

## Birthright Citizenship in the United States A Global Comparison

By Jon Feere

“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.”

-- U.S. CONST. amend. XIV, § 1

### Introduction

Every year, 300,000 to 400,000 children are born to illegal immigrants in the United States. Despite the foreign citizenship and illegal status of the parent, the executive branch of the U.S. government automatically recognizes these children as U.S. citizens upon birth. The same is true of children born to tourists and other aliens who are present in the United States in a legal but temporary status. Since large-scale tourism and mass illegal immigration are relatively recent phenomena, it is unclear for how long the U.S. government has followed this practice of automatic “birthright citizenship” without regard to the duration or legality of the mother’s presence.

Eminent legal scholars and jurists, including Professor Peter Schuck of Yale Law School and U.S. Court of Appeals Judge Richard Posner, have questioned whether the 14<sup>th</sup> Amendment should be read to mandate such a permissive citizenship policy. Nevertheless, the practice has become the de facto law of the land without any input from Congress or the American public.

Advocates of maintaining this citizenship policy argue that the plain language of the Citizenship Clause of the 14<sup>th</sup> Amendment protects automatic birthright citizenship for all children born to illegal and temporary aliens. However, several legal scholars and political scientists who have delved into the history of the 14<sup>th</sup> Amendment have concluded that “subject to the jurisdiction thereof” has no plain meaning and that the executive branch’s current, broad application of the Citizenship Clause may not be warranted.

The overwhelming majority of the world’s countries do not offer automatic citizenship to everyone born within their borders. Over the past few decades, many countries that once did so — including Australia, Ireland, India, New Zealand, the United Kingdom, Malta, and the Dominican Republic — have repealed those policies. Other countries are considering changes.

In the United States, both Democrats and Republicans have introduced legislation aimed at narrowing the application of the Citizenship Clause. In 1993, Sen. Harry Reid (D-Nev.) introduced legislation that would limit birthright citizenship to the children of U.S. citizens and legally resident aliens, and similar bills have been introduced by other legislators in every Congress since. The current Congress saw the introduction by Rep. Nathan Deal (R-Ga.) of the “Birthright Citizenship Act of 2009,” which so far has gathered nearly 100 sponsors.<sup>1</sup>

This *Backgrounder* briefly explains some policy concerns that result from an expansive application of the Citizenship Clause, highlights recent legislative efforts to change the policy, provides a historical overview of the development of the 14<sup>th</sup> Amendment’s Citizenship Clause, and includes a discussion of how other countries approach birthright citizenship. The paper concludes that Congress should clarify the scope of the Citizenship Clause and promote a serious discussion on whether the United States should automatically confer the benefits and burdens of U.S. citizenship on the children of aliens whose presence is temporary or illegal.



Among the findings:

- Only 30 of the world's 194 countries grant automatic citizenship to children born to illegal aliens.
- Of advanced economies, Canada and the United States are the only countries that grant automatic citizenship to children born to illegal aliens.
- No European country grants automatic citizenship to children of illegal aliens.
- The global trend is moving away from automatic birthright citizenship as many countries that once had such policies have ended them in recent decades.
- 14<sup>th</sup> Amendment history seems to indicate that the Citizenship Clause was never intended to benefit illegal aliens nor legal foreign visitors temporarily present in the United States.
- The U.S. Supreme Court has held that the U.S.-born children of permanent resident aliens are covered by the Citizenship Clause, but the Court has never decided whether the same rule applies to the children of aliens whose presence in the United States is temporary or illegal.
- Some eminent scholars and jurists have concluded that it is within the power of Congress to define the scope of the Citizenship Clause through legislation and that birthright citizenship for the children of temporary visitors and illegal aliens could likely be abolished by statute without amending the Constitution.

The international findings in this report are the result of direct communication with foreign government officials and analysis of relevant foreign law. It is the most current research on global birthright citizenship data.

## The Impact of Birthright Citizenship

Between 300,000 and 400,000 children are born to illegal immigrants in the United States every year. Put another way, as many as one out of 10 births in the United States is to an illegal immigrant mother.<sup>2</sup> All of these children are considered by the executive branch of the U.S. government to be U.S. citizens who enjoy the same rights and are entitled to the same benefits as the children of U.S. citizens.

The population of U.S.-born children with illegal alien parents has expanded rapidly in recent years from 2.3 million in 2003 to 4 million in 2008; since these figures do not include children who are 18 years of age or older nor those who are married, the actual figure is somewhat larger.<sup>3</sup>

The two citizenship benefits that have drawn the most attention in the birthright citizenship debate are, first, food assistance and other welfare benefits to which a family of illegal aliens would not otherwise have access, and second, the ability of the child when he grows up to legalize his parents, and also to bring into the United States his foreign-born spouse and any foreign-born siblings. The sponsored spouse can, in turn, sponsor her own foreign-born parents and siblings, and the siblings can, in turn, sponsor their own foreign-born spouses, and so on, generating a virtually never-ending and always-expanding migration chain.

Because having a child on U.S. soil can cement an immigrant's presence in the United States, provide access to welfare benefits, and ultimately initiate chain migration of the child's extended family and in-laws, children born to illegal aliens and legal temporary visitors are sometimes referred to as "anchor babies." These benefits have contributed to the growth of a "birth tourism" industry.

The voices calling for a change to the current application of the Citizenship Clause of the 14<sup>th</sup> Amendment are quite diverse and are not limited to activists and policymakers. The influential Circuit Court Judge Richard Posner held in a recent court decision that the policy of granting automatic birthright citizenship for children of illegal and temporary aliens is one that "Congress should rethink" and that the United States "should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children."<sup>4</sup>

**Benefits.** Most benefits Americans would regard as "welfare" are not accessible to illegal immigrants. However, illegal immigrants can obtain welfare benefits such as Medicaid and food stamps on behalf of their U.S.-born children. Many of the welfare costs associated with illegal immigration, therefore, are due to the current birthright citizenship policy. Put another way, greater efforts at barring illegal aliens from federal welfare programs will not significantly reduce costs because their citizen children can continue to access the benefits. Nationwide, 40 percent of illegal alien-headed households receive some type of welfare. In some states, the rate is higher: in New York, 49 percent receive welfare; in California, the rate is 48 percent; in Texas, it is 44 per-

cent; and in Georgia, 42 percent of illegal alien-headed households receive welfare.<sup>5</sup> Only 19 percent of households headed by native-born citizens make use of a major welfare program.

Of course, states offer additional welfare benefits as well. Los Angeles County Supervisor Michael D. Antonovich recently released data from the Los Angeles County Department of Public Social Services indicating that children of illegal aliens in Los Angeles County received \$50 million in welfare benefits during the month of February 2010 alone. The report estimates that 23 percent of all CALWORKS and food stamp issuances in Los Angeles County are to illegal immigrant parents who collect on their U.S.-born children's behalf. The supervisor estimates that illegal immigration and birthright citizenship cost taxpayers in Los Angeles County over \$1 billion annually, not including education costs.<sup>6</sup>

Despite taxpayers' assistance, approximately 59 percent of illegal aliens and their U.S.-born children live in or near poverty. In total, 21.5 million immigrants (legal and illegal) and their young children live in or near poverty. In California, Arizona, Texas, and Colorado illegal aliens and their U.S.-born children account for roughly a fifth of the those in poverty.<sup>7</sup> Ultimately, treating the U.S.-born children of illegal aliens as citizens has the statistical effect of increasing the percentage of U.S. citizens living in poverty.

It is important to remember that births to illegal aliens are not spread evenly throughout the United States. Some states, particularly those closer to the southern border, carry a much larger burden. According to the Texas Health and Human Services Commission, between 60,000 to 65,000 babies are born to illegal aliens in Texas every year, representing about 16 percent of total births statewide. The report estimates that between 2001 and 2009, births to illegal immigrant women totaled 542,152 in Texas alone.<sup>8</sup>

**Chain Migration.** A child born to illegal aliens in the United States can initiate a chain of immigration when he reaches the age of 18 and can sponsor an overseas spouse and unmarried children of his own. When he turns 21, he can also sponsor his parents and any brothers and sisters.<sup>9</sup>

Family-sponsored immigration accounts for most of the nation's growth in immigration levels. Of the 1,130,818 immigrants who were granted legal permanent residency in 2009, a total of 747,413 (or, 66.1 percent) were family-sponsored immigrants. A change to U.S. immigration laws in the late 1950s — one that allowed for the admission of extended family members outside the nuclear family — resulted in the average an-

nual flow increasing from 250,000 then, to over 1 million today. This number continues to rise every year because of the ever-expanding migration chains that operate independently of any economic downturns or labor needs.<sup>10</sup> Although automatic and universal birthright citizenship is not the only contributor to chain migration, ending it would prevent some of this explosive growth.

The issue of birthright citizenship for the children of aliens who have not been admitted for permanent residence cannot be resolved in isolation from other immigration issues. For example, politicians on both sides of the aisle regularly call for an increase in temporary workers, but the economic and social impact of children born to these workers while they are in the United States is never part of the discussion. Under any large-scale guestworker program, it is likely that tens of thousands of children would be born on U.S. soil. If the guestworker does not depart when his work visa expires, he becomes an illegal alien and is subject to deportation. But immigration authorities cannot deport the guestworker's citizen child along with the overstaying guestworker. The result is that the guestworker makes the case for indefinite stay based on the principle of "keeping families together" — an argument that is often successful at stopping an alien's deportation. Because of birthright citizenship, what started as a policy to bring in laborers on a temporary basis can become yet another channel for permanent immigration. This is one of the reasons why some have said that "there is often nothing more permanent than a temporary worker."<sup>11</sup>

**Birth Tourism.** The significant benefits of U.S. citizenship and the executive branch's permissive birthright citizenship policies have become a magnet for those seeking to add a U.S. passport holder to their family. An entire industry of "birth tourism" has been created and the phenomenon of pregnant women traveling (legally) to the United States specifically for the purpose of giving birth on U.S. soil has grown largely without any debate in Congress or the consent of the public.

"It's easy. If you register the birth, it's automatic that your baby can get an American passport," said Kim Jeong Yeon, a Korean woman who traveled to the United States on a tourist visa while six months pregnant.<sup>12</sup> Like many other women, Kim spent thousands of dollars to have a company arrange the travel. "If they could afford it, all my friends would go to the United States to have their babies," she said.

According to Selin Burcuoglu, a Turkish woman who traveled to the United States to give birth last year, the process was easy: "We found a company on the Internet and decided to go to Austin for our child's

birth. It was incredibly professional. They organized everything for me. I had no problem adjusting and I had an excellent birth. I don't want her to deal with visa issues — American citizenship has so many advantages.”<sup>13</sup>

Birth tourism can be a lucrative business for immigrants who facilitate the travel and birthing process for their former countrymen. Turkish doctors, hotel owners, and immigrant families in the United States have assembled what amounts to a birth-tourism assembly line, reportedly arranging the U.S. birth of 12,000 Turkish children since 2003. The Turkish-owned Marmara Hotel group offers a “birth tourism package” that includes accommodations at their Manhattan branch. “We hosted 15 families last year,” said Nur Ercan Mağden, head manager of The Marmara Manhattan, adding that the cost was \$45,000 each.<sup>14</sup>

Similarly, the Tucson Medical Center (TMC) in Arizona offers a “birth package” to expectant mothers and actively recruits in Mexico. Expectant mothers can schedule a Caesarean or simply arrive a few weeks before their due date. The cost reportedly ranges from \$2,300 to \$4,600 and includes a hospital stay, exams, and a massage. Additional children trigger a surcharge of \$500. “These are families with a lot of money, and some arrive on private jets and are picked up by an ambulance and brought here,” said Shawn Page, TMC’s administrator of international services and relations.<sup>15</sup>

In California, three Chinese-owned “baby care centers” offer expectant mothers a place to give birth to an American citizen for a fee of \$14,750, which includes shopping and sightseeing trips. For a \$35 daily fee, television, internet, and three meals are provided. “We don’t encourage moms to break the law — just to take advantage of it,” explains Robert Zhou, the agency’s owner. Zhou says that he and his wife have helped up to 600 women give birth in the United States within the last five years. In fact, they started the business after traveling to the United States to have a child of their own. Zhou explains that the number of agencies like his has soared in the past five years.<sup>16</sup>

Zhou believes that a cheaper education is often a motivating factor and his pitch to prospective clients includes the notion that public education in the United States is “free.” One of his clients, Christina Chuo, explains that her parents “paid a huge amount of money for their education” in the United States because they were foreign students; having an American citizen child permits her child to acquire the same education at a lower tuition. She also noted that she and her husband were not interested in permanently immigrating to the United States, “except, perhaps, when they retire.”<sup>17</sup>

As discussion about limiting birthright citizenship heats up in the United States, some foreign countries are concerned about possible changes. The Nigerian media, for example, recently published an article titled, “American Agitations Threaten a Nigerian Practice.” The practice referred to is that of Nigerians traveling to the United States to have a child — a practice that, according to the newspaper, is “spreading so fast that it is close to becoming an obsession.”<sup>18</sup>

The U.S. State Department is not permitted to deny a woman a temporary visitor visa simply because she is pregnant and the legal document she obtains means she is not likely to be stopped at the border.<sup>19</sup> Consequently, the practice of granting automatic birthright citizenship allows a seemingly temporary admission of one foreign visitor to result in a permanent increase in immigration and grants of citizenship that were not necessarily contemplated or welcomed by the American public. Add to this the fact that immigration authorities are less likely to deport a visitor who overstays their permitted time if they have a U.S. citizen child, and one ends up with an immigration policy quite different from that which was originally intended.

The birth tourism industry illustrates how the executive branch’s permissive birthright citizenship policies can have the effect of transferring control over the nation’s immigration policy from the American people to foreigners.

## Congress Considers Changes

Over the last few decades, many of those few countries with automatic birthright citizenship policies have changed their law as a means of discouraging illegal immigration and to give citizens more control over the future of their societies. The countries that have ended the practice in recent years include the United Kingdom, Australia, Ireland, India, Malta, New Zealand, and the Dominican Republic. Barbados and Antigua & Barbuda may also be ending the practice as the nations look for ways to cope with illegal immigration.

In the United States, birthright citizenship has been the subject of congressional hearings and proposed legislation for at least the past two decades.

The effort to end automatic birthright citizenship in the United States has come from across the political spectrum. Sen. Harry Reid (D-Nev.) introduced legislation to end automatic birthright citizenship in 1993, the Republican Party made the end of automatic birthright citizenship part of its 1996 platform, and the current Congress saw the introduction of the “Birthright Citizenship Act of 2009” by Rep. Nathan Deal (R-Ga.).



The current bill has attracted nearly 100 co-sponsors.<sup>20</sup> Since 1993, legislation to end birthright citizenship has been introduced in each Congress.<sup>21</sup>

The latest legislation would limit birthright citizenship to persons born in the United States to at least one parent who is either (1) a citizen or national of the United States, (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the armed forces. It is an effort to define who is “subject to the jurisdiction” of the United States, a clause found in the 14<sup>th</sup> Amendment of the U.S. Constitution that dictates the scope of birthright citizenship, as discussed later.

**What Law Requires Birthright Citizenship?** Is automatic birthright citizenship for children of all legal and illegal aliens expressly required by the U.S. Constitution? On its face, the answer is “no.” No language in the Constitution specifically addresses how the children of foreigners must be dealt with in regards to citizenship. The 14<sup>th</sup> Amendment confers citizenship through “naturalization” or by birth to persons “subject to the jurisdiction” of the United States, but provides no guidance on when an alien is to be regarded as subject to U.S. jurisdiction. The next question, then, is whether any statute enacted by Congress specifically directs the granting of citizenship to children born in the United States to illegal aliens. Again, the answer is “no.” The executive branch’s birthright citizenship policy is not based on any federal regulation. One might say that the practice has become policy without becoming law.

Because the current policy has not been taken through the standard legislative or regulatory processes, it has become official practice without any input from the American public or their elected representatives. A recent survey found that only 33 percent of Americans support the practice of granting automatic citizenship to children born to illegal aliens.<sup>22</sup>

**Jus Sanguinis and Jus Soli.** Countries generally adopt one of two systems for granting citizenship to children — *jus sanguinis* or *jus soli*. Most countries practice *jus sanguinis*, also known as citizenship by descent, or citizenship by “right of blood.” Under this system, a child acquires the parent’s citizenship upon birth. This threshold varies from country to country; for example, some countries will determine the child’s citizenship based on the father’s citizenship, while others will look to the mother’s citizenship. Countries practicing *jus sanguinis* will not automatically grant citizenship to a child born within their borders if that child is born to parents who

are foreigners. This would be true of immigrants who have entered both legally and illegally. The child maintains the parent’s foreign citizenship.

A small number of countries practice *jus soli*, or citizenship by “right of soil.” Under this system, a child automatically acquires the citizenship of the country in which the birth takes place. This citizenship is generally granted without conditions, and the citizenship and immigration status of the parents is inconsequential. Only 30 of the world’s 194 countries practice *jus soli*. The United States is one of the few countries with this system.

Although the United States is practicing *jus soli* when it grants automatic citizenship to children born to illegal immigrants, historians generally agree that the two citizenship principles that have vied for supremacy in Anglo-American law are that of ascription and consent — whether citizenship is ascribed to a person based on circumstances outside his control or whether there must be some form of consent by the individual and the state.<sup>23</sup> Some scholars have written that the United States has adopted elements of both ascription and consent, without ever adequately reconciling them into a practical, unified, or effective policy — something that must occur if the United States wishes to successfully address complex issues involving immigration and citizenship.

**From Subjectship to Citizenship.** Political historians note that the founders the United States sought a citizenship policy different from that found in British common law. The phrase “birthright citizenship” is derived from “birthright subjectship,” a phrase that described the perpetual allegiance to the King of England owed in medieval times by anyone born within his realm. According to Professor Edward J. Erler, Professor of Political Science at California State University:

“The framers of the Constitution were, of course, well-versed in the British common law, having learned its essential principles from William Blackstone’s *Commentaries on the Laws of England*. As such, they knew that the very concept of citizenship was unknown in British common law. Blackstone speaks only of ‘birthright subjectship’ or ‘birthright allegiance,’ never using the terms citizen or citizenship. The idea of birthright *subjectship* is derived from feudal law. It is the relation of master and servant; all who are born within the protection of the king owe perpetual allegiance as a ‘debt of gratitude.’ According to Blackstone, this debt is ‘intrinsic’ and ‘cannot be forfeited, cancelled, or altered.’

Birthright subjectship under the common law is thus the doctrine of perpetual allegiance.”<sup>24</sup>

Like other historians, Erler notes that in the Declaration of Independence and the Constitution the Founders rejected the medieval concept of ascriptive “subjectship” in favor of a modern “citizenship” based on the consent of the governed.<sup>25</sup> The liberty sought by the Founders required citizenship, rather than subjectship, as only the former allowed the individual to leave his nation at any time of his choosing — a freedom not possible under British common law. As Blackstone explained, the “natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former... and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince.”<sup>26</sup> It was this very type of subjugation that the Founders did not want to bring to the new government.<sup>27</sup>

The movement from medieval ascription to modern consent was explained by Peter H. Schuck and Rogers M. Smith in their influential book *Citizenship Without Consent*:

“[B]irthright citizenship originated as a distinctively feudal status intimately linked to medieval notions of sovereignty, legal personality, and allegiance. At a conceptual level, then, it was fundamentally opposed to the consensual assumptions that guided the political handiwork of 1776 and 1787. 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.”<sup>28</sup>

Schuck and Smith argue that a constitutional commitment to “citizenship based on mutual consent” is not only in line with the historical development of the United States but that it is also “constitutionally permissible and democratically legitimate.”<sup>29</sup>

Still, the exact perimeters of U.S. citizenship were never fully defined during the early years of the nation’s founding and consensualism was never fully embraced, in part because a complete resolution of the issue would have raised sensitive questions about whether state or national citizenship was primary, whether states

had to recognize citizenship granted by other states, and the issue of state and federal authority, generally.<sup>30</sup>

At the most basic level, Americans were quite obviously committed to the principles of a consensual government and also the right of expatriation — particularly since the British continued to demand the allegiance of their former subjects well into the nineteenth century. The ascriptive approach to citizenship simply did not comport with the purpose behind the American Revolution.<sup>31</sup>

Nevertheless, it was not until the American Civil War that the concept of citizenship acquired some much-needed clarification.

## The Citizenship Clause Of the 14<sup>th</sup> Amendment

Before the 14<sup>th</sup> Amendment, citizenship was granted by states, and subsequently recognized by the federal government. Although the 13<sup>th</sup> Amendment officially ended slavery in 1865, it was not sufficient for the purpose of making freed slaves citizens of the United States. In the 1857 case *Dred Scott v. Sandford*, the Supreme Court held that blacks, even those freed from slavery, were not citizens of the United States.<sup>32</sup> In the aftermath of the Civil War, some states were preventing freed slaves from gaining federal citizenship by denying state citizenship. “Black Codes” passed into law by some states denied many other civil rights.

These injustices led to the Civil Rights Act of 1866, which was aimed, in part, at overruling the *Dred Scott* decision and which laid the groundwork for enactment of the 14<sup>th</sup> Amendment two years later. The Act declared, among other things:

“That 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;”<sup>33</sup>

Two years later in 1868, the Citizenship Clause of the 14<sup>th</sup> Amendment would be closely patterned on the citizenship declaration of the 1866 Act. Both intended to exclude from birthright citizenship at least some U.S.-born persons where a competing claim of subjectship or citizenship existed. The 1866 Act drew the line by excluding persons “subject to any foreign power,” while the 14<sup>th</sup> Amendment included only persons “subject to the jurisdiction” of the United States.<sup>34</sup> In either case what was being weighed was competing claims to the future allegiance of the child.<sup>35</sup>

**“Subject to the Jurisdiction Thereof.”** The first sentence of Section 1 of the 14<sup>th</sup> Amendment of the U.S. Constitution, also known as the Citizenship Clause, reads as follows:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.”<sup>36</sup>

This clause contains two requirements for obtaining U.S. citizenship by birth: (1) the birth must have occurred within the United States; and (2) the person born must be subject to the jurisdiction of the United States. The second requirement imposes a consensual qualification to birthright citizenship.<sup>37</sup> Advocates of granting automatic citizenship to children of illegal aliens almost always focus only on the first requirement, arguing birth on U.S. soil, alone, guarantees U.S. citizenship.<sup>38</sup> These advocates also argue that “subject to the jurisdiction” simply means being susceptible to police authority (i.e. being required to follow laws and pay fines for violations). But such an interpretation creates a redundancy in the 14<sup>th</sup> Amendment, as all people born in the United States are subject to the laws of the land. Accepting the premise that “subject to the jurisdiction thereof” simply means being “subject to police power” turns a critical and carefully-written portion of the Citizenship Clause into a redundancy. Unquestionably, basic statutory interpretation requires one to view each clause as a distinct and separate requirement, and no honest jurist would read a redundancy into a statute, much less a constitutional amendment.<sup>39</sup>

The inquiry, then, is focused on the intent of those who wrote the clause and whether a child born in the United States to an illegal alien is a person who is “subject to the jurisdiction” of the United States, and consequently an automatic citizen of the country. No one doubts that the main purpose of the 14<sup>th</sup> Amendment was to ensure that freed slaves would be recognized as U.S. citizens. Nevertheless, some argue that children of illegal aliens should enjoy the same privilege. But when the 14<sup>th</sup> Amendment was enacted, there were few limits on immigration and very few persons in the United States would have been residing here illegally. Moreover, given the costs and risks of long-distance transportation, tourists and other temporary visitors were limited in numbers. There is simply no direct evidence that Congress wished to confer citizenship on the children of temporary or illegal visitors, but there is some evidence that they did not.

The most informative source on the intent of Congress is the *Congressional Globe*, the earlier version of today’s *Congressional Record*. The development of the language that made it into the 14<sup>th</sup> Amendment is revealing. At the outset, the authors of the 1866 Act and the 14<sup>th</sup> Amendment understood that a certain amount of respect or allegiance to the United States was expected of all persons who found themselves within our borders, even from foreigners visiting temporarily, and that this alone would not justify a grant of citizenship. During debate on the 1866 Act, Sen. Lyman Trumbull (R-Ill.) explained that his goal was “to make citizens of everybody born in the United States who owe allegiance to the United States,” but noted a lack of clarity in such a phrasing, explaining:

“I thought that might perhaps be the best form in which to put the amendment at one time, ‘That all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;’ but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens, and that that form would not answer.”<sup>40</sup>

The “sort of allegiance” owed by an alien “temporarily resident” in the United States, legally or illegally, would seem to include a duty to follow basic laws, but not the duty of loyalty demanded of a citizen. While advocates for the rights of illegal aliens argue that this duty to obey our laws (and an alien’s susceptibility to being arrested for a violation of our laws) makes an alien “subject to the jurisdiction” of the United States, that was not the view of those who framed the Citizenship Clause. In the 1866 Act, any such interpretation was precluded by using the phrase “not subject to any foreign power.”

Soon thereafter, the phrase “not subject to any foreign power” would reappear as “subject to the jurisdiction thereof” in the 14<sup>th</sup> Amendment. Thus, while the language of the 1866 Act distinguished aliens on the basis of their continuing obligation of allegiance to a foreign power, the 14<sup>th</sup> Amendment focused mainly on the alien’s degree of allegiance to the United States. However, in both cases, the purpose was to avoid the granting of citizenship to people with only a temporary sort of allegiance. Opposition to granting citizenship to individuals subject to a foreign power was strong throughout the Senate.<sup>41</sup> It does seem that the framers of the Citizenship Clause had no intention of establishing a universal rule of automatic birthright citizenship.<sup>42</sup>

On May 30, 1866, Sen. Jacob Howard (R-Mich.) initiated debate on a resolution that would become the Citizenship Clause of the 14<sup>th</sup> Amendment. In defining citizenship by birth, Sen. Howard explained:

“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. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States.”<sup>43</sup>

Whether Sen. Howard thought that the “jurisdiction” clause would exclude only the children of diplomats or some larger category of “foreigners” has been much debated. In fact neither side of the debate can rely exclusively on Sen. Howard’s statement since the statement (or the reporting of the statement) is grammatically incomplete, and one’s interpretation depends on how one chooses to complete the grammar. When the senator said...

“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...”

...he may have meant either:

- (1) “This will not, of course, include persons born in the United States who are foreigners, aliens, [or those] who belong to the families of ambassadors or foreign ministers...”

...or:

- (2) “This will not, of course, include persons born in the United States who are foreigners [or] aliens who belong to the families of ambassadors or foreign ministers...”

The former interpretation would support the narrative that children born to illegal aliens are not considered citizens, while the latter would deny U.S. citizenship to only those born to family of visiting government officials. Since we cannot know for sure what Sen. Howard meant to say, the most one can conclude is that he did not expect that every U.S.-born child of an alien would

automatically be made a citizen by the 14<sup>th</sup> Amendment. Interestingly, as noted below, the Supreme Court, even when expanding the scope of birthright citizenship, has assumed the first and more exclusive reading.

There is a better record of how the sponsors expected the 14<sup>th</sup> Amendment to apply to tribal Indians. Sen. Trumbull, sponsor of the 1866 Act, offered his definition of “subject to the jurisdiction:”

“What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means.”<sup>44</sup>

Sen. Trumbull went on to explain how this clause might apply to American Indians:

“It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is ‘subject to the jurisdiction of the United States.’”<sup>45</sup>

Sen. Trumbull’s explanation hearkens back to the 1866 Act and its exclusion of persons “subject to any foreign power.” Today, it cannot be denied that an illegal alien is, under law, a citizen of a foreign country and therefore subject to that country’s jurisdiction. An illegal alien owes at least some amount of allegiance to their home country, if not complete allegiance. They are not under any sense of the law a citizen of the United States. As explained by Thomas Jefferson: “Aliens are the subjects of a foreign power.”<sup>46</sup> Although, as a result of federal statutory law, all native-born Indians are regarded as citizens today, at the time of the 14<sup>th</sup> Amendment Indian tribes were treated as foreign powers, and members of the tribe were presumed to owe their first allegiance to the tribe. There was no need to refer specifically to Indian tribes in the Amendment because it simply stood to reason that, for an Indian, mere presence in the United States could not be treated as a transfer of allegiance from his tribe to the United States. Query whether, in the 21<sup>st</sup> century, it stands to reason that a French tourist who gives premature birth to a child during a two-week visit to Disney World should, by virtue of her presence in Orlando, be regarded as having forsaken her allegiance to France.

If the question of “jurisdiction” boils down to one of allegiance, and under U.S. jurisprudence allegiance is a voluntary association, on what basis can a newborn child be found to have chosen an allegiance to his parent’s country over allegiance to the United States, or vice versa? It was understood by the authors of the 14<sup>th</sup> Amendment that jurisdiction as to the child would



be imputed from the status of the parents. Sen. Reverdy Johnson (D-Md.) explained that parents must be “subject to the authority” of the United States if their children born here are to be classified as having acquired the status of U.S. citizen:

“Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power...shall be considered as citizens of the United States. ... [T]he amendment says that citizenship may depend on birth, and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, *born of parents who at the time were subject to the authority of the United States.*”<sup>47</sup> (emphasis added)

Are illegal aliens subject to the authority of the United States? Not in the way contemplated by authors of the 14<sup>th</sup> Amendment. As explained earlier, the authors of the 14<sup>th</sup> Amendment explained that being subject to the jurisdiction of the United States means not owing allegiance to anybody else.

Without asking immigrants themselves, we cannot know where their allegiances lie, but in the case of Mexican immigrants, who constitute nearly 60 percent of the illegal alien population in the United States,<sup>48</sup> we do know what their government thinks. It appears these individuals owe at least partial, if not complete allegiance to the government of Mexico.

For example, in its recent amicus brief to the U.S. District Court overseeing the injunction hearing on Arizona’s anti-illegal immigration bill S.B. 1070, the government of Mexico refers to Mexican illegal aliens as “its people” and “its citizens.”<sup>49</sup> This is not a new perspective.

Former Mexican President Vicente Fox appointed one Juan Hernandez to head a governmental agency called the Institute for Mexicans Abroad. According to Mr. Hernandez’s own website, the agency’s principal objective is to “serve and dignify the 24 million whom President Fox has called heroes — the countrymen who live in foreign lands.”<sup>50</sup> Mr. Hernandez explains: “We are betting on that the Mexican-American population in the United States...will think ‘Mexico first’ ... But now I want the third generation, the seventh generation, I want them all to think ‘Mexico first.’”<sup>51</sup>

Ultimately, in assessing the statements found in the *Congressional Globe*, it is important to remember that floor statements said during debate in the House or Sen-

ate are not law; it is only the language of the law itself upon which Congress has agreed. Because the “subject to the jurisdiction” language can be, and has been, susceptible to so many interpretations, it may be prudent for the current Congress to clarify, by statute, the full scope of the 14<sup>th</sup> Amendment’s Citizenship Clause.

If Congress does not act first, there is a chance that someday the courts, with nothing more than these floor statements to guide them, will be forced to clarify what is now uncertain. It is arguably better for Congress to determine the proper scope of the 14<sup>th</sup> Amendment based on careful deliberations, rather than having so important a decision rendered by the judiciary based on a handful of 19<sup>th</sup> century floor statements.

### The Supreme Court Weighs In

The U.S. Supreme Court has shed some light on the meaning of “subject to the jurisdiction thereof” in the years that followed the passage of the 14<sup>th</sup> Amendment. The first definition from the Supreme Court appeared in 1873 in the *Slaughter-House Cases*, a series of cases not dealing specifically with birthright citizenship. Here, the Court explained:

“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.”<sup>52</sup>

This interpretation is consistent with Sen. Howard’s floor statement on the scope of jurisdiction, discussed above, as not including foreigners, *or* aliens, *or* children born to foreign government officials. Even the dissenting justices agreed with this restrictive interpretation.

The Supreme Court addressed “subject to the jurisdiction” again in 1884 in *Elk v. Wilkins*, a case that focused on the citizenship of an American Indian who had been born into a tribe but had later severed his tribal ties. Here, the Court emphasized that a person not born into U.S. citizenship could not make himself “subject to the jurisdiction” of the United States without the consent of the United States. According to the Court: “no one can become a citizen of a nation without its consent.”<sup>53</sup> Specifically, the Court held that although the plaintiff was born in the United States, he was not granted U.S. citizenship through any treaty or statute and was consequently not subject to the jurisdiction of the United States under the 14<sup>th</sup> Amendment. The Court defined the jurisdictional requirement of the Citizenship Clause as requiring a person to be:

“...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.”<sup>54</sup>

The Court also explained that Indians born in tribes geographically located within the United States are “no more ‘born in the United States and subject to the jurisdiction thereof’...than the children of subjects of any foreign government born within” the United States “or the children born within the United States, of ambassadors or other public ministers of foreign nations.”<sup>55</sup>

This holding is clearly damaging to those who argue the 14<sup>th</sup> Amendment grants citizenship to children born to illegal aliens because an illegal alien is certainly a subject of a foreign government. A child born to such an individual is not, according to the *Elk* Court, subject to the jurisdiction of the United States. Additionally, this holding is consistent with the interpretation of Sen. Howard’s floor statement that the 14<sup>th</sup> Amendment denies citizenship not only to children born to parents who are visiting foreign diplomats, but also to children born to foreigners, generally.

Another Supreme Court holding that is often cited is the 1898 case *United States v. Wong Kim Ark* which held that Wong Kim Ark, a child born in the United States to legal resident Chinese immigrants, was a birthright U.S. citizen under the 14<sup>th</sup> Amendment. According to the Court:

“[A] child born in the United States, of parents of Chinese descent, who at the time of his birth, are subjects of the emperor of China, *but have a permanent domicile and residence in the United States*, and... are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States.”<sup>56</sup> (emphasis added)

The Court gave little weight to the consensualist attitudes shown in the *Congressional Globe* floor statements and based its decision instead on a theory that the 14<sup>th</sup> Amendment was simply a codification of English common law, citing the English jurists William Blackstone and Edward Coke. Given the *Wong Kim Ark* Court’s reliance on English common law, it is worth observing that Justice Story, who years earlier held that U.S. citizenship law derives from English common law, wrote the following in his famous *Conflict of Laws* treatise:

“A reasonable qualification of the [English birthright citizenship] rule would seem to be that it should not apply to children of parents who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health or curiosity, or occasional business.”<sup>57</sup>

In concluding that “subject to the jurisdiction thereof” in the Citizenship Clause should be very broadly construed, the Court in *Wong Kim Ark* held that it simply means the same thing as “within the jurisdiction,” a phrase found in the Equal Protection Clause of the 14<sup>th</sup> Amendment:

“It is impossible to construe the words ‘subject to the jurisdiction thereof,’ in the opening sentence [of the 14<sup>th</sup> Amendment], as less comprehensive than the words ‘within its jurisdiction,’ in the concluding sentence of the same section; or to hold that persons ‘within the jurisdiction’ of one of the States of the Union are not ‘subject to the jurisdiction of the United States.’”<sup>58</sup>

Setting aside some of its own earlier commentary, the Court surmised that the “real object” of the Citizenship Clause “would appear to have been to exclude, by the fewest and fittest words... two classes of cases — children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State.”<sup>59</sup>

The strongly worded dissent reiterated much of the earlier precedent, explaining:

“To be ‘completely subject’ to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.

“Now I take it that the children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country. ... The Fourteenth Amendment was not designed to accord citizenship to persons so situated and to cut off

the legislative power from dealing with the subject. ... It is not to be admitted that the children of persons so situated become citizens by the accident of birth.”<sup>60</sup>

Some scholars argue that the dissent is more aligned with the established precedent and that the allegiance of the child in this case should have followed that of his parents, as was held to be the rule in *Elk*.<sup>61</sup> Other scholars feel that Congress probably did intend to extend citizenship to individuals like Wong Kim Ark but only with the expectation that the actual effect of such an application would be trivial.<sup>62</sup>

The only 20<sup>th</sup> century case that touches on the 14<sup>th</sup> Amendment’s application to illegal aliens is the 1982 case *Phyller v. Doe*, which held that the denying of public-school admission to illegal-alien children would violate the Equal Protection Clause of the 14<sup>th</sup> Amendment. Although the case did not require the Court to decide the scope of birthright citizenship, Justice William Brennan, writing for a split 5-4 Court, added an endnote that cited language from *Wong Kim Ark* and added the following language:

“[N]o plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.”<sup>63</sup>

Of course, policymakers have made plenty of distinctions as between the two groups. According to University of Texas law professor Lino A. Graglia, Justice Brennan seems to have based his reasoning on the mistaken premise that *Wong Kim Ark* decided the case of illegal aliens.<sup>64</sup> Ultimately, this dictum hardly represents an investigation into the appropriate scope of the 14<sup>th</sup> Amendment’s Citizenship Clause and it does not bind any subsequent court. As Yale Law professor Peter Schuck has written: “no court has ever squarely decided the question of the status under the Citizenship Clause of the native-born children of illegal and nonimmigrant aliens.”<sup>65</sup>

While the *Slaughter-House Cases*, *Elk v. Wilkins*, *Wong Kim Ark*, and *Phyller v. Doe* provide food for thought and fodder for debate, it remains to be seen whether a 21<sup>st</sup> century court will be more inclined to follow the reasoning of *Elk* or the reasoning of *Wong Kim Ark* if and when faced with having to make an unprecedented decision about whether the U.S. Constitution imposes U.S. citizenship on the U.S.-born children of aliens who

have been admitted only for “temporary purposes” or who have not been admitted at all.

## What About the Plenary Power Doctrine?

If Congress were to declare an end to birthright citizenship for the U.S.-born children of aliens not admitted to permanent residence, the law would certainly be challenged in court, likely forcing the Supreme Court to render a final decision. In addition to weighing its own 14<sup>th</sup> Amendment jurisprudence, the Court would have to address the plenary power doctrine which holds that the political branches — the legislative and the executive, rather than the judicial — have sole power to regulate immigration as a basic attribute of sovereignty.<sup>66</sup>

As Justice Felix Frankfurter, an immigrant himself, once held in the defense of the plenary power doctrine:

“Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary... In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.”<sup>67</sup>

Advocates of maintaining automatic birthright citizenship for illegal aliens argue that a constitutional amendment is necessary to change the current policy. However, the ambiguities surrounding the phrase “subject to the jurisdiction thereof” and the scope of Congress’s plenary power to regulate immigration have caused historians and legal scholars to conclude that Congress itself has the power to interpret the phrase and to impose reasonable limits on its application. As explained by Professor Erler:

“We have seen that the framers of the Fourteenth Amendment unanimously agreed that Indians were not ‘subject to the jurisdiction’ of

Countries that Recognize Automatic Birthright Citizenship







the U.S. Beginning in 1870, however, Congress began to pass legislation offering citizenship to Indians on a tribe by tribe basis. Finally, in 1923, there was a universal offer to all tribes. Any Indian who consented could become an American citizen. This citizenship was based on reciprocal consent: an offer on the part of the U.S. and acceptance on the part of an individual. Thus Congress used its legislative powers under the Fourteenth Amendment to determine who was within the jurisdiction of the U.S. It could make a similar determination today, based on this legislative precedent, that children born in the U.S. to illegal aliens are not subject to American jurisdiction. A constitutional amendment is no more required now than it was in 1923.”<sup>68</sup>

This sentiment is shared by the influential Judge Posner, who held in a recent decision that “A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it.”<sup>69</sup> Posner concluded: “Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense.”<sup>70</sup>

### An International Comparison

The United States is one of the few countries on the globe to recognize universal and automatic citizenship for children born to illegal and temporary immigrants. The overwhelming majority of the world’s countries do not have such a birthright policy. Out of the world’s 194 countries, the Center for Immigration Studies can confirm that only 30 countries grant automatic birthright citizenship. This research has been the result of direct communication with foreign government officials and analysis of relevant foreign law including statutory and constitutional law.<sup>71</sup>

The map on pages 12 and 13 illustrates which countries have automatic birthright citizenship, those that do not, and the remaining few countries which we could not confirm. Table 1 lists each country by name.

Developed countries generally do not grant automatic birthright citizenship to children of illegal aliens. There are 31 countries on the International Monetary Fund’s list of advanced economies as listed in Table 2 (page 16). The United States and Canada are the only advanced economies in the world which grant automatic birthright citizenship to children of illegal and temporary aliens. Similarly, the United Nation’s list of countries with “very high human development” includes only

three countries recognizing universal birthright citizenship: Canada, the United States, and Barbados, as listed in Table 3 (page 16). As noted below, the government of Barbados may be on the verge of ending birthright citizenship for children of illegal aliens.

In recent years, the international trend has been to end universal birthright citizenship. Countries that have ended universal birthright citizenship include the United Kingdom, which ended the practice in 1983, Australia (1986), India (1987), Malta (1989), Ireland, which ended the practice through a national referendum in 2004, New Zealand (2006), and the Dominican Republic, which ended the practice in January 2010. The reasons countries have ended automatic birthright citizenship are diverse, but have resulted from concerns not all that different from the concerns of many in the United States. Increased illegal immigration is the main motivating factor in most countries. Birth tourism was one of the reasons Ireland ended automatic birthright citizenship in 2004.<sup>72</sup> If the United States were to stop granting automatic citizenship to children of illegal immigrants, it would be following an international trend.

Some countries which currently recognize automatic birthright citizenship are considering changing the policy. For example, Barbados is struggling with large amounts of immigration (relative to its size), both legal and illegal, and is contemplating ending birthright citizenship for children of illegal aliens. The country initiated an illegal alien amnesty last summer which gave illegal aliens six months to legalize their status. Anyone still in the country illegally after December 1, 2009, faces deportation. The amnesty had a number of conditions, and any illegal alien with three or more dependents could not automatically qualify. Consequently, the question of what to do with children born to illegal aliens became central to political debate. A series of changes have been recommended by the nation’s immigration department, and one proposed change is the end of birthright citizenship.<sup>73</sup>

Not too far from Barbados, a similar discussion has been taking place. Antigua and Barbuda, one of the few nations that currently grant automatic birthright citizenship to children of illegal aliens, just this year outlined a series of enforcement-minded recommendations aimed at tightening their citizenship, immigration, and work permit policies.<sup>74</sup> In a government report, the authors note that “the so called ‘open door’ policy relative to immigration should be discontinued as there is a significant risk of Antigua and Barbuda nationals being displaced in the job market by ‘non-nationals’ whose willingness to work hard for low wages makes them attractive to prospective employers.”<sup>75</sup> The authors also

Table 1. Which Countries Recognize Automatic Birthright Citizenship?

No Automatic Birthright Citizenship			Birthright Citizenship	Unable to Confirm
Afghanistan	Hungary	Pakistan	Antigua and Barbuda	Azerbaijan
Albania	Iceland	Palau	Argentina	Botswana
Algeria	India	Papua New Guinea	Barbados	Cape Verde
Andorra	Indonesia	Philippines	Belize	Central African Rep.
Angola	Iran	Poland	Bolivia	Congo (Rep. of)
Armenia	Iraq	Portugal	Brazil	Equatorial Guinea
Australia	Ireland	Qatar	Canada	Eritrea
Austria	Israel	Romania	Chile	Guinea
Bahamas	Italy	Russia	Colombia	Guinea-Bissau
Bahrain	Japan	Samoa	Dominica	Lesotho
Bangladesh	Jordan	San Marino	Ecuador	Mali
Belarus	Kazakhstan	Sao Tome and Principe	El Salvador	Mozambique
Belgium	Kenya	Saudi Arabia	Fiji	Nauru
Benin	Kiribati	Senegal	Grenada	Niger
Bhutan	Korea, North	Serbia	Guatemala	Rwanda
Bosnia and Herzegovina	Korea, South	Seychelles	Guyana	Sierra Leone
Brunei	Kosovo	Singapore	Honduras	Tanzania
Bulgaria	Kuwait	Slovakia	Jamaica	Tuvalu
Burkina Faso	Kyrgyzstan	Slovenia	Mexico*	Zambia
Burma/Myanmar	Laos	Solomon Islands	Nicaragua	
Burundi	Latvia	Somalia	Panama	
Cambodia	Lebanon	South Africa	Paraguay	
Cameroon	Liberia	Spain	Peru	
Chad	Libya	Sri Lanka	Saint Kitts and Nevis	
China	Liechtenstein	Sudan	Saint Lucia	
Comoros	Lithuania	Suriname	Saint Vincent and the Grenadines	
Congo (Dem. Rep.)	Luxembourg	Swaziland	Trinidad and Tobago	
Costa Rica	Macedonia	Sweden	United States	
Côte d'Ivoire	Madagascar	Switzerland	Uruguay	
Croatia	Malawi	Syria	Venezuela	
Cuba	Malaysia	Tajikistan		
Cyprus	Maldives	Thailand		
Czech Rep.	Malta	Timor-Leste		
Denmark	Marshall Islands	Togo		
Djibouti	Mauritania	Tonga		
Dominican Rep.	Mauritius	Tunisia		
Egypt	Micronesia	Turkey		
Estonia	Moldova	Turkmenistan		
Ethiopia	Monaco	Uganda		
Finland	Mongolia	Ukraine		
France	Montenegro	United Arab Emirates		
Gabon	Morocco	United Kingdom		
Gambia	Namibia	Uzbekistan		
Georgia	Nepal	Vanuatu		
Germany	Netherlands	Vietnam		
Ghana	New Zealand	Yemen		
Greece	Nigeria	Zimbabwe		
Haiti	Norway			
Holy See, Vatican City	Oman			

\* Mexico has "automatic nationality" at birth, which is counted as birthright citizenship here.

note that work visa issuance should “have as priority the ‘importing’ of skills needed in Antigua and Barbuda for the growth of the economy.”<sup>76</sup> Although the report does not call for a change to birthright citizenship policies, it does note that “citizenship of Antigua and Barbuda should be treated as a thing of value and worth.”<sup>77</sup> Interestingly, when asked about Antigua and Barbuda ending birthright citizenship for illegal aliens, the consular

officer with whom I spoke stated, “probably they might look at it down the road.”<sup>78</sup>

There are varying approaches to citizenship throughout the world. Many countries require at least one parent to be a citizen of the country in order for their child to acquire the country’s citizenship. Some countries make a distinction between whether that citizen parent is the mother or father. There are other variations as well. In Australia, a country that does not recognize automatic birthright citizenship, a child born to illegal immigrant parents may obtain Australian citizenship at age 10 if he was born after 1986 and has lived in Australia for the entire 10 years.<sup>79</sup> An Australian official explained that the child must still petition the immigration minister, who conducts fact-finding to verify the claim. The official also added that it would be “extremely unlikely” that illegal immigrants would be able to remain in Australia for the necessary ten-year period, meaning that the grant of citizenship rarely happens.<sup>80</sup>

It is important to remember that while a country may officially recognize birthright citizenship, it does not mean that the country is necessarily easy on illegal immigration. Paraguay, for example, has a birthright citizenship policy, but it has serious laws against illegal immigration which not only bar the employment of illegal aliens, but also prohibit owners of hotels and guesthouses from providing illegal aliens with accommodations.<sup>81</sup>

Mexico has a unique citizenship policy in that the country’s constitution grants automatic nationality to anyone born in Mexico, but not automatic citizenship. This is true even of children born to Mexican citizens. When a Mexican reaches the age of 18, they then acquire citizenship. Mexican government officials with whom I spoke were uncertain how often their country grants nationality or citizenship to children born to illegal immigrants. The effort Mexico makes to discourage immigration indicates that this may be a rare occurrence. For example, the Mexican Constitution, among other things, allows the government to expel any immigrant for any reason without due process.<sup>82</sup> When combined with the protected constitutional right of making a citizen’s arrest, which allows “any person” to detain a suspected criminal and his accomplices who are caught violating a law, it is clear living in Mexico illegally is not easy.<sup>83</sup> The constitution also severely limits the property rights of immigrants and requires immigrants to get permission from the government to own land; even if permission is granted, the immigrant can never own land within 100 kilometers of land borders nor

**Table 2. Of Advanced Economies, Only Canada and the United States Recognize Automatic Birthright Citizenship**

Australia	Iceland	Portugal
Austria	Ireland	Singapore
Belgium	Israel	Slovak Republic
<b>Canada</b>	Italy	Slovenia
Cyprus	Japan	Spain
Czech Republic	Korea	Sweden
Denmark	Luxembourg	Switzerland
Finland	Malta	United Kingdom
France	Netherlands	<b>United States</b>
Germany	New Zealand	
Greece	Norway	

**Source:** International Monetary Fund, World Economic Outlook Database—WEO Groups and Aggregates Information, October 2009, at [www.imf.org/external/pubs/ft/weo/2009/02/weodata/groups.htm#ae](http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/groups.htm#ae)

**Table 3. Only Three Countries with “Very High Human Development” Recognize Automatic Birthright Citizenship**

Norway	Austria	Andorra
Australia	Spain	Slovenia
Iceland	Denmark	Brunei
<b>Canada</b>	Belgium	Kuwait
Ireland	Italy	Cyprus
Netherlands	Liechtenstein	Qatar
Sweden	New Zealand	Portugal
France	United Kingdom	United Arab
Switzerland	Germany	Emirates
Japan	Singapore	Czech Republic
Luxembourg	Greece	<b>Barbados</b>
Finland	Korea (Rep. of)	Malta
<b>United States</b>	Israel	

**Source:** “List of Countries with ‘Very High Human Development.’” Overcoming barriers: Human mobility and development. Human Development Report 2009. United Nations Development Programme.



land within 50 kilometers of the coasts.<sup>84</sup> An immigrant wishing to change these rules will have difficulty as the Mexican Constitution states that only citizens are entitled to participate in Mexico's political affairs.<sup>85</sup> Even with Mexico's form of birthright citizenship, any child born to illegal immigrants or even legal immigrants in Mexico is barred from becoming president of Mexico; not only must the Mexican president be born in Mexico, but so must at least one of his parents.<sup>86</sup> While Mexico may grant citizenship to children born to aliens, the nation's constitution clearly imputes a second-class status on children of immigrants.

Additionally, many countries which do recognize birthright citizenship are not necessarily quick to grant citizenship to all people within their jurisdiction. Some countries are the focus of human rights groups because they do not grant citizenship to indigenous people. For example, Peru, a country with a birthright citizenship policy, has an indigenous population that makes up approximately 45 percent of the nation's total population, but the indigenous do not have access to Peruvian citizenship. Unlike the United States, some countries' birthright citizenship policies come with exceptions.

It is also important to remember that some of the countries which do automatically grant citizenship to children of illegal immigrants may not have much illegal immigration at all. For this reason, comparing countries like Fiji to the United States, for example, may be somewhat disingenuous; Fiji has an estimated illegal immigrant population of 2,000 people, while the United States has an estimated illegal immigrant population of up to 12 million.<sup>87</sup>

Moreover, not all countries which recognize birthright citizenship allow the child to initiate chain migration by petitioning to have additional family members enter. Consequently, some countries are able to avoid some of the problems associated with birthright citizenship experienced in the United States.

Perhaps most instructive is the clarity with which most other nations have authored their respective citizenship laws. Most countries' citizenship laws contain very little ambiguity and do not require one to conduct a historical analysis or seek judicial clarification for the purpose of determining intent. For example, Brazil's constitution confers citizenship on "those born in the Federative Republic of Brazil, even if of foreign parents," Australia's statutory law declares a person born in Australia an automatic Australian citizen "if and only if a parent of the person is an Australian citizen, or a permanent resident, at the time the person is born," while the Dominican Republic's new constitution denies

birthright citizenship to "foreigners who are in transit or who reside illegally in Dominican territory."<sup>88</sup>

To the extent there remains any debate over U.S. citizenship, it may be helpful for the U.S. Congress to clarify the scope of the Citizenship Clause of the 14<sup>th</sup> Amendment.

## Conclusion

Extending 14<sup>th</sup> Amendment birthright citizenship to any class of persons is a momentous matter because it confers very valuable benefits and imposes very serious obligations on children who have no say in the matter and it also has long-lasting and important effects on the size and composition of the U.S. population. The executive branch's current practice of extending birthright citizenship to nonresident aliens has never been authorized by any statute or any court decision. The legislative record left by drafters of the 14<sup>th</sup> Amendment shows that they were primarily concerned about conferring citizenship on freed slaves. While the Supreme Court has settled the matter as it applies to permanent resident aliens, it has yet to decide the matter as it applies to aliens whose presence in the United States is temporary or unlawful. As a result, Americans are justifiably upset with a policy that has become standard practice without their approval.

Because the legislative history is not decisive and there is no Supreme Court precedent, serious legal scholars and eminent jurists have argued that Congress should use its inherent authority to define the scope of birthright citizenship. Congress can use the hearing process to promote a calm, informed, and serious discussion on the wisdom and legality of granting automatic U.S. citizenship to the children of "birth tourists," illegal aliens, and other categories of foreign visitors who are taking advantage of a clause in the 14<sup>th</sup> Amendment that was primarily aimed at helping an entirely different class of persons.

Whatever the outcome of such a debate, and whatever form resulting legislation might take, Americans could then at least feel confident that their country's citizenship policy had become law through the political process and that the public had a say in determining the nation's future. Should the United States end the practice of granting automatic and universal citizenship to anyone born on U.S. soil, the nation would be following a global trend already embraced by most of the world's democracies.

## End Notes

<sup>1</sup> Birthright Citizenship Act of 2009, H.R.1868, 111<sup>th</sup> Cong. (2009). See also Jerry Seper, *Senate bill would slash U.S. immigration quota*, WASH. TIMES, Aug. 16, 1993, at A4 (noting that Sen. Harry Reid's legislation, the Immigration Stabilization Act of 1993 (S.1351), would, among other things, "Change existing law to ensure that a person born in the United States to an alien mother who is not a lawful resident would not automatically become a U.S. citizen," and quoting Sen. Reid as saying, "Our borders have overflowed with illegal immigrants placing tremendous burdens on our criminal justice system, schools and social programs... The Immigration and Naturalization Service needs the ability to step up enforcement... Our federal wallet is stretched to the limit by illegal aliens getting welfare, food stamps, medical care and other benefits, often without paying taxes... Safeguards like welfare and free medical care are in place to boost Americans in need of short-term assistance... These programs were not meant to entice freeloaders and scam artists from around the world... Even worse, Americans have seen heinous crimes committed by individuals who are here illegally.")

<sup>2</sup> Steven Camarota, *Births to Immigrants in America, 1970 to 2002*, Center for Immigration Studies, July 2005, [www.cis.org/ImmigrantsBirths-1970-2002](http://www.cis.org/ImmigrantsBirths-1970-2002), estimated 383,000 births to illegal-immigrant mothers in 2002. The Pew Hispanic Center has estimated 340,000 births with at least one illegal-immigrant parent in 2008; Jeffrey S. Passel and Paul Taylor, *Unauthorized Immigrants and Their U.S.-Born Children*, Aug. 11, 2010, <http://pewhispanic.org/files/reports/125.pdf>.

<sup>3</sup> Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, Apr. 14, 2009, [www.pewhispanic.org/files/reports/107.pdf](http://www.pewhispanic.org/files/reports/107.pdf).

<sup>4</sup> *Oforji v. Ashcroft*, 354 F.3d 609, 620-1 (2003).

<sup>5</sup> Steven Camarota, *Immigrants in the United States, 2007: A Profile of America's Foreign-Born Population*, Center for Immigration Studies, Nov. 2007, [www.cis.org/immigrants\\_profile\\_2007](http://www.cis.org/immigrants_profile_2007). For other states, see Table 25, "Welfare Use for Illegal Alien-Headed Households."

<sup>6</sup> Press Release, Tony Bell, Communications Deputy for the Office of Los Angeles County Supervisor Michael D. Antonovich, *Welfare Costs for Children of Illegal Aliens Exceeds \$50 Million*, Apr. 19, 2010, [antonovich.lacounty.gov/Pages/Press%20Releases/10/April/Illegal%20Immigration%2041910.html](http://antonovich.lacounty.gov/Pages/Press%20Releases/10/April/Illegal%20Immigration%2041910.html).

<sup>7</sup> Camarota, *supra* note 5.

<sup>8</sup> Sherry Jacobson, *Across Texas, 60,000 Babies of Noncitizens Get U.S. Birthright*, DALLAS MORNING NEWS, Aug. 8, 2010, <http://www.dallasnews.com/sharedcontent/dws/dn/latest-news/stories/080810dnmetbabies.2be9a7e.html>.

<sup>9</sup> *Family Based Immigrants*, U.S. Dept. of State, [travel.state.gov/visa/immigrants/types/types\\_1306.html](http://travel.state.gov/visa/immigrants/types/types_1306.html).

<sup>10</sup> Randall Monger, *Annual Flow Report: U.S. Legal Permanent Residents: 2009*, Office of Immigration Statistics, Dept. of Homeland Security, Apr. 2010, [www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2009.pdf).

See also Chain Migration Chart, NumbersUSA, [www.numbersusa.com/content/learn/issues/chain-migration/chain-migration-chart.html](http://www.numbersusa.com/content/learn/issues/chain-migration/chain-migration-chart.html).

<sup>11</sup> Philip Martin, *There Is Nothing More Permanent Than Temporary Foreign Workers*, Center for Immigration Studies, Apr. 2001, [www.cis.org/articles/2001/back501.html](http://www.cis.org/articles/2001/back501.html).

<sup>12</sup> Barbara Demick, *Korean Moms Want 'Born in USA' Babies*, L.A. TIMES, May 2002, [www.fileus.org/dept/citizenship/02-05-26-latimes-birth\\_tourism\\_asia.html](http://www.fileus.org/dept/citizenship/02-05-26-latimes-birth_tourism_asia.html).

<sup>13</sup> Işıl Eğrikavuk, *Birth Tourism in US on the Rise for Turkish Parents*, HÜRRİYET DAILY NEWS, Mar. 12, 2010, [www.hurriyetdailynews.com/n.php?n=birth-tourism-to-the-usa-explodes-2010-03-12](http://www.hurriyetdailynews.com/n.php?n=birth-tourism-to-the-usa-explodes-2010-03-12).

<sup>14</sup> *Id.*

<sup>15</sup> Mariana Alvarado, *Hospital Lures Mexican Moms; Tucson Medical Center 'Birth Package' Raises Questions*, ARIZ. DAILY STAR, June 28, 2009, [www.wincoast.com/forum/archive/index.php/t-90605.html](http://www.wincoast.com/forum/archive/index.php/t-90605.html).

<sup>16</sup> Keith B. Richburg, *For Many Pregnant Chinese, a U.S. Passport For Baby Remains a Powerful Lure*, WASH. POST, July 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/17/AR2010071701402.html>.

<sup>17</sup> *Id.*

<sup>18</sup> Davidson Iriekpen, *Citizenship Rights: American Agitations Threaten a Nigerian Practice*, THIS DAY (Nigeria), Aug. 16, 2010, <http://www.thisdayonline.com/nview.php?id=180829>.

<sup>19</sup> This is not a new phenomenon. See, e.g., Wayne King, *Mexican Women Cross Border so Babies Can Be U.S. Citizens*, N.Y. TIMES, Nov. 21, 1982 ("If she has a document for entry and there is no reason to deny that entry, she can come in," said Berl Williams, acting agent in charge of the Immigration and Naturalization Service at Brownsville. "The local crossing card is good for 72 hours. We don't stop pregnant women at the border.").

<sup>20</sup> Birthright Citizenship Act of 2009, H.R.1868, 111<sup>th</sup> Cong. (2009).

<sup>21</sup> Roy Beck, *Retiring Rep. Deal Leaves 17-Year Record of Trying to End Birthright Citizenship*, Mar. 1, 2010, [www.numbersusa.com/content/nusablog/beckr/march-1-2010/retiring-rep-deal-leaves-17-year-record-trying-end-birthright-citizenshi](http://www.numbersusa.com/content/nusablog/beckr/march-1-2010/retiring-rep-deal-leaves-17-year-record-trying-end-birthright-citizenshi).

<sup>22</sup> Press Release, Rasmussen Reports, "58% Say No to Citizenship for Children of Illegal Immigrants," June 3, 2010, [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/58\\_say\\_no\\_to\\_citizenship\\_for\\_children\\_of\\_illegal\\_immigrants](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/58_say_no_to_citizenship_for_children_of_illegal_immigrants).

<sup>23</sup> PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 9-42 (Yale Univ. Press 1985) (1985).

<sup>24</sup> Edward J. Erler, *Birthright Citizenship and Dual Citizenship: Harbingers of Administrative Tyranny*, California State University, San Bernardino, July 2008, [www.hillsdale.edu/news/imprimis/archive/issue.asp?year=2008&month=07](http://www.hillsdale.edu/news/imprimis/archive/issue.asp?year=2008&month=07). See also John Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, Heritage Foundation, Mar. 30, 2006, [www.heritage.org/Research/Reports/2006/03/From-Feudalism-to-Consent-Rethinking-Birthright-Citizenship](http://www.heritage.org/Research/Reports/2006/03/From-Feudalism-to-Consent-Rethinking-Birthright-Citizenship).

<sup>25</sup> *Id.*

<sup>26</sup> William Blackstone, *Commentaries on the Laws of England*, A

*Facsimile of the First Edition of 1765--1769*. Chicago: University of Chicago Press, 1979, [avalon.law.yale.edu/18th\\_century/blackstone\\_bk1ch10.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk1ch10.asp).

<sup>27</sup> This sentiment against the ascriptive approach was reiterated by Congress in the Expatriation Act of 1868, a law passed within days of passage of the 14th Amendment. The Act read, in part: "Be it enacted... That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." Expatriation Act of 1868, 15 Stat. 223, 40th Cong. (2d Sess. 1868).

<sup>28</sup> SCHUCK, *supra* note 23, at 2.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 53.

<sup>31</sup> *Id.* at 54.

<sup>32</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>33</sup> An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication (the Civil Rights Act of 1866), 14 Stat. 27 (1866).

<sup>34</sup> SCHUCK, *supra* note 23, at 74 ("Although the Citizenship Clause was derived from the 1866 act, it was by no means identical. There were four textual differences... The legal scholar is sorely tempted to ascribe significance to these intriguing differences in language, especially when they appear in two documents adopted by the same body within a period of weeks. Unfortunately, neither the Congressional debates nor subsequent judicial exegesis provides much insight into the origins or meaning of these textual disparities.").

<sup>35</sup> Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, Tex. Review of Law & Politics, Vol. 14, No. 1 (2009), [www.trolp.org/main\\_pgs/issues/v14n1/Graglia.pdf](http://www.trolp.org/main_pgs/issues/v14n1/Graglia.pdf).

<sup>36</sup> U.S. CONST. amend. XIV, § 1.

<sup>37</sup> SCHUCK, *supra* note 23, at 76.

<sup>38</sup> See, e.g., *Ending Birthright Citizenship Would Not Stop Illegal Immigration*, Immigration Policy Center, June 15, 2010 (stating, without any discussion of the "subject to the jurisdiction" language: "Birthright citizenship, or the principle of *jus soli*, means that any person born within the territory of the U.S. is a citizen, regardless of the citizenship of one's parents;" and "The legislative history clearly shows that Congress clearly intended to bestow birthright citizenship on the U.S.-born children of immigrants."), [www.immigrationpolicy.org/just-facts/ending-birthright-citizenship-would-not-stop-illegal-immigration](http://www.immigrationpolicy.org/just-facts/ending-birthright-citizenship-would-not-stop-illegal-immigration); see, e.g., Michael Gerson, *On immigration, Lindsey Graham abandons principle*, WASH. POST, July 30, 2010 (noting, "The authors of the Fourteenth Amendment guaranteed citizenship to all people 'born or naturalized in the United States' for a reason."), [http://voices.washingtonpost.com/postpartisan/2010/07/on\\_immigration\\_lindsey\\_graham.html](http://voices.washingtonpost.com/postpartisan/2010/07/on_immigration_lindsey_graham.html).

<sup>39</sup> See, e.g., Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, Aug. 31, 2008 (citing various court holdings: "Ordinarily, as in everyday English, use of the conjunctive 'and' in a list means that all of the listed requirements must be satisfied, while use of the disjunctive 'or' means that only one of the listed require-

ments need be satisfied;" and, "A basic principle of statutory interpretation is that courts should 'give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.' The modern variant is that statutes should be construed 'so as to avoid rendering superfluous' any statutory language."), [www.fas.org/sgp/crs/misc/97-589.pdf](http://www.fas.org/sgp/crs/misc/97-589.pdf).

<sup>40</sup> *Congressional Globe*, Senate, 39th Congress, 1st Session, Feb. 1, 1866. Pg. 572 (statement of Sen. Trumbull).

<sup>41</sup> *Congressional Globe*, Senate, 39th Congress, 1st Session, Feb. 1, 1866. (See, e.g., statements of Sen. John B. Henderson, Pgs. 571-572; Sen. Trumbull, Pg. 572; Sen. Johnson, Pg. 573).

<sup>42</sup> SCHUCK, *supra* note 23, at 96. See also *Congressional Globe*, Senate, 39th Congress, 1st Session, May 30, 1866. Pg. 2891 (statement of Sen. Cowan). Interestingly, there is some evidence that the 14th Amendment's framers would not have supported a permissive interpretation of the Citizenship Clause that encourages mass immigration in the way it does today. Sen. Edgar Cowan (R-Penn.) was concerned about giving the federal government too much control over the granting of citizenship and asked whether immigrants "...have the free right to locate [to California] and settle among [Californians], and if they have an opportunity of pouring in such an immigration as in a short time will double or treble the population of California, I ask, are the people of California powerless to protect themselves? I do not know that the contingency will ever happen, but it may be well to consider it while we are on this point." The contingency certainly happened. California's population at the time of this debate in 1866 was approximately 488,000. California's population more than doubled by 1890 (at 1,213,398) and more than tripled by 1900 (at 1,485,053). Today, California's population is over 37 million, or approximately 76 times larger than it was when Sen. Cowan voiced his concern. Considering Sen. Cowan was concerned about a doubling of California's population, it is difficult to argue that he would have agreed to language that he thought would allow for a liberal and universal birthright citizenship policy.

<sup>43</sup> *Congressional Globe*, Senate, 39th Congress, 1st Session, Feb. 1, 1866. Pg. 2890 (statement of Sen. Howard).

<sup>44</sup> *Congressional Globe*, Senate, 39th Congress, 1st Session, May 30, 1866. Pg. 2893 (statement of Sen. Trumbull).

<sup>45</sup> *Id.*

<sup>46</sup> John P. Foley, *The Jeffersonian Cyclopaedia: A Comprehensive Collection of the Views of Thomas Jefferson*, Funk & Wagnalls, 1900, p. 32, [www.archive.org/stream/thejeffersoncyclo00jeffuoft#page/32/mode/2up/search/alien](http://www.archive.org/stream/thejeffersoncyclo00jeffuoft#page/32/mode/2up/search/alien).

<sup>47</sup> *Congressional Globe*, Senate, 39th Congress, 1st Session, May 30, 1866. Pg. 2893 (statement of Sen. Johnson).

<sup>48</sup> Camarota, *supra* note 5.

<sup>49</sup> Brief of the United Mexican States as Amicus Curiae in Support of Plaintiffs Pursuant to Court Order, Friendly House, et al. v. Michael B. Whiting, et al., (D. Ariz. 2010) (No. CV-10-1061-PHX-SRB), [http://www.deweyleboeuf.com/en/Firm/MediaCenter/PressReleases/2010/06/~/\\_media/Files/pressreleases/2010/20100622\\_AmicusCuriae.ashx](http://www.deweyleboeuf.com/en/Firm/MediaCenter/PressReleases/2010/06/~/_media/Files/pressreleases/2010/20100622_AmicusCuriae.ashx).



<sup>50</sup> Available at: <http://www.juanhernandez.org/index-1.html>

<sup>51</sup> Peter Jennings, *The New Frontier: Juan Hernandez Works on Both Sides of Mexico/ American Border to Help Resolve Concerns of Mexicans*, ABC News: Nightline, June 7, 2001.

<sup>52</sup> Slaughter-House Cases, 83 U.S. 36, 73 (1873).

<sup>53</sup> Elk v. Wilkins, 112 U.S. 94, 103 (1884).

<sup>54</sup> *Id.* at 102.

<sup>55</sup> *Id.*

<sup>56</sup> United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

<sup>57</sup> JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, ch. 3 § 48 (Hilliard, Gray, and Company 1834). See also *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. 99 (1830).

<sup>58</sup> *Wong Kim Ark*, at 687.

<sup>59</sup> *Id.* at 682.

<sup>60</sup> *Id.* at 729-731.

<sup>61</sup> EDWARD J. ERLER, THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION: PRINCIPLES AND CHALLENGES IN AMERICA 57-67 (Rowman & Littlefield, 2007).

<sup>62</sup> SCHUCK, *supra* note 23, at 78.

<sup>63</sup> Plyler v. Doe, 457 U.S. 202, 212 n.10 (1982).

<sup>64</sup> Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, Tex. Review of Law & Politics, Vol. 14, No. 1 (2009), [www.trolp.org/main\\_pgs/issues/v14n1/Graglia.pdf](http://www.trolp.org/main_pgs/issues/v14n1/Graglia.pdf).

<sup>65</sup> SCHUCK, *supra* note 23, at 117.

<sup>66</sup> Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, Center for Immigration Studies, Feb. 2009, [www.cis.org/plenarypower](http://www.cis.org/plenarypower).

<sup>67</sup> Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

<sup>68</sup> Erler, *supra* note 24. See also *Hearing on the Citizenship Reform Act of 1997 (H.R. 7), Before the House Comm. on the Judiciary, Subcomm. on Immigration and Claims* (June 25, 1997) (statement of Edward J. Erler, Professor, California State University), <http://judiciary.house.gov/legacy/6042.htm>.

<sup>69</sup> *Oforji*, at 621.

<sup>70</sup> *Id.*

<sup>71</sup> We could not confirm the citizenship policy of 19 nations. This report will be updated if the information becomes available.

<sup>72</sup> Rainer Bauböck, *Who are the citizens of Europe?*, Eurozine, Dec. 23, 2006, <http://www.eurozine.com/articles/2006-12-23-baubock-en.html>.

<sup>73</sup> Barbados Ministry of Labour & Immigration, *Comprehensive Review of Immigration Policy and Proposals for Legislative Reform*, noting: "It is the Department's view that the legislation should be amended to stipulate that (as in the United Kingdom and the Bahamas) children born in Barbados will not be deemed to be citizens of Barbados, unless at least one parent at the time of the birth, has permanent status in Barbados. In addition persons born in Barbados should not be deemed to be citizens where the parents are residing illegally in Barbados." Available at: [www.foreign.gov.bb/Userfiles/File/IMMIGRATION%20POLICIES.pdf](http://www.foreign.gov.bb/Userfiles/File/IMMIGRATION%20POLICIES.pdf).

<sup>74</sup> Ms. E. Ann Henry et al., *Report on Review of Matters Pertaining to Immigration, Work Permits, Citizenship and Electoral Reform*, Gov't of Antigua and Barbuda, Feb. 9, 2010, [www.ab.gov.ag/gov\\_v3/pdf/immigration\\_report.pdf](http://www.ab.gov.ag/gov_v3/pdf/immigration_report.pdf).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Phone conversation with Ms. Gracelyn Henry, Embassy of Antigua and Barbuda, Washington, D.C., June 8, 2010. It is likely that the issue of birthright citizenship for children of illegal aliens will have to be addressed by Antigua and Barbuda if the recommendations become law because the country does not have any interest in legalizing illegal alien parents: "The prevailing view was that if we are to pursue Immigration reform in Antigua and Barbuda, it is of importance that the message of zero-tolerance of noncompliance with the Law must be conveyed. Flowing from this was the view that amnesty was not an acceptable way forward and should not be entertained as an option. Indeed, some persons were of the view that persons who were in Antigua and Barbuda illegally should be deported. It is the recommendation of the Committee that there is no compelling argument for implementing a program for the wide spread grant of amnesty." Instead, the country recommends that "persons who are residing in Antigua and Barbuda illegally should be given an opportunity to leave on their own" but if they do not do so within six months, "appropriate action should be taken." Just as in Barbados, the question of separating children from parents would immediately put the propriety of automatic birthright citizenship into the spotlight.

<sup>79</sup> Automatic acquisition of citizenship on 10<sup>th</sup> birthday "A child born in Australia on or after 20 August 1986, who did not acquire Australian citizenship at birth, automatically acquires it on their 10<sup>th</sup> birthday if they have been ordinarily resident in Australia for 10 years from birth. This provision operates regardless of the parent/s immigration or citizenship status," [www.immi.gov.au/media/fact-sheets/17nz.htm](http://www.immi.gov.au/media/fact-sheets/17nz.htm).

<sup>80</sup> Conversation with Rose Lacey, Citizenship and Migration Officer, Australian High Commission, May 31, 2010.

<sup>81</sup> PARA. CONST. art. 69.

<sup>82</sup> MEX. CONST. tit. I, ch. III, art. 33, <http://info.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf>. See also, J. Michael Waller, *Mexico's Glass House*, Center for Security Policy, Jan. 13, 2009, <http://www.centerforsecuritypolicy.org/p17844.xml>.

<sup>83</sup> MEX. CONST. tit. I, ch. I, art. 16.

<sup>84</sup> MEX. CONST. tit. I, ch. I, art. 27.

<sup>85</sup> MEX. CONST. tit. I, ch. I, art. 9.

<sup>86</sup> MEX. CONST. tit. III, ch. III, art. 82.

<sup>87</sup> Kalinga Seneviratne, *Islanders welcome Chinese cash, but not Chinese*, ASIA TIMES ONLINE, Sept. 17, 2002, <http://www.atimes.com/atimes/China/DI17Ad04.html>.

<sup>88</sup> BRAZ. CONT. tit. II, ch. III, art. 12, <http://www.v-brazil.com/government/laws/titleII.html>; Australian Citizenship Act 2007, pt. II, div. 1 (2007), [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/36700F7A6C6BF1DCCA2575DE000D5D6D/\\$file/AusCitizenship2007.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/36700F7A6C6BF1DCCA2575DE000D5D6D/$file/AusCitizenship2007.pdf); DOM. REP. CONST. ch. V, § 1, art. 18, <http://www.jmarcano.com/mipais/politicos/title1.html>.











## Birthright Citizenship A Global Comparison

By Jon Feere

Every year, 300,000 to 400,000 children are born to illegal immigrants in the United States. Despite the foreign citizenship and illegal status of the parent, the executive branch of the U.S. government automatically recognizes these children as U.S. citizens upon birth. The same is true of children born to tourists and other aliens who are present in the United States in a legal but temporary status. Since large-scale tourism and mass illegal immigration are relatively recent phenomena, it is unclear for how long the U.S. government has followed this practice of automatic “birthright citizenship” without regard to the duration or legality of the mother’s presence.

Eminent legal scholars and jurists, including Professor Peter Schuck of Yale Law School and U.S. Court of Appeals Judge Richard Posner, have questioned whether the 14<sup>th</sup> Amendment should be read to mandate such a permissive citizenship policy. Nevertheless, the practice has become the de facto law of the land without any input from Congress or the American public.

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