright:** *n.* 1. a right or privilege that you are entitled to at birth; . . . 2. an inheritance coming by right of birth (especially by primogeniture) 3. personal characteristics that are inherited at birth[28]

> **Citizenship:** *n.* 1. the state of being vested with the rights, privileges, and duties of a citizen. 2. the character of an individual viewed as a member of society; behavior in terms of the duties, obligations, and functions of a citizen: *an award for good citizenship.* [Origin: 1605–15; citizen + -ship][29]

> **Polity:** *n.* 1. The form of government of a nation, state, church, or organization. 2. An organized society, such as a nation, having a

24. GETTYS, *supra* note 23, at 18 (referencing Justice Gray's opinion in *Wong Kim Ark*). *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 14.

25. Children of foreign invaders were one of two commonly recognized exceptions to English subjectship. GETTYS, *supra* note 23, at 21.

26. *See, e.g.,* THOMAS G. TANCREDO, IN MORTAL DANGER: THE BATTLE FOR AMERICA'S BORDER AND SECURITY 65 (2006) ("[T]he United States and Western civilization [are] in a 'clash of civilizations.' And it is a real clash . . . a real war."); LOU DOBBS, WAR ON THE MIDDLE CLASS: HOW THE GOVERNMENT, BIG BUSINESS, AND SPECIAL INTEREST GROUPS ARE WAGING WAR ON THE AMERICAN DREAM AND HOW TO FIGHT BACK (2006); PATRICK J. BUCHANAN, STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA 181 (2006); William H. Calhoun, Magic City Morning Star: Illegal Immigration: India Invades America (Dec. 17, 2006), http://www.magic-city-news.com/William_Calhoun/Illegal_Immigration_India_Invades_America7208.shtml ("America is currently being invaded from all corners of the world. Mexico. China. Africa. India. They all are invading and carving out their enclaves.").

27. TANCREDO, *supra* note 26, at 35 (citation omitted).

28. "BIRTHRIGHT," *retrieved from* DICTIONARY.COM (WORDNET 3.0), *available at* http://dictionary.reference.com/browse/birthright (last visited June 1, 2008).

29. "CITIZENSHIP," *retrieved from* DICTIONARY.COM UNABRIDGED (V. 1.1) (RANDOM HOUSE, INC.), *available at* http://dictionary.reference.com/browse/citizenship (last visited June 1, 2008).

specific form of government: "*His alien philosophy found no roots in the American polity" (New York Times).*[30]

C. *Thesis*

The history of the United States, our Fourteenth Amendment, and the looming social unrest precipitated by terrorism, massive illegal migration, and culture clashes warrant a revised approach to citizenship and a look to alternative methods of managing the movement of people without abandoning our sovereign right to manage the acquisition of citizenship. Many consider the question of birthright citizenship well-settled, based on previous court decisions such as *Wong Kim Ark*[31] and that court's awkward application of the English common law concept of subjectship to the American Fourteenth Amendment's Citizenship Clause. The Fourteenth Amendment gives a two-pronged conjunctive test for citizenship, not subjectship: 1) locality of birth, and 2) allegiance to the United States.[32] The *Wong Kim Ark* decision effectively ignored the second prong of the test, confusing "subject to the jurisdiction thereof" (allegiance to the United States) with "jurisdiction" (the right of the United States to enforce its laws), and misunderstanding our complex American history of consensual government and citizenship. "What is the phrase 'and subject to the jurisdiction thereof' doing in there, if it has no limiting or restrictive function?"[33] The Congress of the United States of America does not need to pass an amendment merely to state that the United States may enforce its own laws.[34]

Compounding the legacy of *Wong Kim Ark* is the inexplicable failure by most readers to note that *Wong Kim Ark* decided only the question of birthright citizenship for children of legal, permanent resident aliens, not illegal and nonimmigrant aliens. Despite *Wong Kim Ark* and any confusion therefrom, the legal community owes the nation an honest review, an accurate reading, and a responsible application of the Citizenship Clause of the Fourteenth Amendment. Congress, the legislative body entrusted with the consent and will of the people, must act to clarify the issue of birthright citizenship and act to manage the growing population of non-citizens within the bor-

30. [Obsolete French politie, from Old French, from Late Latin polītīa, the Roman government; see police.] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1359 (4th ed. 2004).

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

32. It is conjunctive because of the use of "and" between the locality and the jurisdiction phrases, with "All persons born or naturalized *in the United States*" being the locality portion of the clause. U.S. CONST. amend. XIV, § 1.

33. Vin Suprynowicz, *Subject to the Jurisdiction Thereof*, LAS VEGAS REVIEW-JOURNAL, Jun. 4, 2006, http://www.reviewjournal.com/lvrj_home/2006/Jun-04-Sun-2006/opinion/7582766.html.

34. *See* U.S. CONST. art. 1, § 1; art. 2, § 3; art. 6, cl. 2.

ders of the United States with meaningful, relevant legislation appropriate and favorable to the interests of the existing citizenry.

D. *Roadmap*

This Comment will provide background detailing national concern over birthright citizenship, the history and context of the Fourteenth Amendment to the United States Constitution, and origins and concepts of citizenship. Next, it will analyze the text of the Citizenship Clause of the Fourteenth Amendment and discuss the applications and misapplications of the concepts of citizenship in case law following the Fourteenth Amendment. It will also examine the status of "anchor babies," "split families," and "dual citizenship;" argue that Congress can, and should, regulate acquisition of citizenship; and argue that the framers of the Fourteenth Amendment never intended to grant a right or claim of right to citizenship to children of aliens temporarily or illegally present in the United States. Furthermore, this Comment will argue that the phrase "subject to jurisdiction thereof" is the limiting second prong of a conjunctive clause, describing a matter of undivided consensual allegiance between an individual and republican government formed by consent of the people. Moreover, this Comment will present Swiss methods of determining citizenship as an alternative for comparison. Finally, this Comment will argue for elimination of any possible ambiguity in the language of the Fourteenth Amendment, either by statutory act or constitutional amendment.

II. WHY REVISIT BIRTHRIGHT CITIZENSHIP?

A. *Demographics*

Although illegal immigration has been an issue for more than 100 years, the population proportion of immigrants was comparatively small.[35] In 1980, conservative estimates put the number of illegal aliens in the United States at between 3.5 and 6 million people, with an increase of about 200,000 additional illegal aliens each year.[36] Had the influx remained at that rate, the illegal alien population would have reached 7 to 10 million in the new millennium.[37]

The influx, however, has increased. Today, some estimates place the number of illegal aliens as high as 30 million, with the estimated growth rate increasing each year.[38] In 1985, when illegal immigration

35. EXAMINING ISSUES THROUGH POLITICAL CARTOONS: ILLEGAL IMMIGRATION 19 (William Dudley ed., 2003) [hereinafter ILLEGAL IMMIGRATION].

36. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 93; ILLEGAL IMMIGRATION, *supra* note 35, at 33 (estimating the population of illegal aliens was between three and six million in 1986).

37. ILLEGAL IMMIGRATION, *supra* note 35, at 31 (using 2000 Census data, one study estimated the population of illegal aliens at 11 million).

38. *See, e.g.*, Mac Johnson, Texas 2025: The Economy of a Third-World Nation (Feb. 6, 2007), http://humanevents.com/article.php?id=19293.

occurred at the "mere" pace of 200,000 aliens each year, border control dominated policy discussions.[39] "In 1996 alone, the United States apprehended and returned 1.5 million Mexicans attempting to enter the country."[40] The Fourteenth Amendment framers could not have anticipated the magnitude of such an influx, nor could they have foreseen the social and economic effects that have transformed American immigration policy from the open-border policy of 1866 to the condition we have today.[41]

B. *Magnets: Incentives to Illegal Entry*

"[I]f you subsidize something, you get more of it; if you tax something, you get less of it."[42] Birthright citizenship provides aliens yet another incentive to enter the United States illegally, or, if already present, to violate temporary visas.[43] Combined with the powerful lure of entitlement to citizen children and their alien parents, the incentive of birthright citizenship cannot be ignored.[44]

In 1963, President Johnson declared a war on poverty—to date the United States has spent $11 trillion fighting this war, a war that our immigration policies operate against by increasing the number of immigrants with low skill levels likely to receive welfare services.[45] Before 1960, immigrant education level was on par with non-immigrants, and immigrant income, on average, exceeded that of non-immigrants.[46] In other words, immigrants came with education levels comparable to the existing United States population, and they earned as much or more than Americans.

The 1965 Immigration Act, promoted as a minor adjustment, made drastic changes in our immigration law.[47] After the Act, by comparison to non-immigrants, immigrant education levels plummeted such that "immigrants increasingly occupy the low end of the U.S. socio-economic spectrum."[48] Two conditions entice poorly educated immigrants to cross the border: (1) current immigration law favors kinship above education (chain migration), and (2) "a permissive attitude toward illegal immigration that has led to lax border enforcement and

39. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 93.

40. ILLEGAL IMMIGRATION, *supra* note 35, at 34 ("More than half of the illegal immigrant population in the United States is from Mexico.").

41. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 93.

42. BUCHANAN, *supra* note 26, at 265.

43. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 94.

44. *Id.* at 95.

45. Rector, *supra* note 7.

46. *Id.*

47. PETER H. SCHUCK, CITIZENS, STRANGERS & IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 280, 327 (1998) [hereinafter SCHUCK, STRANGERS & IN-BETWEENS]. *See* ROY BECK, THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL, AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS 15, 17, 92 (1996).

48. Rector, *supra* note 7.

non-enforcement of the laws [prohibiting] employment of illegal immigrants."[49] Current politics of immigration make it impossible to be selective in admitting immigrants from different nations, leaving as alternatives only loss of control of the borders or restrictive policies toward immigrants in general.[50]

C. *An Inadequate Measure of Expression*

> "In a polity whose chief organizing principle was and is the liberal, individualistic idea of consent, mere birth within a nation's border seems to be an anomalous, inadequate measure or expression of an individual's consent to its rule and a decidedly crude indicator of the nation's consent to the individual's admission to political membership."[51]
>
> —Peter H. Schuck & Rogers M. Smith, 1985

We, as Americans, can explore the world with passion because we know who we are and where we come from, and yet, everywhere people wrestle with "the same crucial problem that seems [to be] the key to everything: *who belongs and why?*"[52]

> What unites Americans? "E Pluribus Unum"—out of many, one—is our national motto. How that happens remains mysterious and shrouded in conventional, but incorrect, wisdom. What is an American? Throughout the years of our history, there has been no shortage of answers to that question. Yet at this juncture in its history, the United States stands at a particularly difficult and dangerous crossroads. An accurate answer to that question is increasingly imperative.[53]

Have we Americans forgotten whence we come? The debate on proper "size, shape, and composition of the polity" has been renewed, but never decisively resolved.[54] Unlike past times, today's immigrants may not choose to assimilate, but instead follow the "politics of ethnic protest advocated by many minority group leaders . . . ."[55] "The crisis of the West is of a collapsing culture and vanishing peoples . . . . If we do not shake off our paralysis, the West comes to an end."[56]

> A recent article in the *Houston Chronicle* discusses the problem of so-called anchor babies, children born in U.S. hospitals to illegal immigrant parents. These children automatically become citizens, and

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49. *Id.*

50. SCHUCK, STRANGERS & IN-BETWEENS, *supra* note 47, at 280. *See* BECK, *supra* note 47, at 9.

51. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 2–3.

52. GEORGIE ANNE GEYER, AMERICANS NO MORE: THE DEATH OF CITIZENSHIP xi–xii (1996).

53. STANLEY A. RENSHON, THE 50% AMERICAN: IMMIGRATION AND NATIONAL IDENTITY IN AN AGE OF TERROR 39 (2005).

54. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 94.

55. SCHUCK, STRANGERS & IN-BETWEENS, *supra* note 47, at 280.

56. BUCHANAN, *supra* note 26, at 245.

> thus serve as an anchor for their parents to remain in the country. Our immigration authorities understandably are reluctant to break up families by deporting parents of young babies. But birthright citizenship, originating in the 14th amendment, has become a serious cultural and economic dilemma for our nation.[57]

"Today, the nation is experiencing a new, convulsive violation of consensually based political community: the dramatic increase in the number of undocumented aliens, most of whom are present in contravention of the expressed consent of the political community."[58] "[T]he presence of large numbers of illegal aliens in the United States creates significant domestic problems."[59] Further, the "presence and competition of aliens for jobs are a constant source of political and ethnic controversy."[60] The massive influx of illegal aliens represents "the greatest contemporary threat to a consensually based political community."[61] "The conditions that drive aliens to enter the country illegally often merit sympathy and sometimes even justify the offer of refuge and succor."[62] Lacking legal protection, the aliens are often vulnerable to exploitation.[63]

> The problem of illegal aliens is compounded, moreover, by a second social transformation—the emergence of the American welfare state. This development has undoubtedly spurred illegal immigration to some extent, but it has also increased the fears and resentments that accompany the presence of illegal aliens. Their need for many social services raises concerns that governmental programs will be seriously overburdened by demand made by people whom the community has designated as outsiders.[64]

The issue of illegal aliens, and their children, impacts us everyday. For many reasons, the unquestioning acceptance of the "fact" of birthright citizenship has persisted.[65] Perhaps in part because of *Wong Kim Ark*, many believe that *jus soli* citizenship is mandated. Others believe that the Fourteenth Amendment renders any other position unconstitutional.[66] Whatever the reason, only recently has the problem of illegal aliens reached critical proportions.[67] The questions of national autonomy and political community cast a new light on the issues of birthright citizenship and consensual political membership.[68]

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57. Ron Paul, *Rethinking Birthright Citizenship*, LEWROCKWELL.COM, Oct. 3, 2006, http://www.lewrockwell.com/paul/paul346.html.
58. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 3.
59. *Id.*
60. *Id.*
61. *Id.* at 5.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 4.

This new light, a "rather different light," dispels the obscurity to which our "long, unreflective acceptance" relegated the question of birthright citizenship.[69] Notwithstanding some actions initiated in the past, the question of birthright citizenship has not been seriously considered.[70]

D. *Anchor Babies*

> "An illegal alien can cross the border, have a baby five minutes later, and that baby is automatically declared a citizen of the U.S.A. Automatically! . . . They are, in fact, rewarded for disobeying U.S. law by having their children granted automatic citizenship. In addition, the happy family is entitled to welfare benefits. And, illegal alien parents who have children born in the U.S. are seldom deported. That's why their children are called "anchor babies"—they anchor their families securely in the U.S.A.
>
> . . .
>
> How big is the anchor baby phenomenon? It has been estimated that about 165,000 anchor babies are born (and automatically granted citizenship) each year. It might actually be higher. The exact figure is uncertain because all hospitals and physicians receiving federal funds are forbidden from inquiring as [to] their patients' legal status. In other words, the U.S. taxpayer is financing medical care for illegal aliens, and those providing such care can't even ask if patients are legal or not! The state of California has a particularly liberal program to reward illegal aliens which includes free pre-natal care and delivery, and it's no surprise that 60% of babies born in LA community hospitals are born to illegals."[71]
>
> —Allan Wall, 2001

> "***The practice isn't new.*** Drawn by better medical care and U.S. citizenship for their children, Mexican residents have given birth in San Diego for generations—but most were from the upper classes and paid for the services. Some of Tijuana's top business leaders, as well as the governor of Baja California, were born in San Diego hospitals—legally. A rare academic study of the phenomenon, which focused on 184 Tijuana residents who gave birth in the mid-1980s, found that about 10 percent delivered across the border."[72]
>
> —Nancy Cleeland, 1994

Delivering foreign babies in the United States is not new, but the conditions have changed since the 1980s. In 1985, the number of births to illegal aliens within America's borders was estimated at

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69. *Id.*

70. *Id.* at 5.

71. Allan Wall, Anchor Babies (Apr. 26, 2001), http://www.americanpatrol.com/ANCHORBABIES/AnchorBabiesAllanWall.html.

72. Nancy Cleeland, *Births to Illegal Immigrants on the Rise*, SAN DIEGO UNION-TRIB., Feb. 20, 1994, at A-1, *available at* LEXIS.

75,000 each year.[73] Today, illegal aliens comprise 22% of all births in the state of California.[74] The National Center for Health Statistics reported the crude birth rate for California in 2005 at 549,626.[75] Doing the math, California alone had 120,917 births to illegal aliens, approximately 60% more than the entire country had in 1985.

Since these "anchor babies" are considered (by modern wisdom) to be citizens *jus soli*, they "begin to draw a lifetime of benefits we provide all American children and their parents."[76] The births and associated public costs, however, are disproportionately borne by only a few urban areas,[77] located primarily in the southwest United States.

E. *Split Families, Chain Migration, and Dual Citizenship*

Split families, those with both alien members and members claiming citizenship, result when illegal parents arrive, often with illegal children, and give birth to a child on American soil.[78] Illegal aliens—both those who enter the United States illegally and those who stay beyond the term of their once-valid visas—have anchor babies, raise split families with claims of "dual" citizenships, and "bring in their relatives in an unending process known as 'chain migration.'"[79] Such families typically earn less money than legal families, and the cost of healthcare for the children is borne mostly by the public.[80] Alan Wall explains how this public support continues beyond healthcare:

> Of course the birth of an anchor baby is only the beginning. As the child grows he or she is entitled to a multitude of other taxpayer-funded programs. Since most anchor babies are classified as "minorities," they can expect to enjoy legal preference over "non-Hispanic white males" under today's "civil rights" regime. Upon reaching adulthood, the citizen anchor baby is eligible to import relatives from the home country through America's nepotistic chain migration system, in which the principal qualification for a prospec-

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73. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 95.

74. BUCHANAN, *supra* note 26, at 259.

75. BRADY E. HAMILTON, JOYCE A. MARTIN & STEPHANIE J. VENTURA, NAT'L CTR. FOR DISEASE CONTROL, BIRTHS: PRELIMINARY DATA FOR 2005 (Jan 11, 2007), http://www.cdc.gov/nchs/products/pubs/pubd/hestats/prelimbirths05/prelimbirths05.htm (follow Table "8" hyperlink).

76. BUCHANAN, *supra* note 26, at 259.

77. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 95.

78. *See, e.g.*, Esmeralda Bermudez, *Deportation to Break up Beaverton Family*, OREGONIAN, Oct. 6, 2006, at B1, *available at* 2006 WLNR 17377926.

79. BUCHANAN, *supra* note 26, at 259–60.

80. Rector, *supra* note 7. *See* MGT of America, Inc., *Medical Emergency: Costs of Uncompensated Care in Southwest Border Counties*, REPORT (United States/Mexico Border Counties Coalition, Washington, D.C.) (Sep. 2002); Frosty Wooldridge, *Chilling Costs Of Illegal Alien Migration*, NEWSWITHVIEWS, Nov. 9, 2004, http://newswithviews.com/Wooldridge/frosty2.htm; Weekly Epidemiological Record, World Health Organization, No. 32, Aug. 11, 2006, *available at* http://www.who.int/wer/2006/wer8132.pdf; Madeleine Cosman, *Illegal Aliens and American Medicine*, J. AM. PHYSICIANS & SURGEONS, Spring 2005, at 6.

> tive legal immigrant is having relatives already in the U.S. When you look at the vast cornucopia of benefits, you have to conclude that the U.S.A. offers powerful incentives for illegal immigration. For those who disobey U.S. law and their children, America is certainly the land of opportunity![81]

Many countries permit their citizens to become citizens of other countries.[82] Only one, the United States, goes on to permit its citizens to swear allegiance to a foreign power, vote in foreign elections, run for office in foreign regimes, and fight in the wars of other nations.[83]

III. THEORIES OF CITIZENSHIP AND ACQUIRING CITIZENSHIP

A. *Citizenship*

> "There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.
>
> For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States."[84]
>
> —Justice Waite, 1874

> "Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf."[85]
>
> —Justice Warren, 1958

81. Wall, *supra* note 71.

82. RENSHON, *supra* note 53, at 9.

83. *Id.* at 3–4; BUCHANAN, *supra* note 26, at 260.

84. Minor v. Happersett, 88 U.S. (1 Wall.) 162, 165–66 (1874).

85. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

1. Republicanism and the Common Good

Republicanism sees citizenship as an active engagement and membership in the polity, as opposed to a "self-interested protection of private interests."[86] While some think of political concepts as rights, and many think of citizenship in this light, citizenship is not a right, but rather a relationship with the polity.[87] "A citizen in the republican sense must be surrounded by his own unique community."[88] Citizenship, consensual in nature, presupposes both the right of the individual to participate as well as the right of the polity to permit the participation.[89] Four ideals describe this reciprocal and interdependent nature of republican citizenship: (1) citizens enjoy rights needed to attain private goals, whilst performing public roles in society; (2) individual rights protected by the polity correspond to duties to the polity; (3) each citizen must actively protect the rights of others within the polity; and (4) citizens interact both formally and informally within the polity.[90]

2. Communitarianism and Participation

"Communitarianism differs from republicanism insofar as it focuses on an individual's capacity as a member within a specific community, rather than being strictly bound to the government or the authorities."[91] Whereas Republicanism focuses on membership in the polity through allegiance to a nation-state, Communitarianism sees the citizen bound to his fellow citizens through common culture, history, and tradition.[92] Because a communitarian polity manifests citizenship through bonds to the membership, and the member in part sees his identity as an aspect of the community, a newcomer must assimilate in order to participate in the community.[93]

3. Liberalism and Fundamental Principles

A third view of citizenship, Liberalism, sees the relationship between member and polity as a means of protecting individual rights superior to the polity.[94] This view sees rights as defining the entitlement to citizenship, rather than the rights flowing from citizenship.[95] Government of a liberal polity provides and protects three fundamen-

86. Rachel Baskin, Note, *Citizenship Theories, Immigration and Nationality Act Section 309 &* Nguyen v. INS*: How the Supreme Court Got It Wrong*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 869, 891–92 (Jan. 2006).
87. *Id.* at 873.
88. *Id.*
89. *Id.* at 894.
90. *Id.* at 892.
91. *Id.* at 897.
92. *Id.* at 897–98.
93. *See id.* at 898–900.
94. *Id.* at 902.
95. *Id.*

tal principles: (1) equality, (2) due process, and (3) mutual consent of membership in the polity, which "rests on the consensual relationship between the individual and the state."[96]

B. *Acquiring Citizenship*

Citizenship can be controversial, yet the precepts of citizenship have been accepted for centuries, causing many Americans to wonder why these ideas should be controversial at all.[97] Although the American concept of citizenship has evolved since colonial times, its origins stem from allegiance to a monarch and the attendant benefits of protection by the monarch and loyalty from the subject.[98] When the United States Constitution was adopted, it had no definition of citizenship, though it used the term "citizens."[99] Until the adoption of the Fourteenth Amendment, there was some doubt as to whether state citizenship depended on national citizenship, or vice versa.[100] The Chancery Court of New York referenced this issue in the 1844 case of *Lynch v. Clarke*:

> There is no such thing, properly speaking, as a citizen of a state of the Union, independent of, or as contradistinguished from a citizen of the United States. It is impossible to conceive any rights or privileges which a citizen of a state might have, or any disability under which he might labor as a citizen, from a state law, that would not, under our system of government, yield to his paramount duties and obligations, rights and privileges, of a citizen of the United States. And wherever the terms "*citizens of a state*" are used in the laws or constitution, they necessarily refer to such who happen to abide in or who have their domicil in the state, (*Cooper's Lessee v. Galbraith,* 3 Wash. C. C. R. 546,) the term *citizen* being here used more in the sense of *inhabitant.*[101]

Regardless of questions of federalism and comity, early American citizenship focused on the "ties that bind an individual to his community."[102] Modern notions of citizenship, incorporating various aspects of republicanism, communitarianism, and liberalism, create a binding relationship not between two individuals but between an individual and the polity that accepts him as a member.[103]

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96. *Id.* at 904.
97. GEYER, *supra* note 52, at xiii.
98. Baskin, *supra* note 86, at 873.
99. GETTYS, *supra* note 23, at 3.
100. *Id.*
101. Lynch v. Clarke, 1 Sand. Ch. 583, 589–90 (N.Y. Ch. 1844).
102. Baskin, *supra* note 86, at 874.
103. *See id.* at 891–905.

1. *Jus Sanguinis*

> ***Jus Sanguinis***: *n.* [Latin "right of blood"] The rule that a child's citizenship is determined by the parents' citizenship. • Most nations follow this rule. Cf. JUS SOLI.[104]

The principle of *jus sanguinis* applies to persons with a blood relationship to a citizen parent.[105] *Jus sanguinis*, the older of the two rules used to determine citizenship at birth, comes to us through both Roman and early Germanic law.[106] According to this rule, parentage determines citizenship.[107] The United States follows birth citizenship by *jus sanguinis* to a limited extent, particularly where children are born to United States citizens abroad.[108]

2. *Jus Soli*

> ***Jus Soli:*** *n.* [Latin "right of the soil"] The rule that a child's citizenship is determined by place of birth. • This is the U.S. rule, as affirmed by the 14th Amendment to the Constitution. Cf. JUS SANGUINIS.[109]

English common law followed the doctrine of *jus soli*, the principle that a person acquires citizenship in a nation by virtue of his birth in that nation or its territorial possessions.[110] Thus, persons born within the King's dominion owed allegiance to and were subjects of the King of England, regardless of the citizenship of their parents.[111] A feudal concept, *jus soli* developed from the idea that territorial sovereignty created a relationship between the individual and the land to which he was attached.[112] Generally, the rule is universal, with two common exceptions: (1) children born to diplomats abroad, who are citizens of the nation whom their parents represent, and (2) children born to parents of an occupying force, who are considered subjects of the invading sovereign.[113] Although it seemed that U.S. courts and legislatures adopted the *jus soli* doctrine, confusion persisted as to whether those native-born to alien parents were United States citizens.[114]

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104. BLACK'S LAW DICTIONARY 880 (8th ed. 2004).

105. Baskin, *supra* note 86, at 878.

106. GETTYS, *supra* note 23, at 9.

107. *Id.*

108. *Id.* at 23.

109. BLACK'S LAW DICTIONARY (8th Ed. 2004). Even Black's has succumbed to the accepted misunderstanding. *Cf.* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 95; Eastman, *From Feudalism to Consent*, *supra* note 11, at 1.

110. Lee, *supra* note 10, at Summary. *See* Baskin, *supra* note 86, at 878.

111. *Id.*

112. GETTYS, *supra* note 23, at 9.

113. Lee, *supra* note 10, at Summary.

114. *Id.*

C. *Ascription*

> "This [confusion] arose because citizenship by birth in the United States was not defined in the Constitution nor in the federal statutes. Legal scholars and law makers were torn between a 'consensualist' doctrine of citizenship, by which a person and a government consent to be mutually obligated, and an 'ascriptive' doctrine by which a person is ascribed citizenship by virtue of circumstances beyond his control, such as birth within a particular territory or birth to parents with a particular citizenship."[115]
>
> —Peter H. Schuck & Rogers M. Smith, 1985

When the colonies formed their new nation, they inherited both traditions of citizenship: the ascriptive feudal English common law tradition of immutable subjectship and the continental public law view of mutually consensual citizenship.[116] Those holding the ascriptive common law view of subjectship subscribed to the theories of Sir Edward Coke and Filmer.[117] Despite the ascriptive view of citizenship, early Americans, including George Washington, dismissed claims of accidental memberships, such as nationality.[118] Further, Emerich Vattel held that nations have no absolute duty to admit those who leave their homeland, even due to exile, banishment, or "some other pressing cause."[119]

D. *Consensualism*

> "Before the Revolution, the Americans had been the subjects of a royal sovereign, and they inherited their political status as English subjects along with their other patrimonies. By throwing off their allegiance to the Crown, however, they resolved to become something very different—citizens of a new state constituted solely by the aggregation of their individual consents. Voluntary adherence rather than a passive, imputed allegiance was the connective tissue that would bind together the new polity."[120]
>
> —Peter H. Schuck & Rogers M. Smith, 1985

The opposing view to involuntary ascriptive subjectship was the Lockean view of voluntary consensual citizenship, borne of a mutual consent of both the individual seeking admittance and the polity accepting the individual. John Locke and other seventeenth-century writers espoused a concept of consensual and mutual acceptance of an

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115. *Id.*

116. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 42.

117. *Id.*

118. *Id.* at 49–50.

119. *Id.* at 48. *See generally* EMERICH VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson Law Booksellers 1852), *microformed on* 19th-Century Legal Treatises, No. 75,023–75,030 (Microfiche) (discussing rights and obligations of citizens and states).

120. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 1.

individual to a polity.[121] The American colonists had come to think of themselves as Americans, distinct from Britain, entitled to secure the blessings of liberty to their posterity.[122]

Individual liberty, personal consent, and the freedom to do or not to do were important to the founding fathers. Indeed, these ideals were so important to the American colonists that they fought the Revolutionary War to secure inalienable rights and to form a government legitimized by the *consent* of the governed.[123] The colonists had assimilated Lockean political liberalism.[124] The Declaration of Independence was a Lockean view of expatriation—an ending of a consensual relation between individuals and their sovereign.[125] Alexander Hamilton ended *The Federalist* No. 22 with these remarks on the importance of consent:

> However gross a heresy it may be to maintain that a PARTY to a COMPACT has a right to revoke that COMPACT, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.[126]

Government flows from the consent of the governed.[127] Consent allows formation of government, but continued consent legitimizes continuation of the government.[128] David Hume, another sixteenth-century philosopher, saw consent as a gauge of public opinion, something acceptable only if it maintained the government of England.[129] Unlike Hume, American colonists saw "opinion as itself a matter of consent."[130]

1. Consensualism and Federalism

> "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalien-

121. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., student ed. 1988, 7th prtg. 1994) (1698) (discussing consensualism and theories of government).

122. U.S. CONST. pmbl.; GILLIAN BROWN, THE CONSENT OF THE GOVERNED: THE LOCKEAN LEGACY IN EARLY AMERICAN CULTURE 3 (2001).

123. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 49.

124. BROWN, *supra* note 122, at 4.

125. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 49.

126. THE FEDERALIST NO. 22 (Alexander Hamilton); *see* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 50.

127. BROWN, *supra* note 122, at 4.

128. *Id.* at 4, 8–9. *See* 3 DAVID HUME, *Of the First Principles of Government, in* THE PHILOSOPHICAL WORKS OF DAVID HUME 31, 34 (1826) (on file with author).

129. BROWN, *supra* note 122, at 5; *see* HUME, *supra* note 128, at 34–36.

130. BROWN, *supra* note 122, at 5.

> able rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."[131]
>
> —Thomas Jefferson, The Declaration of Independence, 1776

The very foundation of our federal form of government rests on the consent of the governed, and that consent legitimizes government and arbitrates between the branches and levels of government.[132] Those powers not expressly delegated to the central government in the Constitution, "nor prohibited by it to the States, are reserved to the States respectively, or to the people."[133] The specificity of the enumerated powers together with the broad reservation of all other powers in the Tenth Amendment ensures that the States retain a substantial amount of sovereignty within our federal system, thus, ultimately protecting our individual rights.[134] Alexander Hamilton explained:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.[135]

Thus, the government holds no perpetual power without continued consent of the people.[136] The continued ratification of the government by the people both sanctions and sustains our government formed out of consent.[137]

IV. HISTORY OF CITIZENSHIP AND CONTEXT OF THE FOURTEENTH AMENDMENT

> "[T]o understand and imagine the nature of the 'future,' we also need to study the past. History offers us a window on the consistency of human nature over centuries, a description of social change, examples of mistakes and miscalculations that altered the

131. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

132. *See generally* THE FEDERALIST NO. 2 (John Jay); THE FEDERALIST NO. 46 (James Madison); THE FEDERALIST NO. 85 (Alexander Hamilton).

133. U.S. CONST. amend. X.

134. Gregory v. Ashcroft, 501 U.S. 452, 457–58 (1991).

135. THE FEDERALIST NO. 28 (Alexander Hamilton); *see Gregory*, 501 U.S. at 459.

136. BROWN, *supra* note 122, at 16.

137. *Id.*

> course of events. Lastly, it tells us how the environment or culture of a time or place can make it ripe for dramatic changes."[138]
>
> —Dr. Joseph Bordogna, 1999

A. *Antebellum Presumptions and Early American Citizenship*

Prior to the Fourteenth Amendment, national citizenship came through state citizenship.[139] "Despite the splendor of its constitutional pedigree, however, birthright citizenship is something of a bastard concept in American ideology. For all its appealing simplicity, it remains a puzzling idea."[140] Perhaps, as illustrated in *Lynch*, the puzzle comes from the tension of our federal system:

> The different colonies, while pursuing the same general policy, had manifested very diverse views in their legislation upon the subject of aliens. The same thing was apparent in the legislation of the respective states, after the declaration of independence and during the confederation. As early as the year 1782, Mr. Madison strenuously urged the adoption of a uniform rule of naturalization by the states. If the states were to be left to themselves, the same diversity would doubtless continue under the constitution. One state would foster immigration, and confer on foreigners all the rights of citizens on their landing upon its shores; while another, with the same general object in view, but cherishing the ancient jealousy of aliens, would require a probation of many years, before conferring those privileges upon the emigrant. Then under the clause of the constitution which I have first cited, interminable and harassing conflicts of state jurisdiction would have speedily ensued. These considerations are forcibly illustrated by Mr. Madison and Mr. Hamilton in the Federalist, Nos. 42 and 32.[141]

The founding fathers presumed those native-born were citizens.[142] The Constitution requires, without explanation or definition, that a person have been a citizen of the United States for seven years to be a Representative,[143] nine years to be a Senator,[144] and that the President be a "natural born Citizen."[145] Thus, the framers implied citizenship by birth, but failed to define the circumstances for acquiring it.[146]

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138. Dr. Joseph Bordogna, Deputy Director, Nat'l Acad. of Eng'g, Speech at the National Science Foundation Annual Meeting (Oct. 3, 1999), *available at* http://www.nsf.gov/news/speeches/bordogna/nae991003.htm.

139. Edward J. Erler, *Citizenship and the 14th Amendment*, DECLARATION FOUNDATION (Apr. 4, 2006), *available at* http://www.declaration.net/news.asp?docID=5323&y=2006.

140. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 2.

141. Lynch v. Clarke, 1 Sand. Ch. 583, 642 (N.Y. Ch. 1844).

142. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 50.

143. U.S. CONST. art. I, § 2, cl. 2.

144. U.S. CONST. art. I, § 3, cl. 3.

145. U.S. CONST. art. II, § 1, cl. 5; SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 50.

146. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 50.

Although left undefined, nonetheless, the laws made thereafter embodied the premise of consensualism.[147]

> This arose because citizenship by birth in the United States was not defined in the Constitution nor in the federal statutes. Legal scholars and law makers were torn between a "consensualist" doctrine of citizenship, by which a person and a government consent to be mutually obligated, and an "ascriptive" doctrine by which a person is ascribed citizenship by virtue of circumstances beyond his control, such as birth within a particular territory or birth to parents with a particular citizenship.[148]

Healthy republics jealously guard their citizenship.[149] The Constitution gave Congress the power to control immigration and naturalization.[150] From the start, Congress used these powers to exercise consent of the polity to define the country's sense of who it was and what it would become.[151] The freedom to consent, or withhold consent, always included some harsh exclusions.[152] Free to choose who would become American, Jefferson argued against encouraging the "servile masses of Europe" to immigrate, on the ground that those masses would transform the country into a "heterogeneous, incoherent, distracted mass" unfit for republican self-government.[153]

Although the United States set no numerical limits on immigration until late in the nineteenth century, the country did jealously guard its citizenship by limiting immigration and citizenship through waiting periods, racial and national origin restrictions, and mandating relinquishment of aristocratic titles.[154] Even still, the country needed to grow, and for those who met the requirements, the new states viewed birthright citizenship as an incentive to attract immigrants to help build the new country.[155]

The questions of citizenship were questions of state and federal power; no one wanted to confront squarely that politically charged issue.[156] Thus, courts avoided both ascriptive-consensual questions as well as federal-state questions.[157] The to and fro from ascriptive to consensual concepts of citizenship continued throughout the history of the antebellum America, as illustrated in *Lynch*:

> The Constitution of the United States, as well as those of all the thirteen old states, pre-supposed the existence of the common law,

147. *Id.*
148. Lee, *supra* note 10, at Summary.
149. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 51.
150. U.S. CONST. art. I, §§ 8–9.
151. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 50.
152. *See id.*
153. *Id.* at 51.
154. *Id.*
155. *Id.* at 52–53.
156. *Id.* at 53.
157. *Id.*

> and was founded upon its principles, so far as they were applicable to our situation and form of government. And to a limited extent, the principles of the common law prevail in the United States, as a system of national jurisprudence. The subject of alienage, under the national compact, became a national subject, which must be controlled by a principle co-extensive with the United States. And as there is no constitutional or congressional provision declaring citizenship by birth, it must be regulated by some rule of national law; and from the necessity of the case, that rule must have been coeval with the existence of the Union. The law on this subject, which prevailed in all the states, became the governing principle or common law of the United States, when the union of the states was consummated, and their separate legislation on the point was terminated. It is therefore the law of the United States, that children born here, are citizens, without any regard to the political condition or allegiance of their parents. Children of ambassadors are, in theory, born within the allegiance of the sovereign power represented, and do not fall within the rule. By the law, as established in Great Britain, as well as in this country, there is, of necessity, in many cases, *a double allegiance.* Thus, where the citizens of the one country, are naturalized in the other; and where issue are born in the one, of parents who are citizens of the other country.[158]

Legislative and judicial confinement of common law with "consensualist doctrine" gave way to the Lockean view of citizenship by the eighteenth century.[159] Congress passed laws declaring that children, without regard to whether they were native or foreign born, became citizens when their parents were naturalized.[160] Yet, "[d]uring the antebellum period, courts reinforced [the] departure from consensual citizenship by refusing to accept any broad right of expatriation that would permit citizens to withdraw from civic membership whenever they wished."[161]

B. *Consensualism for Weal and Woe*

Opponents and proponents alike argued that consensualism was either an instrument of weal or woe. While the benefits of consensualism can avoid the unwanted effect of involuntary membership through ascription, consensualism can also be used to exclude. A tension exists between the freedom to choose and the freedom to reject. Lest

158. *Lynch*, *supra* note 101, at 584. The *Lynch* court argued for ascriptive citizenship. This passage illustrates not only the to and fro between American ideals and English custom, but also the difficult outcome of the logic of ascription when ultimately extended: the conundrum of a *double allegiance*. *C.f.* Matthew 6:24 (New International) ("No man can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other.").

159. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 42–43.

160. *Id.* at 59.

161. *Id.* at 2.

both freedoms be lost, the freedom to reject must be protected, though perhaps tempered with compassion and good judgment.

1. *Lynch v. Clark* (1844)

Lynch v. Clark asked who is a citizen, and whether a young girl from Ireland could inherit property when the laws of New York prevented inheritance by aliens.[162] Lawyers in *Lynch* argued that birthright citizenship and perpetual allegiance were products of the Dark Ages and English tyranny, unfit for use in a free and just nation.[163] Thus, the plaintiff argued that the old ascriptive form of subjectship was the inferior choice between ascriptive and consensual citizenship, that a free and just nation allowed consent. Ultimately, the *Lynch* court chose ascriptive citizenship, after a long and arduous examination of English common law, American history, and the laws from other nations, including Great Britain and Spain.[164] Thus, to achieve the dubious goal of allowing alien inheritance, the Court looked outside the American foundation of consenualism to the laws of other nations, leaving a legacy of double allegiance.

2. *Dred Scott v. Sanford* (1857)

Chief Justice Taney laid out the relationship between state and national citizenship when, in the *Dred Scott* decision, the United States Supreme Court held that newly-freed blacks were not citizens even though they resided in the United States.[165] The *Dred Scott* court rejected the ascriptive premise argued against, but ultimately used, in *Lynch.* Consensualism, used to exclude, propelled the heretofore-avoided foreboding incommodious question of "what is citizenship?" to the forefront of the political consciousness,[166] but it would take another eleven years, a war, an act of Congress, and two amendments to the Constitution to script a poorly-crafted response to the question that, in the end, still failed to provide a clear answer.[167]

C. *The American Civil War and the Thirteenth Amendment, 1861–1865*

In 1861, eleven southern states seceded from the Union, touching off a response by northern states that resulted in the bloodiest conflict

162. *Lynch*, 1 Sand. Ch. 583.

163. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 58; *Lynch,* 1 Sand. Ch. 583.

164. *Lynch*, 1 Sand. Ch. 583.

165. *See* Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); GETTYS, *supra* note 23, at 4.

166. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 72.

167. Eleven years passed from the *Dred Scott* decision in 1857 to the Civil War in 1861, the Thirteenth Amendment in 1865, the Civil Rights Act of 1866, and finally the ratification of the Fourteenth Amendment in 1868. *See infra* Section IV.C.

in American history, ending the lives of nearly one million Americans.[168] President Lincoln's Emancipation Proclamation freed all blacks from slavery.[169] Despite the astounding cost in blood and treasure, Lincoln's proclamation did little to answer the question of "what is citizenship?" that our country had avoided since its beginning.

Lincoln's proclamation was an executive order freeing slaves in areas of the Confederate States of America that had not yet come under Union control.[170] Because the proclamation was an order, not a law passed by Congress, it affected only those slaves in the regions that the Union armies conquered.[171] "Some slavery continued to exist in the border states until the entire institution was finally wiped out by the ratification of the Thirteenth Amendment on December 6, 1865."[172]

Unlike Indians, who had at least vassal governments, blacks had no government other than the United States to whom they could owe allegiance.[173] While black slaves had a restrictive status of slave, the free black man presented a conundrum: native born with a *jus soli* claim, but rejected by reason of *jus sanguinis*, he ultimately hung in the limbo between ascriptive and consensual theories of citizenship.

To be born a citizen, one must belong to a class eligible for naturalization.[174] Blacks, however, were not party to the social contract wrought concomitant with the founding of the United States.[175] The new nation was a white community, until it decided to become otherwise.[176] Citizenship, jealously guarded, was conferred upon the original colonists, party to the adoption of the Constitution; their descendents; and those admitted by treaty, naturalization, or *birth within a class eligible for citizenship.*[177]

Because children inherited the status of their parents, blacks, who were not citizens, could not pass down the status of eligibility to their children.[178] Thus blacks, free or slave, could not become citizens.[179] Mere birth can make a subject, but to make a citizen requires some-

168. *See* "U.S. Civil War," 10 WEST'S ENCYCLOPEDIA AM. L., 2D ED. 172–73 (2005); *cf.* THE WORLD ALMANAC AND BOOK OF FACTS 2007, at 135 (2007) (listing casualties of major U.S. wars and noting that official statistics for Confederate deaths are not available).

169. "U.S. Civil War," 10 WEST'S ENCYCLOPEDIA AM. L., 2D ED. 172 (2005).

170. *Id.* at 172–73; Dyett v. Turner, 439 P.2d 266, 270–71 (Utah 1968).

171. *See* "Emancipation Proclamation," 4 WEST'S ENCYCLOPEDIA AM. L., 2D ED. 115–17 (2005).

172. *Id.*

173. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 66.

174. *Id.* at 68.

175. *Id.*

176. *Id.*

177. *Id.* (emphasis added).

178. *Id.*

179. *Id.*

thing more.[180] If being native, free-born, and not owing allegiance to another does not constitute citizenship, then how is it acquired?[181] The Emancipation Proclamation and the Thirteenth Amendment not withstanding, blacks could not escape the holding in *Dred Scott*. Held out of the American polity by the two-edged liberal theory of consent, ultimately native-born black Americans gained their citizenship through ascription.[182]

D. *1866: Civil Rights Act and the Fourteenth Amendment*

> "African-Americans were not considered citizens of the United States, even if they were free. Native Americans also were not considered U.S. citizens because they were members of dependent sovereign Indian nations. The Civil Rights Act of 1866 and the Fourteenth Amendment, ratified in 1868, extended birthright citizenship to African-Americans, but the United States Supreme Court made clear that although U.S.-born children of aliens were U.S. citizens regardless of the alienage and national origin of their parents, Native Americans still were not U.S. citizens under the terms of those laws. Native Americans were made U.S. citizens by statute."[183]
>
> —Margaret Lee, Report for Congress, 2005

> "Present U.S. anchor baby 'policy' is an abuse of the 14th Amendment. This amendment was ratified in 1868 to protect the civil rights of native-born black Americans, who had recently been freed from slavery and whose rights were being denied. The amendment states that 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . .' The clear, original intent of the 14th Amendment was spelled out in 1866 by Senator Jacob Howard, co-author of its citizenship clause, who wrote 'Every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. *This will not, of course, include persons born in the United States who are foreigners, aliens*, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.' Clearly the original intent of the 14th Amendment was not to encourage foreigners to defy U.S. law at taxpayer expense. Sadly the amendment is now being employed to do just that."[184]
>
> —Allan Wall, 2001

180. *Id.* at 69 (citing Amy v. Smith, 11 Ky. (1 Litt.) 326 (1822)).

181. *Id.* at 67.

182. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 66.

183. Lee, *supra* note 10, at Summary.

184. Wall, *supra* note 71 (quoting U.S. CONST. amend. XIV, § 1) (emphasis added).

The Fourteenth Amendment overturned *Dred Scott* and brought all former slaves into the American polity.[185] Congress adopted the Fourteenth Amendment amidst the political context of and debates on consent and individual rights.[186]

Assuming, arguendo, that the Fourteenth Amendment is valid law,[187] the questions of consent and intent remain for analysis. Our consensual citizenship requires that the consent be mutual and reciprocal, both the individual to the government,[188] and the government to the individual, but only to "such a degree of sovereignty, as the circumstances of the people [will] allow . . . ."[189] Consent, then, "is a two-way street"[190] tempered by the will of the people. In an attempt to address the silence of the Constitution regarding citizenship, and to overturn *Dred Scott*, Congress passed the Civil Rights Act of 1866 and followed it with the Fourteenth Amendment.[191] Although the Act of 1866 was upheld in two Federal circuit court cases, its constitutionality was doubtful.[192] Congress drafted the Citizenship Clause for the specific purpose of constitutionally enshrining citizenship as defined in the recently passed 1866 Civil Rights Act.[193]

V. ANALYZING THE FORGOTTEN PRONG

> "[F]or the great enemy of the truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic. Too often we hold fast to the clichés of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought."[194]
>
> —John F. Kennedy, 1962

> "Those who find magic language to expand government power, in the Preamble or elsewhere, ignore not only the straightforward

185. BUCHANAN, *supra* note 26, at 258.

186. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 73.

187. It is questionable, however, whether the Fourteenth Amendment is valid. Much irregularity existed in the proposal and ratification of the amendment, as explained by Justice Ellett in Dyett v. Turner, 439 P.2d 266, 271–74 (Utah 1968).

188. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 73.

189. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

190. *Id.*

191. *Id.*

192. MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 4–5 (1947).

193. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 74; GETTYS, *supra* note 23, at 4 ("It has been considered that the two main purposes of this amendment were to make national citizenship primary and paramount to state citizenship and to grant both national and state citizenship to the Negro.").

194. John F. Kennedy, Commencement Address at Yale University, PUB. PAPERS 470, 471 (June 11, 1962).

meaning of words in the Constitution, but also the whole of the Bill of Rights."[195]

—Paul Jacob, 2005

A. *Using Statutory Construction*

When an issue ranks high in the scale of national values, look for the clearly expressed affirmative intention of the Congress.[196] To discern that intent, first, look to the plain language and "find the ordinary meaning in the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies."[197] If needed, compare the statute to related statutory provisions to find either ambiguity or reinforcement of the plain meaning of the statute.[198] Using established canons of construction, ask whether there is any indication that some other meaning might apply; if not, apply the ordinary meaning of the words.[199]

Unfortunately, when analyzing the Citizenship Clause, the ordinary meaning of the words are the source of the confusion. The 1866 Civil Rights Act provides a related statutory provision for comparison but, as noted previously, the language differs. Thus, we turn to rules of statutory construction.

B. *Read the Entire Phrase, See the Conjunction*

The Fourteenth Amendment, sometimes referred to as a "Second Constitution," has been argued and debated since its inception.[200] During this argument and debate, not only has the amendment "lost" its privileges and immunities clause,[201] its jurisdiction phrase has been forgotten. Fortunately, canons of statutory construction can aid us in the "search for truth and justice."[202] Much like Justice Scalia's admonishment in *Chisom*, Justice Stevens's "first canon of statutory con-

195. Paul Jacob, *What's Love Got to Do With It?*, TOWNHALL.COM, Sept. 25, 2005, http://www.townhall.com/columnists/column.aspx?UrlTitle=whats_love_got_to_do_with_it&ns=PaulJacob&dt=09/25/2005.

196. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979).

197. Chisom v. Roemer, 501 U.S. 380, 404 (Scalia, J., dissenting). *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (using plain meaning to interpret statute).

198. *See Rucker*, 535 U.S. at 132.

199. *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

200. Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment,* 36 AKRON L. REV. 589 (2003) (describing the history of the amendment and subsequent court interpretations).

201. Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617 (2003) (discussing the lost privileges and immunities clause).

202. John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1373–34 (1992).

struction is obvious: 'Read the statute.'"[203] His "second canon of statutory construction is much like the first: 'Read the entire statute.' Courts often tell us that the meaning of a particular statutory provision cannot be divined without reading the entire statute."[204] Professor John Eastman[205] applies this canon to analyze the Citizenship Clause:

> The Citizenship Clause of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As manifest by the conjunctive "and," the clause mandates citizenship to those who meet both of the constitutional prerequisites: (1) birth (or naturalization) in the United States and (2) being subject to the jurisdiction of the United States.[206]

The first part of the Citizenship Clause seems to be universally inclusive, based on the territory defined by the borders of the United States: "All persons born or naturalized in the United States, ..."[207] This defines not a legal status so much as a physical presence.[208] The "and" following makes the clause conjunctive.[209] Thus, the jurisdiction phrase following the conjunction narrows the scope of the birthright citizenship.[210]

C. *Subject to the Jurisdiction Thereof—Not a Mere Tautology*

Without the benefit of historical perspective, or with the detriment of misapplied modern denotation, the distinction of limitation fades into a thoughtlessly accepted bromide. Professor Eastman explains the fallacious reasoning that relegates the Citizenship Clause to a platitude:

> The widely held, though erroneous, view today is that any person entering the territory of the United States—even for a short visit; even illegally—is considered to have subjected himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Surely one who is actually born in the United States is therefore "subject to the jurisdiction" of the United States and entitled to full citizenship as a result, or so the common reasoning goes.

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203. *Id.* at 1374.
204. *Id.* at 1376.
205. Dr. John C. Eastman is the Henry Salvatori Professor of Law & Community Service at Chapman University School of Law, specializing in Constitutional Law and Legal History.
206. Eastman, *From Feudalism to Consent, supra* note 11, at 1.
207. U.S. CONST. amend. XIV, § 1; SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 76.
208. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 76.
209. *Id.*
210. *Id.*

> Textually, such an interpretation is manifestly erroneous, for it renders the entire "subject to the jurisdiction" clause redundant. Anyone who is "born" in the United States is, under this interpretation, necessarily "subject to the jurisdiction" of the United States. Yet it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results.[211]

Thus, the jurisdiction phrase must require something more than a mere *jus soli* claim.[212] Unfortunately, regardless of the framers' intentions and assurances when drafting the Fourteenth Amendment, the jurisdiction phrase was and remains widely misunderstood, even by those who otherwise are knowledgeable on the topics surrounding citizenship and immigration.[213]

Justice Stevens's third canon of statutory construction "is much like the first and second, but it adds the requirement that the text be read in its contemporary context."[214] To the modern ear, an understanding of the word "jurisdiction" to mean "subject to the law" seems sensible (even if incorrect).[215] Take, for example, this quote from an issue brief produced by the Federation for American Immigration Reform: "It is well known that a person born in the United States is an *automatic* citizen regardless of the mother's citizenship status."[216] Ever confounding, even well-read authors misunderstand the phrase and the amendment, so often stated as accepted fact, to mean: any child born in the United States is a U.S. citizen, *regardless of the status of his parents.*[217]

The phrase "and subject to the jurisdiction thereof,"[218] the second prong, makes the meaning of the Fourteenth Amendment different from the "manifestly erroneous" interpretation of automatic citizenship granted by mere locality. Indeed, Professors Schuck and Smith argue that the jurisdiction phrase "expresses a constitutional commitment to citizenship based on mutual consent—the consent of the national community as well as that of the putative individual member."[219]

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211. Eastman, *From Feudalism to Consent, supra* note 11, at 1–2.

212. *Id.*

213. *See* Eastman, *Born in the USA?, supra* note 17.

214. Stevens, *supra* note 202, at 1379.

215. Eastman, *Born in the USA?, supra* note 17.

216. Fed'n for Am. Immigration Reform, *Issue Paper: Anchor Babies and Interpreting the 14th Amendment* (Aug. 1997), http://www.americanpatrol.com/REFERENCE/anchorbaby_FAIR.html (emphasis added).

217. *See, e.g.,* RENSHON, *supra* note 53, at 4 (emphasis added).

218. For brevity, hereinafter the Author will use "jurisdiction phrase" to refer to the text "and subject to the jurisdiction thereof" (the latter part of the conjunctive in the first sentence of the Citizenship Clause).

219. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 6.

The view that a merely casual birth has the effect of conferring citizenship reflects the medieval English origins of that concept of citizenship.[220] Far from being redundant, a mere tautology, the jurisdiction phrase serves to limit the universal scope of the first part of the Citizenship Clause; the phrase imposes a consensual qualification on the clause, something more than merely *jus soli*.[221]

D. *Legislative History*

"Since ambiguity persists, we must turn to the fourth canon of statutory construction. If you are desperate, or even if you just believe it may shed some light on the issue, consult the legislative history."[222]

Although the language of the Citizenship Clause derives from the text of the 1866 Civil Rights Act, the wording is not identical.[223] The 1866 Act provides, "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[224] The wording of the 1866 Act makes clear the framers' intent: the 1866 Act did not extend birthright citizenship to children born to foreign nationals present in the United States on a temporary basis and still citizens of another country.[225] Unfortunately, those same framers substituted "subject to the jurisdiction thereof" in place of the Civil Rights Act language "not subject to a foreign power" when they wrote the Fourteenth Amendment.[226] Both jurisdiction phrases were written by the same body, for the same purpose, and used within weeks of each other.[227] Why different language?

Political wrangling and word-smithing seem to be the root of the inconsistency. When first introduced, the bill for the 1866 Civil Rights Act had no citizenship provision.[228] Senator Lyman Trumbull of Illinois, Chair of the Judiciary Committee, introduced an amendment to the bill declaring that all persons born of African descent would be granted citizenship.[229] On the following day, Trumbull substituted a more broadly worded amendment providing that "all persons born in the United States and not subject to any Foreign Power, are hereby declared to be citizens . . . without distinction of color."[230] Immediate discussion ensued concerning the scope of the new language, particu-

220. *Id.* at 73.
221. *See id.* at 76.
222. Stevens, *supra* note 202, at 1381.
223. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 74.
224. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).
225. Eastman, *From Feudalism to Consent, supra* note 11, at 2.
226. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 74.
227. *Id.*
228. *Id.* at 76.
229. *Id.* at 76–77.
230. *Id.* at 77.

larly with regard to whether Indians were included.[231] Trumbull responded that he meant to include only those people taxed, excluding all others (including "sovereign" Indian nations not taxed).[232] Thus Trumbull's language served to extend citizenship to all blacks, not by virtue of *jus soli*, but by virtue of their allegiance, their acceptance of the offer of citizenship, a mutually consensual arrangement that worked for blacks, but not for Indians who owed allegiance to their own tribal governments.

Opponents of the 1866 Civil Rights Act argued that Congress had no power to confer citizenship on native-born non-citizens.[233] The Constitution speaks directly only of naturalization.[234] To further ensure the protections afforded the newly freed slaves, the Congress raised the provisions of the 1866 Civil Rights Act to a constitutional level, preventing future Congresses and Presidents from easily diluting or repealing the intended protections.[235] Thus, the question of why the Fourteenth Amendment is answered, but the greater mystery remains unanswered: the meaning of the phrase "subject to the jurisdiction thereof."[236]

E. *A Question of Allegiance*

"The fifth canon of statutory construction requires judges to use a little common sense. This canon is expressed in various ways. For example: An interpretation that would produce an absurd result is to be avoided because it is unreasonable to believe that a legislature intended such a result."[237] The broad, but not unlimited, scope described in the legislative history supports the conclusion that the Citizenship Clause confers birthright citizenship upon the children born to permanent resident aliens, but not an unlimited right available to anyone who gives birth, regardless of their status.[238] Professor Eastman explains the framers' use of the word jurisdiction connoting political allegiance:

> When pressed about whether Indians living on reservations would be covered by the clause since they were "most clearly subject to our jurisdiction, both civil and military," for example, Senator

231. *See id.*
232. *Id.*
233. *Id.* at 75.
234. The Constitution requires citizenship for legislators and the President, but never speaks of how such is defined. *See* U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. II, § 1, cl. 5.
235. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 75.
236. *Id.* at 75–76.
237. Stevens, *supra* note 202, at 1383; *see also* Louis E. Feldman, Comment, *Originalism Through Raz-Colored Glasses*, 140 U. PA. L. REV. 1389, 1389 (1992) ("When considering a constitutional issue, judges instead should defer first to the clear language of the Constitution, and second to the manifest intent of the framing generation for resolution of textual ambiguities.").
238. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 78.

> Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that "subject to the jurisdiction" of the United States meant subject to its "complete" jurisdiction, "[n]ot owing allegiance to anybody else." And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now" (i.e., under the 1866 Act). That meant that the children of Indians who still "belong[ed] to a tribal relation" and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin explicitly to exclude "Indians not taxed," as the 1866 Act had done, was rejected as redundant.[239]

"'The idea that somebody could come here, five minutes later give birth and have a brand new United States citizen is simply something that most people in their gut feel is wrong,' said Ira Mehlman, a spokesman at the Federation for American Immigration Reform."[240] Rules of statutory construction instruct us to use the plain meaning of the statute unless it leads to an absurd result.[241] To read the Citizenship Clause as only a requirement of birth by geographical location, without the jurisdiction phrase that narrows the scope of the birthright citizenship, creates a universally applicable citizenship rule with no exceptions, allowing literally anyone to become a citizen of the United States.[242]

VI. CITIZENSHIP AFTER THE FOURTEENTH AMENDMENT

A. *Tainted Evolution of the Case Law*

> "Hamilton and Thomas Jefferson . . . disagreed on most of the great issues of their day, just as many have disagreed in ours. They helped begin our long tradition of loyal opposition, of standing on opposite sides of almost every question while still working together for the good of the country. And yet for all their differences, they both agreed—as should be—on the importance of judicial restraint. 'Our peculiar security,' Jefferson warned, 'is in the possession of a written Constitution.' And he made this appeal: 'Let us not make it a blank paper by construction.'"[243]
>
> —Ronald Reagan, 1986

239. Eastman, *From Feudalism to Consent, supra* note 11, at 2 (citations omitted).

240. FoxNews.com, Bill Would Eliminate Birthright Citizenship (Nov. 27, 2005), http://www.foxnews.com/story/0,2933,176664,00.html.

241. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133 (2002).

242. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 76.

243. Ronald Reagan, Remarks at the Swearing-in Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of

1. An Early Affirmation: *Slaughter-House Cases* (1872)[244]

The United States Supreme Court, only six years after passing the Fourteenth Amendment,[245] reaffirmed the contemporary understanding of the jurisdiction phrase in both the majority and dissenting opinions given in *Slaughter-House Cases*.[246] Still close in time to the origins of the Fourteenth Amendment, the majority opinion noted the main purpose of the Citizenship Clause was to bring blacks into citizenship.[247] The majority succinctly summed up the entire political context and effect of the Citizenship Clause, including the meaning of the jurisdiction phrase:

> [A]ll the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution. To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign States born within the United States*.[248]

As Senators Trumbull and Howard had both explained, the jurisdiction phrase was meant to exclude those born to foreign nationals.[249] Despite the fact that the children were born within the *territorial* jurisdiction of the United States, they were not subject by allegiance or mutual acceptance by the American polity, the complete and undi-

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the United States, 2 PUB. PAPERS 1268, 1270 (Sept. 26, 1986), *available at* http://www.fed-soc.org/resources/id.54/default.asp.

244. Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co. (*Slaughter-House Cases*), 83 U.S. (16 Wall.) 36 (1872).

245. Congress passed the Fourteenth Amendment in 1866 and the states ratified it in 1868. The opinion in the *Slaughter-House Cases* came in 1872, only four years after ratification.

246. Eastman, *From Feudalism to Consent*, *supra* note 11, at 2 (citing *Slaughter-House Cases*, 83 U.S. at 73).

247. *Slaughter-House Cases*, 83 U.S. at 73.

248. *Id.* (emphasis added).

249. *See supra* notes 226–30, 237 and accompanying text.

vided jurisdiction of the United States that Senator Trumbull described. The dissent, while not addressing the issue directly, makes mention of the legislative history and acknowledges that the framers designed the Citizenship Clause "to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were . . . citizens both of the United States and of the state in which they resided, *provided they were not at the time subjects of any foreign power.*"[250]

2. Adoption: *Elk v. Wilkins* (1884)

Twelve years later, the Supreme Court in *Elk v. Wilkins* adopted the majority's position stated in *Slaughter-House Cases* regarding the jurisdiction phrase, despite that position being dicta.[251] John Elk was born on an Indian reservation and subsequently moved to non-reservation U.S. territory where he renounced his former tribal allegiance and claimed citizenship by virtue of the Citizenship Clause. The *Elk* court squarely addressed the issue of sufficiency of birth locality:

> The question then is, 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, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution. Under the constitution of the United States . . . congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were *alien nations, distinct political communities, with whom the United States might and habitually did deal,* as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. *The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States.*[252]

The *Elk* court was careful to point out that "[a]lthough 'Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states,' 'they were alien nations, distinct political communities,'" with whom the United States dealt with through treaties and acts of Congress.[253] Thus, born a member of an Indian tribe, even on American soil, Elk could not meet the allegiance test of the jurisdiction phrase because he "owed immediate allegiance to" his

250. Eastman, *From Feudalism to Consent, supra* note 11, at 3 (citing *Slaughter-House Cases*, 83 U.S. at 91–95 (Field, J., dissenting)) (emphasis added).

251. *See* Elk v. Wilkins, 112 U.S. 94, 94 (1884).

252. *Id.* at 99 (second emphasis added).

253. Eastman, *From Feudalism to Consent, supra* note 11, at 3.

tribe, a vassal or quasi-nation, and not to the United States.[254] The Court held Elk was not "subject to the jurisdiction" of the United States at birth.[255] "The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[256] Clearly, if a quasi-vassal nation's member cannot meet the degree of allegiance demanded by the Citizenship Clause, then neither can a citizen of a truly foreign state.

3. Reversion: *Wong Kim Ark* (1898)[257]

> "In *Wong Kim Ark*, the Supreme Court treated the jurisdiction phrase of the Citizenship Clause as almost a nullity. The Court was not in fact ruling on illegal aliens, which is today's larger problem, but *Wong Kim Ark's* over-expansive reading of the Citizenship Clause is substantially to blame for the current mistaken policy of extending birthright citizenship to illegal aliens' children."[258]
>
> —Howard Sutherland, 2001

> "[T]he original meaning of the 14th Amendment has admittedly been lost to the modern eye. The amendment guarantees citizenship to anyone 'born or naturalized in the United States and subject to the jurisdiction thereof,' and for a century we have assumed, thanks to an erroneous Supreme Court decision in the 1898 case of *United States v. Wong Kim Ark*, that birth on U.S. soil was sufficient for citizenship."[259]
>
> —Dr. John Eastman, 2006

Despite a demonstrated understanding of the framers' intent in prior cases, with clear direction given in *Slaughter-House Cases* and *Elk v. Wilkins*, the Supreme Court in *Wong Kim Ark* returned to the old *jus soli* ascriptive analysis of citizenship, relegating the jurisdiction phrase to obscurity, and opening the door for the modern "erroneous view" that locality, and locality alone, is sufficient to confer birthright citizenship.[260] In 1898, barely thirty years after ratification of the Fourteenth Amendment, the Supreme Court seems to have lost its understanding of the difference between legal territorial jurisdiction (which subjects one and all to the laws of the land) and Senator Trumbull's complete political jurisdiction (which is a matter of allegiance).[261] The 39th Congress's unfortunate choice of words, using

254. *Id.*
255. *Id.*
256. *Elk*, 112 U.S. at 102.
257. United States v. Wong Kim Ark, 169 U.S. 649 (1898).
258. Howard Sutherland, Weigh Anchor! Enforce the Citizenship Clause, http://www.vdare.com/sutherland/weigh_anchor.htm (last visited June 1, 2008).
259. Eastman, *Citizen by Right, or by Consent?*, *supra* note 19.
260. Eastman, *From Feudalism to Consent*, *supra* note 11, at 4.
261. *Id.*

"jurisdiction" to mean mutually consensual and undivided allegiance, allowed the *Wong Kim Ark* Court to steer a new course, avoiding the nearby din of the voices from *Elk*, *Slaughter-House Cases*, legislative history, and the Declaration of Independence to fill the averred silence of the Constitution with the venerable voice of 1606 English common law:

> The constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Amend. art. 14. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.[262]

But this was not an issue of what was familiar to the framers of the Constitution, this was a question of what was familiar to the framers of the Fourteenth Amendment. Rather than looking back over less than half a century or American jurisprudence, Justice Gray, taking his lead from *Minor v. Happersett*[263] and *Smith v. Alabama*,[264] turned to 250-year-old English common law to assist him in interpreting anew the Citizenship Clause.[265] Using the ascriptive premise of British fealty, as discussed in *Calvin's Case*,[266] as a basis for determining citizenship, Justice Gray proceeded to analyze the case in terms of kings and their subjects:

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "ligealty," "obedience," "faith," or "power"—of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, "Protectio trahit subjectionem, et subjectio protectionem,"—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.[267]

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262. *Wong Kim Ark*, 169 U.S. at 654. As noted below, the Court ultimately finds its way to the 1606 English *Case of the Postnati*, better known as *Calvin's Case*.

263. Minor v. Happersett, 88 U.S. (1 Wall.) 162 (1874).

264. Smith v. Alabama, 124 U.S. 465 (1888).

265. *Wong Kim Ark*, 169 U.S. at 655.

266. Calvin's Case, (1608) 77 Eng. Rep. 377 (K.B.).

267. *Wong Kim Ark*, 169 U.S. at 655–56.

English law assumed, from antiquity, that anyone born within the King's realm, regardless of parentage, was an English subject owing fealty to the King.[268] Even though this tradition seems to be *jus soli* citizenship, English law never expressly referred to the principle.[269] On the contrary, while the tradition determined subjectship by *jus soli* for those born within the King's dominion, English law had, since the mid-fourteenth century, decreed that children of both English nobles and subjects born outside the Empire did not lose any rights.[270] So, the King had it both ways; any child was a loyal subject if born in the kingdom (*jus soli*), and any child born English was English no matter where born (*jus sanguinis*).

England and Ireland, two separate kingdoms, had united when James VI of Scotland ascended to the throne of England as James I.[271] England and Scotland did not unite until the Acts of Union formed Great Britain in 1707.[272] James was a Scot, an alien, inheriting English land and the throne from his late cousin Elizabeth I.[273] *Calvin's Case*, or *Case of the Postnati*, addressed the weighty question of whether a Scot was a native that could inherit English land, or whether he was an ineligible alien.[274] Sir Edward Coke, Chief Justice of the Court of Common Pleas, together with fourteen other judges, decided the case and reported the opinion, which contained "the first comprehensive theory of English Subjectship."[275] Justice Coke's decision, based firmly on the ascription theory of citizenship, "remained the universally cited starting point for Anglo-American legal analyses of political membership through at least the nineteenth century."[276] Coke stressed the fundamental and inescapable relation formed with, and duty owed to, the King upon birth of any subject.[277] Coke appealed to natural law and the natural obligation the infant owed to the crown for the protection afforded when weak and helpless.[278]

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268. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 12.

269. *Id.*

270. *See id.*

271. *Id. See* 3 MODERN Legal Systems CYCLOPEDIA 3.150.9 (Kenneth R. Redden ed., 1990) (describing Henry VIII's claim to Ireland and the Irish resistance that ensued); *see also* Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case*, 9 YALE J.L. & HUMAN. 73, 80 (1997).

272. Price, *supra* note 271, at 82 n.49; *see also* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 12.

273. *See* Price, *supra* note 271, at 80.

274. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 12; *see also* 3 JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, *in* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 199, 227 (Bird Wilson, ed., 1804) (explaining *Calvin's Case* was heard in the Exchequer Chamber, making it an important issue at the time).

275. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 12–13; *see also* Price, *supra* note 271, at 83.

276. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 13.

277. *Id.*

278. *Id.* at 13–15.

Coke's complex ascriptive subjectship determination served his purposes in 1606, but the ascriptive unalterable status of English subjectship is precisely one of the concepts the founding fathers discarded when they wrote the Declaration of Independence, severing that "fundamental and inescapable" relationship 170 years after *Calvin's Case*. Thomas Jefferson eloquently stated this casting away of the old and adoption of the new:

> WHEN, in the Course of human Events, it becomes necessary for one People to dissolve the political bands which have connected them with another, and to assume, among the Powers of the earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[279]

Coke spoke of an inescapable relationship between King and subject, but the colonists rejected that for individual freedom of choice between equals:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their Creator, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such Principles and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[280]

Jefferson articulated the essence of the Declaration of Independence, that government is grounded in consent of the people.[281] The consent must exist beyond the formation of government, into and through its operation.[282] Justice Gray's opinion "is simply incompatible not only with the text of the Citizenship Clause, but with the political theory of the American Founding."[283]

Although deciding only the issue of citizenship for children of permanent legal residents, "the United States Supreme Court made clear that . . . [native-born] children of aliens were U. S. citizens regardless of alienage and national origin of their parents . . . ."[284] Oddly, Native American Indians were not citizens under those holdings (Congress eventually made Native Americans citizens by statute).[285]

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279. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
280. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
281. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
282. Eastman, *From Feudalism to Consent*, *supra* note 11, at 6.
283. *Id.*
284. Lee, *supra* note 10, at Summary.
285. *Id.*

In his dissent, Justice Fuller noted the distinction between the natural and perpetual allegiance of a subject to his king, in contrast to the local, temporary nature of consensual, revocable allegiance that distinguished American citizenship through the jurisdiction phrase.[286] While the outcome of the case was correct for Wong Kim Ark, the legacy of the overly broad opinion "has colored basic questions of citizenship ever since."[287] Justice Gray based his reasoning on an English case decided 292 years earlier, the principles of which had been rejected in our Declaration of Independence.[288] Granting citizenship to anyone born in the territory of the United States, with no other consideration, lacks the very consent espoused in the forming of our nation.[289] "In other words, birthright citizenship is contrary to the principle of consent that is one of the bedrock principles of the American regime."[290]

4. Obscurity: *Plyler v. Doe* (1982)[291]

> "The debate upon the clause was essentially cursory in both Houses, but there are several clear indications of its intended effect. Its sponsors evidently shared the fears of Senators Stewart and Wade that unless citizenship were defined, freedmen might, under the reasoning of the *Dred Scott* decision, be excluded by the courts from the scope of the Amendment. It was agreed that, since the 'courts have stumbled on the subject,' it would be prudent to remove the 'doubt thrown over' it. The clause would essentially overrule *Dred Scott*, and place beyond question the freedmen's right of citizenship because of birth."[292]
>
> —Justice Harlan, 1967

Despite Justice Harlan's reminder in 1967 of the purpose of the Citizenship Clause, the myth continued to grow, or rather the clause continued to fade into obscurity. By 1982, the *Plyler* court had relegated the Citizenship Clause to dictum in a footnote. While the *Plyler* Court's conclusion that the Equal Protection Clause protects children of illegal aliens may be correct, it "has no direct bearing on the ques-

286. United States v. Wong Kim Ark, 169 U.S. 649, 710–11 (Fuller, J., dissenting); Eastman, *From Feudalism to Consent*, *supra* note 11, at 5.

287. Eastman, *From Feudalism to Consent*, *supra* note 11, at 4–5.

288. *See Wong Kim Ark*, 169 U.S. at 707 (Fuller, J., dissenting); Eastman, *From Feudalism to Consent*, *supra* note 11, at 5.

289. *See* Edward J. Erler, *Immigration and Citizenship: Illegal Immigrants, Social Justice and the Welfare State*, in LOYALTY MISPLACED: MISDIRECTED VIRTUE AND SOCIAL DISINTEGRATION 71, 77 (Gerald Frost ed., 1997); Eastman, *From Feudalism to Consent*, *supra* note 11, at 7; Edward Erler, *Birthright Citizenship and the Constitution*, HERITAGE.ORG (Dec. 1, 2005), http://www.heritage.org/Research/GovernmentReform/wm925.cfm; *see generally* EDWARD J. ERLER, JOHN MARINI & THOMAS G. WEST, THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION: PRINCIPLES AND CHALLENGES IN AMERICA (2007).

290. Eastman, *From Feudalism to Consent*, *supra* note 11, at 7.

291. Plyler v. Doe, 457 U.S. 202 (1982).

292. Afroyim v. Rusk, 387 U.S. 253, 284 (1967) (Harlan, J., dissenting).

tion of their citizenship."[293] The *Plyler* Court's treatment of the question of birthright citizenship was "notably casual, . . . relegated to dictum in a footnote that took the form of a deeply flawed syllogism."[294] The major premise, that *Wong Kim Ark* had answered the question of birthright citizenship for children of illegal aliens, is simply wrong.[295] Wong Kim Ark's parents were legal residents, not illegal aliens. The *Wong Kim Ark* holding could not address the status of children born to illegal aliens.[296]

VII. Policy Questions

A. *Do Non-resident Aliens Need Birthright Citizenship?*

The 1986 new citizen test administered by the INS illustrates how far away we have moved from the ideal of citizenship.[297] Question 86 asked, "Name one benefit of being a citizen of the United States."[298] Speculation on answers to this question may range from our history and the original social contract to thoughts on federalism, the writings of Rousseau, the Federalist Papers, or Higham's work on Nativism.[299] "But such musing would no longer be relevant."[300] There were only three acceptable answers to question 86: (1) to obtain federal government jobs, (2) to travel with a United States passport, and (3) to petition for close relatives to come to the United States to live.[301]

Citizenship means more than obtaining ministerial and financial benefits. Illegal aliens do not need birthright citizenship and are less needful of it than may be supposed; they almost always possess another nationality (almost by definition this would be so), owing allegiance to a foreign state, and thus already belong to a polity.[302] Most nations, including Mexico, regard the children born to their nationals living abroad to be citizens of their parent's country.[303] Even if moral or humanitarian obligations exist to assist those less fortunate than we, as compelling as those obligations may be, they by no means impute a claim to United States citizenship—and certainly not to a birth-

293. Schuck, Citizenship Without Consent, *supra* note 3, at 103.

294. *Id.* at 102–03 (emphasis removed).

295. *See Plyler*, 457 U.S. at 211 n.10; Schuck, Citizenship Without Consent, *supra* note 3, at 103. See the discussion of *Wong Kim Ark* above. As noted, that case addressed the question of citizenship of children of *resident* aliens.

296. Schuck, Citizenship Without Consent, *supra* note 3, at 157 n.39.

297. Geyer, *supra* note 52, at 3.

298. *Id.*

299. *See id.*; Schuck, Strangers & In-Betweens, *supra* note 47, at 5–6; John Higham, Strangers in the Land: Patterns of American Nativism 1860–1925 (1955).

300. Geyer, *supra* note 52, at 4.

301. *Id.*

302. Schuck, Citizenship Without Consent, *supra* note 3, at 97.

303. *Id.* at 100.

right entitlement granted unilaterally by the alien's act, without consent of the American polity.[304]

Primarily, illegal aliens are attracted to the United States for financial reasons.[305] While their interest in gaining a better life is laudable, that is not a basis for extraordinary, or illegal, immigration measures. If a foreign national has a true fear of returning to his native land, he may apply for asylum.[306] Even without asylum, other forms of relief are available, such as extended departure and deferred action status.[307]

B. *Is It Practical to Move 30 Million People?*

How should the U.S. address the issue without causing calamity? Must undocumented workers and illegal aliens be allowed to remain inside the borders of the United States? Is it practical to move what some estimate to be as many as 30 million people? No, but neither is it necessary. As impossible as it may seem, in 1953, when newly-elected President Dwight D. Eisenhower took office, the "southern frontier was as porous as a spaghetti sieve."[308] Then, as many as three million illegal aliens had entered California, Arizona, Texas, and other areas of the country.[309] "President Eisenhower cut off this illegal traffic. He did it quickly and decisively with only 1,075 United States Border Patrol agents—less than one-tenth of today's force."[310]

Cutting off traffic is only a first step, and must be followed with decisive, clear actions that remove the benefits of illegal entry and presence within the United States. No one should be rewarded for illegal acts, citizen and non-citizen alike. Further, pathways to citizenship should be consistent for all applicants, without special exceptions for illegal migrants. Citizenship for children must be determined by some means other than mere locality at time of birth. Clear and undivided allegiance, observation of the rule of law, and attendant status

304. *Id.* at 98.

305. *Cf.* Rector, *supra* note 7 (noting that the non-enforcement of prohibitions against employing illegal immigrants is a significant factor in the current influx of poorly educated immigrants).

306. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 100; Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 189 U.N.T.S. 150, *available at* http://www.unhchr.ch/html/menu3/b/o_c_ref.htm; Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (incorporating the Convention definition of refugee by reference), *available at* http://www.unhchr.ch/html/menu3/b/o_p_ref.htm; *see generally* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that an applicant need not show that it is more probable than not that he would be persecuted in his home country, and that the standard for withholding of removal set in *INS v. Stevic*, 467 U.S. 407 (1984), was too high).

307. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 100.

308. John Dillon, *How Eisenhower Solved Illegal Border Crossings from Mexico*, CHRISTIAN SCI. MONITOR, July 6, 2006, *available at* http://www.csmonitor.com/2006/0706/p09s01-coop.html.

309. *Id.*

310. *Id.*

in a valid process of obtaining citizenship must be the standard for claiming birthright citizenship.

VIII. ALTERNATIVE VIEWS

Today, we have come far from our root of strong national identity, so far that we must now ask, "*what makes an American Citizen? Who belongs to the American polity, and why?*"[311] The United States may benefit from studying the policies of other countries in the areas of citizenship and entry of foreign nationals. We should look abroad, however, not for justification, but comparison. "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry."[312]

A. *A Brief Look at Swiss Citizenship*[313]

Although much older, the structure of Switzerland's government contains much in common with that of the United States.[314] Switzerland adopted a constitutional democracy with a federal structure and an independent judiciary in 1848.[315] On January 1, 2000, the people of Switzerland adopted a new Federal Constitution that provides for, inter alia, three political levels (federal, canton, and local) and three branches of government (executive, legislative, and judicial).[316] Similar to the individual states of the United States, each of the twenty-six cantons (states) have a three-branch structure similar to that of the federal government.[317]

Swiss citizens share many of the rights enjoyed by Americans, including the right to privacy; freedoms of religion, speech, and the press; the right to assemble and freedom of association; and right to a public trial, habeas corpus, right to an attorney, and right of appeal.[318] The Swiss Constitution confers an additional right, the right to

311. GEYER, *supra* note 52, at xiii.

312. Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

313. What follows in this portion is in no way an attempt to make an exhaustive analysis of Swiss law. Some of the material given comes from the Author's own experiences and conversations with Swiss citizens and aliens living in Switzerland. The Author seeks only to present basic conditions in Switzerland for the purpose of comparison and illustration.

314. Fridolin M.R. Walther, *Update to Introduction to the Swiss Legal System: A Guide for Foreign Researchers*, LLRX.COM (Nov. 15, 2001), http://www.llrx.com/features/swiss2.htm ("It's [sic] history is normally traced back to the year 1291 when the representatives of Schwyz, Uri and Unterwalden concluded the Federal Charter of 1291 (the so-called 'Bundesbrief') and founded a federation against foreign countries."); *see also* 4 MODERN Legal Systems CYCLOPEDIA 4.210.12 § 1.1(B) (4) (Kenneth R. Redden ed., 1989) (noting that Switzerland's Constitution—adopting a Federal system in 1848—imitated the U.S. Constitution).

315. 4 MODERN Legal Systems CYCLOPEDIA 4.210.12–4.210.18.

316. *Id.*

317. *See id.* at 4.210.17.

318. *See generally* Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999,

marry,[319] and specifically provides for *jus sanguinis* citizenship and naturalization.[320] Children born in Switzerland are not granted citizenship because they are physically in Switzerland. Citizenship comes by *jus sanguinis*:[321] one of the parents must be Swiss, and they must be married.[322] If not married, the child acquires citizenship through the mother by birth, or through the father by acknowledged paternity.[323] Unlike the United States, Swiss citizenship flows from local citizenship. Thus, in conjunction with *jus sanguinus*, Swiss citizenship is determined by ancestral place of origin, not place of birth.[324] A Swiss baby is Swiss if his ancestors are Swiss, regardless of where he may be born.

B. *Swiss Citizenship: Three Layers From Local to Federal*

Much like the United States before the Fourteenth Amendment,[325] Swiss citizenship comes through local political acceptance and sponsorship and is recognized thereafter by the federal government. Swiss citizenship is triple-layered, with every citizen being a local citizen, a canton citizen, and a federal citizen.[326]

C. *Citizenship by Birth*

A child born to a Swiss parent inherits the local citizenship of his parent.[327] Thus, the child Henri, son of Jacque, citizen of Geneva is Genevan. Henri's Genevan citizenship makes him Swiss. The birth

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SR 101, RS 101, art. 7–36 (Switz.), *available at* http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf.

319. *Id.* art. 14.

320. *Id.* art. 38.

321. FED. DEP'T OF FOREIGN AFFAIRS (SWITZ.), INFORMATION ON SWISS CITIZENSHIP: HOW DO YOUR CHILDREN BECOME OR REMAIN SWISS CITIZENS, at 1 (Feb. 2007), http://www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi.Par.0143.File.tmp/Einbuergerung_Kinder_e_0702.pdf [hereinafter CHILDREN BECOME OR REMAIN SWISS CITIZENS].

322. Swiss Embassy Fact Sheet, at 1 (copy on file with author).

323. Loi fédérale sur l'acquisition et la perte de la nationalité suisse [LN] [Swiss Citizenship Act] Sept. 29, 1952, Recueil systématique du droit fédéral [RS] 140.0, art. 1, ¶ 2 (Switz.), *available at* http://www.admin.ch/ch/f/rs/141_0/index.html (follow "Art. 1 Par afiliation" hyperlink); CHILDREN BECOME OR REMAIN SWISS CITIZENS, *supra* note 321, at 1.

324. Swiss Citizenship Act, Factsheet (copy on file with author).

325. As noted earlier, prior to the Fourteenth Amendment, each state determined citizenship. Erler, *supra* note 139.

326. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RS 101, art. 37, ¶ 1, *available at* http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf; RS 140.0, art. 4 (Switz.), *available at*, http://www.admin.ch/ch/f/rs/141_0/index.html (follow "Art. 4 Droit de cité canonal et communal" hyperlink).

327. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RS 101, art. 37, ¶ 1, *available at* http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf.

location bears no part in determining citizenship; rather the parent's status, *jus sanguinis*, determines citizenship.

D. *Swiss Naturalization*

Other than acquiring citizenship through birth or adoption, Swiss citizenship comes through naturalization by the Swiss cantons.[328] For naturalization, Switzerland requires twelve years of residency; application and acceptance by the local political subdivision, usually the canton or municipality; competence in the language where residing and a demonstrated integration into and familiarity with the local community; and credible evidence that the applicant has complied with existing Swiss laws and will not pose a danger to internal or external security.[329]

E. *Alien Entry and Limits on Aliens in Switzerland*

Many foreigners travel to Switzerland without visas and may remain in the country legally for up to ninety days.[330] Some 700,000 people cross the Swiss border every day.[331] Although Switzerland has a generous entry policy,[332] it controls access to services within Switzerland based on documentation,[333] and may forcibly remove any foreigner considered dangerous.[334] Non-Swiss have limits on employment, pro-

328. *Id.* art. 38, ¶ 2.

329. Fed. Office for Migration (Switz.), Regular Naturalisation (Sept. 5, 2007), http://www.bfm.admin.ch/bfm/en/home/themen/buergerrecht/einbuergerungen/ordentliche_einbuergerung.html.

330. This three-month limit has certain restrictions by origin, and many other options and exceptions apply, depending on purpose of travel. *See Information Sheet for Entry to Switzerland*, Federal Office for Migration (Berne, Switz.), *available at* http://www.bfm.admin.ch/bfm/en/home/themen/einreise/merkblatt_einreise.html, and general Swiss entry requirements, available at http://www.bfm.admin.ch/bfm/en/home/themen/einreise.html (last visited June 1, 2008).

331. OFFICE FÉDÉRAL DES MIGRATION (Switz.), RAPPORT SUR LA MIGRATION ILLÉGALE 9 (June 23, 2004), http://www.bfm.admin.ch/etc/medialib/data/pressemitteilung/2004/pm_2004_06_29.Par.0002.File.tmp/ber_illegale_migration_f.pdf [hereinafter SWISS ILLEGAL IMMIGRATION].

332. The policy is generous in that it allows a large volume of traffic, and, for travelers from many countries, does not require a visa. However, Switzerland's law enforcement sees the current state of illegal immigration as a serious, threatening issue, as discussed at length in *Rapport sur la Migration Illegale*. *Id.*

333. *See id.* at 6; Martin Walker, Walker's World: Switzerland Gets Tough on Immigration (Sept. 25, 2006), http://wpherald.com/articles/1431/1/Walkers-World-Switzerland-gets-tough-on-immigration/Easier-to-send-asylum-seekers-home.html.

334. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RS 101, art. 121, ¶ 2, *available at* http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf; SWISS ILLEGAL IMMIGRATION, *supra* note 331, at 6 (reporting that 55% of crimes charged were against foreigners).

fessional licenses, vehicle registration, credit, and property ownership.[335]

Some foreigners overstay their allotted time, but Swiss practices discourage illegal presence by restricting certain key activities. Without appropriate documentation, it is not possible to register a car, rent an apartment, obtain a driver's license, hold a job, or obtain credit. An illegal alien in Switzerland must impose on someone for a place to sleep, must have an independent source of income or work *traveille au noir*,[336] and must use public transportation or have a vehicle registered in a Swiss citizen's name. In short, Switzerland controls illegal immigration through a combination of laws and practices that create an open, inviting locale for visitors, but a far less hospitable abode for an illegal alien to remain in at length.

IX. ACTION ITEMS

A. *Possible Actions*

> "The anchor baby fiasco must be stopped. It rewards illegal immigrants and encourages more illegal immigration. It costs law-abiding taxpayers a bundle. It makes it harder to control the border, reform immigration and rein in the runaway welfare state. And, as I found in my personal experience, it cheapens American citizenship and mocks those who play by the rules."[337]
>
> —Allan Wall, 2001

> "[The] prescription isn't radical—though it might seem that way based on the reaction of the Big Media and establishment politicians in both parties. What [Rep. Tom] Tancredo is advocating are common-sense principles being implemented in nations all over the world—including in supposedly 'progressive' Europe.
>
> It's real simple. A nation without borders ceases to be a nation. That is the threat we face with 20 million illegal aliens already here and more pouring over the border every day.[338]"
>
> —Joseph Farah, 2007

Although many assume the Citizenship Clause guarantees birthright citizenship *ex proprio vigore*, the history of the Fourteenth Amendment instructs otherwise.[339] The 39th Congress did not, and

335. *See, e.g.*, ERNST & YOUNG, DOING BUSINESS IN SWITZERLAND: YEAR 2007 6–9 (2006), *available at* http://www2.eycom.ch/publications/items/doing_business_2006/en.pdf (explaining visa, work permit, travel restrictions, and housing requirements).

336. *See* SWISS ILLEGAL IMMIGRATION, *supra* note 331, at 8. Travail au noir (work with black) means to work for cash "off the books." As in the United States, this is doing work such as domestic services, gardening, and restaurant help. *See id.* at 8.

337. Wall, *supra* note 71.

338. Joseph Farah, Tom Tancredo for President (Apr. 26, 2005), http://worldnetdaily.com/news/article.asp?ARTICLE_ID=43981.

339. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 95.

had no need to, consider massive illegal immigration when it passed the 1866 Act and the Fourteenth Amendment.[340] Indeed, in 1866, with the limited population and open-border policy, there were no illegal aliens.[341] Even so, the congressional debate clearly shows intent to *not* create a universal rule of birthright citizenship. Indeed, Congress added the jurisdiction phase to limit the scope of birthright citizenship.[342] Citizenship is not established by mere locality, nor is it alone created by "naked government power or legal jurisdiction of the individual."[343] Citizenship requires mutual consent by the immigrant and the polity accepting the immigrant as a new citizen.[344]

Today, two fears—loss of self-government and erosion of community—define the anxiety of our age.[345] Each time a foreign national unilaterally chooses to enter the United States, however fervent and honest be his desire to seek the American dream, he does so without honoring America's right to make the corresponding choice, and we the people lose yet another bit of our sense of self-government. Each time an illegal alien enters our nation, a choice to accept is taken away from the existing citizenry; the mutually consensual "two-way street" is never traveled. Our sense of community further erodes. The prevailing political agenda fails to address this anxiety.[346] Congress has power to act in the face of the challenge massive immigration makes to consensual citizenship, power to restore the mutual choice of the immigrant accepting America (a given by his arrival) and America accepting or rejecting the immigrant (presumed as a rejection by the current laws denying entry).[347]

"The idea that freedom consists in our capacity to choose our ends finds prominent expression in our laws and politics."[348] To protect our freedom to choose who joins the polity, Professors Schuck and Smith propose four reforms: (1) effectively enforce our existing immigration laws; (2) implement a system of credible employer sanctions to remove the primary impetus for most illegal migration; (3) set more generous legal admission policies; and (4) "reinterpret the Fourteenth Amendment's Citizenship Clause to make birthright citizenship for the children of illegal and temporary visitor aliens a matter of congressional choice rather than of constitutional prescription."[349]

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340. *See id.*

341. *See id.*

342. *Id.* at 96.

343. *Id.*

344. *Id.*

345. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 3 (1996).

346. *Id.*

347. *See* SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 95.

348. SANDEL, *supra* note 345, at 5.

349. SCHUCK, CITIZENSHIP WITHOUT CONSENT, *supra* note 3, at 5.

In his book, *State of Emergency*, Patrick Buchanan suggests similar actions, including (1) a time-out on all immigration,[350] and no further granting of amnesty;[351] (2) building a border fence (a positive barrier) and ending incentives that bring illegal aliens here (a negative barrier);[352] (3) increasing penalties for hiring and keeping illegal aliens here;[353] and (4) enacting legislation "stating that a child born to an illegal immigrant is not a U.S. citizen," thus eliminating the "anchor baby" loophole brought on by the unquestioningly accepted belief of unrestricted Fourteenth Amendment conference of citizenship.[354]

Interestingly, many of these suggestions are the same or similar to Swiss practices or proposed actions.[355] Surveying the many options reveals some recurring recommendations. First, remove the magnets that draw illegal immigrants to our borders and encourage them to defy our laws. Second, enforce the laws; create an environment that rewards enforcement of and compliance with the laws. Third, make an honest assessment and acceptance of who and what this nation is: a country built, originally, on Anglo-Saxon blood, sweat, culture, and values; a country that speaks English; a Christian country, primarily Protestant; and, perhaps most importantly, a country built by immigrants, albeit mostly of European descent, who, until recently, assimilated with the existing culture and made the country stronger through the mixture of values, all the while retaining the core American ideals inherited from the original colonists.

B. *Remove the Magnets*

Buchanan presents the following steps to accomplish the first task, that of removing the magnets:

1. Terminate birthright citizenship to children of illegal aliens.
2. Permit states, counties, and communities to decide whether they wish to tax themselves to pay for the education of children of illegal aliens. In enacting a federal law to overturn *Plyler* v. *Doe,* Congress should invoke Article III, Section 2 of the Constitution to deny the right of review of the law to all federal courts, including the Supreme Court.
3. All United States businesses should be required to match the Social Security numbers and names of all prospective employees by making a toll-free call to the Social Security Administration, just as retail clerks routinely call to check the credit cards of customers making expensive purchases.
4. A fine should be imposed for every instance of hiring an illegal. Repeated hirings should bring jail terms. For businesses that

350. BUCHANAN, *supra* note 26, at 250.
351. *Id.* at 252.
352. *Id.* at 254, 265.
353. *Id.* at 265.
354. *Id.* at 250–59, 265.
355. *See generally* SWISS ILLEGAL IMMIGRATION, *supra* note 329.

> hire illegals are triple cheaters. They cheat the government of taxes that must be made up by honest citizens. They cheat the community that has to pay the health, education, and welfare costs of illegal aliens and their children. And they cheat their competitors, who have to pay fair wages and honest taxes and are thus at a disadvantage.[356]

C. *Enforce the Laws*

Myriad existing laws protect, regulate, and control the borders of our nation, as well as the people who cross or seek to cross those borders.[357]

Illegal immigration makes access to the American immigration system unfair to legal immigrants. Most illegal immigrants are Mexican nationals.[358] Their unilateral decision to immigrate illegally, facilitated by their physical proximity, gives Mexicans a distinct advantage over others who cannot easily make use of the ground-based (albeit illegal) route into the United States. Conferring a "birthright" on children of someone who should not be here only condones the illegal act, encouraging further illegal entry.

D. *Acknowledge Cultural, Linguistic, and Historical Differences*

> "With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting

356. BUCHANAN, *supra* note 26, at 266.

357. *See, e.g.*, Tom Barry, *Which Way Immigration Reform? Toward a Comprehensive Immigration Policy*, DISCUSSION PAPER (International Relations Center, Silver City, New Mex.) (Mar. 20, 2006), *available at* http://americas.irc-online.org/am/3161; *Foreign Government Ownership of American Telecommunications Companies: Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection*, 106th Cong. (2000) (statement of Larry R. Parkinson, General Counsel, Federal Bureau of Investigation), *available at* http://www.usdoj.gov/criminal/cybercrime/lrp_telecom.htm; Jose E. Alvarez, *President's Column*, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Apr. 6, 2007, http://www.asil.org/ilpost/president/pres070406.html.

358. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, BACKGROUND BRIEFING (Pew Hispanic Center, Washington, D.C.) (June 14, 2005) ("There are about 10.3 million unauthorized migrants estimated to be living in the United States as of March 2004. Of these, about 5.9 million or 57% are from Mexico. The rest of Latin America (mainly Central America) accounts for another 2.5 million or about one-quarter of the total. Asia, at about 1.0 million, represents 9%. Europe and Canada account for 6% and Africa and Other about 4%."), *available at* http://pewhispanic.org/files/reports/46.pdf.

> side by side throughout a long and bloody war, have nobly established general liberty and independence."[359]
>
> —John Jay, in *Federalist* No. 2

"What is wrong with preferring as immigrants one's own kinsmen?"[360] The flawed view that by "believing in a few abstractions (e.g., the American flag is good) one can achieve national identity" runs counter to more traditional beliefs that "much more [is] involved in the composition of a country: a common history, regional loyalty and localities, common bloodlines and genealogy, blood and soil, kin and kith."[361] While no reasonable person would suggest barring immigrants merely because they hail from different cultures or ethnic groups, there certainly is little value in discriminating negatively against immigrants who come from elsewhere in the English-speaking world.[362] Intuitively, the less difference that exists between an immigrant and the citizens of the destination country, the less effort to integrate, assimilate, and accept the immigrant, and the sooner the immigrant becomes a productive member of his newly adopted society.

E. *Make the Necessary Changes*

> "Our destiny is not to be a vague, confusing collection of ethnic groups or religious sects, but rather it is a continuation of the land of freedom and opportunity, the world's beacon of hope for all who are oppressed. To rekindle that desire and remain focused on that destiny, we must renew the bonds of citizenship and the values and institutions that nourish and sustain those bonds."[363]
>
> —Rep. Tom Tancredo, 2006

1. State Action

Although immigration is primarily a federal question, the states are not powerless to act. Vin Suprynowicz lays out a variety of ideas that could be implemented at both the federal and state level:

> Yes, the courts—so far—have generally deferred to an interpretation of the provision which holds that [the citizenship clause] means "The U.S. Constitution grants citizenship to any person born on U.S. soil." But saying the courts have so far interpreted the amend-

359. THE FEDERALIST NO. 2 (John Jay).

360. BUCHANAN, *supra* note 26, at 240.

361. William H. Calhoun, *Recent Statistics on "Hard-Workin" Illegal Immigrants*, CONSERVATIVE VOICE (Aug. 10, 2006), http://www.theconservativevoice.com/article/16930.html.

362. After the adoption of the 1965 Immigration Act, the focus of determining entry moved from numerical limits by nation of origin to numerical limits by hemispheres, allowing a significant change in the nationality and ethnicity of immigrants. *See* SCHUCK, STRANGERS & IN-BETWEENS, *supra* note 47, at 327; *see generally* BECK, *supra* note 47.

363. TANCREDO, *supra* note 26, at 183.

> ment that way *is quite different from pretending that's what the amendment actually says.*
> Judges and juries and presidents and lawmakers could begin tomorrow, in good conscience, to rule that the phrase "and subject to the jurisdiction thereof" means there is no automatic citizenship for a baby born to an illegal alien who willfully evaded the jurisdiction of American immigration laws. Whether they should do so is a legitimate subject for political debate—informed, one hopes, with some thoughtful deliberation on what our society and economy might look like after a few more decades of such an unrestricted invasion (How are the Islamic "guest worker" populations assimilating in Western Europe?).[364]

To wit, Texas State Representative Leo Berman has introduced two bills to remove the magnets, or, at least, begin a discussion on the issue. HB 28 would reserve state entitlements to citizens and children of citizens.[365] HB 29 would impose a fee on money transmitted to certain destinations outside the United States.[366] Further, states can take the simple measure of merely noting on the birth certificate a notice such as this:

> The parents of this child are not citizens or legal residents of the United States, they are citizens of a foreign nation, and as such owe their allegiance to a foreign state; this birth certificate merely records the birth event for the state's limited purpose of record keeping; no United States citizenship or claim to United States citizenship is implied, conferred, or granted by this document. The child named on this certificate is a citizen of the nation of his parent's citizenship.

2. Congressional Action

Because an invading tidal wave of migrants regularly accomplish entry into the United States at a rate of nearly one million each year, it seems prudent to dispense with the myth of controlled borders. To ensure the safety of the United States, Congress should enact workable measures that require proper identification for all forms of licensing and business transactions.

Non-resident aliens and asylum seekers need a status of some kind, to provide documentation, and to distinguish them from permanent resident aliens (who should be seeking citizenship). Technology exists to create hi-tech, forgery-resistant visas to attach to passports for any non-resident alien seeking entry into the United States. These visas could provide identification, class (asylum or other), and give clear, simple notice to any government or business organization that the person is known and allowed entry but not to be afforded benefits

364. Suprynowicz, *supra* note 33 (emphasis added).
365. Tex. H.B. 28, 80th Leg., R.S. (2007).
366. Tex. H.B. 29, 80th Leg., R.S. (2007).

reserved to citizens and permanent resident aliens, including birthright of citizenship.

The question of birthright citizenship exists amidst a tangle of immigration issues. Congress must also address the related issues, including: human trafficking; border control; hiring of illegal aliens; federally mandated benefits (such as public education); dual citizenship; visa lottery; H-1B visas; the lack of a skills requirement for green cards; and poor law enforcement.[367] Most importantly, Congress must take control of citizenship, give a clear definition of citizenship applicable to citizen and would-be-citizen alike, and return citizenship to a valued ideal. "The greatest threat to our nation today does not come from invasion by foreign soldiers but rather from internal decay, a loss of identity, and a de-emphasis on the value of American citizenship."[368]

"Some proponents of immigration reform have advocated either constitutional or statutory amendments to limit automatic birthright citizenship . . . [to] . . . persons born in the United States to parents who are unlawfully present in the United States or are non-immigrant aliens would not become U.S. citizens."[369] Congress can do this by enacting legislation that defines "subject to the jurisdiction thereof" as exclusive allegiance to the United States of America, coupled with the consensual acceptance of such allegiance by appropriate governing authority. If necessary, Congress can also amend the Constitution to remove any ambiguity regarding constitutionality or conditions for birthright citizenship, as the 39th Congress did with the 1866 Act. An amendment could remove the Citizenship Clause altogether, there being no more freed slaves needing its protection, and return control of conferring citizenship to the states. Alternatively, a slight modification to the Citizenship Clause would make the parents' allegiance a clear element in the test for claiming birthright citizenship:

> All persons born *to a citizen; or born to a permanent resident alien then legally residing within the borders of the United States;* or naturalized in the United States*;* and subject to the *complete and undivided political* jurisdiction thereof, *and no other*, are citizens of the United States and of the State wherein they reside.
>
> (suggested modifications shown in italics).

Alternatively, Congress could repeal, either in whole or in part, the Fourteenth Amendment, and begin to restore the balance of power between the central government and the states. Whatever is done, actions to preserve our great heritage, and our national sovereignty, are imperative.

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367. TANCREDO, *supra* note 26, at 187–89.

368. *Id.* at 193.

369. Lee, *supra* note 10, at 1.

Epilogue:

Some would treat citizenship as something akin to a driver's license, a mere registration obtained by filling in forms and passing a test. Others would say citizenship, in conjunction with national borders, is a means of limiting our right to live, work, or travel where we please. The former view reduces citizenship to nothing more than possession of a document such as a passport. The latter, while possibly true, couches a "right" to go where one would by disingenuously framing it as a conflict between individual rights and national sovereignty. The truth lies outside of those parameters, betwixt the concepts of association and choice. As I argue above, citizenship is a mutual acceptance between citizen and polity, not a unilateral decision made by a single person who seeks citizenship. Like a marriage and other consensual relationships, citizenship is a membership in a polity, and a status resulting from that membership. Thus, citizenship is not a right, but rather confers rights, and with those rights come corresponding duties. Too often, we focus on rights, neglecting duties. Perhaps citizenship is best defined by the duties it imposes: loyalty, diligence, allegiance, and participation.

Perduellio est communis.

William M. Stevens

Appendix A — Representative Berman's Bill H.B. 28

80R1245 CAE-D

By: Berman H.B. No. 28

A BILL TO BE ENTITLED
AN ACT

relating to the eligibility of an individual born in this state whose parents are illegal aliens to receive state benefits.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 10, Government Code, is amended by adding Subtitle H to read as follows:

SUBTITLE H. PROVISION OF PUBLIC BENEFITS
CHAPTER 2352. ELIGIBILITY FOR BENEFITS

Sec. 2352.001. DEFINITION. In this chapter, "illegal alien" means an individual who is not a citizen or national of the United States and who has entered the United States without inspection and authorization by an immigration officer.

Sec. 2352.002. APPLICABILITY. This chapter applies only to an individual:

(1) who is born in this state on or after the effective date of this chapter; and

(2) whose parents are illegal aliens at the time the individual is born.

Sec. 2352.003. ELIGIBILITY. An individual to whom this chapter applies is not entitled to and may not receive any benefit provided by this state or a political subdivision of this state, including:

(1) a grant, contract, loan, professional license, or commercial license provided by an agency of this state or a political subdivision of this state or by appropriated funds of this state or a political subdivision of this state;

(2) employment by this state or a political subdivision of this state;

(3) a retirement payment or other benefit received on account of the status of the individual as a former employee or officer of this state or a political subdivision of this state;

(4) public assistance benefits, including welfare payments, food stamps, or food assistance from this state or a political subdivision of this state;

(5) health care or public assistance health benefits;

(6) disability benefits or assistance;

(7) public housing or public housing assistance;

(8) instruction in primary or secondary education;

(9) instruction from a public institution of higher education; and

(10) an unemployment benefit.

SECTION 2. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2007.