ARTICLES

FROM DRED SCOTT TO ANCHOR BABIES: WHITE SUPREMACY AND THE CONTEMPORARY ASSAULT ON BIRTHRIGHT CITIZENSHIP

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"[W]e remain imprisoned by the past as long as we deny its influence in the present."[1]

ABSTRACT

Section 1 of the Fourteenth Amendment guarantees "birthright citizenship": "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." Unrestricted birthright citizenship is under attack in America and must be defended to protect the nation's future as a pluralistic, liberal democracy. Attempts to redefine birthright citizenship have taken the form of proposed state and federal legislation, executive orders, and, most alarmingly, a drive to initiate an Article V constitutional convention. Beneath the twenty-first century packaging, these proposals mirror the message of Dred Scott*: "true" Americans are, by definition, white people.*

Opposition to birthright citizenship, particularly for children whose parents lack legal immigration status, is a core tenet of white supremacy, a worldview

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1. McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting). Justice Brennan made this observation in reference to issues of racism in American society, specifically in the context of the criminal law and the administration of the death penalty.

that, in the modern era, has taken on many forms, including white nationalism, white Christian nationalism, and white replacement theory. Earlier iterations of these ideologies created the Dred Scott *decision and the Chinese Exclusion Acts in the nineteenth century, and their influence is apparent in the modern assault on birthright citizenship. Eliminating unconditional birthright citizenship would restrict and redefine American citizenship, potentially stripping citizenship from millions of people who are descended from immigrants, most of whom are non-white. This constriction of citizenship would yield disastrous consequences, not just for the groups targeted by it, but for America as a whole.*

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INTRODUCTION

The guarantee of "birthright citizenship" derives from the plain language of the Fourteenth Amendment to the United States Constitution: "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."[2] The Fourteenth Amendment constitutes the cornerstone of an expansive and inclusive definition of American citizenship that enabled the nation to rise from the ashes of the Civil War and begin its journey towards equality under the law. That journey has been undermined from the start by a pervasive national belief in white supremacy, a poison that girded the institution of chattel slavery, fueled the Civil War, torpedoed Reconstruction, and continues to deprive non-white Americans of their civil and human rights. Even today, white supremacy threatens the fundamental tenets of American democracy. Its influence is evident in the increasingly "mainstream" voices that have challenged and belittled both the literal meaning and the egalitarian intent of the birthright citizenship clause of the Fourteenth Amendment. Unrestricted birthright citizenship is under attack in America and must be preserved to protect the nation's future as a pluralistic, liberal democracy.[3]

The Fourteenth Amendment's grant of birthright citizenship represented a radical departure from the racialized construct of citizenship that predated it. The "whites-only" vision of the American polity was explicated by the

2. U.S. CONST. amend. XIV, § 1.

3. Throughout this article, the terms "unrestricted birthright citizenship" and "unconditional birthright citizenship" are used to refer to the traditional meaning of Section 1 of the Fourteenth Amendment, under which all children born in the United States are U.S. citizens, regardless of their parents' immigration status (with the narrow exception of children whose parents are diplomats serving in the United States at the time of the child's birth).

Supreme Court in *Dred Scott v. Sandford,*[4] one of its most infamous decisions. The Court held that, because of their race, Black people could never be citizens of this country, regardless of whether they were, or had ever been, enslaved. In essence – and contrary to tradition – the Supreme Court imposed a test of inherited citizenship, or *jus sanguinis*, in America. Due to the existence of chattel slavery, the Court reasoned, all Black people in the United States of America failed this test since all of them (according to Chief Justice Roger B. Taney) were either enslaved or descended from enslaved people. The Fourteenth Amendment rejected and superseded *Dred Scott*, directing that citizenship extends to "*all* persons born or naturalized in the United States," regardless of race, national origin, or any other innate characteristic. The congressmen who cemented this expanded definition of citizenship in the Constitution understood and embraced its radical potential to redefine membership in the American polity.

For decades, this inclusive definition of American citizenship was largely, although not universally, accepted across the American political spectrum. However, attacks on unconditional birthright citizenship that once emanated from the far right have become routine political discourse. White nationalist groups were some of the earliest contemporary adopters of the idea that the Fourteenth Amendment either does not or should not grant citizenship to individuals born in the United States to undocumented parent(s).[5] Their ideology, however, is not new and has deep roots in nineteenth-century hostility to immigrants, especially the Chinese.[6] The election of President Donald Trump in 2016 brought these beliefs further into the mainstream of American politics in the modern era, as he repeatedly derided the concept of birthright citizenship and proclaimed it contrary to the national interest.[7] Although Trump is no longer in office, the ideas he espoused did not begin or end with him, and he is seeking the Presidency again.[8] Politicians and pundits disseminate white nationalist dogma on the evening news, often under a sanitized version of "white replacement theory."[9] Beneath the twenty-first century packaging, the message is reminiscent of *Dred Scott*: "true" Americans are, by definition, white people.

Birthright citizenship constitutes a fundamental pillar of American democracy. Eliminating it for children with undocumented parent(s) would restrict and redefine American citizenship, potentially stripping citizenship from millions of people who are descended from immigrants, most of whom are non-white.[10] This constriction of citizenship would yield disastrous consequences, not just for the groups targeted by it, but for America as a whole. The United

4. Dred Scott v. Sandford, 60 U.S. 393 (1857).
5. *See infra* note 230 and accompanying text.
6. *See infra* notes 130–133 and accompanying text.
7. *See infra* notes 318–319 and accompanying text.
8. *See infra* and note 327 and accompanying text.
9. *See infra* notes 213–215 and accompanying text.
10. *See infra* Section III.A.

States cannot and should not forget its history, which is rooted in white supremacy and the institutions of chattel slavery and settler colonialism that it enabled. The Fourteenth Amendment did not negate white supremacy but did bring the nation closer to realizing its stated ideal of equality under the law. This country cannot permit the forces of racism and nativism to turn back the clock.[11]

Part I of this article examines the historical foundations of the Fourteenth Amendment's birthright citizenship clause, beginning with the Supreme Court case it superseded: *Dred Scott*. Part I explains that the drafters of the Fourteenth Amendment understood and embraced its radical potential to reshape the American polity. The Supreme Court, in interpreting the amendment, understood and accepted that intent, even though it did so at a time of widespread racism and nativism, especially against Chinese immigrants. Part II of this article examines the modern assault on the Fourteenth Amendment's guarantee of unconditional birthright citizenship. The racial motivations underlying this movement cannot be ignored. Legislation and executive action have been proposed to end birthright citizenship, either of which may be tested in the most conservative Supreme Court in more than a century. However, the ultimate threat to birthright citizenship may lie in an Article V convention that could rewrite the Constitution itself. Part III explores the potential demographic and economic impacts of ending birthright citizenship in America for children with undocumented parent(s). Immigration does not make America "poorer," as some have claimed, but eliminating birthright citizenship based on the immigration status of a child's parent(s), would. More importantly, the revocation of unrestricted birthright citizenship would pose an existential threat to American democracy itself.

I. THE MEANING AND SCOPE OF THE FOURTEENTH AMENDMENT'S GRANT OF BIRTHRIGHT CITIZENSHIP

The Fourteenth Amendment defines the citizenry of the United States as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof." In short, with few exceptions, everyone born in the United States is a citizen of this country.[12] The Fourteenth Amendment was adopted in the wake of the Civil War as a key component of the national endeavor of Reconstruction. It aimed to extend the benefits and burdens of American citizenship to all people born in this country, regardless of their race. Prior to this amendment, the Supreme Court held that the Constitution defined

11. Garrett Epps, *The Citizenship Clause: A Legislative History*, 60 AM. U. L. REV. 331, 390 (2010) ("[I]f the children of 'illegal aliens' are 'illegal' themselves, then we have taken a giant step toward recreating slavery in all but name. If citizenship is the hereditary gift of the nation rather than the inheritance of its people, we are drifting back to the discredited doctrine of *Dred Scott*.").

12. *See infra* Section I.D. (discussing the Supreme Court's holding in United States v. Wong Kim Ark, 169 U.S. 649 (1898)). The primary exception to this rule applies to children of foreign diplomats born in the United States. *See infra* notes 172–177 and accompanying text.

American citizenship as a privilege of race rather than a birthright, at least for Black people. The Fourteenth Amendment represented a radical departure from the racialized construction of citizenship articulated in *Dred Scott*. The Supreme Court's interpretation of the Fourteenth Amendment in *Wong Kim Ark*, about thirty years after its ratification, recognized and implemented the egalitarian intent reflected in the words of the amendment.

A. *Dred Scott's Whites-Only Definition of American Citizenship*

The Supreme Court's decision in *Dred Scott v. Sandford*[13] set forth a racialized definition of American citizenship that excluded Black people, free or enslaved, just four years before the start of the Civil War. If the *Dred Scott* decision had not been superseded by the Fourteenth Amendment, it would have "relegate[d] American blacks to a permanent state of inferiority."[14] The majority's belief that the country was founded by and for white men only should have been swept into the dustbin of history by the Civil War and Reconstruction. It was not. Traces of *Dred Scott* linger today in the rhetoric of white nationalism and white replacement theory, which are frequently invoked to attack unconditional birthright citizenship.

The political context of the *Dred Scott* decision is crucial to understanding its importance in defining American citizenship in the antebellum era. When this case was decided, the status of slavery in the territories was a key point of contention between the Northern and Southern states. The Missouri Compromise of 1820 allowed admission of Missouri as a slave state and Maine as a free state, while prohibiting slavery in the remainder of the Louisiana Territory north of the 36° 30' parallel.[15] In doing so, it effectively delineated a border between slavery and freedom. Congress passed the Kansas-Nebraska Act in 1854 to appease the South, repealing the Missouri Compromise and opening the territories north of the 36° 30' latitude line to slavery.[16] Southerners praised the Act, but it was wildly unpopular in the North, where the repeal of the Missouri Compromise "was seen as a terrible

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13. Dred Scott v. Sandford, 60 U.S. 393 (1857). For further analysis of the *Dred Scott* opinion, *see generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); AMANDA FROST, YOU ARE NOT AMERICANS: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS 13-29 (2021); PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY (2d ed. 2017); Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1 (1996).

14. Finkelman, *supra* note 13, at 5. *Cf.* Elk v. Wilkins, 112 U.S. 94, 122-23 (1884) (Harlan, J., dissenting) (arguing that, if members of the "Indian race" did not acquire U.S. citizenship upon abandoning their tribes, then "there is still in this country a despised and rejected class of persons with no nationality whatever, who, born in our territory, owing no allegiance to any foreign power, and subject. . . to all the burdens of government, are yet not members of any political community, nor entitled to any rights, privileges, or immunities of citizens of the United States").

15. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545, 548, *invalidated* by Dred Scott v. Sandford, 60 U.S. 393 (1857). *See* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 265 (Ward M. McAfee ed., 2001) (discussing the Missouri Compromise).

16. An Act to Organize the Territories of Nebraska and Kansas, ch. 59, 10 Stat. 277, 283 § 14 (May 30, 1854) [hereinafter the Kansas-Nebraska Act]; *see* DAVID M. POTTER, THE IMPENDING CRISIS, 1848–

betrayal."[17] In *Dred Scott*, the Supreme Court attempted to quell this sectional controversy by holding that the Missouri Compromise, which had already been statutorily abrogated, was "void" because it was unconstitutional.[18] In an opinion by Chief Justice Roger B. Taney, the Supreme Court declared that Congress had no power to prohibit slavery in the territories since doing so would unconstitutionally interfere with citizens' private property rights over enslaved people under the Fifth Amendment.[19]

The facts underlying Chief Justice Taney's sweeping decision in *Dred Scott* arose from a Black man's quest for freedom for himself and his family.[20] Dred Scott argued that he was no longer enslaved because he had resided in the state of Illinois and Fort Snelling (in the Wisconsin Territory) for five years; two places that did not legally recognize slavery.[21] In 1838, Scott and his wife, Harriet, left Fort Snelling; by 1840, they were residing in Missouri, a slave state.[22] The slaveholder who legally owned Dred Scott and his family, Dr. John Emerson, died suddenly in 1843, after which Emerson's widow, Irene, inherited the family.[23] In 1846, Dred Scott attempted to buy the family's freedom from Irene Emerson, but she refused.[24] Shortly thereafter, Dred Scott filed a lawsuit challenging the family's enslavement.[25]

1861, 160–76 (Don E. Fehrenbacher ed., 1976) (discussing the legislative history of the Kansas-Nebraska Act).

17. Jeffrey Schmitt, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1322 (2007); *see also* POTTER, *supra* note 16, at 163–67; ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 94–96 (1995).

18. *Dred Scott*, 60 U.S. 451–52. *See* FROST, *supra* note 13, at 22 (discussing this aspect of the *Dred Scott* decision). Dissenting Justice Benjamin R. Curtis later observed that Taney believed the Court could "quiet all agitation on the question of slavery in the territories by affirming that Congress had no constitutional power to prohibit its introduction." DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 189 (2005); *see also* Finkelman, *supra* note 13, at 5 (concluding that "Taney tried to settle, with one sweeping decision, the volatile problem of slavery in the territories"). As evidenced by the outbreak of the Civil War in 1861, Justice Taney's opinion did not achieve his goal of quelling sectional dissent. *See* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 93 (2010) (noting that *Dred Scott* had "precisely the opposite effect" of its intended goal of quelling the debate regarding slavery in the territories).

19. *Dred Scott*, 60 U.S. 450–52.

20. *Id.* at 431–32; *see also* Finkelman, *supra* note 13, at 6. For an in-depth account of the life and claim to freedom of Harriet Robinson Scott, Dred Scott's wife, *see* LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER (2009). For an account of the *Dred Scott* case from the perspective of the children in the family, Lizzie and Eliza Scott, *see* Barbara Bennett Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669 (2000).

21. *Dred Scott*, 60 U.S. at 431; *see also* Finkelman, *supra* note 13, at 6; Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How it Changed History*, 82 CHI. KENT L. REV. 3, 14–15 (2007) (explaining that Scott lived in Illinois from 1833–1836, and at Fort Snelling from 1836–1838). Fort Snelling, where the Scotts lived in the Wisconsin Territory, is located in present-day St. Paul, Minnesota, one mile from the Minneapolis-St. Paul International Airport. *Historic Fort Snelling*, Minnesota Historical Society, https://perma.cc/BN3M-HMGU.

22. *See Dred Scott*, 60 U.S. at 400; Finkelman, *supra* note 21, at 18–19. Scott married Harriet Robinson, an enslaved woman, while they were living at Ft. Snelling. Finkelman, *supra* note 21, at 15–16.

23. Finkelman, *supra* note 13, at 15, 17.

24. Finkelman, *supra* note 21, at 19–20.

25. *Id.* at 20.

The case eventually made its way to federal court, where the district court held that it had jurisdiction over the case through diversity of citizenship but denied the Scotts' claims to freedom.[26] On appeal, the U.S. Supreme Court affirmed that Dred Scott and his family remained enslaved, despite living for years on free soil.[27] More broadly, Chief Justice Taney wrote that the lower federal court never had jurisdiction over the case, because Dred Scott was not a citizen of the United States. Therefore, federal diversity jurisdiction did not apply to him.[28] Reaching even farther, as noted above, *Dred Scott* held that the Wisconsin Territory never should have been insulated from slavery, because the Missouri Compromise was unconstitutional and void.[29]

Infamously, the Court's jurisdictional holding proclaimed that Black people could never be citizens of the United States, even if they were free.[30] The Court purported to draw this conclusion from an originalist analysis of the concept of citizenship embedded (but not explicitly defined) in the Constitution.[31] The opinion characterizes white supremacy as a "fixed and universal" belief at the time of the Founding, and it paints its conclusion regarding the non-citizenship status of Black Americans as the inevitable result of that supposed eighteenth-century consensus.[32] Chief Justice Taney asserted that because the Founders believed in Black inferiority and white supremacy, they never intended to extend the rights and liberties embodied in the Constitution to any Black Americans of any generation, free or enslaved.[33] Thus, Dred Scott was not a "citizen" of the United States and had

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26. Finkelman, *supra* note 13, at 18–21.

27. *Dred Scott*, 60 U.S. at 452 (concluding that "the act of Congress which prohibited a citizen from holding and owning property of this kind [enslaved people] in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident").

28. Federal courts may have original jurisdiction over cases that arise under state law, based on diversity of citizenship. 28 U.S.C. § 1332(a)(1) (providing that federal courts have original jurisdiction over cases between "citizens of different states"). Scott claimed to be a citizen of Missouri; Sandford was a citizen of the state of New York. *See* Stanton D. Krauss, *New Evidence that Dred Scott was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction*, 37 CONN. L. REV. 25 (2004) (discussing and critiquing this aspect of the opinion); *see also* FONER, *supra* note 18, at 93–94.

29. *See supra* notes 18–19 and accompanying text.

30. *Dred Scott*, 60 U.S. at 406–27.

31. The Court concluded that, to determine whether Dred Scott could be considered a "citizen" of the state of Missouri and hence entitled to sue in federal court, "[i]t becomes necessary . . . to determine who were citizens of the several States when the Constitution was adopted." *Id.* at 407. The majority opinion concluded that belief in Black inferiority "prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted." *Id.; cf.* Finkelman, *supra* note 13, at 8–10 (discussing the modern debate as to whether Justice Taney applied an originalist approach to constitutional interpretation in *Dred Scott*).

32. Justice Taney wrote that "[t]his opinion [as to Black inferiority] . . . was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion." *Dred Scott*, 60 U.S. at 407.

33. Justice Taney wrote that, because members of the "negro African race" were considered "beings of an inferior order, and altogether unfit to associate with the white race" when the Constitution was drafted, neither slaves nor their descendants, regardless of whether they were free, were "intended to be included in the general words used in that memorable instrument." *Id.* at 406, 407; *see also id.* at 404–05

no right to access its federal courts under diversity jurisdiction. According to Chief Justice Taney's analysis of the Framers' intent, the Constitution envisioned the creation of a national polity that included a permanent caste of non-citizens solely defined by race, an inferior status from which they could never escape.[34]

Chief Justice Taney's portrayal of the founding period was "slanted and one-sided."[35] Black people themselves did not agree that they were inferior beings entitled to no rights. Enslaved Black people publicly petitioned for their freedom based on Revolutionary ideology, arguing that it was hypocritical for Americans to insist on freedom for themselves while enslaving others.[36] Free Black people employed similar Revolutionary rhetoric to argue for the end of the slave trade and equality for Black men.[37] Many states recognized the civil and even political rights of free Black men when the Constitution was ratified in 1790.[38] As dissenting Justice Benjamin R. Curtis observed in *Dred Scott*, "in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established."[39] He concluded that "the Constitution was [not] made exclusively by the white race."[40] As one specific example, the great-uncle of Senator Hiram Rhodes Revels of Mississippi, the

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(claiming that Black people "were not intended to be included, under the word 'citizens' in the Constitution . . . [because] they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them").

34. *See* Epps, *supra* note 11, at 388 (noting that, under the reasoning of the *Dred Scott* decision, Black people "could never be citizens. . . [and] were a permanently inferior caste whose proper role was to serve the Constitution's true beneficiaries").

35. *See* Finkelman, *supra* note 13, at 29.

36. *See* Lancaster Hill, Peter Bess, Brister Slenser, Prince Hall, et al., *The Petition of a Great Number of Negroes Who Are Detained in a State of Slavery* (Jan. 13, 1777), *available at* The Gilda Lehrman Institute of American History, https://perma.cc/5PPW-T98T (arguing that "every principle from which America has acted in the course of her unhappy difficulties with Great Britain, pleads stronger than a thousand arguments in favor of [the enslaved]"); *Vox Africanorum*, Unsigned Letter to the Maryland Gazette (May 15, 1783), *available at* The Gilda Lehrman Institute of American History, https://perma.cc/66DQ-6TDC ("[W]e have an indubitable right to liberty."); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 116–17 (1967) (discussing freedom petition submitted to New Hampshire state legislature by enslaved people in 1779).

37. Lemuel Haynes, a free Black man from Connecticut who fought for the Continental Army in the Revolutionary War, argued that "[e]ven an African, has Equally as good a right to his Liberty in common with Englishmen." Lemuel Haynes, *Liberty Further Extended: Or Free Thoughts on the Illegality of Slave-keeping* (1776), *available at* The Gilda Lehrman Institute of American History, https://perma.cc/N3BW-EAY5. Haynes opens his essay with Thomas Jefferson's proclamation of life, liberty, and the pursuit of happiness, and then outlines the importance of these rights for all men, regardless of color. *Id.*

38. *See* Paul Finkelman, *The First Civil Rights Movement: Black Rights in the Age of the Revolution and Chief Taney's Originalism in Dred Scott*, 24 UNIV. PA. J. CONST. L. 676, 683 (2022) (analyzing the "remarkable expansion of Black rights in the Revolutionary period").

39. Dred Scott v. Sandford, 60 U.S. 393, 582 (1857) (Curtis, J., dissenting).

40. *Id.*; *see also id.* at 533 (noting that "[s]everal of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States") (McLean, J., dissenting). At the time of the founding, free Black men were allowed to vote in Massachusetts, New Hampshire, New York, Pennsylvania, New Jersey, and North Carolina. *See* Paul Finkelman, *Who Counted, Who Voted, and Who They Could Vote For,* 58 ST. LOUIS UNIV. L.J. 1071, 1088 (2014).

first Black person elected to the United States Congress, fought in the Revolutionary War and voted to ratify the Constitution in 1787.[41] Even in Maryland, Taney's home state, free Black men "who owned fifty acres or had thirty dollars in assets could vote" when Thomas Jefferson wrote the Declaration of Independence, while women (regardless of their race or wealth) and poor white men could not.[42] Many state governments rescinded or limited the civil and political rights of Black men during the antebellum era,[43] but that retrenchment shadowed the Founding period that Taney claimed to interpret.

Chief Justice Taney attempted to justify his reading of the Constitution, vis-à-vis Black people living in the United States, by arguing that, in a political system that enabled the enslavement of a particular race, members of that race could never be members of the polity or entitled to any protections as citizens under the laws of that state. In essence, Taney rejected the idea that Black people could be truly "free" in a society that legally recognized the enslavement of members of the same race. Taney concluded that neither the Constitution nor the Declaration of Independence guaranteed the rights of any Black people living in America because "neither the class of persons who had been imported as slaves, *nor their descendants*, *whether they had become free or not*, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."[44] Taney denied that any Black (or mixed-race) person living in America was not descended from an enslaved person: "No [Black person] had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise."[45]

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41. FROST, *supra* note 13 at 33, 42; *see also* Nikole Hannah-Jones, *Democracy*, *in* THE 1619 PROJECT: A NEW ORIGIN STORY 28 (ed. by Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein) (2021) (noting that, after the election of Revels and Sen. Blanche Bruce in 1874, it took almost another hundred years to elect another Black Congressional representative). Senate Democrats objected to the seating of Hiram Revels in the Senate, on the grounds that he had not been a citizen of the United States for at least nine years, as required by the Constitution. Their argument stemmed from the *Dred Scott* decision. *See* Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1682–83 (2006).

42. David Skillen Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks 1776-1810*, 34 AMERICAN J. LEGAL HIST. 381, 383 (1990). Benjamin Banneker, a well-known Black scientist and almanac writer from Maryland, was described in an appellate case as exercising "the rights of a free man in holding real property, in voting at elections, and being allowed and permitted to give evidence in courts of justice in cases in which free white citizens were concerned . . ." Rusk v. Sowerwine, 3 H. & J. 97, 98 (Md. 1810) (discussed in Bogen, *supra* note 42, at 383); *see also Today in History - November 9 (Benjamin Banneker)*, LIBRARY OF CONGRESS DIGITAL COLLECTION, https://perma.cc/B5BC-BLHH. Thus, "age, gender and property ownership were as important as race" in exercising the rights of citizenship in Maryland, in 1776. Bogen, *supra*, at 383.

43. Finkelman, *supra* note 13, at 29. By 1840, Black men were no longer allowed to vote in North Carolina, Tennessee, Pennsylvania, and New Jersey. *Id.; see also* Bogen, *supra* note 42, at 388–410 (describing the protracted decline in the rights of free Black people in Maryland, after the Revolution).

44. *Dred Scott*, 60 U.S. at 407 (emphasis added). In United States v. Dow, 26 F. Cas. 901 (D. Md. 1840) (No. 14,990), Taney similarly surmised that the "political community of the [Maryland] colony" was solely comprised of "white men professing the Christian religion." United States v. Dow, 26 F. Cas. 901, 903 (D. Md. 1840) (No. 14,990); *see infra* notes 46–59, discussing this case.

45. *Dred Scott*, 60 U.S. at 411. Taney's statement is incorrect. *See generally* T.H. BREEN & STEPHEN INNES, MYNE OWN GROUND: RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640–76 (2004).

Seventeen years earlier, Chief Justice Taney confronted similar issues regarding race and the rights of citizenship in *United States v. Dow*, a case involving the murder of a white ship captain by Lorenzo Dow, a free person of "Malay" descent.[46] Dow was a native of the Philippines and a Spanish subject; he was also a baptized Christian.[47] The court described the rest of the crew members (none of whom were enslaved) as either "colored" or "mulatto."[48] Dow argued that, under Maryland law, the testimony of the crew members (the only witnesses to the alleged murder, other than Dow) could not be admitted against him, due to their race. Maryland evidentiary rules excluded the testimony of "any negro or mulatto slave, or any mulatto descended of a white woman, or any negro or mulatto free or freed" in any case "wherein a *Christian white person* is concerned."[49] However, testimony of such individuals could be admitted into evidence "in all criminal prosecutions, for and against one another."[50] Dow argued that because he was neither negro nor mulatto, the crew members' testimony could not be admitted as evidence against him in his murder trial. As Chief Justice Taney framed the issue, the central question was whether Dow was a "Christian white person."[51] Given that Dow was admittedly Christian, the only remaining question was whether he should be considered "white."

Using tortured logic linking Dow, a free person from the Philippines, to slavery on the island of Madagascar, Taney held that Dow was not white. Taney attempted to use the existence of slavery anywhere to justify a hierarchy of rights based on race in America. White Christians, he reasoned, could not be enslaved but could enslave others, specifically "negroes or mulattos, or Indians," under the laws of Maryland.[52] Thus, anyone whose race was subject to enslavement under Maryland law was, by definition, not white (regardless of whether that person was enslaved). To establish that Malays could be

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46. United States v. Dow, 26 F. Cas. 901 (D. Md. 1840) (No. 14,990). For a thorough analysis of the *Dow* opinion, *see* Gabriel J. Chin, *Dred Scott and Asian Americans*, 24 U. PA. J. CONST. L. 633 (2022). In *Dow*, Taney acted as a trial judge, even though at that time he was the chief justice of the United States Supreme Court. During the nineteenth century, Supreme Court justices "rode the circuit," acting as trial judges for cases in the federal system. *See* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1759 (2003) (noting that the Judiciary Act of 1789 vested circuit court judges with exclusive jurisdiction over federal criminal cases); *see also A Brief History of Circuit Riding*, FEDERAL JUDICIAL CENTER, https://perma.cc/WQ8R-JNZX. This practice ended in 1911. Glick, *supra* note 46, at 1829.

47. *Dow*, 25 F. Cas. at 902.

48. *Id.*

49. *Id.* At the time, federal courts followed state evidentiary rules if they were codified, as in this case. *See* Dow, 25 F. Cas. at 902 (quoting the Federal Judiciary Act of 1789: "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law"); *see also* Swift v. Tyson, 41 U.S. 1 (1842) (holding that the term "rules of decision" in the Act included state statutes but not common law rules), *overruled by* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). The Federal Rules of Evidence were adopted in 1975. *See Historical Note, Federal Rules of Evidence,* House Judiciary Committee, Committee Print No. 10, 116th Cong., 2d Sess. (Dec. 2020), https://perma.cc/G77M-NL3D.

50. *Dow*, 25 F. Cas. at 902; *see also* Maryland Act of Assembly of 1808, chapter 81.

51. *Dow*, 25 F. Cas. at 903.

52. *Id.*

enslaved in Maryland (as apparently, no Maryland statute referred to Malays), Taney relied upon a 1798 case adjudicating a claim to freedom by a descendant of an enslaved woman who was forcibly taken to Maryland from Madagascar via the foreign slave trade.[53] The descendant challenged her own enslavement on the grounds that her mother should have been free, as Madagascar did not participate in the slave trade.[54] The court disagreed.[55] The court's succinct opinion said nothing about the racial characteristics of the petitioner's mother but referred to her as "Negro Mary."[56] Taney concluded, however, that Mary was "not of the negro race," because he "examined the original papers" in the case and found that she was a "yellow woman with straight black hair."[57] Taney, therefore, determined that she was "undoubtedly a Malay," solely based on this brief description.[58] Taney further reasoned that, because Malays could be enslaved in Madagascar, they could also be enslaved in Maryland.[59] Hence, Malays were not "white." Therefore, because unrelated members of his race were subject to enslavement in Madagascar in 1798, a free man from the Philippines was not entitled to the benefits of being "white" under the laws of Maryland in 1840.[60]

Taney was forced to engage in these mental gymnastics because, objectively, distributing the rights of citizenship based on race is arbitrary and intellectually indefensible.[61] The absurdity is illustrated by Dow's case: If

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53. *Id.*; *see* Negro Mary v. Vestry of Williams & Mary's Par., 3 H. & McH. 501, 501 (Md. Gen. 1796) ("this was a petition for freedom").

54. The petitioner argued that "[w]herever a person has been taken from a country where the slave trade was not practised and carried on, and brought here and sold, such a person is not a slave according to the laws of this state. [citation omitted] The act of 1715 [establishing slavery in Maryland] related only to slaves brought in according to the regular course of the slave trade. Madagascar was not a place from whence slaves were usually brought." Negro Mary v. Vestry of Williams & Mary's Par., 3 H. & McH. 501, 501 (Md. Gen. 1796).

55. The entirety of the court's opinion is as follows: "Madagascar being a country where the slave trade is practised, and this being a country where slavery is tolerated, it is incumbent on the petitioner to show her ancestor was free in her own country to entitle her to freedom." *Mary*, 3 H. & McH. at 501.

56. *Mary*, 3 H. & McH. at 501 (noting the petitioner's admission that she was "descended from Negro Mary, imported many years ago into this country from Madagascar").

57. *Dow*, 25 F. Cas. at 903.

58. *Id.*

59. *Id.* at 903–04. Taney's conclusion required several logical leaps, given that the case he relied upon made no specific finding regarding the enslavement of Malays in Madagascar – it said nothing about Malays at all. The court solely found that, because slavery was generally tolerated in Madagascar, the burden of proof fell to the petitioner to prove that her mother was not enslaved there. *Mary*, 3 H. & McH. at 501. Presumably, due to lack of access to evidence and the passage of time, the petitioner had no way of meeting that burden.

60. After the testimony of Dow's non-white crew members was admitted, Dow was convicted of murder. *Dow*, 25 F. Cas. at 904. However, Taney held that Dow's indictment was defective, hence granting his counsel's motion in arrest of judgment. *Dow*, 25 F. Cas. at 90405. Dow was subsequently re-indicted, re-tried, and convicted of murder again. *Id.* at 905. In this second trial, Dow was sentenced to death, but he was never executed because (for unstated reasons) he was pardoned by President John Tyler. *Id.*

61. California Senator John Conness (1821-1909) wrote that his desire to enter politics stemmed from observing a criminal trial in California "in which a judge permitted the use of a magnifying glass to human hair of a witness called to testify, to determine if he had truth-telling capacity." John Conness, *Autobiography and Reminiscences of John Conness, San Francisco, in* 7 AUTOBIOGRAPHIES AND REMINISCENCES OF CALIFORNIA PIONEERS 110, 111 (1904), https://perma.cc/G375-MMZP. Conness immigrated to the United States from Ireland in 1833 and served one term in the United States Senate.

Dow had been a "white" man, he almost certainly could have murdered his captain with impunity because no one else on the ship could have testified against him. Nevertheless, Taney embraced the doctrine of white supremacy but tried to justify his decision without explicitly relying on it. In discussing the conditions under which Maryland's race-based evidentiary rule was adopted, Taney observed that "[t]he only nations of the world which were then regarded, *or perhaps entitled to be regarded*, as civilized, were the white Christian nations of Europe. . . ."[62] However, he denied that these white, Christian, formerly European men created evidentiary rules barring the admission of testimony from Black people and Native Americans based on the "differences, moral or physical, which have been supposed to exist between the different races of mankind. . . ."[63] Rather, Taney reasoned that white men adopted such rules because it would have been "dangerous" for them to do otherwise.[64] Taney asserted that "it was natural, that [negative] feelings should be created" by white men's subjugation and degradation of both Black people and Native Americans, such that their testimony could not be trusted in cases involving the people who had oppressed them.[65] Taney never addressed the intellectual, moral, or legal justification for the enslavement and oppression itself. The practical result of his reasoning in both *Dred Scot* and *Dow* was to divide the populace into two groups: white Christian men, who were entitled to the full array of the rights of citizenship, and everyone else, who – to varying degrees – were entitled to only those rights that white Christian men chose to give them.[66]

Neither the literal text nor the legislative history of the Constitution supports Chief Justice Taney's vision of a government under which the rights of citizenship were allocated by race. During the ratification debates, the Framers of the Constitution spent countless hours debating and accommodating the demands of slavery.[67] Generations of historians, politicians, and

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Conness, John, 1821-1909, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, https://perma.cc/N5NJ-DVCE. He was elected as a Union Democrat but later switched his party affiliation to Union Republican. *Id*.

62. *Dow*, 25 F. Cas. at 903 (emphasis added).

63. *Id*.

64. *Id*.

65. *Id*. ("No one who belonged to either of the races of which slaves could be made, was allowed to be a witness where any one was concerned who belonged to the race of which masters were composed.").

66. *See* Chin, *supra* note 46, at 638 (concluding that "from the very beginning of this country, white supremacy was a complete, comprehensive, and operational jurisprudence–at least to those like Taney, who made and applied the law"); *see also* Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857) (concluding that Black people, "whether emancipated or not . . . had no rights or privileges but such as those who held the power and the Government might choose to grant them"). During this period the rights of citizenship were also restricted according to a person's gender, as female citizens were denied many rights considered fundamental in the modern era, including the right to vote, to serve on a jury, to own property (if they were married), and to practice various professions. *See* Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89, 91–99 (1994) (comparing the legal disabilities of race and gender under nineteenth-century law).

67. *See, e.g.*, Sandra L. Rierson, *Tracing the Roots of the Thirteenth Amendment*, 91 U.M.K.C. L. REV. 57, 69–114 (2022) (discussing this history); *see generally* FEHRENBACHER, *supra* note 15; MICHAEL

activists have hotly contested the extent to which the Constitution did or did not embrace the concept of "property in man."[68] However, evidence of *Dred Scott's* vision of a permanent racial caste system—the precursor to modern apartheid—does not fill the pages of the Congressional Globe.[69] Although some delegates to the constitutional convention undoubtedly agreed with Taney that the United States was a country created by and for white men only, their views were not shared by everyone, and they were not enshrined in the words of the Constitution. The Constitution does not explicitly refer to color or race.[70] Its failure to codify white supremacy was cited as the reason for its rejection by Confederate vice-president Alexander Stephens, in his infamous "Cornerstone Speech":

> The prevailing ideas entertained by [Thomas Jefferson] and most of the leading statesmen at the time of the formation of the old Constitution were, that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally and politically. [] Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation [upon which to build a Government]. Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and normal condition.[71]

Given its toleration and protection of the institution of chattel slavery—a total deprivation of rights imposed almost exclusively on Black people—Stephens' assessment that the "old Constitution" "rested upon the assumption of the equality of the races" was dishonest. However, the Constitution's implicit recognition of slavery[72] is nevertheless distinguishable from a

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J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 257–304 (2016); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3–45 (3d ed. 2014).

68. *See* SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 59 (2018) ("[T]he convention took care to prevent the Constitution from recognizing what had become slavery's main legal and political bulwark during the northern struggles over emancipation, the legitimacy of property in man."); THE 1619 PROJECT, *supra* note 41, at 19 (arguing that the drafters of the Constitution sought to "shroud" their hypocrisy regarding slavery rather than "explicitly acknowledge" it).

69. *See* Bogen, *supra* note 42, at 381–82 ("The Constitution did not mention race. Several clauses in the document dealt with issues arising out of the institution of slavery, but no language even hinted that race made a difference in the constitutional rights of free individuals.").

70. *See* Citizenship, 10 U.S. Op. Att'y Gen. 382, 398 (1862) (noting that the Constitution is "is silent about race as it is about color").

71. Alexander H. Stephens, Cornerstone Address, Savannah, Georgia (Mar. 21, 1861), https://perma.cc/MCW3-DGK4.

72. The words "slave" or "slavery" do not appear in the Constitution. *See* KLARMAN, *supra* note 67 at 264–65 (discussing this omission); *see also* WILENTZ, *supra* note 68, at 86 (same); Frederick Douglass, *The Constitution and Slavery*, NORTH STAR, (Feb. 9, 1849), *reprinted in* FREDERICK DOUGLASS, SELECTED SPEECHES AND WRITINGS 130–31 (Philip S. Foner ed., 2000) ("Had the Constitution dropped down from the blue overhanging sky, upon a land uncursed by slavery, and without an interpreter, . . . so

permanent political hierarchy of race. Unlike color or race, the legal status of enslavement could be dissolved via legal emancipation, which occurred in many Northern states after the Revolution, or private manumission. Dred Scott and his family finally attained their freedom in 1857, when the sons of Scott's first enslaver, Peter Blow, "bought" and then manumitted the Scott family.[73] The Scotts thus joined the ranks of the nation's free Black population. The first census counted almost sixty thousand free Black people living in the United States in 1790, approximately 8 percent of the total Black population.[74] By 1860 that number had grown to half a million, out of a total Black population of approximately 4.5 million.[75] In Maryland, the Black population was almost evenly divided between free and enslaved people by 1860, even though the state had not legally emancipated anyone.[76] Many states outside the South recognized free Black people as citizens.[77] Although Chief Justice Taney acknowledged these facts, he concluded that "[i]t does not by any means follow, because [a person] has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States."[78]

In drafting the majority opinion in *Dred Scott*, Taney couched his conclusions regarding a constitutional mandate for "whites-only" American citizenship in the language of originalism.[79] His decision retroactively imposed a *jus sanguinis* model of citizenship – one in which the capacity for citizenship is inherited from one's parent(s)[80] – on all Black people in the United States of America. Because he believed that everyone fitting this description was descended from an enslaved ancestor, they could not be citizens. As discussed below, white people born in the United States were never subjected to this generational scrutiny and hence enjoyed the benefits of birthright

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cunningly is it framed, that no one would have imagined that it recognized or sanctioned slavery."); Abraham Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 544 (Roy P. Basler ed., 1953) ("An inspection of the Constitution will show that the right of property in a slave is not 'distinctly and expressly affirmed' in it.").

73. Finkelman, *supra* note 13, at 41; VANDERVELDE, *supra* note 20, at 322.

74. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* (U. S. Census Bureau, Population Division, Working Paper No. 56, 2002), tbl. 1, https://perma.cc/K9TZ-MYTG.

75. *Id*. *See also* FROST, *supra* note 13, at 22 (noting that Justice Taney "stripped national citizenship from half a million free blacks living in the United States and barred four million enslaved blacks from any hope of joining the polity, even if they bought or won their freedom").

76. Gibson & Jung, *supra* note 74, at tbl. 35. In 1860 the census reported 83,942 free Black people living in the state of Maryland, and 87,189 enslaved. *Id.*

77. *See, e.g*., FONER, *supra* note 18, at 94 (discussing the long-standing recognition of Black citizenship by Massachusetts state courts). In the wake of the *Dred Scott* decision, many Republican state party conventions and Republican-dominated state legislatures passed resolutions affirming the citizenship of free Black people, including in New York, New Hampshire, Vermont, and Ohio. *See* FONER, *supra* note 17, at 293. North Carolina was an outlier among Southern states when, for a short period of time, it recognized free Black citizenship. *See* State v. Manuel, 20 N.C. 20, 25 (1838).

78. *Dred Scott*, 60 U.S. at 405. This language from *Dred Scott* was superseded by the Fourteenth Amendment's privileges and immunities clause, which states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl.1.

79. *See* Finkelman, *supra* note 38, at 681 (characterizing Taney's "originalist argument" as "selective and misleading").

80. *See infra* notes 114–115.

citizenship.[81] Although Taney's historical analysis was incomplete at best, it was rendered largely irrelevant by the Fourteenth Amendment. The drafters of that amendment deliberately painted in broad strokes intended to reach the formerly enslaved and beyond.

B. *The Fourteenth Amendment Rejects Dred Scott in Favor of an Egalitarian Ideal*

Section 1 of the Fourteenth Amendment extends citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof."[82] The Supreme Court later recognized that "[t]he main object of the opening sentence of the fourteenth amendment was to settle the question. . . as to the citizenship of free [Black people]. . . and to put it beyond doubt that *all persons*, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the state in which they reside."[83] The egalitarian ideal embedded in the Fourteenth Amendment – a paramount Republican achievement during the aftermath of the Civil War – rejected and replaced *Dred Scott*'s white citizenry with a more inclusive blueprint for the American republic.

The Fourteenth Amendment and the legislation that preceded it, the Civil Rights Act of 1866,[84] were cornerstones of Reconstruction. The Fourteenth Amendment was easily passed by the House on June 13, 1866, and previously by the Senate.[85] The amendment was ratified by three-fourths of the states on July 9, 1868.[86] The same Congress enacted the Civil Rights Act of 1866 over President Andrew Johnson's veto.[87] This legislation contained parallel (although not identical) language regarding birthright citizenship: "[A]ll persons born in the United States, and not subject to any foreign power,

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81. *See infra* notes 111–113.

82. U.S. CONST. amend. XIV; *see* Constitution Annotated: Analysis and Interpretation of the U.S. Constitution, Amendment XIV, https://perma.cc/N7A6-7NXX (describing the ratification of the Fourteenth Amendment).

83. Elk v. Wilkins, 112 U.S. 94, 101 (1884) (citations omitted and emphasis added); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 675 (1898) (noting that the "fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms" in the Fourteenth Amendment and the Civil Rights Act of 1866).

84. *An Act to Protect all Persons in the United States in their Civil Rights, and Furnish Means for their Vindication* (Civil Rights Act of 1866), ch. 31, 14 Stat. 27 (Apr. 9, 1866).

85. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3148, 3149 (1866) (recording House vote of 120 to 32 in favor, with 32 members not voting); *Senate Roll Call Vote on the Fourteenth Amendment*, UNITED STATES SENATE (May 12, 1866), https://perma.cc/R27Z-GLEB (recording Senate vote of 33 to 11 in favor, with 5 not voting); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 88 (2019).

86. *See* FONER, *supra* note 85, at 88–91.

87. CONG. GLOBE, 39th Cong., 1st Sess. 1809 (1866) (recording Senate vote of 33 to 15 in favor, and one absent); CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866) (recording House vote of 122 to 41 in favor, with 21 members not voting); *see* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2006) (discussing Johnson's veto and noting that "no Congress had ever before overridden a presidential veto on an important measure"); FONER, *supra* note 85, at 67 (discussing same).

excluding Indians not taxed, are hereby declared to be citizens of the United States . . . ."[88] Both legislative achievements sought to de-racialize American citizenship.

Like the constitutional amendment that followed it, the Civil Rights Act of 1866 extended United States citizenship to any person born in the United States, regardless of race or ethnicity. By "sever[ing] citizenship from race," it "abrogated the *Dred Scott* decision," a long-standing demand of the abolitionists.[89] Moreover, it was "the first law to declare who is a citizen of the United States and specify the rights all citizens are to enjoy."[90] Although the Act did not address political rights, it guaranteed civil rights to all American citizens, "of every race and color," specifically the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . ."[91]

President Andrew Johnson understood the transformative power of the Act, vis-à-vis American citizenship. To justify his veto, Johnson lamented that the law would grant citizenship to "the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as . . . Negroes, mulattoes, and persons of African blood."[92] President Johnson, a former slaveholder from Tennessee who was personally and politically deeply racist, rejected the expansion of American citizenship Congress sought to achieve under the Civil Rights Act, but his veto was overridden.[93]

Some academics have recently claimed that the words "not subject to any foreign power" in the Civil Rights Act signified a Congressional intent to exclude some of the people on Johnson's list in the reframing of American citizenship.[94] However, the proponents of this law did not challenge President Johnson's interpretation of it. When asked to address this point, the bill's sponsor, Republican Senator Lyman Trumbull of Illinois, averred that

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88. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 1; *see* United States v. Wong Kim Ark, 169 U.S. 649, 675 (1898) (discussing the Act); FROST, *supra* note 13, at 40 (same).

89. FONER, *supra* note 85, at 63.

90. *Id*. The concept of "civil rights" – a "widely discussed but poorly defined concept" in the antebellum era – was alluded to during the Thirteenth Amendment debates but not specifically delineated until the Civil Rights Act of 1866. *Id.*

91. Civil Rights Act of 1866, 14 Stat. 27, § 1. The law was necessary because southern whites refused to accept their defeat in the Civil War and attempted to perpetuate slavery and white dominance by a variety of means, including violence and murder of Black people and their white allies, and the passage of discriminatory state laws designed to deprive Black people of civil and human rights. *See* Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change*, 74 LOUISIANA L. REV. 1039, 1045–50 (2014).

92. President Andrew Johnson, Veto Message on Civil Rights Legislation (Mar. 27, 1866), https://perma.cc/6JPS-TE97; *Wong Kim Ark*, 169 U.S. at 682 (citing Johnson's interpretation of the 1866 Civil Rights Act).

93. *See supra* note 87.

94. *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 80 (1985); *cf.* Epps, *supra* note 11, at 345 (critiquing this reading of the legislative history).

the law "makes no such distinction" between children of German and Asiatic parents; thus, "the child of an Asiatic [parent] is just as much a citizen as the child of a European."[95] When asked whether the law would apply to the children of "Gypsies" and "Mongolians," he replied, "Undoubtedly."[96] Senator Reverdy Johnson of Maryland, a Democrat who later voted against the Fourteenth Amendment, similarly observed that the law would encompass "all persons, without any reference to race or color," born within the United States.[97]

Although the Civil Rights Act guaranteed birthright citizenship, the Republican majority in Congress believed that this right needed to be enshrined in the Constitution. For Representative John A. Bingham of Ohio, the Fourteenth Amendment was necessary to resolve doubts as to whether Congress had the Constitutional authority to pass this legislation.[98] Moreover, a legislative grant of citizenship could be repealed by subsequent Congresses.[99] As Senator Jacob Howard explained, "We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of [those] who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters."[100]

The Congress that debated the Fourteenth Amendment likewise understood its "birthright citizenship" provision would enable people hailing from other countries and cultures to become citizens of the United States.[101] Many of them, like President Johnson, feared this outcome. Republican Senator Edgar Cowan of Pennsylvania rhetorically asked, "Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in

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

96. *Id.*

97. *Id.* at 573 (Feb. 1, 1866). Johnson made these observations in the context of contending that the words "without distinction of color" should be removed from the Act as unnecessary. *Id.* at 573–74.

98. Bingham asked, "Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reenactment of those atrocious statutes of banishment and confiscation and imprisonment and murder under which people have suffered in those [Southern] States during the last four years? [Mr. Hale] . . . said that the citizens must rely upon the State for their protection. I admit that such is the rule under the Constitution as it now stands." John Bingham, *Speech of Hon. John A. Bingham, of Ohio, in the House of Representatives, February 28, 1866, In support of the proposed amendment to enforce the Bill of Rights* (Feb. 28, 1866), at 6–7, https://perma.cc/D2M8-L2XW; *see also* FONER, *supra* note 85, at 64–65 (noting that Bingham's concern about the constitutionality of the Civil Rights Act, which he voted against, was virtually unique among Republicans).

99. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2768–69 (1866) (remarks of Benjamin Wade). *See also* United States v. Wong Kim Ark, 169 U.S. 649, 675 (1898) (noting that the same congress passed the Civil Rights Act and, soon thereafter, the Fourteenth Amendment, "evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress. . . .").

100. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866); *see also* FONER, *supra* note 85, at 70 (discussing same).

101. *See generally* Epps, *supra* note 11, at 349–82 (analyzing the legislative and intellectual history of Section 1 of the Fourteenth Amendment, regarding birthright citizenship).

Pennsylvania a citizen?"[102] Cowan argued against such a result, contending that these ethnic groups should be excluded from birthright citizenship:

> I consider those people to have rights just the same as we have, but not rights in connection with our Government. If I desire the exercise of my rights I ought to go to my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions, and not thrust myself in upon a society of other men entirely different in all those respects from myself.[103]

When Cowan spoke of the "rights" to which "those people" were entitled, he cited as examples the right to be free from bodily harm, such as assault and battery or murder.[104] However, Cowan did not wish to see children who were members of certain ethnic groups endowed with "rights in connection with our Government" as a result of their birth within the geographic borders of the United States, nor did he want to restrain the State from "expelling" all members of such a group, regardless of where they were born.[105] He expounded on the various character traits of "Gypsies" and "Mongolians," supposedly rendering them unfit for citizenship.[106] Of course, he was not the only member of the Reconstruction Congress who held such beliefs.[107]

In response, Senator John Conness of California, an Irish immigrant, affirmed that he favored a constitutional declaration that "the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal rights with other citizens of the United States."[108] Conness also contended that Cowan and others were using the apocryphal threat of "invasion" by "Gypsies" or "Mongols" for political

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102. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866); *see* Epps, *supra* note 11, at 382–84 (discussing children of Chinese laborers and "Gypsies" in the context of Fourteenth Amendment debates).

103. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). Sen. Cowan also argued, "It is utterly and totally impossible to mingle all the various families of men, from the lowest form of Hottentot up to the highest Caucasian, in the same society."

104. *Id.* at 2890.

105. *Id.* Cowan stated that it was "essential to the existence of society itself" that that the State should "have the power to declare who should exercise political power within its boundaries" and, "if it were overrun by another and a different race," to have the right "to absolutely expel them."

106. *Id.* In referencing Gypsies and Mongolians, Cowan alluded to people of Roma and Chinese descent. Of the Roma people, Cowan argued that their "sole merit" was a "universal swindle," and that they "infest[ed]" society. *Id.* at 2891. Persecution of the Roma people in Europe and elsewhere is well documented and continues today. *See generally* YARON MATRAS, THE ROMANI GYPSIES (2015); Antonia Eliason, *With No Deliberate Speed: The Segregation of Roma Children in Europe*, 27 DUKE J. OF COMPAR. & INT'L L. 191 (2017) (discussing ongoing educational segregation of Roma children in Europe). Although Cowan professed to know little about the Chinese, he warned that California was in danger of being "overrun by a flood of immigration of the Mongol race." CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866). Cowan argued that the people of California needed to "protect themselves" from being "immigrated out of house and home" by people of a different race, religion, manners, traditions, "tastes and sympathies." *Id.* at 2891. He previously referred to the Chinese people as "rapacious." *Id.* at 498.

107. *See infra* notes 130–135, and accompanying text.

108. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). Conness noted that this proposition was already settled "by law," referring to the 1866 Civil Rights Act. *Id. See supra* note 61 (discussing Conness).

purposes, noting that "it may be very good capital in an electioneering campaign to declaim against the Chinese."[109] Conness wryly observed that he was aware of only one invasion of Cowan's home state of Pennsylvania, one "very much worse and more disastrous to the State… than that of the Gypsies": "It was an invasion of rebels, which this amendment… is intended to guard against and to prevent the recurrence of."[110]

Although the Fourteenth Amendment sought to remove all doubt regarding the citizenship of those born in the United States, regardless of race or color, the rule it articulated was not new.[111] The rule of birthright citizenship was grounded in three hundred years of British common law.[112] Long before the Supreme Court's decision in *Dred Scott*, courts in the United States adopted and applied the British rule of *jus soli*, or "law of the soil," under which "all persons born in the United States were citizens of the United States," at least if they were white.[113] This rule contrasts with that of *jus sanguinis*, or "law of descent," under which a child's nationality derives from the status of her parents, not her place of birth.[114] In the nineteenth century and today, the rule of *jus sanguinis* predominates on the European continent.[115] However, the rule of *jus sanguinis* was not part of the British common law inherited by the

109. CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866).

110. *Id.*

111. The author of this language, Republican Sen. Jacob Howard of Michigan, explained that his proposed amendment "is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." *Id.* at 2890; *see also Wong Kim Ark*, 169 U.S. at 693 (concluding that the "fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory… including all children here born of resident aliens. …").

112. *Wong Kim Ark*, 169 U.S. at 655–58; *Id.* at 660 ("Nothing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.") (citations omitted). This rule was articulated by Sir Edward Coke in Calvin v. Smith (1608) 77 Eng. Rep. 377 (KB) (*Calvin's Case*); *see also* Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608),* 9 YALE J. L. & HUMAN. 73 (1997); Heather Horn, *Birthright Citizenship Wasn't Born in America,* THE ATLANTIC (Sept. 1, 2015), https://perma.cc/R6GB-E3DD.

113. *Wong Kim Ark*, 169 U.S. at 658; FROST, *supra* note 13, at 24 ("Birthright citizenship was the common-law rule at the time the Constitution was ratified in 1788 and had generally been accepted both before the Declaration of Independence and after, when those born in the former colonies became citizens of the US."); *see also* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 287 (1978); Lucy E. Salyer, *Wong Kim Ark: The Contest over Birthright Citizenship*, in IMMIGRATION STORIES 51, 52 (David A. Martin & Peter H. Shuck eds., 2005); Michael Robert W. Houston, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693, 705–08 (2000).

114. Salyer, *supra* note 113, at 52. Congress has provided for the attainment of American citizenship *jus sanguinis* as well: Children born outside the United States are entitled to American citizenship if both parents are U.S. citizens, so long as one parent resided in the United States prior to the birth of the child. 8 U.S.C. § 1401(c). If only one parent is an American citizen, the child is entitled to American citizenship only if the U.S. citizen parent resided in the United States for a minimum of one year prior to the child's birth, and the other parent is a "national, but not a citizen of the United States." 8 U.S.C. § 1401(d). Unlike birthright citizenship, the right of citizenship *jus sanguinis* is not Constitutionally guaranteed. Birthright citizenship is guaranteed by statute as well as the Fourteenth Amendment. *See* 8 U.S.C. § 1401(a).

115. Salyer, *supra* note 113, at 52.

United States.[116] *Dred Scott* deviated from that common law when it retroactively imposed a rule of *jus sanguinis* on the country's Black population, effectively stripping citizenship from half a million free Black people.[117] The Fourteenth Amendment to the United States Constitution nullified that result.

C. *Naturalization Laws and the Chinese Exclusion Acts Embody Racism and Signal the Nation's Retreat from Reconstruction*

America largely squandered the transformative potential of the Reconstruction Era. A lack of political will, enabled by a deep-seated national belief in white supremacy and a conservative Supreme Court, ultimately doomed – at least temporarily – the nation's push toward equality and the fulfillment of promises made in the Declaration of Independence. In many ways, that tragic trajectory was reflected in the naturalization laws and Chinese Exclusion Acts that were adopted as the nineteenth century drew to a close. Congressional power over the naturalization process partially usurped the promise of equality embedded in Section 1 of the Fourteenth Amendment.

The Constitution grants Congress the power to "establish a uniform Rule of Naturalization."[118] It first did so in 1790, enacting a Naturalization Act permitting only "free white persons" to become naturalized citizens.[119] Subsequent naturalization acts similarly limited the privilege of naturalized citizenship to "free white persons."[120] The first naturalization act passed after the adoption of the Fourteenth Amendment, the Naturalization Act of 1870, expanded racial eligibility for naturalization to include "aliens of African nativity and to persons of African descent."[121] In doing so, Congress abrogated the rule previously established under *Dred Scott*, which excluded all those of "African descent" from the American citizenry, regardless of whether they

116. *Wong Kim Ark*, 169 U.S. at 655 (noting that the provisions of the U.S. Constitution "are framed in the language of the English common law, and are to be read in the light of its history"); *id*. at 667 ("The later modifications of the rule [of birthright citizenship] rest upon the constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the constitution of the United States.").

117. *See supra* note 75.

118. U.S. CONST., art. I, § 8; Chirac v. Chirac's Lessee, 15 U.S. 259, 269 (1817) (noting that "the power of naturalization is exclusively in congress"); *Wong Kim Ark*, 169 U.S. at 701 (same).

119. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795). To become a citizen, a "free white person" who had lived in the United States for at least two years was required to prove to a court that they were a "person of good character" and take an oath to support the Constitution of the United States. *Id.*

120. *See, e.g.,* Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414 (repealed 1802) (applying to "any alien, being a free white person"); Naturalization Act of 1802, ch. 28, § 1, 2 Stat. 153 (Apr. 14, 1802) (same); Naturalization Act of 1824, ch. 186, § 1, 4 Stat. 69 (May 26, 1824) (applying to "any alien, being a free white person and a minor").

121. Naturalization Act of 1870, ch. 254, §7, 16 Stat. 254, 256 (July 14, 1870); CONG. GLOBE, 41st Cong., 2d Sess. 5177 (1870) (describing the vote on the amendment relating to "aliens of African nativity and to persons of African descent"). *See* MARTIN B. GOLD, FORBIDDEN CITIZENS, CHINESE EXCLUSION AND THE U.S. CONGRESS: A LEGISLATIVE HISTORY 1–32 (2012) (describing the legislative history of this Act).

were born within the borders of the United States.[122] However, the Reconstruction Congress did not create a "color-blind" naturalization process.

Congress could have – and almost did – pass a law that would have removed racial limitations on naturalized citizenship. Republican Senator Charles Sumner of Massachusetts proposed an amendment to the 1870 Naturalization Act that would have eliminated the word "white" from all naturalization laws.[123] This proposed amendment was initially accepted but ultimately torpedoed in the Senate by a filibuster from Republican Senator William Stewart of Nevada.[124] The primary objection to race-neutral naturalization laws turned on the question of Chinese citizenship.[125]

Republican Senator George Williams of Oregon responded to Sumner's proposed amendment by offering his own amendment, specifically excluding "the naturalization of persons born in the Chinese empire."[126] In the ensuing debate, the senators focused their attention on the prospect of Chinese men gaining the right to vote in American elections by becoming naturalized citizens.[127] Stewart rhetorically asked, "Do you want to extend naturalization to men who are liable to be dictated to by their masters who brought them here as to how they shall vote?"[128] Unlike Stewart, some Republicans (led by Sumner) argued that excluding Chinese men from the privileges of citizenship would violate the promises of the Declaration of Independence and the core principles of the Republican party.[129] However, it became clear that the

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122. *See supra* notes 30–34.

123. CONG. GLOBE, 41st Cong., 2d Sess. 5121 (1870) (proposing to remove the word "white" from all naturalization laws, "so that in naturalization there shall be no distinction of race or color").

124. In 1870 Senate filibusters were rare but, when they did occur, "they were fatal to the legislation being impeded." GOLD, *supra* note 121, at 7. Only unanimous consent could end a filibuster, as the cloture rule (allowing a supermajority of Senators to do so) was implemented later, in 1917. *Id.* After initial approval, Sumner's amendment was reconsidered and voted down, with fourteen senators in favor, thirty opposed, and twenty-eight absent. CONG. GLOBE, 41st Cong., 2d Sess. 5176 (1870); *see also* GOLD, *supra* note 121, at 30 (discussing this vote).

125. GOLD, *supra* note 121, at 4–5 (noting that "the discord arose [over Sumner's proposed amendment] because of the prospect that such race-neutral legislation would open the door to naturalization of Chinese immigrants").

126. CONG. GLOBE, 41st Cong., 2d Sess. 5121 (1870).

127. The Fifteenth Amendment (barring the abridgement of the right to vote on the basis of race or color) was ratified on February 3, 1870, shortly before the debate regarding the Naturalization Act. However, the Constitution did not guarantee women (of any race) the right to vote until fifty years later, with the ratification of the Nineteenth Amendment in August 1920. U.S. CONST. amend. XIX. Senators presumed that, if Chinese men could become naturalized citizens, they could vote.

128. CONG. GLOBE, 41st Cong., 2d Sess. 5125 (1870); *see also id.* at 5151 ("They would sell their votes as a matter of course."); *id.* at 5163 ("[T]hey will sell themselves in flocks to vote."). Stewart later boasted about the role he played during these debates, to "bar Chinese from the ballot box." GOLD, *supra* note 121, at 7.

129. Sen. Sumner argued that his proposed amendment "simply opens the question of the Declaration of Independence and whether we will be true to it. 'All men are created equal' without distinction of color.'" CONG. GLOBE, 41st Cong., 2d Sess. 5122 (1870); *see also id.* at 5154, 5164 (comments by Sen. Lyman Trumbull of Illinois); *id.* at 5160 (comments by Sen. Matthew Hale Carpenter of Wisconsin, arguing in favor of the "broad American principle" that "every man who is bound by the law ought to have a voice in making the law," for Chinese people as well as the formerly enslaved); *id.* at 5168 (comments by Sen. Samuel Pomeroy of Kansas, arguing that a policy excluding the Chinese would not be "founded in justice" or "in harmony with the genius and spirit of our institutions").

Republicans' egalitarian ideology did not necessarily extend to people of Chinese descent.

Racism toward Chinese immigrants and other non-white people animated much of the Senate debate. Williams rhetorically asked, "[D]oes the Declaration of Independence mean that Chinese coolies, that the Bushmen of south Africa, that the Hottentots, the Digger Indians, heathen, pagan, and cannibal, shall have equal political rights under this Government with citizens of the United States?"[130] In framing what he considered an "absurd and foolish" interpretation of the Declaration, Williams presumed that these groups of people were not – and could not become – American citizens.[131] Williams and other western senators characterized Chinese people as incapable of assimilation, vice-ridden, and inherently unworthy of citizenship.[132] He contended that taking the oath of citizenship would be meaningless to Chinese men, such that endowing them with political rights would "be very much like trying to invest so many cattle with the elective franchise."[133] Williams also argued that enfranchising Chinese men would be political suicide for the Republican party, as western constituents would reject the party that invited cheap Chinese labor to drive down their wages.[134] He claimed that the ultimate result of enfranchising Chinese men would be their slaughter and "extermination," as "thoughtful men" would be "overpowered by the mob element" intent on eliminating them.[135] The debate ended without the passage of either Sumner's or Williams' amendments, so the final version of the Naturalization Act expanded the availability of naturalized citizenship to Black people only. The Act implicitly excluded anyone else who was not considered "white," including Chinese people.[136]

The debates regarding the Naturalization Act of 1870 presaged escalating nativism and discrimination against Chinese immigrants in Congress and in the nation as a whole. An economic depression in the 1870's accelerated anti-Chinese sentiment, as politicians and the general populace blamed Chinese men for falling wages and worsening economic conditions, particularly in

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130. *Id.* at 5155.

131. *Id.* at 5155–56.

132. *See id.* at 5156 (Williams, arguing that "Mongolians . . . will never amalgamate with persons of European descent"); *id.* at 5157 (characterizing Chinese immigration as a "mighty tide of ignorance and pollution . . . pouring with accumulating force and volume into the bosom of our country"); *id.* at 5163 (comments of Sen. Henry W. Corbett of Oregon, claiming that Chinese immigrants degraded, demoralized, and corrupted communities). Sen. Trumbull was one of the few who spoke in favor of Chinese people, characterizing them as patient, laborious, industrious, skillful, and intelligent, noting that "[f]rom China we have much to learn." *Id.* at 5165–66; *see also id.* at 5172 (comments by Sen. Sumner, favorably comparing the tenets of Confucianism to those of Christianity).

133. *Id.* at 5157.

134. *Id.* at 5158.

135. *Id.* at 5125.

136. *See generally supra* note 121; Sen. Lyman Trumbull offered another amendment to *include* "persons born in the Chinese empire" in the scope of the Naturalization Act, but his amendment was defeated by a vote of 9–31, with 32 senators not voting; *see also* CONG. GLOBE, 41st Cong., 2d Sess. 5177 (1870).

California.[137] These sentiments culminated in the Chinese Exclusion Acts, the first of which was enacted in 1882.[138] This law suspended the immigration of "Chinese laborers" to the United States for ten years.[139] The Act marked the first time Congress enacted legislation limiting immigration into the United States based on race or nationality.[140]

The Chinese Exclusion Acts also did what Congress would not do in 1870: explicitly bar people of Chinese origin from becoming naturalized citizens of the United States.[141] Under the Naturalization Act of 1870, some Chinese men sued to become naturalized citizens, arguing that they should be considered "white."[142] Courts rejected this argument on the grounds that "a native of China, of the Mongolian race" was not a "white" person under the Naturalization Act.[143] The core issue in these cases—like that in *United States v. Dow* almost forty years earlier—turned on who was considered "white" in the eyes of the law.[144]

The centrality of race in American immigration law persisted well into the twentieth century. The Chinese Exclusion Acts were amended in 1884 and 1888, further limiting the rights of Chinese people living in the United States.[145] In 1892, Congress passed the Geary Act, renewing the ten-year ban on the immigration of Chinese laborers and placing even harsher restrictions on Chinese people already living in the United States.[146] The United States Supreme Court upheld the constitutionality of these laws, under the theory of federal supremacy.[147] Congress did not fully remove race as a criterion for

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137. *See* LUCY E. SALYER, LAWS AS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 9–12 (1995) (noting that a "severe depression" in California between 1873 and 1878 "resulted in reduced wages and widespread unemployment," which many labor groups attributed to Chinese labor competition).

138. An Act to Execute Certain Treaty Stipulations relating to Chinese, 22 Stat. 58, ch. 126 (May 6, 1882) [the Chinese Exclusion Act]; GOLD, *supra* note 121, at 85–218 (detailing the legislative history of the Chinese Exclusion Act of 1882 and subsequent amendments); SALYER, *supra* note 137, at 15–18 (same).

139. 22 Stat. 58, ch. 126, § 1 (May 6, 1882). The term "Chinese laborer" was broadly defined to include "both skilled and unskilled laborers and Chinese employed in mining." *Id.* at § 15. The Act did not apply to Chinese people who did not qualify as "laborers," specifically "teachers, students, merchants" and visitors. *Id.* at § 6.

140. SALYER, *supra* note 137, at 17.

141. 22 Stat. 58, Ch. 126, § 1 (May 6, 1882) (providing that no state or federal court "shall admit Chinese to citizenship," repealing "all laws in conflict with this act"). The core issue in *In re Ah Yup* – like that in United States v. Dow, almost forty years earlier – turned on who was considered "white" in the eyes of the law.

142. *See, e.g., In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878).

143. *Id.* at 224; *see also* SALYER, *supra* note 137, at 13 (discussing this case).

144. *See supra* notes 46–66 and accompanying text (discussing *Dow's* holding that a person of the "Malay" race was not white).

145. The Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), amended by Act of Jul. 5, 1884, ch. 220, 23 Stat. 115, repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600; *see* GOLD, *supra* note 121, at 219–35 (detailing the legislative history of the 1884 amendments to the Chinese Exclusion Acts); Scott Act, ch. 1064, 25 Stat. 504 (Oct. 1, 1888) (repealed 1943); GOLD, *supra* note 121, at 237–80 (detailing the legislative history of the Scott Act of 1888).

146. Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892) ("Geary Act"); *see* GOLD, *supra* note 121, at 281–318 (detailing the legislative history of the Geary Act).

147. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889) [The Chinese Exclusion Case] (holding that the 1888 amendment to the Chinese Exclusion Act did not exceed Congressional authority, even

naturalization of citizenship until 1952 through the passage of the McCarran-Walter Act.[148]

The naturalization laws adopted after the ratification of the Fourteenth Amendment—capped by the Chinese Exclusion Acts—heralded the nation's retreat from its commitment to equality after the Civil War. In an era marked by change and instability, non-white immigrants made a convenient target for politicians and their constituents. As Conness observed during the Fourteenth Amendment debates, "it may be very good capital in an electioneering campaign to declaim against the Chinese"[149] – or anyone else who may be painted as a racial "other." The Supreme Court interpreted the Fourteenth Amendment's birthright citizenship clause on the heels of this retreat.

D. *The Supreme Court Interprets the Fourteenth Amendment's Guarantee of Birthright Citizenship*

The United States Supreme Court interpreted the definition of citizenship in Section 1 of the Fourteenth Amendment in 1884 and 1898, during this time of economic, social, and political upheaval. In two cases, *Elk v. Wilkins*[150] and *United States v. Wong Kim Ark,*[151] the Court sought to clarify the meaning of the phrase "subject to the jurisdiction thereof" in Section 1 of the Fourteenth Amendment.[152] The Court held that—outside the traditional context of Native American tribes and diplomats enjoying sovereign immunity within the borders of the United States—the Fourteenth Amendment broadly extended both the rights and duties of citizenship to everyone born within the geographic boundaries of the United States. It reached this conclusion despite the nativistic trend in national sentiment that predominated at the time, as reflected in the Chinese Exclusion Acts.

The Court addressed the issue of Native American citizenship in 1884 in *Elk v. Wilkins*, sixteen years after the ratification of the Fourteenth Amendment. In *Elk*, the Court considered whether Native Americans, denominated "Indians" in the Constitution, were citizens of the United States if they were born members of a recognized Indian tribe, but had voluntarily severed their tribal connections.[153] In answering this question, the Court focused on the unique nature of Native American tribes within the borders of the United States: Though they "were not, strictly speaking, foreign states,"

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though it violated terms of a treaty with China); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding constitutionality of the Geary Act).

148. McCarran-Walter Act, the Immigration and Nationality Act (INA), Pub. L. No. 414, c. 477, 66 Stat. 163 (June 27, 1952) (current version at 8 U.S.C. §§ 1101 et seq.).

149. *See supra* note 109 and accompanying text.

150. Elk v. Wilkins, 112 U.S. 94 (1884).

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

152. *See* Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016) (discussing and comparing these cases).

153. *Elk*, 112 U.S. at 98–99.

they were treated as "alien nations, distinct political communities," with whom the United States interacted through treaties and acts of Congress.[154] For this reason, Section 2 of the Fourteenth Amendment referred to "Indians not taxed" as outside the sphere of individuals entitled to political representation in the House.[155] The Court concluded that persons born into a native tribe were not considered members of the American polity unless they formally became naturalized citizens, either via treaty, federal statute, or individual application.[156] Their status was thus similar to diplomats living within the borders of the United States, who owed allegiance to another sovereign and thus were not "subject to the jurisdiction" of the United States.[157]

Native Americans born in "Indian country" did not become citizens by birth within the territorial boundaries of the United States until Congress passed the Indian Citizenship Act of 1924.[158] Although some individual Native Americans became U.S. citizens and benefitted from that status,[159] the statutory extension of citizenship to Native Americans did not improve their condition as a group. Birthright citizenship for Native Americans constituted the "end point of federal plans to end the 'Indian problem' by ending Indian tribes."[160] Citizenship, rather than constituting a "gift to Native people," was more accurately characterized as "part of a campaign of forced assimilation" that undermined tribal sovereignty and destroyed many parts of Native culture.[161] Citizenship for Native Americans was intertwined with broader issues unique to Native tribes and their struggle to avoid annihilation in nineteenth-century America.

Fourteen years after its decision in *Elk v. Wilkins*, the Supreme Court revisited the definition of American citizenship under the Fourteenth Amendment in *United States v. Wong Kim Ark*.[162] In this case, the Supreme Court held

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154. *Id.* at 99; *see also Wong Kim Ark,* 169 U.S. at 680–82 (discussing this reasoning). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statements by Sen. Lyman Trumbull, explaining why "Indians" would not be considered "subject to the jurisdiction of the United States" under Section 1 of the Fourteenth Amendment); *see also id.* at 2890 (remarks of Sen. Jacob M. Howard of Michigan).

155. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."); *see also Elk*, 112 U.S. at 102–03 (discussing this language in the Fourteenth Amendment).

156. *Elk*, 112 U.S. at 109 ("To be a citizen of the United States is a political privilege which no one, *not born to*, can assume without its consent in some form.") (emphasis added).

157. *See infra* notes 172–177 and accompanying text.

158. An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, Pub. L. No. 68–175, 43 Stat. 253 (June 2, 1924) (declaring that all "non-citizen Indians born within the territorial limits of the United States" are "citizens of the United States").

159. Ely Parker, a member of the Iroquois tribe who eventually attained U.S. citizenship and became a Brigadier General in the Union Army and the Commissioner of Indian Affairs, fell into this category. *See* Berger, *supra* note 152, at 1206–09; *see generally* ARTHUR CASWELL PARKER, THE LIFE OF GENERAL ELY S. PARKER: LAST GRAND SACHEM OF THE IROQUOIS AND GENERAL GRANT'S MILITARY SECRETARY (1919).

160. Berger, *supra* note 152 at 1205–06.

161. *Id.* at 1257; *see also* Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2527–28 (characterizing the Act as "a final blow to Indian sovereignty").

162. United States v. Wong Kim Ark, 169 U.S. 649 (1898); *see generally* FROST, *supra* note 13, at 50–73 (discussing this case); Salyer, *supra* note 113 (same).

that, unlike members of Native tribes, children of foreign nationals living in the United States were "subject to the jurisdiction" of this country.[163] In seeking to bar Wong Kim Ark from re-entering the United States after a trip to China, the United States government unsuccessfully argued that a person of Chinese descent was not a citizen of the United States, even though he was born in California.[164] To reach this result, the government relied on the status of Wong's parents, who were described as subjects of the emperor of China.[165] Because Wong Kim Ark's parents (particularly his father) were Chinese subjects at the time he was born, the government argued that they—and by extension, Wong Kim Ark—were not "subject to the political jurisdiction of the general government" of the United States of America.[166]

The Court rejected the government's proffered interpretation of the words "subject to the jurisdiction thereof." Instead, it held that the term excluded only two "classes of cases" in addition to Native Americans who were born into an Indian tribe: 1) "children born of alien enemies in hostile occupation," and 2) "children of diplomatic representatives of a foreign state."[167] Wong Kim Ark fell into neither category. Both exceptions were grounded in the common law and well-settled principles of law, long before the Fourteenth Amendment was ratified.[168]

Alien enemies are not considered "subject to the jurisdiction" of the United States if they are engaged in hostile occupation of U.S. territory.[169] Thus, the Supreme Court held that the port of Castine in the state of Maine was outside the jurisdiction of the United States while it was occupied and held by British forces during the War of 1812.[170] As a result, customs duties were not owed under U.S. law for goods imported into Castine during British occupation, "for where there is no protection or allegiance or sovereignty [to the United States], there can be no claim to obedience."[171]

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163. *Wong Kim Ark*, 169 U.S. at 682.

164. The government argued that Wong Kim Ark, "although born within the United States, [was] not, under the laws of the United States a citizen thereof, for the reason that his father and mother were, at the time of his birth . . . Chinese persons, and subjects of the emperor of China, and . . . therefore, Wong Kim Ark is also a Chinese person, and a subject of the emperor of China." In re Wong Kim Ark, 71 F. 382, 383 (N.D. Cal. 1896), *aff'd sub nom*. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

165. *Wong Kim Ark*, 169 U.S. at 652.

166. Citing international law, the government argued that the "political status of the child follows that of the father, and that of the mother when the child is illegitimate," and therefore "the mere fact of birth in this country does not, ipso facto, confer any right of citizenship." *In re Wong Kim Ark*, 71 F. at 384; *see also* FROST, *supra* note 13, at 59–60 (discussing this aspect of the opinion).

167. *Wong Kim Ark*, 169 U.S. at 682. *See also* Houston, *supra* note 113, at 700–01 (discussing these exceptions under the British common law).

168. *Wong Kim Ark*, 169 U.S. at 657–58, 682.

169. *Id*. at 682–83.

170. *See* United States v. Rice, 17 U.S. 246, 254 (1819) (customs duties were not owed under U.S. law for goods imported into a port occupied by the British military and hence outside the jurisdiction of the United States, "for where there is no protection or allegiance or sovereignty, there can be no claim to obedience"); Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 L. & HIST. REV. 621, 637 (2008).

171. *Rice*, 17 U.S. at 254.

Diplomatic representatives or foreign ministers also are not "subject to the jurisdiction" of the United States while serving in their official capacities due to the long-standing "fiction of extraterritoriality" created by international law.[172] Thus, although diplomats may be physically present within the geographic boundaries of the United States, they are legally considered to "remain within the territory of [their] own state."[173] As a result, the diplomat's children, even if born in the United States, are considered natives of the diplomat's home country (not the United States).[174] For similar reasons, diplomats and their children are immune from the criminal jurisdiction of their host nation and, hence, cannot be prosecuted for crimes allegedly committed in the host nation during their diplomatic service.[175] The fiction of extraterritoriality derives from the nature of the diplomat's service: He cannot owe a "temporary and local allegiance" to the sovereign in the country of his post, as a dual loyalty would render him "less competent to the objects of his mission."[176] The country that receives a diplomat or foreign minister, therefore, gives implied consent to this exemption from its jurisdiction within its own territory, which is otherwise "exclusive and absolute."[177]

Neither of these exemptions were found to apply to other aliens located within the geographic boundaries of the United States. The Court reasoned that "[w]hen private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other . . . it would be obviously inconvenient and dangerous to society . . . if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."[178] Unlike diplomats, these individuals are not employed by or otherwise "engaged in national pursuits" on behalf of their home sovereign.[179] Thus, the Supreme Court found that the words "subject to the jurisdiction thereof" in the Fourteenth Amendment were not intended to "impose any new

172. *Elk*, 112 U.S. at 121 (Harlan, J., dissenting); *see also Wong Kim Ark,* 169 U.S. at 685; The Schooner Exchange v. McFadden, 11 U.S. 116, 138–39 (1812) (noting that a foreign minister is "not within the jurisdiction of the sovereign at whose Court he resides," because he owes allegiance to the sovereign he represents, not the one governing the country where he is posted); Citizenship, 10 Op. Att'y. Gen. 382, 396–97 (1862) (citing "children of foreign ministers" as an exception to the general rule that "every person in this country is born a citizen").

173. *Elk*, 112 U.S. at 121 (Harlan, J., dissenting).

174. *Id*. (Harlan, J., dissenting); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2768, 2769 (1866) (remarks of Sen. Benjamin Wade of Ohio); *id*. at 2890 (remarks of Sen. Jacob M. Howard of Michigan).

175. *See* Vienna Convention on Diplomatic Relations, Art. 31 (Apr. 18, 1961), 23 U.S.T. 3227 (ratified by U.S. Senate, Sept. 14, 1965). Any case brought against a diplomat, or a family member entitled to diplomatic immunity "shall be dismissed." Diplomatic Relations Act of 1978, 22 U.S.C. § 254d; *see also* Derrick Howard, *Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era*, 3 ALA. C.R. & C.L. L. REV. 121, 138–141 (2012) (describing the history of diplomatic immunity).

176. *Wong Kim Ark*, 169 U.S. at 685 (citing *The Schooner Exchange*, 11 U.S. at 139).

177. *Id*. at 683–84 (citing *The Schooner Exchange*, 11 U.S. at 136).

178. *Id*. at 685–86 (citing *The Schooner Exchange*, 11 U.S. at 144).

179. *Id*. at 686 (citing *The Schooner Exchange*, 11 U.S. at 144).

restrictions upon citizenship."[180] Rather, it held that "[e]very citizen *or subject of another country*, while domiciled [in the United States], is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."[181]

The Supreme Court thus concluded that the Fourteenth Amendment's "broad and clear"[182] guarantee of birthright citizenship was not, and could not, be limited by the Chinese Exclusion Acts. These Acts, passed under the congressional power to regulate the naturalization of U.S. citizens, could not control the meaning of the Fourteenth Amendment "or impair its effect, but must be construed and executed in subordination to its provisions."[183] Thus, while the Act may have allowed the United States to "exclude or expel. . . persons of the Chinese race, born in China," its provisions were "inapplicable to *citizens*, of whatever race or color."[184] Wong Kim Ark's undisputed place of birth, San Francisco, California, made him a United States citizen.

The Supreme Court's decision in *Wong Kim Ark* has been settled law in this country for 125 years. Although *Wong Kim Ark* did not stop the forces of white supremacy from undermining the concept of "citizenship" during the Jim Crow Era and beyond, it has played a key role in the nation's ongoing evolution into a pluralistic, liberal democracy. The baseline guarantee of citizenship, extended to every person born in this country, is critical to that endeavor.

II. THE MODERN ATTACK ON BIRTHRIGHT CITIZENSHIP

Unconditional birthright citizenship in the United States is currently under attack. White supremacists openly state their purpose in doing so: to make (or remake) the United States of America a country for white people only.[185] They believe that *Dred Scott* was rightly decided. Other prominent activists and politicians' cloak racial motivations in more modern trappings – arguing that the benefits of citizenship belong to "legacy Americans" – while disclaiming any racial motivation.[186] Regardless of intent, however, the assault on birthright citizenship – citizenship as a birthright of all children born in the United States, without regard to the immigration status of their parent(s) – is

180. *Id*. at 687–88. The Court similarly concluded that, when Congress used the words "not subject to any foreign power" in the Civil Rights Act of 1866, it did not intend to exclude anyone from the guarantee of birthright citizenship outside the exceptions described above for 1) alien enemies and 2) diplomats. *Id*. at 688.

181. *Id*. at 693 (emphasis added).

182. *Id*. at 704.

183. *Id*. at 699; *see also id*. at 703 (noting that the Fourteenth Amendment confers "no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship").

184. *Id*. at 699 (citations omitted and emphasis added); *see also id*. at 702 ("Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.").

185. *See Reject 'Asia for the Asians, Africa for the Africans, White Countries for EVERYBODY' - Reject 'Birthright Citizenship'*, STORMFRONT.ORG, https://perma.cc/PE95-BBVJ.

186. *See infra* note 214 and accompanying text.

real and ongoing. Internationally, the availability of unrestricted birthright citizenship has steadily declined over the past forty years.[187] In the United States, efforts to roll back birthright citizenship have emerged in both state and federal governments, at the executive and legislative level, any of which could land the issue of birthright citizenship in the Supreme Court. Perhaps the most serious threat to birthright citizenship in the United States derives from plans to call an Article V constitutional convention, which could result in excising birthright citizenship from the Fourteenth Amendment itself.

A. *The Racial Animus Driving the Campaign to End Birthright Citizenship in the United States*

The impetus for reinterpreting and restricting the meaning of the Fourteenth Amendment's guarantee of birthright citizenship today is largely racially motivated. Some proponents of this "immigration reform" candidly admit their desire to exclude racial minorities from the American polity; others do not.[188] White nationalists have long railed against the Fourteenth Amendment's grant of birthright citizenship to all persons born in the United States.[189] One former white nationalist has described the elimination of birthright citizenship as a "cornerstone" of white nationalist dogma.[190] Of course, many people who oppose birthright citizenship for the children of undocumented immigrants are not white nationalists or white supremacists. However, the core beliefs of these groups have steadily migrated to the mainstream of American politics, from the dark corners of the web to *Tucker Carlson Tonight*, which averaged almost 3 million viewers per episode in 2021.[191] The election of Donald Trump in 2016 heralded a wave of hostility towards non-white immigrants that swept along with it denunciations of

187. *See infra* Section II.B.

188. *See infra* Section II.A. (explaining the manner in which the doctrines of white supremacy, white Christian nationalism, and white replacement theory support opposition to unrestricted birthright citizenship).

189. *See infra* note 229 and accompanying text.

190. Ewan Palmer, *David Duke Godson Calls Trump's Birthright Citizenship Removal Plan 'Goal of White Nationalists'*, NEWSWEEK (Oct. 31, 2018), https://perma.cc/R98F-ZDW4 (referring to statement by Derek Black, who "was once the heir apparent of the white nationalist movement," but denounced these beliefs in 2013). *See* Terry Gross, *How A Rising Star Of White Nationalism Broke Free From The Movement*, NPR.ORG (Sept. 24, 2018), https://perma.cc/8999-HF5G.

191. Mark Joyella, *Tucker Carlson Has Most-Watched Show In Cable News As Fox Leads Basic Cable For 17 Straight Weeks*, FORBES (June 15, 2021), https://perma.cc/5KY4-VGYT; David Folkenflik, *Tucker Carlson Ousted at Fox News Following Network's $787 Million Settlement*, NPR.ORG (Apr. 24, 2023), https://perma.cc/6R6A-X2C4 (discussing how Fox News "parted ways" with Carlson and discontinued his show in April 2023); Shannon Bond, *How Tucker Carlson Took Fringe Conspiracy Theories to a Mass Audience*, NPR.ORG (Apr. 25, 2023), https://perma.cc/ET3V-P4RK (referring to Carusone's argument that Tucker Carlson's show incorporation of White Replacement Theory led to its adoption in Republican politics); *see also White Nationalist*, SOUTHERN POVERTY LAW CENTER, https://perma.cc/2NZA-CFSF (noting that "white nationalist rhetoric and policies – including a belief in a so-called "great replacement" of white people, strict opposition to immigration and a belief that national belonging should be determined by race – have become even more deeply embedded the United States' broader political right" since 2019).

unrestricted birthright citizenship.[192] The racial dynamic undergirding this movement is not that different from the reasoning expressed by Chief Justice Roger B. Taney in the nineteenth century: "real" Americans are white.[193]

1. *White supremacy, white Christian nationalism, white replacement theory, and "closing the anchor baby loophole"*

Racism and white supremacy have been potent forces in America since its founding. Both in the nineteenth century and today, these beliefs have animated racial and ethnic violence, discrimination, and the political exclusion of non-white people. Modern adherents of white nationalism, white Christian nationalism, and white replacement theory all embrace the idea that the United States of America "belongs" to people who are white. Opposition to birthright citizenship for children with parent(s) who lack legal immigration status is a core tenet of all these ideologies.

White nationalism is centered on the belief that "white identity should be the organizing principle of the countries that make up Western civilization."[194] "White nationalists advocate for policies to reverse changing demographics and the loss of an absolute, white majority" in the United States.[195] For that reason, "[e]nding nonwhite immigration, both legal and illegal, is an urgent priority. . . for white nationalists seeking to preserve white, racial hegemony."[196]

A related concept is Christian Nationalism or White Christian Nationalism.[197] The roots of the concept are evident in Chief Justice Taney's opinions in *Dred Scott* and earlier in *Dow*. These cases illustrate the nineteenth-century belief that only white Christian men were entitled to the full benefits of American citizenship.[198] Under this worldview, adherence to the Christian faith may have been best characterized as a necessary but insufficient requirement of full citizenship.[199] Being a Christian – as Lorenzo Dow

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192. *See infra* notes 239–55, 316–22 and accompanying text.

193. *See* Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 57 (2012) (arguing that the "modern political assault on birthright citizenship" is "grounded in nativism, sexism, and racism"). Republican Rep. Marjorie Taylor Green alluded to this idea when she stated, "[W]e are the Americans, and we should have a lot of pride in our home and our country. [W]e need to clean up our house. [] We need to shut our doors. We need to shut our windows. We need to throw out the trash, and we need to clean it up." David Edwards, *Marjorie Taylor Greene tells GOP donors: 'We are the Americans. . . and we need to throw out the trash'*, RAW STORY (Apr. 30, 2023), https://perma.cc/57RE-QCPP.

194. *White Nationalist*, *supra* note 191 (emphasis added).

195. *Id.*

196. *Id.*

197. *See generally* PHILIP S. GORSKI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY (2022).

198. *See supra* note 66 and accompanying text.

199. *See* Michelle Boorstein, *Researchers Warn that Christian Nationalists are Becoming More Radical and Are Targeting Voting*, WASH. POST (Mar. 18, 2022), https://perma.cc/3KH9-TERM (discussing the history of "[g]overnment discrimination against non-Protestants" in the United States, and the lingering belief by many Evangelical Protestants that "true Americans are White, culturally conservative and natural born citizens").

could attest – did not compensate for a lack of whiteness.[200]

Unfortunately, these dogmas have not been swept into the dustbin of history. Even today, white Christian nationalists believe that America should be ruled by Christians – as the movement broadly defines that term.[201] They believe it is their duty and their birthright to preserve "order," defined hierarchically, with "white Christian men at the top," through violence if necessary.[202] The movement's embrace of violence partially explains why crosses, Christian banners and flags, and other symbols of faith were prominently displayed by rioters who stormed the United States Capitol and attempted to overturn the results of a Presidential election on January 6, 2021.[203] A recent poll shows that "majorities of white evangelical Protestants and Republicans remain animated by this vision of a white Christian America."[204] In fact, "Christian nationalists . . . make up the base of the Republican Party."[205]

White nationalists[206] (and white Christian nationalists[207]) are also white supremacists: people who believe that "white people are genetically superior to other people," and further that "white people have their own 'culture' that is superior to other cultures."[208] White supremacy also carries with it the belief that white people should control or dominate "people of other backgrounds, especially where they may co-exist."[209] The two doctrines go hand-in-hand: the perceived superiority of white genetics and culture leads to the belief that white people are entitled to dominate other groups or, alternately, to exclude them from the white nation-state.

White supremacists and white nationalists are the progenitors of white replacement theory, also known as white genocide or white extinction

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200. *See supra* notes 46–66 and accompanying text.

201. GORSKI & PERRY, *supra* note 197, at 6–7. Over time, the meaning of "Christian" within the movement has expanded to include "Catholics and Mormons and even hyphenated to include (some 'good') Jews." *Id*. at 74.

202. *Id*. White Christian nationalists view violence as a "righteous means of defending freedom and restoring order, means that are reserved to white Christian men." *Id*. at 7.

203. *See* Samuel L. Perry & Andrew Whitehead, *January 6th May Have Been Only the First Wave of Christian Nationalist Violence*, TIME (Jan. 6, 2021), https://perma.cc/RPB3-WHSV; Philip Gorski, *White Christian Nationalism: The Deep Story Behind the Capitol Insurrection*, ABC NEWS (Jan. 12, 2021), https://perma.cc/QV3R-ET9T.

204. Jennifer Rubin, *A New Poll Gives us Insight into a Troubling Anti-American Movement*, THE WASHINGTON POST (Feb. 9, 2023), https://perma.cc/CP2W-CWVQ.

205. *Id*.

206. *White Nationalism*, DICTIONARY OF POPULISM, European Center for Populism Studies, https://perma.cc/G34K-JCDW ("White nationalism. . .refers to a form of white supremacy that emphasizes defining a country or region by white racial identity and which seeks to promote the interests of whites exclusively, typically at the expense of people of other backgrounds").

207. *See* GORSKI & PERRY, *supra* note 197, at 8 (noting that white Christian nationalism is "rooted in white supremacist assumptions and empowered by anger and fear").

208. *White Supremacy*, ANTI-DEFAMATION LEAGUE (ADL), https://perma.cc/8J9J-XNQE; *see also* Jancie Gassam Asare, *4 Myths About White Supremacy That Allow It To Continue*, FORBES (Jan. 14, 2021), https://perma.cc/N9YT-UETK.

209. *White Supremacy*, *supra* note 208; *see also White Supremacy*, DICTIONARY OF POPULISM, European Center for Populism Studies, https://perma.cc/7U4D-RXU3.

theory.[210] These beliefs, popularized by neo-Nazi David Lane's *White Genocide Manifesto* in 1995, assert that the white race is deliberately being forced into extinction in the United States and throughout the world.[211] White replacement theory targets reproductive rights, as the increase of the white race – through rape, if necessary –is a concomitant goal, along with the elimination or displacement of minority populations.[212]

Especially at its inception, Jews were portrayed as the puppet masters of "white genocide."[213] As this rhetoric has shifted to the mainstream of American political discourse, however, its focus has transitioned from blatant anti-Semitism to hyper-partisanship. Former President Trump, Tucker Carlson, and other Republican politicians and pundits claim that Democrats are "trying to replace the current electorate. . . with new people, more obedient voters from the third world."[214] The implication is that the "current electorate" is primarily white, while the "obedient voters from the third world" are not.[215] The idea that non-white immigrants who become voters are somehow incapable of independent decision-making at the ballot box is a

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210. *See The Racist 'Great Replacement' Conspiracy Theory Explained*, SOUTHERN POVERTY LAW CENTER (May 17, 2022), https://perma.cc/46VK-VV87 (noting that "[t]he 'great replacement' theory is inherently white supremacist").

211. *SPLC Poll Finds Substantial Support for 'Great Replacement' Theory and Other Hard-Right Ideas*, SOUTHERN POVERTY LAW CENTER (June 1, 2022), https://perma.cc/4QRV-SZD8 (defining white replacement theory as the belief in "a systematic, global effort to replace white, European people with nonwhite, foreign populations. The ultimate goal of those responsible — Democrats, leftists, 'multiculturalists' and, at times, Jews — is to reduce white political power and, ultimately, to eradicate the white race."); *The Racist 'Great Replacement' Conspiracy Theory Explained, supra* note 210.

212. *See* Cynthia Miller-Idriss, *How the Loss of Roe Directly Serves White Supremacists' Horrifying Plot*, MSNBC (Aug. 14, 2022), https://perma.cc/53A3-THEY. Neo-Nazis explain the theory as follows: "One reason that Whites are on the skids to minority status is the low White birthrate. White Americans, in fact, have a negative birthrate … A greater immediate danger, however, is the flood of non-White immigrants pouring into the US. Consequently, the Number One priority in saving White America is to close the border. We need to stop the flow of non-White invaders into the United States and begin a program to systematically expel those who are already here." *Close the Border!,* STORMFRONT.ORG, https://perma.cc/F6B7-LKJN.

213. *See What is White Replacement Theory? Explaining the White Supremacist Rhetoric*, NPR.ORG (Sept. 26, 2021), https://perma.cc/EG7P-TMA9 (noting that "many incarnations of this theory involve a supposed cabal of Jewish elites"); Deena Zaru, *How 'Replacement Theory' Became Prominent in Mainstream US Politics*, ABC NEWS (May 16, 2022), https://perma.cc/RGV4-V6L4; Michael D'Antonio & James Cohen, *The Racist Theory That is Animating some Trump Backers*, CNN (Oct. 27, 2021), https://perma.cc/9EFR-DM9Y.

214. *See* Khaleda Rhaman, *Video of Tucker Carlson Repeatedly Touting 'Replacement Theory' Goes Viral*, NEWSWEEK (May 16, 2022), https://perma.cc/4L8V-HJD6; *see also* Lee Moran, *Fox News' Tucker Carlson Goes On Lengthy Rant About Immigrants Replacing Americans*, HUFFPOST (Dec. 18, 2018) (quoting Carlson as stating, "I'm not against the immigrants. I'm just … for Americans. Nobody cares about them. It's like, 'shut up, you're dying, we're gonna replace you.'"). *See* Adam Serwer, *Conservatives Are Defending a Sanitized Version of 'The Great Replacement'*, THE ATLANTIC (May 19, 2022), https://perma.cc/YK77-86SK (discussing the increasing prevalence of this belief among members of the Republican party); *see also* Cameron Joseph, *Racist 'Replacement Theory' Is Bleeding Into GOP Senate Campaigns*, VICE NEWS (May 10, 2022) (describing replacement theory rhetoric adopted by Republican Senate candidates J.D. Vance (Oh.), Eric Schmitt (MO), Blake Masters (AZ) and Ron Johnson (Wis.), as well as House representatives Matt Gaetz (FL) and Scott Perry (Penn.)).

215. Carlson has also obliquely referred to white voters as "legacy Americans" who are being pushed out by "more obedient people from faraway countries." *See* Domenico Montenaro, *How the 'Replacement' Theory Went Mainstream on the Political Right*, NPR.ORG (May 17, 2022), https://perma.cc/YK77-86SK (quoting Carlson).

nineteenth-century racist trope – prevalent during the era of the Chinese Exclusion Acts[216] – that should have been abandoned with the buggy whip.

Advocates of white replacement theory often portray non-white immigrants as an invading force that must be repelled to defend the white race. In 2018, President Trump tweeted that Democrats "don't care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country, like MS-13. They can't win on their terrible policies, so they view them as potential voters!"[217] More recently, Florida Governor and Presidential candidate Ron DeSantis has promised to stem the tide of an alien "invasion" if elected President in 2024.[218] Again, this rhetoric is reminiscent of the nineteenth century, as politicians levied fears of a Chinese "invasion" to win elections and keep Chinese men out of the ballot box.[219]

Rhetoric using words like "invasion" and "infest" is dangerous, because it both dehumanizes immigrants and creates an irrational fear among white people that can lead to acts of violence.[220] This fear, infecting the minds of a heavily armed public, has led to the murder of numerous Black, Hispanic, Asian, Muslim, and Jewish people via mass shootings and individual killings, in the past five years.[221] In the nineteenth and early twentieth centuries, racial violence was similarly fueled by the irrational fears of white people and the dehumanization of Black people, Chinese people, and others who were not considered "white."[222]

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216. *See supra* notes 127-128 and 133 and accompanying text.

217. Donald J. Trump (@realDonaldTrump), X (FORMERLY KNOWN AS TWITTER) (June 19, 2018); Abigail Simon, *People Are Angry President Trump Used This Word to Describe Undocumented Immigrants*, TIME (June 19, 2018), https://perma.cc/JJZ3-84CY.

218. *See* Gov. Ron DeSantis, DeSantis for President, *Mission Stop the Invasion: No Excuses*, https://perma.cc/P424-ASGV; Valerie Gonzalez & Steve Peoples, *DeSantis Unveils an Aggressive Immigration and Border Security Policy that Largely Mirrors Trump's*, AP NEWS (June 26, 2023), https://perma.cc/7JCQ-HRQT (quoting the DeSantis slogan, "Stop the Invasion"); *Close the Border!, supra* note 212 ("We need to stop the flow of non-White invaders into the United States").

219. *See supra* notes 109, 133 and accompanying text. *See also* Ben Zimmer, *Where Does Trump's 'Invasion' Rhetoric Come From?*, THE ATLANTIC (Aug. 6, 2019), https://perma.cc/8ZY2-VP69 (noting that "[t]he American brand of nativism has long relied on menacing images of immigrant invaders").

220. Simon, *supra* note 217 (noting that Trump was criticized for using the term "infest" because it is "dehumanizing to use a term traditionally used for pests").

221. *See The Racist 'Great Replacement' Conspiracy Theory Explained, supra* note 210 (citing as examples mass murders carried out at a supermarket in Buffalo, New York; a Pittsburgh synagogue, a mosque in Christchurch, New Zealand; a Walmart in El Paso, Texas; a synagogue in Poway, California; and a mosque in Escondido, California, from 2018-2022); Julio Ricardo Valera, *Trump's Anti-Immigrant 'Invasion' Rhetoric Was Echoed by the El Paso Shooter for a Reason*, NBC NEWS (Aug. 5, 2019), https://perma.cc/3ESZ-A4Z6; Maria Paul, *Woman Fatally Shot Uber Driver She Thought Was Kidnapping Her, Police Say*, THE WASHINGTON POST (June 26, 2023), https://perma.cc/F6PX-3KAR (noting that the defendant thought she was being kidnapped because she saw a traffic sign for Juarez, Mexico, in El Paso, Texas).

222. *See, e.g.,* Sandra L. Rierson & Melanie H. Schwimmer, *The Wilmington Massacre and Coup of 1898 and the Search for Restorative Justice*, 14 ELON L. REV. 117, 145–50 (2022) (describing numerous acts of "domestic terrorism" against Black communities during the post-Reconstruction Era); CAMERON MCWHIRTER, RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA (2012) (describing violence against Black communities after World War I); Denny Chin & Kathy Hirata Chin, *"Kung Flu": A History of Hostility and Violence Against Asian Americans*, 90 FORDHAM L. REV. 1889 (2022) (describing numerous instances of racial violence and expulsions of Asian Americans); Lupe S. Salinas, *Lawless Cops, Latino Injustice, and Revictimization by the Justice System*, 2018 MICH. ST. L. REV. 1095 (2018) (discussing acts of violence against Latinos).

Most (but not all) modern advocates of white replacement theory do not openly encourage violence and murder, and instead rely on euphemisms to convey their message of racial exclusion. Prominent white nationalist Peter Brimelow's website, VDare.com, promotes "patriotic immigration reform," proclaiming that "demography is destiny."[223] The name "VDare" comes from Virginia Dare, the first English child born in North America.[224] Virginia Dare's ultimate fate is unknown, along with that of the rest of the "Lost Colony" of 115 English settlers who arrived on Roanoke Island, North Carolina in 1587.[225] Since at least the 1830s, white supremacists have used the idea and legacy of Virginia Dare to promote efforts to protect "vanishing" white people, most recently in response to increased immigration and demographic change.[226] Brimelow promotes the legend that Virginia Dare and other members of that expedition figuratively disappeared by being absorbed into the local Native American population.[227] Brimelow concludes, "We cannot allow the Lost Colony to prove analogous to America itself."[228]

These ideas were once relegated to the fringes of political discourse in the United States. However, as politicians and pundits have sanitized and widely propagated them, an increasing percentage of the voting population, particularly among those who identify as Republican, accept white replacement theory. A poll conducted by the Southern Poverty Law Center in April 2022 found that "[n]early seven in ten Republicans surveyed agree to at least some extent that demographic changes in the United States are deliberately driven by liberal and progressive politicians attempting to gain political power by 'replacing more conservative white voters.'"[229]

Brimelow and other purveyors of white nationalism and white replacement theory have, for many years, demanded that America end birthright citizenship or – in their own words – "close the Anchor Baby Loophole."[230] The

223. *About*, VDARE.COM, https://perma.cc/N685-M5LW (last visited Oct. 20, 2023).

224. *Id.*

225. *See generally* ANDREW LAWLER, THE SECRET TOKEN: MYTH, OBSESSION, AND THE SEARCH FOR THE LOST COLONY OF ROANOKE (2019).

226. *Id.* at 276. The legend of Virginia Dare continued to grow throughout the nineteenth and twentieth centuries. In 1917, an advertisement in NATIONAL GEOGRAPHIC magazine read, "We Plead in the Name of Virginia Dare, that North Carolina Remain White." *Id.* at 287.

227. Peter Brimelow, *Why VDARE.com? Why the White Doe?*, VDARE.COM, https://perma.cc/K989-6H4L (last visited Oct. 20, 2023).

228. *See About*, VDARE.COM, *supra* note 223.

229. Cassie Miller, *SPLC Poll Finds Substantial Support for 'Great Replacement' Theory and Other Hard-Right Ideas*, SPLC (June 1, 2022), https://perma.cc/4QCA-SJTY. A different poll conducted in December 2021 by the Associated Press and NORC asked similar questions and yielded slightly different results, finding that almost half of Republicans (42%) subscribe to these beliefs. *See Immigration Attitudes and Conspiratorial Thinkers: A Study Issued on the 10th Anniversary of The Associated Press-NORC Center for Public Affairs Research*, NORC AT THE UNIVERSITY OF CHICAGO (May 9, 2022), https://perma.cc/JJG2-SKYA; *see also* Philip Bump, *Nearly Half of Republicans Agree with 'Great Replacement Theory'*, THE WASHINGTON POST (May 9, 2022), https://perma.cc/CJW9-2D8B (describing and analyzing this polling data).

230. Peter Brimelow, *Jared Taylor and Peter Brimelow: Let's Put a Cherry on Top of the Trump Immigration Plan!*, VDARE.COM (Aug. 27, 2015), https://perma.cc/8KK5-KFN6. In this interview, Brimelow stated that "the thing that delighted us the most in [Trump's immigration] proposal is . . . 14th Amendment reform—closing the 'Anchor Baby' loophole. It's one of our favorite subjects, one we've

term "anchor baby" is derisively used to refer to a child born in the United States to parents without legal immigration status.[231] Former President Trump and numerous Republican politicians and commentators regularly use this pejorative term to attack birthright citizenship for children with undocumented parent(s).[232] The term is based on the scenario in which a non-citizen comes to the United States expressly for the purpose of having a baby, so that the child's American citizenship can act as an "anchor" for the parent's own citizenship status, allowing both parent and child to stay in the United States and ultimately become American voters and receive American welfare benefits.[233] There are many flaws with this theory – chief among them that having an American citizen child by no means confers automatic American citizenship on the parent – but these facts have not deterred the use or rhetorical effectiveness of the term.[234]

Some white nationalists, including Brimelow, have argued that the elimination of birthright citizenship should be retroactive, stripping American citizenship from all people who were born in the United States to non-citizen parent(s), at any point in time.[235] Although Brimelow has acknowledged that such a proposal would be "radical," he cites as past examples the American South – presumably under the *Dred Scott* decision – and South Africa under

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been writing about for 14 years." *Id.; see also* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 264–67 (1995) ("[T]he fact that the children of even illegal immigrants are automatically U.S. citizens is plainly outdated. It must be ended, by amending the Constitution if necessary").

231. *See* Nathaniel Parker, *Weigh Anchor! Enforce the Citizenship Clause*, VDARE.COM (Aug. 31, 2001), https://perma.cc/6Q9J-8FRE (criticizing the "anchor baby effect" for rendering "a baby born to foreign parents five minutes after they crept over the border illegally . . . just as American as a baby whose parents are both Americans and U.S. citizens and whose ancestors have been here 350 years"). LEO R. CHAVEZ, ANCHOR BABIES AND THE CHALLENGE OF BIRTHRIGHT CITIZENSHIP 13 (2017) (noting that common usage of the pejorative term "anchor baby" in the United States arose in the early 2000's).

232. Trump promised that his administration would test "whether or not anchor babies are citizens" through the courts, "because a lot of people don't think they are." Reena Flores, *Donald Trump: "Anchor Babies" Aren't American Citizens*, CBS NEWS (Aug. 19, 2015), https://perma.cc/Z2CF-SMM2 (quoting Fox News interview with candidate Trump); *see also* Barbara Rodriguez, *Asked about Trump's Birthright Citizenship Comments, Reynolds Defers to Feds; Hubbell, Porter Oppose*, THE DES MOINES REGISTER (Oct. 30, 2018), https://perma.cc/4LES-GLSJ (quoting press release issued by Iowa Rep. Steve King, predicting that ending birthright citizenship "will ensure that illegal aliens cannot use 'anchor babies' in order to take advantage of our overly generous welfare system").

233. *See* William M. Stevens, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment's Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 349–50 (2008).

234. *See* Alexandra Villareal, *'Anchor Babies': The 'Ludicrous' Immigration Myth that Treats People as Pawns*, THE GUARDIAN (Mar. 16, 2020), https://perma.cc/SUK8-VDY2 (characterizing the term "anchor baby" as a "narrative trope that completely misrepresents the harsh realities of America's current immigration laws"); Mariana E. Ormode, Comment, *Debunking the Myth of the "Anchor Baby": Why Proposed Legislation Limiting Birthright Citizenship is not a Means of Controlling Unauthorized Immigration*, 17 ROGER WILLIAMS UNIV. L. REV. 861, 863 (2012) (concluding that "giving birth on American soil is a protracted and ineffectual manner of gaining citizenship status for the birth parent, and therefore any attempt to bring about a constitutional amendment or enact legislation eliminating birthright citizenship would not cure the issue it seeks to remedy").

235. Brimelow, *supra* note 230. Arguing that such a policy should not be considered racist, Taylor added, "It would be a question of stripping American citizens of citizenship that they got in ways now considered illegitimate. That would be a matter of law and not a matter of race." *Id.*

Afrikaner rule.[236] Brimelow does not cite the Nazis' Nuremberg laws as a further example, although they similarly stripped citizenship from Germany's Jewish population in the years leading up to the Holocaust.[237] The Nazis themselves drew inspiration from American race-based laws regarding citizenship.[238] The retroactive, citizenship-stripping approach is the most extreme of all existing proposals to end birthright citizenship for the children of the undocumented.

White supremacy, white nationalism, white Christian nationalism, and white replacement theory are dangerous ideologies that have been present in America, under varying labels and forms, since the country's inception. These beliefs enabled the enslavement of Black people and annihilation of Native Americans, the deprivation of Black citizenship in *Dred Scott*, the prohibition of Chinese immigration and naturalized citizenship via the Chinese Exclusion Acts, and untold acts of racial violence. Unfortunately, these dogmas are not historical footnotes. They are alive and well in modern America, and they animate much of the hostility to birthright citizenship and non-white immigration today.

2. *Modern hostility towards non-white immigrants*

The modern assault on unrestricted birthright citizenship in America must also be understood in the context of escalating hostility towards immigrants, especially non-white immigrants. Anti-immigrant rhetoric launched former President Trump's 2016 campaign and fueled many of his administration's policies, gutting legal protections for immigrants in ways that have persisted into the Biden administration. Racist sentiments undergird these policies and rhetoric. The messaging behind the demonization of non-white immigrants is similar to that driving white nationalism and white replacement theory: non-white immigrants pose an imminent threat to "real" Americans.

Former President Trump famously launched his Presidential campaign in 2015 with a tirade about Mexicans, claiming:

> When Mexico sends its people, they're not sending their best. They're not sending you. [] They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people. But I speak to

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236. *Id*. (noting with approval, "[C]itizenship was basically stripped from blacks, in South Africa after the Afrikaners got control in the early 1900s.") *See also* FROST, *supra* note 13, at 6 (noting that, during the Apartheid era, the South African government stripped citizenship from all Black people living in the country, about 70% of the population). More recently, approximately 200,000 people of Haitian descent were stripped of citizenship in the Dominican Republic, based on the retroactive application of a 2010 constitutional revision eliminating birthright citizenship. *See infra* notes 284–292 and accompanying text.

237. *See* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 49-50 (2017).

238. *See generally* WHITMAN, *supra* note 237; FROST, *supra* note 13, at 6. Whitman argues that the Nazis took inspiration from American law in two main categories: 1) race-based citizenship, and 2) laws prohibiting miscegenation, or marriages between people who were not of the same race (known as "blood purity" laws in Germany). WHITMAN, *supra* note 237, at 34–72 (race-based citizenship); *id*. at 73–131 (blood purity laws).

> border guards and they tell us what we're getting. And it only makes common sense. [] They're sending us not the right people.[239]

He then targeted Central and South America and the Middle East: "It's coming from more than Mexico. It's coming from all over South and Latin America, and it's coming . . . from the Middle East."[240] The "it" that Trump referred to is presumably immigration, which he characterized as a vague and imminent threat: "Because we have no protection and we have no competence, we don't know what's happening. And it's got to stop and it's got to stop fast."[241] To solve this problem, Trump promised to build his infamous "great wall" between the United States and Mexico.[242] Although candidate Trump repeatedly promised that the wall would be inexpensive and that Mexico would pay for it, neither proved to be true.[243] Despite Trump's failure to "build the wall" during his four years in office, neither the rhetoric nor the goals that launched Trump's 2016 Presidential campaign have subsided. One of Trump's chief challengers in the race to secure the 2024 Republican Presidential nomination, Ron DeSantis, promises to up the ante in a campaign ad: "We will secure the border. We will stop the cartels. We will build the wall. We will stop the invasion. NO EXCUSES."[244]

President Trump, like candidate Trump, continued to espouse and adopt policies targeting non-white immigrants and attempting to prevent them from entering the United States. He gutted the nation's commitment to the legal principle of *non-refoulement*, which provides that refugees "should not be returned to a country where they face serious threats to their life or freedom."[245] Trump mocked asylum law in much the same way he targeted the

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239. *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), https://perma.cc/PAL9-XY4U.

240. *Id.* President Trump also issued a series of executive orders barring travel to the United States by people living in Muslim-majority countries – collectively known as the "Muslim ban" – while in office, and he has promised to expand these policies if re-elected in 2024. *See* Trump v. Hawaii, 585 U.S. __, 138 S.Ct. 2392, 2403–06 (2018) (describing these executive orders); Brett Samuels, *Trump Vows Expanded Travel Ban if Reelected*, THE HILL (Sept. 20, 2023), https://perma.cc/J6VL-H5NA.

241. *Here's Donald Trump's Presidential Announcement Speech*, *supra* note 239.

242. *Id.*

243. Two former presidents of Mexico have vowed that Mexico has no duty to pay for a border wall in the United States and will never do so. *See* David Wright, *Vicente Fox Says It Again – This Time on Live TV: 'I'm Not Going to Pay for That F***ing Wall'*, CNN POLITICS (Feb. 26, 2016), https://perma.cc/P233-YYRA; Holly Ellyatt & Hadley Gamble, *Mexico Won't Pay a Cent for Trump's 'Stupid Wall'*, CNBC (Feb. 8, 2016), https://perma.cc/7N4T-RBJ3 (quoting former President Felipe Calderon). The Trump Administration largely failed to win Congressional approval for border wall funding. *See* California v. Trump, 963 F.3d 926, 945 (9th Cir. 2020) (listing various bills for border wall funding that failed to pass Congress).

244. Chris Donaldson, *Hard-Hitting New DeSantis Ad Vows to Secure the Border: 'NO EXCUSES'*, BPR BUSINESS & POLITICS (June 26, 2023), https://perma.cc/E3NR-UAY7.

245. *See* Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; *The 1951 Refugee Convention*, U.N. HIGH COMM'R FOR REFUGEES, https://perma.cc/LSX4-MSGT (last visited Oct. 28, 2023); Sandra L. Rierson, *Fugitive Slaves and Undocumented Immigrants: Testing the Boundaries of Our Federalism*, 74 U. MIAMI L. REV. 598, 669–83 (2020) (discussing various measures taken by the Trump Administration to undermine the nation's commitment to the legal principle of *non-refoulement*).

concept of birthright citizenship for children with undocumented parent(s), calling it a "loophole"[246] in American immigration laws and a "big fat con job"[247] on the American people. During the COVID-19 pandemic, the Trump administration used a public health rationale to justify implementing administrative regulations collectively known as Title 42, which effectively barred asylum seekers from entering the United States.[248]

The asylum "loophole" is embodied in federal laws that reflect commitments made in treaties signed by the United States and other western nations in the aftermath of the refugee crisis created by World War II.[249] Today, most people seeking asylum in the United States are fleeing political instability and violence in Central and South America, especially the countries of El Salvador, Guatemala, Haiti, Honduras, and Venezuela (and hence are predominantly not white).[250] While President Biden eschews Trump's inflammatory language denigrating asylum, he has proposed regulations that mirror Trump's policy goal of thwarting asylum seekers and keeping them out of the United States.[251]

These changes in immigration law and policy have been fueled, at least in part, by prejudice directed towards non-white immigrants. Few modern politicians have so openly expressed racist opinions as former President Trump, whose attitude towards asylees mirrors his opinions of the countries they are fleeing. Trump's assessment of these countries was revealed in a moment of unscripted candor, during an Oval Office meeting in January 2018 regarding

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246. *See President Donald J. Trump is Working to Stop the Abuse of our Asylum System and Address the Root Causes of the Border Crisis*, WHITE HOUSE (Apr. 29, 2019), https://perma.cc/SN6T-VD2Z. In this press release, President Trump states, "The biggest loophole drawing illegal aliens to our borders is the use of fraudulent or meritless asylum claims to gain entry into our great country." *Id.*

247. *See* Donica Phifer, *Donald Trump Calls Asylum Claims a 'Big Fat Con Job,' Says Mexico Should Stop Migrant Caravans from Traveling to U.S. Border*, NEWSWEEK (Mar. 29, 2019), https://perma.cc/6593-9F8Q (quoting statements made by President Trump during a campaign rally in Grand Rapids, Michigan).

248. *See* 42 U.S.C. §§ 265, 268; 42 C.F.R. § 71.40. Nearly 1.8 million people were expelled from the United States under Title 42 and not allowed to pursue asylum claims. John Gramlich, *Key Facts About Title 42, the Pandemic Policy that Has Reshaped Immigration Enforcement at U.S.-Mexico Border*, PEW RESEARCH CENTER (Apr. 27, 2022), https://perma.cc/GF5J-GNMS.

249. *See* Rierson, *supra* note 245, at 662–64 (discussing this history); 8 U.S.C. § 1231(b)(3)(B) (2018) (permitting withholding of deportation for any alien who "more likely than not" would be persecuted, if forced to return to his home country); 8 U.S.C. § 1158(b)(1)(A) (cross-referencing 8 U.S.C. § 1101(a)(42)) (providing asylum to refugees who are unable or unwilling to return to their home countries due to a "well-founded fear of persecution" on the grounds of "race, religion, nationality, membership in a particular social group, or political opinion").

250. Nadwa Mossaad, *Refugees and Asylees: 2018 (Annual Flow Report)*, DEPARTMENT OF HOMELAND SECURITY (Oct. 2019), https://perma.cc/9XJP-3T4X 6-7 tbls.6a & 6b.

251. *Circumvention of Lawful Pathways*, 8 C.F.R. Part 208, United States Department of Justice, Executive Office of Immigration Review, https://perma.cc/W3XV-BHML (proposed rule); Priscilla Alvarez, *Biden Administration Rolls Out New Asylum Restrictions Mirroring Trump-Era Policy*, CNN (Feb. 21, 2023), https://perma.cc/5AKE-X5T5. The asylum policy of the Biden administration, like that of his predecessor, violates "U.S. law and international obligations, which guarantee the legal right to seek asylum … and could undermine respect for refugee protections globally." Press Release, International Rescue Committee, Proposed Asylum Ban Would Bar Thousands of People Seeking Protection from U.S. Asylum and Threatens to Undermine Regional Protection Systems, IRC Says (Feb. 21, 2023), https://perma.cc/WU6S-SPWN.

bipartisan immigration reform. Speaking in reference to Haiti and El Salvador, Trump reportedly asked, "Why are we having all these people from shithole countries come here?"[252] He specifically rejected Haitian immigrants, insisting, "Why do we need more Haitians? Take them out."[253] Trump expressed a preference for immigrants from countries like Norway, which is overwhelmingly white and one of the least diverse countries in Europe.[254] Democratic Congressman Cedric L. Richmond of Louisiana, chairman of the Congressional Black Caucus, released a statement lamenting that these comments were "yet another confirmation of his racially insensitive and ignorant views," which reinforced the concern that "the President's slogan 'Make America Great Again' is really code for 'Make America White Again.'"[255]

B. *The International Trend of Abandoning Birthright Citizenship*

Former President Trump was incorrect when he proclaimed that the United States is "the only country in the world" to recognize birthright citizenship, even for children born to parents lacking legal immigration status.[256] The United States' neighbors to the north and south, Canada and Mexico, both recognize unconditional birthright citizenship, as do several other countries.[257] However, the number of countries recognizing birthright citizenship has sharply declined over the past forty years, as many nations have replaced a *jus soli* citizenship model with a *jus sanguinis* system, or a hybrid of the two.[258] Often, this transition has been prompted by hostility toward non-white immigrants and fear of demographic change.[259]

As discussed *supra*, the concept of birthright citizenship, or *jus soli,* originated in the common law of Great Britain.[260] In *Calvin's Case*, decided in 1608, Lord Coke wrote that, because the plaintiff's place of birth was "within

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252. Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, THE WASHINGTON POST (Jan. 12, 2018), https://perma.cc/HP7X-AUUL.

253. *Id.*

254. *Id.*; *Norway,* CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK (last updated Oct. 16, 2023), https://perma.cc/FF5C-E9DP (describing Norway's ethnic makeup as about 81.5% Norwegian and 8.9% "other European").

255. Press Release, Congressional Black Caucus, CBC Chairman Statement on Trump's Racist Comments about African Countries (Jan. 11, 2018), https://perma.cc/6SH4-G54F. Illinois Democratic Representative Luis Gutierrez similarly maintained that Republicans "don't believe in immigration — it's always been about people of color and keeping them out of this country." Dawsey, *supra* note 252.

256. Jonathan Swan & Stef W. Kight, *Exclusive: Trump Targeting Birthright Citizenship with Executive Order*, AXIOS (Oct. 30, 2018), https://perma.cc/3CQK-QYN5.

257. *See Birthright Citizenship around the World*, LIBRARY OF CONGRESS, https://perma.cc/67PL-LJVV. Most countries in South America, including Argentina, Brazil, Peru, Venezuela, Ecuador, and Uruguay, also recognize unconditional birthright citizenship. *Id.*

258. *See* Caroline Sawyer, *The Loss of Birthright Citizenship in New Zealand*, 44 VICT. U. WELLINGTON L. REV. 653, 655, 658–60 (2013) (characterizing this shift as a "global trend"); Natalie Sears, *Repealing Birthright Citizenship: How the Dominican Republic's Recent Court Decision Reflects an International Trend*, 20 L. & BUS. REV. AM. 423, 423, 425–26 (2014); Hartry, *supra* note 193, at 73–74.

259. *See* Ngai, *supra* note 161, at 2530 (noting that the elimination of birthright citizenship in Great Britain, Australia, Ireland, and New Zealand was "partly, if not primarily, in response to popular nativist sentiment against nonwhite immigrants").

260. *See supra* notes 111–113 accompanying text.

the King's dominion," he was "born under the King's power or protection", and therefore was not an alien.[261] Instead, he was a natural-born subject of the King.[262] Great Britain observed the rule of *jus soli* for hundreds of years, with some accounts dating the origins of the practice to 1290, during the Medieval period.[263] In 1981, Great Britain officially ended its long-standing rule of birthright citizenship by statute.[264]

The evolution of the British approach to citizenship began almost forty years before the passage of the 1981 statute and stemmed from anti-immigrant sentiment that arose during the post-World War II era.[265] Although Great Britain needed immigrant labor to recover from the war, "ethnic groups from British colonies in the West Indies, Africa, and the Indian sub-continent were not greeted with open arms."[266] They faced systemic discrimination in housing and employment and were often the victims of racial violence.[267] Sir Cyril Osborne, a Tory politician during the 1950s and 1960s, used "unapologetically racist rhetoric," proclaiming: "This is a white man's country and I want it to remain so."[268] J. Enoch Powell, a Conservative politician during the late 1960s and early 1970s, gained notoriety using similarly xenophobic and anti-immigrant rhetoric.[269]

Reflecting these sentiments, the British Parliament passed three laws that tightened immigration controls during this time period, effectively restricting the ability of non-white members of the British Commonwealth to enter the

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261. Calvin's Case, 77 Eng. Rep. 379, 399, 407 (K.B. 1608); *see also* Houston, *supra* note 113, at 698–701 (discussing the reasoning of *Calvin's Case*).

262. Calvin's Case, 77 Eng. Rep. at 399.

263. *See* Price, *supra* note 112, at 92 & n.109.

264. *See* British Nationality Act of 1981, ch. 61, §1(a)&(b) [hereinafter BNA].

265. *See* Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 568–69 (1995).

266. *Id*. at 569.

267. *Id*. at 570–71; *see also* Samuel Earle, *"Rivers of Blood:" The Legacy of a Speech That Divided Britain*, THE ATLANTIC (Apr. 20, 2018), https://perma.cc/ZKV4-5QYP (noting that English transport workers went on strike in 1955, in response to the hiring of an Indian immigrant as a conductor).

268. Pearson Phillips, *Notting Hill's Ghost Raises its Head Again. . .*, THE DAILY MAIL (Feb. 7, 1961); Wilson, *supra* note 265, at 570 n.23. In a different speech, Osborne prompted laughter in the House of Commons when he argued that "[immigration of non-white people] cannot be allowed to go on indefinitely because in another ten, twenty or thirty years' time the *face of England* would not be recognisable." Sir Cyril Osborne, House of Commons Debate (Feb. 17, 1961), vol. 634, *available at* https://perma.cc/3R5S-DYZU (emphasis added). *See also* Earle, *supra* note 267 (noting that Winston Churchill declared an intention to "keep England white" in 1955); *Race Rivals Clash Near No. 10*, THE DAILY MAIL, Jul. 8, 1968 (Demonstrators chanted "Keep England White" and "2, 4, 6, 8, we won't integrate" outside Parliament in 1968).

269. Wilson, *supra* note 265, at 573–75, (discussing the notoriety that Powell gained for his *Rivers of Blood* speech, delivered to a Conservative group in 1968). *See* Enoch Powell, Rivers of Blood Speech, Birmingham, England (Apr. 20, 1968) https://perma.cc/G77C-P2DQ; *see also* Earle, *supra* note 267; Michael Savage, *Fifty Years on, What is the Legacy of Enoch Powell's 'Rivers of Blood' Speech?*, THE GUARDIAN (Apr. 14, 2018), https://perma.cc/6YWE-CL83 (discussing this speech). Although Powell was ostracized within the Conservative party for his extreme rhetoric in this speech, he was not alone in his racism or willingness to exploit it for political benefit. In 1964, Conservatives adopted the following campaign slogan for an election in Smethwick: "If you want a nigger for a neighbor, vote Labor." Earle, *supra* note 267.

United Kingdom.[270] The Commonwealth Immigrants Acts of 1962[271] and 1968,[272] and the Immigration Act of 1971[273] progressively limited the ability of "non-patrials"—people born in the former British colonies without direct ties to the United Kingdom by birth or lineage—to immigrate. The 1971 Act explicitly provided that non-patrials did not have a "right to abode" in the United Kingdom.[274] Ten years later, the British Nationality Act completed the evolution of British citizenship law.[275] The Act ended the rule of *jus soli*, mandating that a person born in the United Kingdom is a British citizen only if that person's mother or father is a British citizen or "settled" in the United Kingdom.[276]

The trend among Commonwealth countries has been to follow Great Britain's lead in the rescission of unrestricted birthright citizenship. Among Britain's most well-known former colonies, the United States and Canada stand alone in their extant preservation of unrestricted birthright citizenship.[277] The Australian government, like that of Great Britain, encouraged immigration in the wake of World War II.[278] However, in later years, residents' "resentment toward illegal immigrants" caused a shift in policy.[279] The Australian Citizenship Act of 1948 was amended in 1986 to eliminate the rule of unconditional *jus soli*.[280] Ireland amended its constitution via popular referendum in 2004, replacing the rule of unrestricted birthright

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270. *See* Wilson, *supra* note 265, at 585–87; Houston, *supra* note 113, at 702–04 (discussing this legislation).

271. Commonwealth Immigrants Act, 1962, c. 21, § 2 (Eng.).

272. *Id.* at § 1. Commonwealth Immigrants Act, 1968, c. 9, §§ 1, 2 (Eng.). The 1968 Act was passed largely in response to an influx of Asian British citizens previously domiciled in Kenya. *See* Wilson, *supra* note 265, at 586; Houston, *supra* note 113, at 703–04.

273. Immigration Act, 1971, c. 77 (Eng.).

274. *Id.* at § 2(1)(a) (providing that only "British citizens" have a "right of abode" in the United Kingdom). However, the Act did not eliminate a Commonwealth citizen's "right of abode" in the United Kingdom if that person had a right to live in the United Kingdom under earlier versions of the law. *Id.* at § 2(1)(b).

275. BNA, c. 61, §§ 1–14 (British Citizenship). *See also* Venus Booth, *Citizenship as a Birthright: What the United States Can Learn from Failed Policies in the United Kingdom and Ireland*, 28 ARIZ. J. INT'L & COMP. L. 693, 705-07 (2011) (discussing the Act).

276. BNA, c. 61, § 1(a) & (b); *see also* Houston, *supra* note 113, at 704–05. A person is considered "settled," under the terms of the Act, if the person is "ordinarily resident in the United Kingdom . . . without being subject under the immigration laws to any restriction on the period for which he may remain." BNA § 50(2). The Act further provides that if a child is born in Britain whose parents do not satisfy these criteria, the child can register as a citizen after living in Great Britain for ten years, so long as the child did not spend more than ninety days out of the country during that time. BNA, ch. 61, § 3A (4).

277. *See* Hartry, *supra* note 193, at 73–74.

278. *See* Amanda Colvin, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS U. L.J. 219, 235–36 (2008).

279. *Id.* at 236–37.

280. *Australian Citizenship Act 1948*, pt III div 1 s 10(2)(a) (Austl.), https://perma.cc/5LTE-2FFA (Since 1986, birth in Australia confers citizenship only if at least one parent of the child is "an Australian citizen or a permanent resident" at the time of the child's birth). *See also Australian Citizenship Act 2007*, pt 2 div 1 s 12(1)(b) (Austl.), https://perma.cc/M4XZ-CZCS (If a child does not have a parent who is a citizen or permanent resident, that child is only considered an Australian citizen after living ten consecutive years in Australia). *Id.* at s 12(1)(b). *See also* Hartry, *supra* note 193, at 74; Colvin, *supra* note 278, at 236–37.

citizenship with one in which children born in the country are citizens only if at least one parent is a citizen or permanent resident.[281] In 2005, New Zealand similarly amended its Citizenship Act to limit citizenship based on birth to those children with at least one citizen parent, or a parent entitled to reside in New Zealand "indefinitely" under the terms of that country's immigration laws (i.e., a permanent resident).[282] In both Ireland and New Zealand, an "apparent moral panic about the rights of citizen children to act as 'anchor babies' for their foreign-national parents" fueled the elimination of birthright citizenship.[283]

The retrenchment of unrestricted birthright citizenship has also occurred outside the British Commonwealth countries. Hostility towards Haitian immigrants catalyzed radical changes to citizenship law in the Dominican Republic. This island nation, which shares a border with Haiti, ended unconditional birthright citizenship via a constitutional amendment and judicial interpretation, resulting in the citizenship-stripping of up to 200,000 Dominicans of Haitian descent.[284] The country's 1929 constitution had guaranteed birthright citizenship to all children born in the Dominican, except for the children of diplomats and foreigners "in transit."[285] The term "in transit" was statutorily defined as "a period of ten days or less."[286]

The country officially revoked birthright citizenship for the children of undocumented immigrants in 2004, when it passed a law redefining the term "in transit" to include any undocumented person (or person holding an expired visa) living in the Dominican Republic, regardless of the duration of their residence in the country.[287] In 2010, the Dominican Republic enshrined the elimination of unconditional birthright citizenship in its revised

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281. Irish Nationality and Citizenship Act 2004 (Act No. 38/2004); *see also* Timothy Collins, Note, *I Amend Therefore I am? Discretionary Referenda and the Irish Constitution*, 35 BROOK. J. INT'L L. 563, 566–67 (2010); Booth, *supra* note 275, at 713–15. A law has been proposed to restore birthright citizenship in Ireland, but it has not been enacted. Irish Nationality and Citizenship (Restoration of Birthright Citizenship) Bill 2017 (Bill 36 of 2017), https://perma.cc/AP6T-MZWR**;** Ed O'Loughlin, *In Ireland, Bid to Restore Birthright Citizenship Gains Ground*, N.Y. TIMES (Nov. 28, 2018), https://perma.cc/W4EB-E55K.

282. New Zealand Citizenship Act 1977, pt 1, s 6(1)(a)–(b) (effective Jan. 1, 2006), https://perma.cc/MMF7-K3DD; *see also* Sawyer, *supra* note 258, at 653.

283. Sawyer, *supra* note 258, at 671. In Ireland, the government lobbied in favor of the constitutional referendum, arguing that Ireland needed to "close the loophole" that allowed "anchor babies" to become Irish citizens. Collins, *supra* note 281, at 571–74. Ireland's status as a member of the European Union (E.U.) also created pressure to change its citizenship laws, given that, at the time of the Irish constitutional referendum, it was the only E.U. country that recognized birthright citizenship. *Id*. at 574-76; *see also* Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?,* 2 LAW & ETHICS HUM. RTS. 1, 8–9 (2008) (characterizing Ireland's previous constitutional rule of *jus soli* as "an anachronistic anomaly within the European context").

284. *See* Jillian Blake, *Haiti, the Dominican Republic, and Race-Based Statelessness in the Americas*, 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 139, 149 (2014); Kristymarie Shipley, *Stateless: Dominican-Born Grandchildren of Haitian Undocumented Immigrants in the Dominican Republic*, 24 TRANSNAT'L L. & CONTEMP. PROBS. 459, 460 (2015).

285. DOMINICAN REPUBLIC CONSTITUTION June 20, 1929, art. 8; *see also* Blake, *supra* note 284, at 148; Shipley, *supra* note 284, at 461–63.

286. Blake, *supra* note 284, at 148.

287. Dominican Republic General Migration Law, No. 285–04 (2004). *See also* Blake, *supra* note 284, at 149; Shipley, *supra* note 284, at 462.

constitution.[288] In 2013, the country's highest court rejected a constitutional challenge to these laws. In *Pierre v. No. Judgment 473/2012*, the court denied the Dominican citizenship of the plaintiff, Juliana Deguis Pierre, a woman born in the Dominican Republic to parents of Haitian descent.[289] Like the U.S. Supreme Court in *Dred Scott*, the court proceeded to make broad pronouncements regarding the status of all persons of Haitian ancestry living in the Dominican Republic. The court ordered an audit of the country's civil registry to identify "foreigners incorrectly registered as Dominicans" going back to 1929; to catalog this information; and to report it to the government.[290] These legal changes called into question the citizenship of hundreds of thousands of Dominicans of Haitian descent.[291] In concert with the end of birthright citizenship, the government carried out mass deportations of Dominicans with Haitian ancestry, separating families and subjecting the population to racial violence.[292]

These international trends demonstrate that "access to citizenship, including birthright citizenship [for children with undocumented parents] in the United States, is not fixed but politically contingent."[293] Many Republican politicians and right-wing activists now perceive the termination of unconditional birthright citizenship in the United States as an attainable political goal. The plan of attack is two-fold: 1) to pass legislation or an executive order that would compel the United States Supreme Court—the most conservative Court the country has seen in a hundred years—to decide the issue; and 2) to force an Article V convention that could yield a constitutional amendment directly removing birthright citizenship from the Fourteenth Amendment. While either pathway would encounter significant obstacles, the danger they pose should not be ignored.

C. *Legislative Attempts to End Birthright Citizenship in the United States*

Under the Supreme Court's holding in *Wong Kim Ark*, changing the rule regarding birthright citizenship would require a Constitutional amendment and could not be achieved via a federal law.[294] However, as noted above, the

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288. DOMINICAN REPUBLIC CONSTITUTION 2010, ch. V, art. 18, https://perma.cc/M7PD-9KJZ (providing that "persons born in the national territory [are considered Dominican citizens], with the exception of [children of diplomats] and of foreigners in transit or [foreigners] *residing illegally in the Dominican territory*") (emphasis added). *See also* Blake, *supra* note 284, at 151; Shipley, *supra* note 284, at 463.

289. *See* Nicia C. Mejia, *Dominican Apartheid: Inside the Flawed Migration System of the Dominican Republic*, 18 HARV. LAT. L. REV. 201, 218–22 (2015) (analyzing this case); *see* Shipley, *supra* note 284, at 463–65 (same).

290. *See* Blake, *supra* note 284, at 152; Shipley, *supra* note 284, at 464–65.

291. *See* Ricardo Rojas, *Dominican Court Ruling Renders Hundreds of Thousands Stateless*, REUTERS (Oct. 11, 2013), https://perma.cc/X46S-C87N; *Dominican Republic Must Retract Ruling That Could Leave Thousands Stateless*, AMNESTY INT'L (Oct. 18, 2013), https://perma.cc/6SLS-9GZG.

292. *See* Blake, *supra* note 284, at 150.

293. Ngai, *supra* note 161, at 2525.

294. *See supra* Section I.D. (describing the Supreme Court's interpretation of the Fourteenth Amendment in *Wong Kim Ark*).

enactment of legislation ending unrestricted birthright citizenship could enable a court challenge to make its way to the Supreme Court, which would have the power to overturn its prior decision in *Wong Kim Ark*.[295] Regardless of the intent behind the numerous anti-birthright citizenship laws that have been proposed, their existence demonstrates hostility towards the *jus soli* model of citizenship, especially within the Republican party.

The goal of ending birthright citizenship for children of parents without legal immigration status officially arrived in the halls of Congress in 2007 and 2011, with the introduction of two bills by Republican representatives.[296] The Birthright Citizenship Act of 2007 (H.R. 1940) was introduced in the House by Representative Nathan Deal of Georgia.[297] This law garnered 104 co-sponsors (102 Republicans and two Democrats).[298] H.R. 1940 sought to amend Section 301 of the Immigration and Nationality Act, redefining the words "subject to the jurisdiction" of the United States, as stated in the Fourteenth Amendment, to include only the children of U.S. citizens, permanent residents residing in the U.S., or aliens "performing active service in the Armed Forces."[299] Representative Steve King of Iowa—a politician known for his racist rhetoric[300]— introduced a similar piece of legislation in 2011, H.R. 140. Both bills were referred to committee and never received a vote in the House.[301] Unlike Peter Brimelow's proposal to end birthright citizenship, neither H.R. 1940 nor H.R. 140 would apply retroactively.[302]

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295. A similar strategy led to the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), which overturned Roe v. Wade, 410 U.S. 113 (1973), and thereby eliminated the constitutional right to abortion. *See* Michael Scherer, Josh Dawsey, Caroline Kitchener & Rachel Roubein, *A 49-year Crusade: Inside the Movement to Overturn Roe v. Wade*, THE WASHINGTON POST (May 7, 2022), https://perma.cc/LE9U-YM2P (noting that, after the death of Ruth Bader Ginsburg and the confirmation of Amy Coney Barrett to the Supreme Court, "[a]t least nine states passed abortion bans … that clearly violated *Roe* … each hoping their law would make it all the way up to an increasingly conservative Supreme Court").

296. H.R. 140, 116th Cong. (2019), https://perma.cc/5GX3-7PNM.

297. *See* H.R. 1940, 110th Cong. (2007), https://perma.cc/P7QR-QUJT.

298. *See* Cosponsors: H.R.1940, 110th Cong. (2007-2008), https://perma.cc/R7Q6-JDKY. The supporters of anti-birthright citizenship legislation have been overwhelmingly Republican. Democratic Senator Harry Reid of Nevada did, however, propose similar legislation in 1993. *See* Immigration Stabilization Act of 1993, S.B. 1351, 103d Cong. (1993), https://perma.cc/526U-T6WH. However, he later changed his position and called it the "biggest mistake" of his political career. *See* Burgess Everett, *Reid Fires Back at Trump Over Birthright Citizenship Stance*, POLITICO (Oct. 31, 2018), https://perma.cc/HM4U-KQS3.

299. *See* H.R. 1940, § 2(b), https://perma.cc/8NY3-4REN.

300. *See, e.g.*, Philip Bump, *Rep. Steve King Warns That 'Our Civilization' Can't be Restored With 'Somebody Else's Babies'*, WASH. POST (Mar. 12, 2017), https://perma.cc/BGW7-UTXT (quoting King's Tweet dated March 12, 2017, in which he also asserted that "culture and demographics are our destiny"). King, who was first elected to the House in 2002, lost the Republican primary election in 2020. *See* Barbara Sprunt, *Iowa Rep. Steve King, Known for Racist Comments, Loses Reelection Bid*, NPR.ORG (June 2, 2020), *available at* https://perma.cc/DYV2-BNB2.

301. *See* H.R. 1940, *supra* note 299; H.R. 140, *supra* note 296.

302. H.R. 140, *supra* note 296 ("The bill does not affect the citizenship or nationality status of any person born before the bill's enactment date."); H.R. 1940, *supra* note 299 ("The amendment … shall not be construed to affect the citizenship or nationality status of any person born before the date of the enactment of this Act."); *supra* notes 235–38, and accompanying text (discussing Brimelow's proposal to end birthright citizenship retroactively).

King has been characterized as "on the absolute outer fringe of the immigration issue,"[303] but his bill (H.R. 140) has enjoyed widespread support among Republicans in Congress. When King introduced this bill during the 2011/2012 legislative session, ninety Republican representatives cosponsored it.[304] In 2015, the chair of the House Judiciary Committee, Republican Bob Goodlatte of Virginia, cosponsored the bill and characterized the issue of birthright citizenship as "far from settled."[305] King reintroduced the bill in every legislative session between 2013 and 2019, each time garnering around thirty to fifty Republican co-sponsors.[306] Even though King is no longer a Congressional representative, Republican Representative Brian Babin of Texas picked up the reins and introduced the bill on January 4, 2021, along with twenty-seven cosponsors.[307]

Anti-birthright citizenship bills have garnered less support in the Senate. Republican Senator David Vitter of Louisiana introduced a companion bill in the Senate three times, beginning in 2011, during the 112th, 113th, and 114th Congress.[308] No more than four Republican Senators have co-sponsored Vitter's bills.[309] Although the various bills have been referred to committees, neither the full House nor the Senate has ever voted on proposed legislation to end birthright citizenship.

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303. Chris Cillizza, *The Real Reason Steve King Lost*, CNN POLITICS (June 3, 2020), https://perma.cc/8DZ4-DQ43.

304. *See* H.R.140 - Birthright Citizenship Act of 2011, 112th Congress Cosponsors, https://perma.cc/74VF-8ZUC (listing 90 Republican co-sponsors for H.R. 140 during the 112th Congress).

305. *See* Janie Boschma, *Steve King Wants to End Birthright Citizenship: A Pair of Bills in Each Chamber Would Repeal the Automatic Right to Citizenship for Everyone Born in the United States*, THE ATLANTIC (Apr. 30, 2015), https://perma.cc/6KUZ-TPEP.

306. *See* H.R.140 - Birthright Citizenship Act of 2013, 113th Congress Cosponsors, https://perma.cc/CD3W-V5AZ (listing 39 Republican co-sponsors for H.R. 140 during the 113th Congress); H.R.140 - Birthright Citizenship Act of 2015, 114th Congress Cosponsors, https://perma.cc/FJL8-6EMU (listing 53 Republican co-sponsors for H.R. 140 during the 114th Congress); H.R.140 - Birthright Citizenship Act of 2017, 115th Congress Cosponsors, https://perma.cc/SM29-WTJ3 (listing 48 Republican co-sponsors for H.R. 140 during the 115th Congress); H.R.140 - Birthright Citizenship Act of 2019, 116th Congress Cosponsors, https://perma.cc/7Y96-7D4X (listing 30 Republican co-sponsors for H.R. 140 during the 116th Congress).

307. H.R.140 - Birthright Citizenship Act of 2021, 117th Congress Cosponsors, https://perma.cc/7QV2-BBE7 (listing 27 Republican co-sponsors for H.R. 140 during the 117th Congress).

308. *See* Birthright Citizenship Act of 2011, S.B. 723, 112th Congress Cosponsors, https://perma.cc/T59Y-7Y72; Birthright Citizenship Act of 2013, S.B. 301, 113th Congress Cosponsors, https://perma.cc/CWG8-M9U4; Birthright Citizenship Act of 2015, S.B. 45, 114th Congress (2015), https://perma.cc/QJ36-P3LU. Senator Vitter's political career ended in 2015 when he ran for the Louisiana governorship and lost to Democrat John Bel Edwards, "largely because . . . he had admitted to being involved in a prostitution ring." *See* Chris Cillizza, *Why Did David Vitter's Prostitute Problem Kill Him in 2015 and Not in 2010?*, THE WASHINGTON POST (Nov. 23, 2015), https://perma.cc/5BMX-PAHG.

309. Four Republican Senators cosponsored the bill in 2011: Rand Paul of Kentucky, Mike Lee of Utah, Jerry Moran of Kansas, and John Boozman of Arizona. S.723 - Birthright Citizenship Act of 2011, 112th Congress Cosponsors, https://perma.cc/ECS5-JN92. Only two Republican Senators cosponsored the bill in 2013, Mike Lee of Utah and John Boozman of Arizona. S.301 - Birthright Citizenship Act of 2013, 113th Congress Cosponsors, https://perma.cc/EF59-G6U9. Vitter's bill had no cosponsors in 2015. *See also* S.45 - Birthright Citizenship Act of 2015, 114th Congress Cosponsors, https://perma.cc/2RBP-JVHW.

Around the same time King proposed H.R. 140 in 2011, various state legislatures introduced similar bills, to no avail.[310] These proposed laws fell into two general categories. The first purported to reinterpret the Fourteenth Amendment, narrowing its reference to those "subject to the jurisdiction of" the United States. Under these proposed laws, such as Arizona House Bill 2561, the Fourteenth Amendment's guarantee of birthright citizenship would apply only to those who have at least one parent who is either a citizen or permanent resident of the United States, or a parent "without citizenship or nationality in any foreign country."[311] A second proposed statute sought to create an interstate compact, under which the signatory states would share a separate form of birth certificate for children who were not considered "natural born United States citizens"—those who were not "subject to the jurisdiction" of the United States, due to the existence of at least one parent without legal immigration status.[312] According to Fox News, over six hundred "immigration bills" were introduced in various state legislatures in January 2011 alone.[313] However, none of these proposed state laws were enacted.[314] Any state law attempting to circumscribe birthright citizenship would almost certainly be unenforceable, as it would be preempted by federal law and would conflict with the Fourteenth Amendment, as interpreted by the Supreme Court in *Wong Kim Ark*.[315]

D. *The Executive Branch Assault on Birthright Citizenship*

The election of Donald J. Trump to the Presidency in 2016 shifted critiques of birthright citizenship even closer to the center of the American political landscape.[316] When Trump was elected, white nationalist Jared Taylor observed, "[F]or those of us who have been trying to slow the dispossession

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310. *See* Angela Kim, *Developments in the Legislative Branch: The Growing Movement to Redefine Birthright Citizenship and the Fourteenth Amendment*, 25 GEO. IMMIGR. L.J. 757 (2011); Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, N.Y. TIMES (Jan. 5, 2011), https://perma.cc/Y8TG-LZS8; Shankar Vedantam, *State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship*, WASH. POST (Jan. 5, 2011), https://perma.cc/TX5B-ZUU2.

311. H.B. 2561, 50th Leg., 1st Reg. Sess. (Ariz. 2011), https://perma.cc/7V55-JVUU.

312. H.B. 2562, 55th Leg., 1st Reg. Sess. (Ariz. 2011), https://perma.cc/BRZ5-8F52DF6Z-QVSL; *see also* H.B. 392, 62d Leg. (Mont. 2011).

313. *South Dakota Introduces Immigration and Birthright Citizenship Bills*, FOX NEWS (Jan. 31, 2011), https://perma.cc/J7MK-2K9D: *See also* Kim, *supra* note 310, at 758 (noting that legislation attacking birthright citizenship had been introduced in thirty-seven states, in addition to Arizona).

314. *See, e.g.,* Seth Hoy, *Some States Applying Brakes to Legislation Denying Citizenship to U.S.-Born Children*, Immigration Impact (Feb. 8, 2011), https://perma.cc/7ZVW-6ZLL; Kim, *supra* note 310, at 758–59 (noting the rejection of such bills by the governor and legislature in South Dakota).

315. *See* Vedantam, *supra* note 310 (noting that the proponents of these laws admit they are "designed to draw legal challenges and get the issue before the Supreme Court"); *see also infra* Section II.E., and accompanying text (discussing potential review of *Wong Kim Ark* by the current Supreme Court).

316. *See* Garrett Epps, *The Citizenship Clause Means What it Says*, THE ATLANTIC (Oct. 30, 2018), https://perma.cc/E74D-UN89 (observing that the assault on birthright citizenship "is an idea that has crawled slowly from the fever swamps of the far right into the center of our discourse"); Tina Vasquez, *Lines Blurring between Immigration Priorities of Trump Administration and Hate Groups*, REWIRE.NEWS (Jan. 29, 2018), https://perma.cc/HP4W-4C98.

of whites, all of his policies—at least, those pertaining to immigration—align very nicely with the sorts of things we've been saying for many years."[317] Trump's election normalized these ideas by bringing them into the Oval Office.

Former President Trump has mocked birthright citizenship for children of undocumented parent(s). In 2018, then-President Trump called the concept of birthright citizenship "ridiculous" and stated, "We're the only country in the world where a person comes in, has a baby, and the baby is essentially a citizen of the United States for eighty-five years, with all of those benefits. It's ridiculous. It's ridiculous, and it has to end."[318] The next day, Trump Tweeted that "[s]o-called Birthright Citizenship, which costs our Country billions of dollars and is very unfair to our citizens, will be ended one way or the other."[319]

Trump was not the only Republican presidential candidate in 2016 to attack the Fourteenth Amendment's guarantee of unrestricted birthright citizenship. During the presidential primary, most Republican candidates supported a "repeal" of unconditional birthright citizenship, including candidates whose own parent(s) were immigrants.[320] Most of these candidates fell into two camps: those who believed a constitutional amendment would be required to end birthright citizenship for children of undocumented parent(s), and those who believed this goal could be achieved legislatively.[321] When candidate Trump made his pronouncements regarding birthright citizenship, Representative King released a statement that he was "very happy that [his] legislation [H.R. 140] will soon be adopted by the White House as national

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317. Zach Beauchamp, *A Leading White Nationalist Says it Plainly: Trump's Victory Was About White Identity*, VOX.COM (Nov. 21, 2016), https://perma.cc/LG8U-T6QC; *see also* Stephen Piggott, *Buoyed by Trump's SCOTUS Pick, the Anti-Immigrant Movement Renews Its Attacks on the 14th Amendment*, SOUTHERN POVERTY LAW CENTER (Aug. 9, 2018), https://perma.cc/7BMD-KA26.

318. Swan & Kight, *supra* note 256; *see also* FROST, *supra* note 13, at 193–94 (discussing this statement by Trump and his attempts to limit citizenship for children of immigrants).

319. Donald J. Trump, @realDonaldTrump, X (FORMERLY KNOWN AS TWITTER) (Oct. 31, 2018), https://perma.cc/73G6-CHJJ. Trump made similar claims in 2019, again characterizing as "frankly ridiculous" that a person can "have a baby on our land, you walk over the border, have a baby - congratulations, the baby is now a U.S. citizen." *See Trump Says He Is Seriously Looking at Ending Birthright Citizenship*, REUTERS (Aug. 21, 2019), https://perma.cc/KU8W-7R7M; *see also* Paul LeBlanc, *Trump Again Says He's Looking 'Seriously' at Birthright Citizenship Despite 14th Amendment*, CNN POLITICS (Aug. 22, 2019), https://perma.cc/ND77-BVRV.

320. *See* Jamile Kadre, *Born in the USA: 2016 Presidential Hopefuls' Stances on Birthright Citizenship and the Electoral Implications of Those Stances*, 30 GEO. IMMIGR. L. J. 197 (2016); Berger, *supra* note 152, at 1187–88. Former Louisiana Governor Bobby Jindal's parents immigrated to the United States from India a few months before he was born. Berger, *supra* note 152, at 1187. Texas Sen. Ted Cruz was born in Canada; his father was a Cuban immigrant, and his mother was a U.S. citizen. *Id*. at 1187–88; *see also* Steve Contorno, *Is Ted Cruz, Born in Canada, Eligible to Run for President?*, POLITIFACT (Mar. 26, 2015), https://perma.cc/V84W-NEZZ. Some Republican presidential candidates in the 2016 election - former Florida Gov. Jeb Bush, former Arkansas Gov. Mike Huckabee, Sen. Marco Rubio (R-FL), and former Hewlett-Packard CEO Carly Fiorina – did not support the repeal of birthright citizenship. *See* Tierney Sneed, *Ben Carson: Birthright Citizenship 'Doesn't Make Any Sense To Me*', TALKING POINTS MEMO (Aug. 19, 2015), https://perma.cc/N6JA-WD9Q.

321. Berger, *supra* note 152, at 200–02; *see also* Sneed, *supra* note 320 (quoting candidate Ben Carson stating, "[I]t doesn't make any sense to me that people could come in here, have a baby and that baby becomes an American citizen. . . .").

policy."[322] However, rather than pursue change through either the legislative process or a proposed Constitutional amendment, former President Trump chose to attack the Fourteenth Amendment, at least rhetorically, through his executive authority.

Former President Trump claimed to have the authority to eliminate birthright citizenship via an executive order.[323] However, he never issued such an order, and leaders within his own party expressed skepticism that such an order would be consistent with the Fourteenth Amendment.[324] When the Republican Speaker of the House of Representatives, Paul Ryan, was asked about the President's executive authority to end birthright citizenship, he responded, "[Y]ou obviously cannot do that."[325] Trump's acting director of U.S. Citizenship and Immigration Services, Ken Cuccinelli, supported Trump's position that ending birthright citizenship would not require alteration of the Fourteenth Amendment: "I do not think you need an amendment to the Constitution. I think the question is do you need congressional action or can the executive act on their own."[326]

Trump's presidency ended in 2020, but the threat to birthright citizenship posed by the executive branch did not. While President Trump was in office, he did not test his belief that he could end birthright citizenship via an executive order. However, Trump is seeking the Presidency again in 2024.[327] He has promised to issue an executive order ending birthright citizenship on

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322. *See* Rodriguez, *supra* note 232 (quoting press release issued by Congressman Steve King, stating, "I am delighted to learn that President Trump intends to end automatic citizenship at birth for the children of illegal aliens whose parents have no ties, and owe no allegiance, to the United States.")

323. Kevin Liptak & Devan Cole, *Trump Claims He Can Defy Constitution and End Birthright Citizenship*, CNN POLITICS (Oct. 31, 2018), https://perma.cc/C6SK-DAFJ.

324. *See, e.g.*, Bill Chappell & Vanessa Romo, *Paul Ryan Dismisses Trump Plan to Void Birthright Citizenship Law by Executive Order*, NPR.ORG (Oct. 30, 2018), https://perma.cc/SB5R-JTYK. However, Sen. Lindsay Graham of South Carolina stated that he planned "to introduce legislation along the same lines as the proposed executive order" from President Trump on the subject of birthright citizenship. Robert Barnes, *Trump Again Raises Much-Debated but Rarely Tested Question of Birthright Citizenship*, THE WASHINGTON POST (Oct. 30, 2018), https://perma.cc/4RQY-NN7F. To date, he has not done so. In fact, when Louisiana Republican Sen. David Vitter introduced such legislation in 2011, 2013 and 2015, Graham did not co-sponsor the bill. *See supra* notes 308–309 and accompanying text.

325. Chappell & Romo, *supra* note 324 (quoting statements made by Ryan during a radio interview broadcast in Kentucky). Republican Representative Carlos Curbelo similarly Tweeted, "Birthright citizenship is protected by the Constitution," and cannot be changed via Executive Order. *See* Justin Wise, *GOP Lawmaker Blasts Trump: 'Birthright Citizenship Is Protected by the Constitution'*, THE HILL (Oct. 30, 2018), https://perma.cc/T5FE-V4Z7. Ryan was immediately chastised by Trump, who Tweeted that Ryan should not be offering his opinions regarding birthright citizenship, "something he [Ryan] knows nothing about!" Felicia Sonmez and John Wagner, *Trump Lashes Out at Paul Ryan over Birthright Citizenship Comments, Says He 'Should Be Focusing on Holding the Majority,'* WASH. POST (Oct. 31, 2018), https://perma.cc/QT22-U885.

326. *See* Laura Powers, *Trump's Acting Immigration Director Claims Ending Birthright Citizenship Would Not Require Constitutional Amendment*, NEWSWEEK (Oct. 16, 2019), https://perma.cc/KLC3-CY4L; *see also* Andrea Zelinski, *Texas Attorney General Ken Paxton Supports Trump Plan to End Birthright Citizenship*, HOUSTON CHRONICLE (Oct. 30, 2018), https://perma.cc/4UN4-VFDP.

327. Former President Trump announced his candidacy from his Mar-a-Lago country club in Palm Beach, Florida, stating that his aim was to "make America great and glorious again." *See* Gabby Orr, Kristen Holmes & Veronica Stracqualursi, *Former President Donald Trump Announces a White House Bid for 2024*, CNN.COM (Nov. 26, 2022), https://perma.cc/L8YM-A3RF.

"Day 1" of his administration, if he is reelected.[328] A leading Republican primary challenger, Gov. Ron DeSantis of Florida, has also pledged to end birthright citizenship.[329] Candidate Vivek Ramaswamy has effectively vowed to end unconditional birthright citizenship retroactively, pledging to deport "the family unit" if it includes an undocumented parent, including children born in the United States.[330] Clearly, the existential threat posed by these attacks on the Fourteenth Amendment did not begin and will not end with Trump. Short of a constitutional amendment, the ultimate arbiter of the fate of unconditional birthright citizenship is likely to be the United States Supreme Court.

E. *Threats to Birthright Citizenship Posed by the Supreme Court*

As demonstrated above, the issue of unrestricted birthright citizenship could wend its way to the United States Supreme Court via a number of pathways. If a dominant Republican majority were elected to Congress, bills ending birthright citizenship – which have lain dormant for years[331] – could be passed and would be immediately challenged for violating the Fourteenth Amendment. If former President Trump is re-elected in 2024, he could follow through with his promise to end birthright citizenship via executive order, which again would prompt an immediate court challenge.[332] Like Trump, other Republican presidential candidates have stated their opposition to unconditional birthright citizenship, and, if elected, could similarly issue an executive order or support legislation designed to land the issue of birthright citizenship in the Supreme Court.[333]

The Supreme Court that could decide the fate of birthright citizenship is widely acknowledged to be the most conservative Court in almost a

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328. Trump made this announcement via a video posted on Truth Social. *See* Claire Hansen, *Trump Renews Pledge to End Birthright Citizenship for Children of Immigrants*, U.S. NEWS & WORLD REPORT (May 30, 2023), https://perma.cc/J243-3K4M ("I will sign an executive order making clear to federal agencies that under the correct interpretation of the law, going forward, the future children of illegal aliens will not receive automatic U.S. citizenship . . . ."); *see also* Philip Bump, *Trump Pledges to Win an Immigration Fight He Didn't Win as President*, WASH. POST (May 30, 2023), https://perma.cc/6LFN-SPWE. White nationalists celebrated Trump's pledge for making birthright citizenship "a top issue in the 2024 presidential campaign." *Trump: I'll End Birthright Citizenship. Your Move, DeSantis, Scott, Haley et al.!*, VDARE.COM (June 2, 2023), https://perma.cc/P9QT-7596.

329. Gonzalez & Peoples, *supra* note 218; Matt Dixon, *Scott Mum, DeSantis Supports Trump's Proposal to End Birthright Citizenship*, POLITICO (Oct. 30, 2018), https://perma.cc/4UL5-24LQ.

330. Alex Tabet & Katherine Koretsky, *Vivek Ramaswamy Says He'll Deport Children of Undocumented Immigrants Born in the U.S.*, NBC NEWS (Sept. 8, 2023), https://perma.cc/XGL5-F7GL.

331. *See supra* notes 296–309 and accompanying text.

332. White nationalists have urged the issuance of an executive order ending birthright citizenship, and then "let the U.S. Supreme Court decide. Considering its conservative composition, SCOTUS could well rule that the 14th Amendment does not support Birthright Citizenship." *Trump: I'll End Birthright Citizenship, supra* note 328; *see also* Zelinski, *supra* note 326 (quoting Paxton as predicting that the constitutionality of an executive order ending birthright citizenship would be a "close call" in the Supreme Court).

333. *See supra* notes 329–330 and accompanying text.

century.[334] Former President Trump appointed three Supreme Court justices: Neil M. Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.[335] Neil Gorsuch replaced a "conservative icon" of the Court, Antonin Scalia, who unexpectedly died in office at the end of the Obama administration.[336] A reliably conservative jurist, Brett Kavanaugh, replaced the justice who often provided the Court with a swing vote, Anthony Kennedy.[337] Most significantly, Amy Coney Barrett, a judge who amassed "an almost uniformly conservative voting record" prior to her elevation to the Supreme Court, took the seat of "liberal heroine" Ruth Bader Ginsburg,[338] who died in the waning days of the Trump administration.[339] Due to these appointments, the Court's previously tenuous 5-4 conservative majority has shifted to a 6-3 solidly conservative vote. Three decisions issued by the Court during the 2021-2022 term illustrate the conservative majority's willingness to reverse long-standing precedents, with a heavy emphasis on originalism as an interpretive tool.[340] All three cases were decided by a 6-3 conservative majority, with Justices Kagan, Sotomayor, and Breyer dissenting.[341] In *Dobbs v. Jackson Women's Health Organization*, the Court reversed its 1973 decision in *Roe v. Wade*[342] and eliminated a woman's federal constitutional right to an abortion.[343] The Court held that the Constitution guarantees only those rights that are "deeply

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334. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR.ORG (July 5, 2022), https://perma.cc/P795-8G3G; Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://perma.cc/LCN7-4VRR; *see also Conservative Victories at the Supreme Court,* SENATE RPC [Senate Republican Policy Committee, Sen. Joni Ernst, chair] (Aug. 4, 2022), https://perma.cc/T8FR-3BP4 (describing the 2021-22 session of the Supreme Court as the "most conservative Supreme Court in nearly a century").

335. *Supreme Court Nominations (1789-Present)*, UNITED STATES SENATE, https://perma.cc/RFZ3-PWJ2.

336. *See* Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court*, NPR.ORG (Apr. 7, 2017), https://perma.cc/2K9Q-6BUD.

337. *See* Dylan Matthews, *America Under Brett Kavanaugh*, VOX (Oct. 5, 2018), https://perma.cc/RM47-KQVE.

338. *See* Dan Roberts, *Liberal Heroine Ruth Bader Ginsburg Sure Her Place Is Still on Supreme Court Bench*, THE GUARDIAN (Dec. 2, 2014), https://perma.cc/SKJ6-SDA5.

339. *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), https://perma.cc/4T7W-XX32; Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR.ORG (Oct. 26, 2020), https://perma.cc/K9VC-JT4E.

340. *See* Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken over the Supreme Court*, ABA JOURNAL (Sept. 6, 2022), https://perma.cc/4RL4-UKJL (concluding that "[t]he U.S. Supreme Court term that ended on June 30 was the most originalist in American history"); *see also* Liptak, *supra* note 339 ("The term was a triumph for the theory of constitutional interpretation known as originalism . . . .").

341. Justice Alito wrote the majority opinion in Dobbs v. Jackson Women's Health Org., 587 U.S. __, 142 S. Ct. 2228 (2022); the dissent was jointly authored by Justices Breyer, Kagan, and Sotomayor. The majority opinion in New York State Rifle & Pistol Ass'n v. Bruen, 587 U.S. __, 142 S. Ct. 2111, 2126 (2022), was authored by Justice Thomas. Justice Breyer wrote the dissent, in which Justices Kagan and Sotomayor joined. In Kennedy v. Bremerton Sch. Dist., 587 U.S. __, 142 S. Ct. 2407 (2022), the majority opinion was written by Justice Gorsuch, and Justice Sotomayor authored the dissent, joined by Justices Breyer and Kagan. Since these cases have been decided, Justice Breyer retired and was replaced by Justice Kentanji Brown Jackson, an appointment described as "solidifying the liberal wing of the 6-3 conservative-dominated court." Mary Clare Jalonick & Mark Sherman, *Senate Confirms Ketanji Brown Jackson to the Supreme Court,* PBS NEWS HOUR (Apr. 7, 2022), https://perma.cc/GQJ4-7TTZ.

342. Roe v. Wade, 410 U.S. 113 (1973).

343. *Dobbs*, 142 S. Ct. 2228.

rooted in this Nation's history and tradition," if not explicitly stated in the constitutional text.[344] *New York State Rifle and Pistol Association v. Bruen* struck down a 1913 state law regulating concealed carry permits for violating the Second Amendment.[345] *Bruen* replaced a well-established balancing test with an inquiry based solely on "this Nation's historical tradition of firearm regulation."[346] Finally, in *Kennedy v. Bremerton School District*, the Court overruled *Lemon v. Kurtzman*,[347] replacing the *Lemon* endorsement test with a directive to interpret the First Amendment Establishment Clause with "reference to historical practices and understandings."[348]

None of these precedents provide clear guidance as to how the Supreme Court would decide a legal challenge to its 1898 interpretation of the Fourteenth Amendment in *Wong Kim Ark*. Some politicians (and white nationalists) have speculated that it would be a "close call."[349] The legal argument in favor of overruling *Wong Kim Ark* does not emanate from an originalist interpretation of the Constitution – the approach apparently favored by the Court's conservative majority. As explained *supra*, the Court in *Wong Kim Ark* held that the Fourteenth Amendment granted United States citizenship to every person born in this country, including people like Wong Kim Ark, whose parents were not U.S. citizens.[350] The federal government argued that Wong was not "subject to the jurisdiction" of the United States, because his parents were subjects of the emperor of China. However, the Court rejected this argument based on the clear language and intent behind the Fourteenth Amendment.[351]

Modern critics argue that *Wong Kim Ark* is distinguishable because Wong's parents were not "illegal aliens" present in the country in violation of federal immigration laws, unlike the parent(s) of many children who benefit from birthright citizenship today.[352] Professors Peter Schuck and Rogers

344. *Id*. at 2242.
345. *Bruen*, 142 S. Ct. 2111.
346. *Id*. at 2126.
347. Lemon v. Kurtzman, 403 U.S. 602 (1971).
348. Kennedy v. Bremerton Sch. Dist., 587 U.S. __, 142 S. Ct. 2407, 2428 (2022).
349. *See supra* note 332.
350. *See supra* Section I.D. and accompanying text.
351. *See supra* notes 167–168, 182–184 and accompanying text.
352. *See* Maureen Groppe, *Vice President Mike Pence Says Trump's Plan to Curb Birthright Citizenship May Be Constitutional*, USA TODAY (Oct. 30, 2018), https://perma.cc/T33T-CD9P (quoting former Vice-President Pence as stating, "[T]he Supreme Court of the United States has never ruled on whether or not the language of the 14th Amendment, subject to the jurisdiction thereof, applies specifically to people who are in the country illegally."); *see also* Dr. John Eastman & Professor Ediberto Román, *Debate on Birthright Citizenship*, 6 FIU L. Rev. 293, 298 (2011) (Eastman distinguishing *Wong Kim Ark* on the grounds that Ark's parents were "lawful, permanent residents" of the United States); John C. Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020), https://perma.cc/DCP8-KSVJ (arguing that Kamala Harris is not a "natural-born citizen" of the United States, even though she was born in California, because her parents were likely not U.S. citizens or permanent residents at the time of her birth). Professor Eastman, one of the most outspoken advocates of the view that the Fourteenth Amendment does not guarantee birthright citizenship, also gained notoriety as one of the chief architects of a legal strategy to keep President Trump in office after his failed 2020 re-election bid. *See* Michael S. Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. TIMES (Oct. 13, 2022), https://perma.cc/G7YF-3XJR.

Smith have framed the issue as a problem of "mutual consent."[353] They argue that birthright citizenship lacks legitimacy because it is "ascriptive" and not "consensual" between the state and the individual.[354] The term "ascriptive" describes a group or society "in which status is based on a predetermined factor, such as age, sex, or race, and not on individual achievement."[355] Schuck and Smith's theory suggests birthright citizenship is "ascriptive" because it is predetermined by place of birth, rather than one's effort to join the state, or the consent of the person born within the territorial borders of the state. Moreover, the state itself does not consent to a grant of birthright citizenship, particularly when the child's parent is present in violation of the state's immigration laws. Under this theory, the deep historical roots of birthright citizenship detract from its legitimacy by evidencing feudal origins deemed incompatible with the modern state.[356]

However, even if "consent" to citizenship was considered relevant from a policy perspective, it does not support rejection of birthright citizenship. Neither the *jus soli* nor *jus sanguinis* citizenship model is truly "consensual" on the part of the individual: A person chooses neither their parents nor their place of birth.[357] Only citizenship achieved via the naturalization process is truly consensual between the individual and the state.[358] No one suggests that U.S. citizenship be solely contingent upon the congressional powers of naturalization. This rule would be undesirable for many reasons, including its cost and inefficiency.[359] Moreover, both naturalization[360] and the rule of

353. *See* SCHUCK & SMITH, *supra* note 94, at 94 ("arguing that "mutual consent is the irreducible condition of membership in the American polity"); *cf.* David S. Schwartz, Book Review, *The Amorality of Consent*, 74 CALIF. L. REV. 2143, 2170 (1986) (critiquing this argument, concluding that "mutual consent" in this context is a "morally incoherent" theory); Ngai, *supra* note 161, at 2529 (characterizing mutual consent as a "fiction" because "[t]he individual's consent to be governed carries far less power than the state's ability to exclude").

354. SCHUCK & SMITH, *supra* note 94, at 22; *contra* Schwartz, *supra* note 353, at 2152 (rejecting the ascription/consent distinction argued by Schuck and Smith). Neither Professor Schuck nor Professor Smith embraces white supremacy or opposes immigration generally. *See, e.g.,* Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963 (1996) (reviewing and critiquing Peter Brimelow's book, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER).

355. WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2010).

356. SCHUCK & SMITH, *supra* note 94, at 11.

357. *See* Ngai, *supra* note 161, at 2526 (noting that "both basic rules of assigning citizenship at birth are ascriptive, whether by geography or by descent").

358. *See* Schwartz, *supra* note 353, at 2150 n.20 ("The law governing immigration and naturalization provides the closest approximation to a 'purely consensual' citizenship model in American law, because it deals with the case in which an immigrant applies for citizenship and Congress grants or withholds consent."); Ngai, *supra* note 161, at 2526 ("In contrast to the native-born who hold passive citizenship, . . . only naturalized citizens give explicit consent to citizenship and its obligations.").

359. *See, e.g.*, Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 DENV. L. REV. 669 (2020) (documenting barriers to attaining citizenship via the naturalization process, particularly for noncitizens serving in the military).

360. *See supra* Section I.C. (discussing race-based nineteenth-century naturalization laws, especially the Chinese Exclusion Acts); *see also* Giselle Rhoden & Nicole Chavez, *Black Immigrants Are More Likely to be Denied US Citizenship than White Immigrants, Study Finds*, CNN.COM (Feb. 24, 2022, 10:26 AM), https://perma.cc/L5RR-6YGD (discussing racial disparities in citizenship applications).

jus sanguinis[361] have historically been used to exclude non-white people from American citizenship – a result largely voided by the Fourteenth Amendment with respect to individuals born within the United States.

Regardless of one's views about the proper role of "consent" in the modern polity, an originalist's interpretation of the Fourteenth Amendment's guarantee of birthright citizenship should not be swayed. The words "subject to the jurisdiction thereof" had a clear and long-standing meaning under the common law that existed when the Fourteenth Amendment was adopted. That meaning was reiterated and explained throughout the congressional debates surrounding the Fourteenth Amendment.[362] The drafters and adopters of the amendment intended that the *only* persons not "subject to the jurisdiction" of the United States, despite being born within its borders, were Native Americans born into a recognized tribe, the children of diplomats, and enemies during wartime.[363] Therefore, if this language is understood with "reference to historical practices and understandings"[364] and the nation's historical traditions[365] – as the Court directed in *Bremerton* and *Bruen* – *Wong Kim Ark* should not be in any danger of being overturned. Moreover, birthright citizenship, unlike the right to abortion recently discarded in *Dobbs*, is both clearly spelled out in the Fourteenth Amendment (not implied) and "deeply rooted in this Nation's history and tradition," for the same reasons.[366] Under their own reasoning, the Supreme Court's conservative justices should find no reason to disturb this precedent.

Of course, time has not stood still since the Supreme Court issued its decision in *Wong Kim Ark*. Judges who employ a theory of "living constitutionalism," as contrasted with originalism, are more likely to read the words of the Constitution in light of evolving societal circumstances and therefore may consider such changes when interpreting it.[367] However, even judges who look beyond the nation's "historical traditions" to interpret the Constitution should not disturb *Wong Kim Ark*. Although the nation's immigration laws have significantly changed over the past century, federal immigration law did

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361. Justice Taney's decision in *Dred Scott* effectively imposed a rule of *jus sanguinis* on Black people born in America, contrary to the common law rule of *jus soli*. Taney presumed that every Black person in the country had an enslaved ancestor, and therefore that none of them could ever be "free" citizens of the United States. *See supra* notes 33–34 and 44–45 and accompanying text.

362. *See supra* notes 98–110 and accompanying text.

363. *See supra* notes 153–157 (Native Americans), 169–171 (alien enemies), and 172–177 (diplomats), and accompanying text.

364. Kennedy v. Bremerton Sch. Dist., 587 U.S. __, 142 S. Ct. 2407, 2428 (2022).

365. New York State Rifle & Pistol Ass'n v. Bruen, 587 U.S. __, 142 S. Ct. 2111, 2126 (2022).

366. *See* Dobbs v. Jackson Women's Health Org., 587 U.S. __, 142 S. Ct. 2228, 2242 (2022).

367. As Professor Charles Reich observed, "Courts, having the power of interpreting the Constitution, have the duty to . . . give it meaning in new settings as society changes, even if this requires facing issues which could be avoided, overruling precedents, or affirmatively undertaking to change some aspect of society." Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 703 (1963). *See generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

exist in 1898.[368] Approximately sixteen years after the ratification of the Fourteenth Amendment, Congress enacted the Chinese Exclusion Acts.[369] In fact, Wong's citizenship status was before the Supreme Court because he had temporarily left the United States to visit China, and then was barred from re-entering the country under the terms of the Act.[370] The Court had previously affirmed the federal government's power to exclude people of Chinese descent from entering the country and from becoming naturalized citizens.[371] However, it held that these immigration and naturalization statutes could not "control [the Fourteenth Amendment's] meaning, or impair its effect, but must be construed and executed in subordination to its provisions."[372] The opinion does not state or imply that Wong would not have been "subject to the jurisdiction" of the United States if Wong's parents had been in the United States in violation of the Chinese Exclusion Acts.

More broadly, the claim that the drafters of the Fourteenth Amendment could not have anticipated an immigration crisis analogous to the experience of the modern era is itself ahistorical. *Wong Kim Ark* was decided at a time of escalating nativism, racism, and fear directed at immigrants, primarily those who came to the United States from China, such as Wong's parents.[373] Congress passed laws to restrict Chinese people from entering the country. Further, once they arrived, Congress made it impossible for them to become naturalized citizens.[374] However, Congress did not have the power to revoke U.S. citizenship from the children of Chinese immigrants born in America. Similarly, today, anti-immigrant sentiment runs high, especially against people coming to the United States from Latin America.[375] Congress has passed laws making it nearly impossible for people from these countries to legally immigrate and become naturalized U.S. citizens.[376] And yet, even today, their children (if they are born in the United States) do not need congressional permission to exercise the rights and privileges of their American citizenship. The Constitution makes it their birthright.

As the Supreme Court recognized in *Wong Kim Ark*, the language of the Fourteenth Amendment's birthright citizenship clause is clear, as is the historical foundation of its meaning. The context of *Wong Kim Ark* is similar to

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368. In fact, federal immigration laws – in the form of federal statutes regulating the slave trade – existed for several decades *prior* to the ratification of the Fourteenth Amendment. *See* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2227–50 (2021) (arguing that, when the Fourteenth Amendment was adopted, federal statutes regulating the slave trade treated illegally imported enslaved people as unauthorized migrants).

369. *See supra* notes 137–147 and accompanying text (discussing the history and terms of the Acts).

370. United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898).

371. *See id*. at 699–702.

372. *Id*. at 699.

373. *See supra* notes 132–137 and accompanying text.

374. *See supra* note 141 and accompanying text.

375. *See supra* Section II.A.2.

376. *See generally* MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020) (arguing in favor of improving pathways to citizenship for immigrants in America).

that of today, as politicians and commentators seek voter approval by demanding the expulsion of members of disfavored groups and their exclusion from the rights and duties of American citizenship. Even the most conservative Supreme Court in a hundred years should not disturb this precedent.

F. *The Right-Wing Push for a Constitutional Convention*

Even if the Supreme Court does not abrogate *Wong Kim Ark* and affirms the Fourteenth Amendment's guarantee of birthright citizenship, a more serious threat to this constitutional principle remains: a constitutional amendment. The 1996 Republican Party Platform supported a constitutional amendment ending birthright citizenship.[377] In 2010, South Carolina Senator Lindsey Graham announced that he was "considering introducing a constitutional amendment" ending birthright citizenship (but he did not do so).[378] More recently, a growing number of Republicans and right-wing activists, heavily funded by conservative donors, have called for an Article V convention, an event with the potential to rewrite the Constitution.[379] If such a convention were to be called, eliminating unconditional birthright citizenship – presumably replacing it with a model based on the rule of *jus sanguinis* – could be a priority of those who have railed against it for decades. Conservative commentator Jenna Ellis, who later became a critical player in former President Trump's efforts to overturn the 2020 election, wrote in the *National Review* that "[t]he future of our country doesn't rest solely on the [Presidential election] results in November [2016]. There is a much bigger and better solution in the U.S. Constitution itself – Article V."[380]

Article V establishes two procedures for amending the United States Constitution: the congressional method and the convention method.[381] Under

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377. Republican Party Platform of 1996, *A Sensible Immigration Policy* (Aug. 12, 1996), https://perma.cc/W48Z-4GAH ("We support a constitutional amendment or constitutionally-valid legislation declaring that children born in the United States of parents who are not legally present in the United States or who are not long-term residents are not automatically citizens."). Republican presidential nominee Bob Dole and vice-presidential nominee Jack Kemp both publicly opposed this plank of the platform. *Presidential Politics and Immigration*, MIGRATION NEWS (Sept. 1, 1996), https://perma.cc/Q3VF-PBQ4.

378. *See* Andy Barr, *Graham Eyes 'Birthright Citizenship'*, POLITICO (July 29, 2010, 8:19 AM), https://perma.cc/W4NK-PBJH. Graham Tweeted that he had always supported "the elimination of birthright citizenship." Jordain Carney, *Graham to Introduce Legislation to End Birthright Citizenship*, THE HILL (Oct. 30, 2018, 11:12 AM), https://perma.cc/L64V-QQ3H.

379. *See infra* notes 406–417 and accompanying text.

380. Jenna Ellis & Michael Farris, *A Convention of the States to Amend the Constitution*, NATIONAL REVIEW (Sept. 29, 2016), https://perma.cc/9X4K-ZUQM (*quoted in* RUSS FEINGOLD & PETER PRINDIVILLE, THE CONSTITUTION IN JEOPARDY: AN UNPRECEDENTED EFFORT TO REWRITE OUR FUNDAMENTAL LAW AND WHAT WE CAN DO ABOUT IT 110 (2022)).

381. Article V provides as follows: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ." U.S. CONST. art. V. *See* FEINGOLD &

the congressional method, two-thirds of the members of both the House and the Senate must approve a proposed amendment before it can be submitted to the states for ratification.[382] To date, the Constitution has been amended twenty-seven times; each of these amendments has originated in Congress.[383] Alternately, Article V provides that Congress must call a "Convention for proposing Amendments" if it receives applications for such a convention from two-thirds of the country's state legislatures.[384] Given that the nation is currently comprised of fifty states, a congressional duty to call such a convention would be triggered by the receipt of convention applications from thirty-four states.[385] Article V does not specify how applications from state legislatures are to be submitted or received; how they may be withdrawn; when they expire; or even how the constitutional convention itself would be administered and by whom. Simply stated, "The framers left no rules."[386] The ambiguity of Article V has generated fear of a "runaway convention"[387] that could place many of the Constitution's fundamental principles (including birthright citizenship) at risk, should such a convention become a reality.[388] As former Senator and Article V convention proponent Rick Santorum has characterized it, the process is like a grenade: "You pull the pin [and] you've got a live piece of ammo in your hands."[389]

Conservative proponents of Constitutional change, like Santorum, are seeking an Article V convention, as opposed to the congressional method of amendment, due to the centrality of state legislatures in the Article V process.[390] The convention method utilizes state legislatures – most of which are currently controlled by Republicans[391] – to propose amendments, rather than

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PRINDIVILLE, *supra* note 380, at 39–47 (describing the amendment process under Article V); Rierson, *supra* note 67, at 62–64 (same).

382. U.S. CONST. art. V.

383. *See* FEINGOLD & PRINDIVILLE, *supra* note 380, at 218–26 (appendix listing all ratified constitutional amendments, 1–27).

384. U.S. CONST. art. V.

385. *Id*. *See* Grace Panetta & Brett D. Griffiths, *Republicans' Next Big Play is to 'Scare the Hell out of Washington' by Rewriting the Constitution. And They're Willing to Play the Long Game to Win.*, BUSINESS INSIDER (July 31, 2022, 6:55 AM), https://perma.cc/R2R9-7CVC (quoting former Sen. Rick Santorum as stating, "34 states — if every Republican legislator votes for this, we have a constitutional convention").

386. Carl Hulse, *A Second Constitutional Convention? Some Republicans Want to Force One*, N.Y. TIMES (Sept. 4, 2022), https://perma.cc/WDP7-EFHP (quoting Feingold).

387. FEINGOLD & PRINDIVILLE, *supra* note 380, at 60, 122–27.

388. *See* Hulse, *supra* note 386 (noting that constitutional convention delegates could "seiz[e] the opportunity to promote wholesale changes in the founding document"); Panetta & Griffiths, *supra* note 385 ("[A] constitutional convention led by conservatives could trigger sweeping changes to the Constitution."). Former Wisconsin Sen. Russ Feingold worries that an Article V convention "could gut our Constitution." Hulse, *supra* note 386.

389. Santorum made these remarks at the ALEC policy summit held in December 2021. Panetta & Griffiths, *supra* note 385.

390. U.S. CONST. art. V.

391. "As of October 10, 2023, Republicans controlled 54.82% of all state legislative seats nationally, while Democrats held 44.34%. Republicans held a majority in 57 chambers, and Democrats held the majority in 40 chambers." *Partisan Composition of State Legislatures*, BALLOTPEDIA, https://perma.cc/E2UZ-F6GJ. *See* David Byler, *Republicans Now Enjoy Unmatched Power in the States. It Was a 40-year Effort*., WASH. POST (Feb. 18, 2021), https://perma.cc/2Q3H-DLF2.

Congress, where political power is more evenly distributed between Republicans and Democrats.[392] Pervasive political gerrymandering has distorted legislative representation in many states, leading to Republican legislative majorities and veto-proof supermajorities in states where the voting population is almost evenly divided between Republicans and Democrats.[393] Moreover, although Article V leaves no instructions for convention voting procedures, conservative proponents advocate using the same protocol employed in 1787, allotting one vote per state.[394] This procedure also advantages conservatives, given that sparsely populated, more rural states (which tend to be predominantly Republican) receive the same amount of representation as larger states with millions more inhabitants (which tend to be more liberal and Democratic).[395] For these reasons, constitutional amendments that would not be feasible via the congressional method may have a higher chance of success in the context of a twenty-first century Article V convention.[396]

Proposed amendments that emerge from an Article V convention (or from the Congress) do not automatically become part of the Constitution; to become effective, an amendment must be ratified by three-fourths of the states.[397] However, even this constitutional guardrail may be subject to control by state legislatures. Article V provides that ratification of proposed amendments may be controlled either by state legislatures or by a state

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392. As of October 3, 2023, Republicans hold a slim nine-vote majority in the House of Representatives (221-212), and the Senate is almost evenly split and effectively controlled by the Democratic party, with 48 Democrats, 49 Republicans, and three Independents, two of whom caucus with the Democrats. Vice-President Kamala Harris is the President of the Senate. *List of Current Members of the U.S. Congress*, BALLOTPEDIA, https://perma.cc/2H74-JSZ8

393. *See* DAVID PEPPER, LABORATORIES OF AUTOCRACY: A WAKE-UP CALL FROM BEHIND THE LINES 81–105 (2021) (discussing the process and impact of gerrymandering in Ohio and other states); Jane Mayer, *State Legislatures are Torching Democracy*, THE NEW YORKER (Aug. 6, 2022), https://perma.cc/GJ9V-9BKG (discussing the impact of gerrymandering on the Ohio state legislature). Gerrymandering has also distorted political representation in the U.S. House of Representatives. *See* Glenn Altschuler, *Gerrymandering, a Legal Form of Vote Stealing, More Entrenched Now than Ever*, THE HILL (May 29, 2022, 8:30 AM), https://perma.cc/H6PJ-6CWA (noting that 53.3% of Ohio voters supported Donald Trump in the 2020 election, but Ohio's delegation in the U.S. House of Representatives consists of twelve Republicans and four Democrats); *see also* Ari Berman, *Texas Republicans Are Pulling Out All the Stops to Dilute the Voting Power of People of Color*, MOTHER JONES (Oct. 4, 2021), https://perma.cc/GQ9U-EWYE (discussing racial gerrymandering in Texas). As Justice Sonia Sotomayor observed in her dissent in *Rucho v. Common Cause*, Republican candidates won nine of North Carolina's thirteen seats in the U.S. House of Representatives in 2012, despite receiving less than half of the statewide vote. 588 U.S. ___, 139 S. Ct. 2484, 2509–10 (2019). Two years later, Republican House candidates received 55% of the statewide vote and 77% of the state's House seats. *Id.*

394. FEINGOLD & PRINDIVILLE, *supra* note 380, at 108–09. The 2016 convention simulations employed this method of voting. *Id.*

395. *See id.* at 109 (nothing that, if each state were allocated one vote in a constitutional convention, California's 39.5 million inhabitants would receive the same amount of representation as the 577,000 people living in Wyoming). Sen. Rick Santorum acknowledged this disparity at an ALEC policy summit, proclaiming that it would enable conservatives "to have a supermajority, even though . . . we may not even be in an absolute majority when it comes to the people who we agree with." Panetta & Griffiths, *supra* note 385.

396. Michael Farris, a founder of the Convention of States Project, argued that "[i]f you put enough pressure on state legislatures, you can get stuff done [re constitutional amendments]. You don't need a majority of America, because a majority doesn't participate [in state legislative elections]." FEINGOLD & PRINDIVILLE, *supra* note 380, at 109.

397. U.S. CONST. art. V.

constitutional convention; Congress determines which "mode of ratification" will be employed.[398] Article V does not guide Congressional decision-making on this point. It is, therefore, feasible that the vote of a bare majority in Congress could send a proposed constitutional amendment ending birthright citizenship to gerrymandered state legislatures for ratification.

Movements advocating for an Article V convention to amend the Constitution have arisen at various points in American history. Activists calling for constitutional change during the Progressive Era, beginning in the 1890s, tried to achieve their goals via an Article V convention but fell one state short of the required number of applications to Congress.[399] Conservatives seeking to overturn the decisions of the Warren Court in the 1950s and 1960s, particularly *Reynolds v. Sims*[400] and *Baker v. Carr*,[401] pushed for an Article V convention and likewise fell one state short.[402] Anti-tax fervor in the 1970s drove another convention movement focused on adding a balanced budget amendment to the Constitution.[403] That campaign also faltered, falling two states short of the 34-state minimum for calling a convention.[404] Although these convention appeals focused on specific amendments to achieve targeted policy goals, if the 34-state threshold is reached, it is unclear whether a resulting Article V convention could be so limited in scope.[405]

The most recent push to call a constitutional convention crystallized after the election of President Barack Obama in 2008 and has become increasingly identified with the "burgeoning far right."[406] Multiple conservative groups have joined the ongoing crusade to call an Article V convention to amend the Constitution.[407] One such group is the Convention of States Action (COS). This non-profit organization was founded by activist Mark Meckler, who also co-founded the Tea Party Patriots in 2009 and briefly served as the CEO of Parler, a right-wing alternative to Twitter.[408] COS publishes an "Article V Pocket Guide" and asks readers to sign a petition calling for an Article V

398. *Id*.
399. *See* FEINGOLD & PRINDIVILLE, *supra* note 380, at 90–92.
400. Reynolds v. Sims, 377 U.S. 533 (1964).
401. Baker v. Carr, 369 U.S. 186 (1962).
402. FEINGOLD & PRINDIVILLE, *supra* note 380, at 112–16.
403. *Id*. at 116–18.
404. *Id*. at 118. Attempts to pursue a balanced budget constitutional amendment through the congressional method likewise failed. *Id*.
405. *Id*. at 60.
406. *Id*. at 119.
407. *See* Hulse, *supra* note 386 (noting that representatives of the Tea Party, the Federalist Society, and activists allied with former president Trump, such as John Eastman, support calls for a constitutional convention).
408. *See* Alex Kotch, *Parler Is Now in the Hands of a Right-Wing Activist Seeking a Radical Rewrite of the Constitution*, EXPOSED BY CMD, THE CENTER FOR MEDIA AND DEMOCRACY (Feb. 15, 2021), https://perma.cc/A3MG-VXX2; *Parler Announces Re-Launch, New CEO*, NBC NEWS.COM (Feb. 16, 2021), https://perma.cc/C7X3-UR4A (discussing appointment of "Tea Party Patriot" Meckler as Parler's interim CEO); Travis Waldron, *A Radical Right-Wing Dream to Rewrite the Constitution Is Close to Coming True*, HUFFPOST.COM (Apr. 27, 2021), https://perma.cc/8FAV-MMX6.

convention.[409] COS states that the purpose of such a constitutional convention would be to "impose fiscal restraints on the federal government, limit its power and jurisdiction, and impose term limits on its officials and members of Congress."[410] COS has been endorsed by numerous conservative political activists and potential Republican nominees for the 2024 Presidential election, including Florida governor Ron DeSantis, Texas governor Greg Abbott, Senators Rick Santorum and Rand Paul, and Fox News commentators Sean Hannity and Mark Levin.[411] "[C]onservative megadonors" such as Charles and David Koch, and Rebekah and Robert Mercer, have given millions of dollars to COS and affiliated groups.[412] Organizations and individuals associated with the Federalist Society have contributed millions to the convention movement as well.[413] Another group lobbying for an Article V convention is the non-profit American Legislative Exchange Council (ALEC). ALEC provides states with a model bill calling for a constitutional convention (which many have adopted verbatim).[414] ALEC claims to represent nearly a quarter of the nation's state legislators.[415] ALEC has sponsored three Article V "boot camps" designed to prepare state legislators to bring about and participate in a constitutional convention.[416] Although some left-leaning interest groups support the call for an Article V constitutional convention to achieve their own policy goals, such as campaign finance reform and gun control, they are a minority within the convention movement.[417]

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409. *Take Action*, CONVENTION OF STATES ACTION, https://perma.cc/L9KA-X75N.

410. *Id.*

411. Endorsements, CONVENTION OF STATES ACTION, https://perma.cc/L9KA-X75N (showing governors Sarah Palin and Mike Dunleavy as endorsees of COS's push for a Constitutional convention, along with Republican presidential candidate Vivek Ramaswamy and other conservative activists); *see also* Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL. 1 (2016) (arguing in favor of an Article V constitutional convention); GREG ABBOTT, UNBROKEN AND UNBOWED (2016) (proposing the "Texas Plan" under which an Article V convention would lead to the adoption of nine proposed constitutional amendments, primarily designed to curtail the power of the federal government and the federal courts).

412. *See* Chris Cillizza, *How the Koch Brothers Fundamentally Changed Modern Politics*, CNN POLITICS (Aug. 23, 2019), https://perma.cc/JX8F-RFJ8; Brian Schwartz, *Mercer Family Played Bigger Role in 2020 Election than Thought, Giving Nearly $20 million to Dark Money GOP Fund*, CNBC POLITICS (Sept. 15, 2021), https://perma.cc/62A6-PST4.

413. FEINGOLD & PRINDIVILLE, *supra* note 380, at 120; Kotch, *supra* note 408 (discussing donations made by the Mercers and by the Judicial Education Project, a group closely linked to the Federalist Society, and the chairman of the Federalist Society, Leonard Leo); Panetta & Griffiths, *supra* note 385 (noting that COS received a $1.3 million Bitcoin donation in 2020); *see also* Jonaki Mehta & Courtney Dorning, *One Man's Outsized Role in Shaping the Supreme Court and Overturning Roe*, NPR.ORG (June 30, 2022), https://perma.cc/5GAH-TVN8 (discussing conservative activism of Leo).

414. *Application for a Convention of the States under Article V of the Constitution of the United States*, AM. LEGIS. EXCH. COUNCIL, https://perma.cc/F4C7-6HNT.

415. *About* ALEC, AM. LEGIS. EXCH. COUNCIL, https://perma.cc/7RHE-NCRC. *See also* FEINGOLD & PRINDIVILLE, *supra* note 380, at 121–22 (describing ALEC and characterizing it as a "mainstay of the now-dominant Republican establishment in statehouses").

416. *See* Panetta & Griffiths, *supra* note 385; *Academy of States 3.0*, PATH TO REFORM: EQUIPPING STATE LEGIS. TO IMPOSE REFORMS ON WASHINGTON, D.C., https://perma.cc/2P2Y-BY96.

417. Sanya Mansoor, *How a Mock Convention is Helping Fuel a Movement to Change the Constitution*, THE CENTER FOR PUBLIC INTEGRITY (July 30, 2018), https://perma.cc/Z8YL-WVBK. One such group is Wolf PAC, a California-based group that advocates a constitutional convention to adopt a twenty-eighth amendment (the Free and Fair Elections Amendment) to overturn the Supreme Court's

COS sponsored a constitutional convention "simulation" in September 2016.[418] The mock convention, held in Williamsburg, Virginia, was attended by approximately 120 state legislators and led by a "who's who of the far-right establishment."[419] At this mock convention, the delegates proposed and adopted six constitutional amendments, which (if enacted) would radically restrict the power of the federal government.[420] The mock amendments included proposals to revoke the federal government's ability to collect income and estate taxes, to allow states to abrogate federal laws and administrative regulations, and to severely restrict Congress' ability to regulate interstate commerce – a constitutional principle that currently undergirds many of the nation's federal civil rights laws.[421] This simulation did not attempt to address the guarantee of birthright citizenship in the Fourteenth Amendment. However, if its proponents achieve their goal of calling an Article V convention, they could attempt to do so.[422]

Due to Article V's ambiguity regarding the process by which states may submit "applications" for a constitutional convention, some Republican politicians contend that the required 34-state threshold has already been reached or exceeded.[423] This calculation includes states that have passed resolutions calling for a convention to adopt specific amendments, such as the balanced budget proposals of the 1970s, plus those states that have arguably adopted resolutions calling for a "plenary" constitutional convention.[424] Some of these resolutions are over two hundred years old: New York, for example, adopted its resolution in 1789, predating the ratification of the Bill of

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decision in Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310 (2010). *The Solution,* WOLF PAC, https://perma.cc/55A4-DZ2N; *see also* Bob Egelko, *Newsom Explains Why He's Pushing for U.S. Constitutional Convention on Guns*, SAN FRANCISCO CHRON. (Sept. 15, 2023), https://perma.cc/55HR-MXUF; Mansoor, *supra* note 417; Panetta & Griffiths, *supra* note 385.

418. FEINGOLD & PRINDIVILLE, *supra* note 380, at 107–112.

419. *Id*. at 107; s*ee Convention of States Historic Simulation*, CITIZENSHIP CONVENTION OF STATES ACTION (Sept. 21-23, 2016), https://perma.cc/6KLM-KCR7; Waldron, *supra* note 408; Mansoor, *supra* note 417. Sen. Joan Carter Conway of Maryland was one of the few Democrats to attend the mock convention. Mansoor, *supra* note 417.

420. *See Official Proposals of the Simulated Convention of States*, CONVENTION OF STATES HISTORICAL SIMULATION (adopted September 26, 2016), https://perma.cc/ESV5-F6UD; *see also* FEINGOLD & PRINDIVILLE, *supra* note 380, at 109–10 (describing these proposed constitutional amendments as a "hard-right constitutional wish list").

421. *Official Proposals of the Simulated Convention of States*, *supra* note 420, (explaining that the proposal allowing states to abrogate federal law would require a vote approving such abrogation by three-fifths of the state legislatures). The proposal limiting congressional power under the Commerce Clause states, "The power of Congress to regulate commerce among the several states shall be limited to the regulation of the sale, shipment, transportation, or other movement of goods, articles or persons. Congress may not regulate activity solely because it affects commerce among the several states." *Id*.; *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (holding that the Commerce Clause empowers Congress to prohibit private entities from discriminating in public accommodations, due to the effects of such discrimination on interstate commerce).

422. Jay Riestenberg, a representative of the liberal non-profit group Common Cause, has predicted that the Fourteenth Amendment, along with civil rights and other constitutional protections, could be "up for grabs" if conservatives succeed in calling an Article V convention. Waldron, *supra* note 408.

423. FEINGOLD & PRINDIVILLE, *supra* note 380, at 143. Former Wisconsin governor Scott Walker made this announcement at ALEC's annual meeting in 2020. *Id*.

424. Waldron, *supra* note 408; *see also* FEINGOLD & PRINDIVILLE, *supra* note 380, at 146.

Rights.[425] These attempts at Article V "mathematical magic" stretch credulity and defy common sense.[426] Nevertheless, in July 2022, Representative Jodey Arrington of Texas introduced a bill in the House of Representatives to instruct the national archivist to "tally applications for a [constitutional] convention from state legislatures and compel Congress to schedule a gathering when enough states have petitioned for one."[427]

The possibility of an Article V convention, ultimately controlled by a minority of voters via Republican-dominated, gerrymandered state legislatures, should not be dismissed as an unattainable right-wing fantasy. Conservative mega-donors are pouring millions of dollars into the campaign to bring about an Article V convention. Such a convention would pose a mortal threat to unconditional birthright citizenship in the United States. If any of these attacks bear fruit, the result will be the whitening of the American citizenry and the degradation of America's democratic institutions.

III. THE IMPACT OF ENDING BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES

Ending birthright citizenship for children with undocumented parent(s) – through judicial interpretation, a constitutional amendment, or any other means – would have devastating consequences for immigrants in the United States. It also would fundamentally change what it means to be an "American" and undermine the nation's future as a pluralistic, liberal democracy. After the Civil War, America built economic success and growth on the shoulders of immigrants, and it continues to do so today. The Fourteenth Amendment's guarantee of unrestricted birthright citizenship has always been essential to that success.

A. *Ending Birthright Citizenship Would Exponentially Increase the Number of Undocumented People Living in the United States and Whiten the American Citizenry*

Under the Fourteenth Amendment, as it is now understood, all that is required to prove U.S. citizenship is a birth certificate indicating a person's birth within the United States or one of its territories.[428] An alternative test, based on the immigration status of one or both parents, would potentially deprive millions of people living in the United States of their citizenship, many of whom know no other country and are non-white. Stripping citizenship from

425. Waldron, *supra* note 408; *see also* FEINGOLD & PRINDIVILLE, *supra* note 380, at 146–47.

426. FEINGOLD & PRINDIVILLE, *supra* note 380, at 150; *see also id*. at 147–50 (critiquing this method of tallying state applications for a constitutional convention).

427. Hulse, *supra* note 386.

428. *See I Am a U.S. Citizen: How Do I Get Proof of My U.S. Citizenship*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Oct. 2013), https://perma.cc/J5HF-5N55 (providing that "[y]our birth certificate issued where you were born is proof of your citizenship," except for the children of foreign diplomats); *see also* SCHUCK & SMITH, *supra* note 94, at 33 (acknowledging that "[c]larity and simplicity are unquestionably important virtues in any citizenship test").

millions of people would further disenfranchise them and whitewash the American electorate.

The impact of a proposal to end birthright citizenship for children without legal immigration status would depend, in part, on the method of implementing it. Former President Trump never specified how he would carry out a plan to eliminate birthright citizenship under the Fourteenth Amendment.[429] Some white nationalist proposals (and that of Presidential candidate Vivek Ramaswamy) would be retroactive, depriving citizenship from *all* people who were born in the United States, but whose parents were not.[430] Others, like the bills proposed in the U.S. Congress, would deprive citizenship from children born in the United States in the future based on their parents' immigration status.[431] It is also unclear whether children born in "mixed status" households – where one parent has legal immigration status but the other does not – would be considered United States citizens under these varied reinterpretations of the Fourteenth Amendment. Regardless, all of these proposals would eliminate millions of people from the American citizenry, most of them non-white.

Millions of people living in the United States are citizens of this country because they were born here. Between 2009 and 2013, over five million children (people under the age of 18) were living with at least one parent who did not have legal immigration status.[432] These five million children represent about seven percent of the total number of children living in the United States.[433] Approximately eighty percent of them – over four million people – are citizens of the United States because they were born in this country.[434] In 2016, an additional one million U.S.-born adults were living with at least one undocumented parent.[435] People who were born *in* the United States to parents who were born *outside* its borders are considered second-generation immigrants.[436]

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429. *See* Epps, *supra* note 316 (noting that Trump did not specify whether his proposed executive order "would target only American-born children of undocumented immigrants, children of foreigners visiting the U.S. on nonpermanent visas – or the children of any noncitizen").

430. *See supra* notes 235–238, 330 and accompanying text.

431. *See supra* note 302 and accompanying text.

432. Randy Capps, Michael Fix & Jie Zong, *A Profile of U.S. Children with Unauthorized Immigrant Parents*, THE MIGRATION POLICY INST. (Jan. 2016), https://perma.cc/6LKH-BXLP (explaining that these percentages are further complicated because parents' immigration status may change as people may either acquire or lose lawful immigration status over time).

433. *Id*.

434. *Id*. at 4.

435. Jeffrey S. Passel, D'Vera Cohn & John Gramlich, *Number of U.S.-Born Babies with Unauthorized Immigrant Parents Has Fallen Since 2007*, PEW RESEARCH CENTER (Nov. 1, 2018), https://perma.cc/69CD-53QF. In 2016 about 250,000 children whose parents lacked legal immigration status were born in the United States, a figure that represents about 6% of all births in the U.S. for that year. *Id*. That number has declined about 36 percent since 2007, when about 390,000 children (9% of total births) were born in the United States to undocumented parents. *Id*.

436. *See* Philip Bump, *How Many American Children are 'Birthright' Citizens Born to Illegal Immigrants?*, WASH. POST (Aug. 20, 2015), https://perma.cc/7RFU-KEHM (explaining that children who are born *outside* the United States are considered first-generation immigrants). *Id*. Due to their place of birth, first-generation immigrant children are not entitled to U.S. citizenship under the Fourteenth

Because second-generation immigrants with at least one undocumented parent are less likely to be white than the general population, the elimination of birthright citizenship would disproportionately disenfranchise racial and ethnic minorities and otherwise deprive them of the benefits of citizenship, especially Hispanics.[437] In 2017, about 57 percent of U.S. children who were second-generation immigrants were Hispanic, as compared to 14 percent of non-immigrant children.[438] About 42 percent of these children had at least one parent born in Mexico; the second-highest parental country of origin was El Salvador, with 5.3%.[439] About 15 percent of second-generation immigrant children identified as Asian, compared to less than 1 percent of all non-immigrant children.[440]

The negative effects associated with eliminating birthright citizenship would not be evenly spread across the United States. The undocumented immigrant population in the U.S., which is currently estimated to be around 11 million people, is concentrated in three states: California, Texas, and New York.[441] About half of the nation's undocumented population lives in these three states.[442] Almost a third of the nation's undocumented population – over three million people – live in the state of California.[443] Many of these undocumented immigrants have children who were born in the United States and, hence, under the Fourteenth Amendment, are citizens of the United States. Almost a third of California's adult, undocumented population lives with at least one U.S. citizen child.[444] Over ninety percent of the children born to immigrant families in California are U.S. citizens.[445] If unconditional birthright citizenship were eliminated, millions of non-white people would be disenfranchised in the state of California alone.

Stripping U.S. citizenship from every child born in the United States with at least one undocumented parent would automatically increase the number of non-citizens living in the country without legal immigration status by about four million (a number approximately equal to the number of enslaved

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Amendment. *See infra* notes 477–483 and accompanying text (discussing DACA and its impact on first-generation immigrants).

437. *See* Michael Fix, *Repealing Birthright Citizenship: The Unintended Consequences*, THE MIGRATION POLICY INST. (Aug. 2015), https://perma.cc/9YTM-2WRX (noting that about three-fourths of all "unauthorized immigrants" in the United States are from Mexico and Central America).

438. *Immigrant Children*, CHILD TRENDS (Dec. 28, 2018), App. 2, https://perma.cc/4BYU-HR62. Since 1994, that figure has never dipped below 49.5%. *Id.*

439. *Id.*

440. *Id.*

441. *Unauthorized Immigrant Population Profiles*, THE MIGRATION POLICY INST., https://perma.cc/LL4P-TU47; *see also* FROST, *supra* note 13, at 194 (estimating the number of undocumented people living in the United States at 11 million, as of 2020).

442. *Unauthorized Immigrant Population Profiles, supra* note 441.

443. *Id.*

444. *Profile of the Unauthorized Population: California*, THE MIGRATION POLICY INST. (2012-2016), https://perma.cc/AGG6-XQ6T. Overall, about half of *all* children in the state of California have at least one parent who is an immigrant. *See* Cal. Gov't Code § 7284.2(a).

445. *Children in Immigrant Families Who Are U.S. Citizens in California* (2009-2018), The Annie E. Casey Foundation, Kids Count Data Center, THE ANNIE E. CASEY FOUND., https://perma.cc/V2KD-VLR8 (last visited Nov. 10, 2023).

people living in the United States at the start of the Civil War).[446] That number would exponentially increase over time as generations of children born in the United States would be deprived of citizenship by virtue of their parents' or their grandparents' immigration status. Under this scenario, in thirty years about 24 million people would be living in the United States without legal immigration status.[447] Even if birthright citizenship was not eliminated for children with undocumented parent(s) retroactively, the same exponential effect would occur over time. A person's undocumented status (and hence lack of citizenship) would pass to each subsequent generation.

B. *Immigration and Birthright Citizenship Make the United States a Better Place*

Undergirding the assault on unconditional birthright citizenship, especially among voters who identify as Republican, is the unfounded belief that immigration is degrading the country and imposing costs on "legacy" Americans.[448] Tucker Carlson infamously broadcast the claim that immigration was making the United States "poorer, and dirtier,[449] and more divided."[450] This rhetoric is dangerous and largely false. Despite repeated claims that "illegal immigration" is taking away American jobs and driving down American wages,[451] the data shows that America's prior, current, and future economic success depends on immigration.

During the age of Mass Migration (1850-1940), immigrant workers enabled the United States to progress from an agrarian to an industrial economy.[452] At the turn of the twentieth century, immigrants and their children comprised three-quarters of the population in the majority of large American cities.[453] In these cities, immigrants worked in and eventually owned factories and made essential contributions to the creation of increasingly fair labor

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446. *See* FROST, *supra* note 13, at 194–95; Fix, *supra* note 437; Capps, Fix & Zong, *supra* note 432; *see also supra* note 75 (discussing the number of enslaved Black people living in the United States in 1860).

447. *See* FROST, *supra* note 13, at 195. This number is based on a study conducted by the Migration Policy Institute, working with researchers from Penn State University. Fix, *supra* note 437. For perspective, 24 million people currently exceeds the population of only two states, California (39,512,223) and Texas (28,995,881), according to the 2020 Census. *U.S. and World Population Clock*, U.S. CENSUS BUREAU (Oct. 23, 2023), https://perma.cc/K8PX-GJCK.

448. *See supra* note 215.

449. Tucker Carlson later claimed that his statement regarding the "dirtiness" of immigrants referred to litter along the Potomac River, which he claimed was "left almost exclusively by immigrants." Elaina Plott Calabro, *What Does Tucker Carlson Believe?*, THE ATLANTIC (Dec. 15, 2019), https://perma.cc/98A2-CZ7T. Clean water advocates denounced Carlson's remarks as factually inaccurate and racist. Ed Pilkington, *Clean Water Group Denounces Tucker Carlson's 'Racist' Litter Comments*, THE GUARDIAN (Dec. 17, 2019), https://perma.cc/2T7K-G9Y4.

450. *See* Tim Marcin, *Fox News Host Tucker Carlson Reiterates Claim Immigrants Make America 'Poorer and Dirtier' Even as Advertisers Flee*, NEWSWEEK (Dec. 18, 2018), https://perma.cc/NBE5-FGTC.

451. *See, e.g., Mission Stop the Invasion: No Excuses*, *supra* note 218.

452. *See* Charles Hirschman & Liz Mogford, *Immigration and the American Industrial Revolution From 1880 to 1920*, 38 SOC. SCIENCE RES. 897 (2009).

453. *Id.* at 898.

practices.[454] Throughout the nineteenth and twentieth centuries (and earlier), immigrants fostered increased trade, scientific and technological advancement, and breathed life into the cultural, creative, and democratic fabric of the country.[455]

Immigrants, both with and without legal immigration status, continue to serve an essential role in the American economy. Critics of birthright citizenship often claim that pregnant women come to the United States to give birth (in violation of immigration laws) so they can enjoy the "benefits" of the American welfare state.[456] In fact, data shows that immigrants come to America to work. The foreign-born population – who are often the parents of American children, due to birthright citizenship – participates in the labor force at a higher rate than native-born Americans.[457] Immigrants fill critical gaps in the American economy, at both the low- and high-end of the labor market. Immigrants are both "four times more likely than children of native-born parents to have less than a high school degree" and "almost twice as likely to have a doctorate."[458] A 2019 study found that almost 45% of Fortune 500 companies (223), including Apple and Costco, were founded by immigrants or their children.[459]

In the healthcare field, international medical graduates (IMG's) play a critical role in addressing physician shortages—foreign-born doctors "often practice in . . . areas and communities with limited access to health care services."[460] At the other end of the spectrum, over 25% of home health care workers are foreign-born.[461] During the first year of the COVID-19 pandemic in the United States, more than a third of the health care workers who died were foreign-born.[462]

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454. *Id.*

455. *Id. See* JOHN F. KENNEDY, A NATION OF IMMIGRANTS 32–36 (1964).

456. *See supra* notes 230–234 and accompanying text.

457. Economic News Release, *Labor Force Characteristics of Foreign-Born Workers*, U.S. BUREAU OF LABOR STAT., https://perma.cc/N8NA-CD29 (showing an overall labor force participation rate for immigrants of 64.7% in 2021 and 65.9% in 2022, as compared to rates of 61% and 61.5% for native-born Americans, also in 2021 and 2022). *See also* Kenneth Megan & Theresa Cardinal Brown, *Culprit or Scapegoat? Immigration's Effect on Employment and Wages*, BIPARTISAN POLICY CENTER (June 2016), https://perma.cc/SA5L-5JC5 (analyzing similar data for the period 2000-2015).

458. Ryan Nunn, Jimmy O'Donnell, & Jay Shambaugh., *A Dozen Facts about Immigration*, THE HAMILTON PROJECT, The Brookings Institution, at 7 (Oct. 2018), https://perma.cc/DGM3-VRGD; *see also New Americans in the United States of America*, AM. IMMIGR. COUNCIL 4, https://perma.cc/59VZ-E55S (last visited Oct. 28, 2023) (analysis based on data from 2019; noting that immigrants "are twice as likely as the U.S.-born to work as home health aides, but also twice as likely to be physicians and surgeons").

459. *New American Fortune 500 in 2019: Top American Companies and Their Immigrant Roots*, NEW AMERICAN ECONOMY RESEARCH FUND (July 22, 2019), https://perma.cc/M8G7-35T2. The study does not distinguish between immigrants whose parents did or did not have legal immigration status.

460. Andis Robezniek, *Easing IMGs' Path to Practice a Key to Solving Physician Shortage*, AM. MEDICAL ASS'N (Jul. 13, 2022), https://perma.cc/75VN-SD8D.

461. *New Americans, supra* note 458.

462. *Our Key Findings About US Healthcare Worker Deaths in the Pandemic's First Year*, THE GUARDIAN (Apr. 8, 2021), https://perma.cc/3MQP-6TRP.

Lower-skilled immigrants also contribute significantly to the farming, fishing, manufacturing, hospitality, and construction industries.[463] Many of these industries are currently experiencing labor shortages exacerbated by reduced immigration levels resulting from Trump administration policies and the COVID-19 pandemic.[464] Florida recently enacted an immigration law, SB 1718, designed to force undocumented people out of the workforce.[465] The law is predicted to worsen labor shortages, especially in agriculture (where almost half of all workers are undocumented), construction, and hospitality sectors of the Florida economy.[466] The Florida Policy Institute estimates that the implementation of SB 1718 will cost the Florida economy billions of dollars in one year.[467]

The claim that immigrants make the United States "poorer"[468] is also inaccurate. Research shows that, en masse, immigrants complement rather than stifle the economic opportunities of native-born workers.[469] Although many recent immigrants, especially the undocumented, have relatively low levels of education and skills, they fulfill an essential role in the U.S. economy, as discussed above.[470] The data does not support the claim made by presidential candidate Ron DeSantis, that the existence of these immigrant workers has "hollowed out the wages of the American working class."[471] Research suggests that lower-skilled immigrants compete more with offshore workers than native ones for these jobs.[472] Moreover, the "consensus of the empirical literature" is that the existence of low-skilled immigrants in the workforce does not substantially impact the wages of low-skilled, native-born

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463. *See New Americans, supra* note 458, at 2–4 (analysis based on data from 2019); *see also* Tyler Cowen, *How Immigrants Create More Jobs*, N.Y. TIMES (Oct. 30, 2010), https://perma.cc/2V3H-8P7D (noting that "low-skilled immigrants usually fill gaps in American labor markets and generally enhance domestic business prospects rather than destroy jobs"); Megan & Brown, *supra* note 457, at 9–10.

464. *See* Lydia DePillis, *Immigration Rebound Eases Shortage of Workers, Up to a Point*, N.Y. TIMES (Feb. 6, 2023), https://perma.cc/3XC6-2722; Dany Bahar & Pedro Casas-Alatriste, *Who Are the 1 Million Missing Workers that Could Solve America's Labor Shortages?*, BROOKINGS (July 14, 2022), https://perma.cc/NJ87-EQHM; Catherine Rampell, *Earth to Politicians: The U.S. Has Too Few Immigrants — Not Too Many*, WASH. POST (May 2, 2023), https://perma.cc/LZT8-74GE.

465. An Act Relating to Immigration, Chapter 2023-40, Committee Substitute for S.B. 1718 (effective date of July 1, 2023), *available at* https://perma.cc/U4LR-CQ2Y.

466. *See* Fred Grimm, *Florida's Immigration Crackdown Exacerbates Labor Shortage*, FLORIDA SUN SENTINEL (June 9, 2023), https://perma.cc/EBA6-NFYX; Alexis Tsoukalas & Esteban Leonardo Santis, *Florida HB 1617/SB 1718: Potential Economic and Fiscal Impact*, FLORIDA POL'Y INST. (Apr. 26, 2023), https://perma.cc/HC7T-CB9E; *see also* Chris Kenning, *As New Florida Immigration Law Takes Effect, Undocumented Workers Ask: Do I Stay or Go?*, USA TODAY (July 1, 2023), https://perma.cc/P7CE-3BHB.

467. Tsoukalas & Santis, *supra* note 466; Grimm, *supra* note 466.

468. *See supra* note 450 and accompanying text.

469. *See* Cowen, *supra* note 463 (noting that "low-skilled immigrants usually fill gaps in American labor markets and generally enhance domestic business prospects rather than destroy jobs . . . because of . . . the presence of what are known as 'complementary' workers, namely those who add value to the work of others"); Bahar & Casas-Alatriste, *supra* note 464 (describing immigrants as "much-needed workers that can complement the American workforce").

470. *See supra* notes 458–467 and accompanying text.

471. *Mission Stop the Invasion: No Excuses*, *supra* note 218.

472. Gianmarco I. P. Ottaviano et al., *Immigration, Offshoring, and American Jobs*, 103 AM. ECON. REV. 1925, 1237 (2013); *see also* Cowen, *supra* note 463 (discussing this study).

workers.[473] Further, the children of immigrants, many of whom are birthright citizens, do not tend to stay in low-wage occupations, and they work in roughly the same fields and attain similar educational levels as the children of native-born Americans.[474]

Immigrants who attain citizenship fare better economically than those who do not. Naturalized citizens have significantly higher earnings and a higher employment rate than noncitizens living in the United States, and they are much less likely to be poor.[475] They also have higher average levels of education and are more likely to own a home.[476] As this data suggests, when people are unable to work legally and fear deportation, their opportunities and, hence, their societal contributions are restricted.

The Consideration of Deferred Action for Childhood Arrivals (DACA) also illustrates the impact of undocumented status on individuals and society as a whole. DACA was enacted under the executive authority of President Barack Obama in 2012 to "allow young people to live and work in the only country they know as home."[477] DACA recipients are first-generation immigrants who are not entitled to birthright citizenship because they were born outside the United States. To qualify for the program, a child living in the U.S. without legal immigration status must have entered the country no later than June 15, 2007, before reaching the age of 16; not have a criminal record; and be enrolled in school or have obtained at least a high school diploma or GED equivalent.[478] DACA recipients are eligible for deferred action from deportation (but not citizenship or permanent residence) and work authorization.[479] Over 800,000 "Dreamers" applied for DACA status before new applications were suspended in 2021 by court order.[480] More than half of this group reported "moving to jobs with better pay and benefits" after receiving

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473. Nunn, O'Donnell, & Shambaugh, *supra* note 458, at 11. *See also* Megan & Brown, *supra* note 457, at 13–15; Alan de Brauw, *Does Immigration Reduce Wages?*, CATO JOURNAL (June 2017), https://perma.cc/EFA9-8EZP (concluding that the "the impacts of immigration on native wages" are likely "either very small or zero").

474. Nunn, O'Donnell, & Shambaugh, *supra* note 458, at 8.

475. Madeleine Sumption & Sarah Flamm, *The Economic Value of Citizenship for Immigrants in the United States*, THE MIGRATION POLICY INST. (Sept. 2012) 11–13, https://perma.cc/BQ86-32L2; Maria Gabriela Sanchez & Jeanne Batalova, *Naturalized Citizens in the United States*, THE MIGRATION POLICY INST. (Nov. 10, 2021), https://perma.cc/NHY4-Q4TH.

476. Sanchez & Batalova, *supra* note 475.

477. *Fact Sheet: President Biden Announces Plan to Expand Health Coverage to DACA Recipients*, THE WHITE HOUSE (Apr. 13, 2023), https://perma.cc/E5BZ-Q9AR; *see also* Nicole Prchal Svajlenka & Trinh Q. Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CAP 20 (Nov. 24, 2021), https://perma.cc/KGY8-N7TB.

478. *Consideration of Deferred Action for Childhood Arrivals (DACA) Guidelines*, U.S. CITIZENSHIP AND IMMIGR. SERV., https://perma.cc/HYY7-YJ8P (last visited Oct. 28, 2023).

479. *Id.*

480. *Fact Sheet: President Biden Announces Plan to Expand Health Coverage to DACA Recipients, supra* note 477; State of Texas v. United States, Civil Action No. 1:18-CV-00068, Order of Permanent Injunction (July 16, 2021), https://perma.cc/8UZM-BWW6. The district court in this case recently granted summary judgment, ruling that the Obama administration lacked the authority to implement DACA; the ruling will almost certainly be appealed. Memorandum and Order (Sept. 13, 2023), https://perma.cc/4KSB-JRMR.

DACA.[481] Working legally, at increased wages, also translates into greater spending power on behalf of DACA recipients and higher tax revenues. One study estimates that "DACA recipient households pay $6.2 billion in federal taxes and $3.3 billion in state and local taxes each year."[482] Research by the CATO Institute – conducted in response to then-President Trump's announced plans to terminate DACA in 2018 – predicted that revoking DACA status "would cost the U.S. economy $351 billion from 2019 to 2028 in lost income" and $92.9 billion in lost federal tax revenue over the same ten-year period.[483] The importance of DACA for *first*-generation, undocumented immigrants demonstrates the significance of birthright citizenship for *second*-generation immigrants whose parents lack legal immigration status.

The reality is that immigrants, including undocumented immigrants, play an essential role in the U.S. economy. Immigration makes America better, not dirtier or poorer. The guarantee of unrestricted birthright citizenship embedded in the Fourteenth Amendment has played a vital role in immigrant success. It enables the children of all immigrants born in this country, of all races and ethnicities – even those with undocumented parent(s) – to enjoy the benefits and share the responsibilities of American citizenship. As citizens, these second-generation immigrants can obtain an education and maximize their earning potential by working legally, paying taxes, and voting without fear of deportation. If unrestricted birthright citizenship ceased to exist, they would immediately face roadblocks to full participation in American society and the possibility of deportation to countries they have never seen. The consequences would be devastating to the millions of individuals impacted by loss of citizenship, as well as society as a whole.

CONCLUSION

The societal instinct to limit the rights of citizenship to "legacy" Americans – "my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions" – is as old as America itself.[484] Likewise, the political benefit of "riling the base" by channeling and escalating fear of a racial "other" in response to an economic crisis, shifting demographics, or other forms of social upheaval, is not new. When Senator John Conness observed that it was "very good capital in an electioneering campaign to declaim against the Chinese,"[485] he was right. Conness' refusal to vilify the Chinese subsequently led to the end of his

481. Svajlenka & Truong, *supra* note 477.

482. *Id*. This study was based on data from 2018 and 2019.

483. Logan Albright, Ike Brannon, & M. Kevin McGee, *A New Estimate of the Cost of Reversing DACA*, Cato Working Paper No. 49, THE CATO INST. (Feb. 15, 2018), https://perma.cc/8T2C-FYRU.

484. *See supra* note 103 (quoting Congressional debate in 1866); *see also* Schwartz, *supra* note 353, at 2162 ("There is always a tendency among assimilated people to view newcomers with disdain and alarm, to characterize them as threats to the existing group identity.").

485. *See supra* note 109 and accompanying text.

political career.[486] However, he was also correct in identifying the most salient threat to the United States as an internal one. In his era, "[i]t was an invasion of rebels" – not "Gypsies" or any other outsider – that threatened the existence of the United States.[487] Those rebels were fueled by the same core beliefs that animate white Christian nationalists and advocates of white replacement theory today – the same beliefs that drove a mob to storm the U.S. Capitol on January 6, 2021, hoisting crosses, swastikas, and Confederate flags in the halls of Congress.

Today, as in the nineteenth century, the Fourteenth Amendment "is intended to guard against and to prevent the recurrence of" such attacks.[488] Twisting the words and meaning of the Fourteenth Amendment to eliminate unconditional birthright citizenship – or altering the Fourteenth Amendment itself – would effectively reinvigorate a racialized notion of American citizenship that would undermine and demean American democracy itself.[489]

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486. *See* Greg Lucas, *An Anti-Slavery US Senator is Selected*, CAL@170: 170 STORIES CELEBRATING THE STATE OF CALIFORNIA'S FIRST 170 YEARS, California State Library, https://perma.cc/A38U-VWE8.

487. *See supra* note 110 and accompanying text.

488. *Id*.; Epps, *supra* note 316 ("Birthright citizenship . . . is a key to the egalitarian, democratic Constitution that emerged from the slaughter of the Civil War.").

489. *See* FROST, *supra* note 13, at 194 (arguing that "[e]liminating birthright citizenship for the children of undocumented immigrants would create a perpetual, hereditary caste of 'un-Americans' – men, women, and children who would live and work in the United States without legal status and always in fear of deportation"); Fix, *supra* note 437 ("[T]he idea that the U.S.-born children, grandchildren, great-grandchildren, etc. of people born in the United States would themselves inherit their forefathers' lack of legal status would have deep implications for social cohesion and the strength of the democracy itself."); Ngai, *supra* note 161, at 2529 ("In light of contemporary migration patterns, eliminating birthright citizenship to children of illegal aliens would create a hereditary caste of illegal aliens in our society, an extreme form of racial marginalization that would impact Mexicans more than any other single ethnoracial group."); Epps, *supra* note 11, at 389 (arguing that elimination of birthright citizenship would create "a hereditary subordinate caste of persons who are subjected to American law but do not belong to American society").