



# **Birthright Citizenship Under the 14<sup>th</sup> Amendment of Persons Born in the United States to Alien Parents**

**Margaret Mikyung Lee**  
Legislative Attorney

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## Summary

Over the last decade or so, concern about illegal immigration has sporadically led to a re-examination of a long-established tenet of U.S. citizenship, codified in the Citizenship Clause of the Fourteenth Amendment of the U.S. Constitution and §301(a) of the Immigration and Nationality Act (INA) (8 U.S.C. §1401(a)), that a person who is born in the United States, subject to its jurisdiction, is a citizen of the United States regardless of the race, ethnicity, or alienage of the parents. The war on terror and the case of Yaser Esam Hamdi, a U.S.-Saudi dual national captured in Afghanistan fighting with Taliban forces, further heightened attention and interest in restricting automatic birthright citizenship, after the revelation that Hamdi was a U.S. citizen by birth in Louisiana to parents who were Saudi nationals in the United States on non-immigrant work visas and arguably entitled to rights not available to foreign enemy combatants. More recently, some congressional Members have supported a revision of the Citizenship Clause or at least holding hearings for a serious consideration of it. An Arizona state legislator has voiced support for state legislation that would deny birth certificates to persons born to undocumented aliens. This report traces the history of this principle under U.S. law and discusses some of the legislation in recent Congresses intended to alter it.

The traditional English common-law followed the doctrine of *jus soli*, under which persons born within the dominions of and with allegiance to the English sovereign were subjects of the sovereign regardless of the alienage status of their parents. The exceptions to this rule are persons born to diplomats, who are born subjects of the sovereign whom the parents represent abroad, and persons born to citizens of a hostile occupying force, who are born subjects of the invading sovereign. Although the states and courts in the United States apparently adopted the *jus soli* doctrine, there still was confusion about whether persons born in the United States to alien parents were U.S. citizens. This arose because citizenship by birth in the United States was not defined in the Constitution nor in the federal statutes. Legal scholars and law makers were torn between a “consensualist” doctrine of citizenship, by which a person and a government consent to be mutually obligated, and an “ascriptive” doctrine by which a person is ascribed citizenship by virtue of circumstances beyond his control, such as birth within a particular territory or birth to parents with a particular citizenship. Additionally, African Americans were not considered citizens of the United States, even if they were free. Native Americans also were not considered U.S. citizens because they were members of dependent sovereign Indian nations. The Civil Rights Act of 1866 and the Fourteenth Amendment, ratified in 1868, extended birthright citizenship to African Americans and also to most persons born in the United States. In an 1898 decision, *United States v. Wong Kim Ark*, the United States Supreme Court made clear that U.S.-born children of aliens were U.S. citizens regardless of the alienage and national origin of their parents, with narrow exceptions for the children of foreign diplomats and hostile invasion and occupation forces of a foreign nation. However, in the 1884 decision *Elk v. Wilkins*, the Supreme Court held that Native Americans were not U.S. citizens under the terms of the Citizenship Clause. Native Americans were U.S. citizens by treaties or statutes granting U.S. citizenship to members of specific tribes. Immigration statutes enacted in 1924, 1940, and 1952 granted U.S. citizenship to all Native Americans.

In the 111<sup>th</sup> Congress, H.R. 126, §301 of H.R. 994, H.R. 1868, §7 of H.R. 5002, and S.J.Res. 6 would amend the Constitution and/or the INA to exclude from citizenship at birth persons born in the United States whose parents are unlawfully present in the United States or are nonimmigrant aliens. This report will be updated as necessary.

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## Introduction

Over the last decade or so, concern about illegal immigration has sporadically led to a re-examination of a long-established tenet of U.S. citizenship, codified in the Citizenship Clause of the Fourteenth Amendment of the U.S. Constitution and §301(a) of the Immigration and Nationality Act (INA) (8 U.S.C. §1401(a)), that a person who is born in the United States, subject to its jurisdiction, is a citizen of the United States regardless of the race, ethnicity, or alienage of the parents. The war on terror and the case of Yaser Esam Hamdi, a U.S.-Saudi dual national captured in Afghanistan fighting with Taliban forces, further heightened attention and interest in restricting automatic birthright citizenship, after the revelation that Hamdi was a U.S. citizen by birth in Louisiana to parents who were Saudi nationals in the United States on non-immigrant work visas and arguably entitled to rights not available to foreign enemy combatants. More recently, in response to increased public concern about the lack of movement on comprehensive federal immigration reform legislation, some congressional Members have supported a revision of the Citizenship Clause or at least holding hearings for a serious consideration of it.<sup>1</sup> An Arizona state legislator has proposed state legislation that would deny birth certificates to persons born to undocumented aliens.<sup>2</sup> This report traces the history of this principle under U.S. law and discusses some of the legislation in recent Congresses intended to alter it.

Some proponents of immigration reform have advocated either constitutional or statutory amendments to limit automatic citizenship upon birth in the United States so that persons born in the United States to parents who are unlawfully present in the United States or are non-immigrant aliens would not become U.S. citizens. This report traces the history of “automatic birthright citizenship” under U.S. law and discusses the legislation in recent Congresses intended to alter it.

## Historical Development

### *Jus Soli* Doctrine Before the Fourteenth Amendment

There are two basic doctrines for determining birthright citizenship. *Jus soli* is the principle that a person acquires citizenship in a nation by virtue of his birth in that nation or its territorial possessions.<sup>3</sup> *Jus sanguinis* is the principle that a person acquires the citizenship of his parents, “citizenship of the blood.”<sup>4</sup> The English common law tradition prior to the Declaration of Independence, which was the basis of the common law in the original 13 colonies and which was adopted by most of the states as the precedent for state common law,<sup>5</sup> followed the *jus soli*

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<sup>1</sup> J. Taylor Rushing and Bob Cusack, *GOP leader McConnell: Fourteenth Amendment is in need of review*, THE HILL, Aug. 2, 2010; Miriam Jordan, Jean Guerrero, Laura Meckler, *U.S. Immigration Fight Widens to Native Born*, WALL ST. J., July 30, 2010, at A5.

<sup>2</sup> Jordan, Guerrero, Meckler, *supra* footnote 1. In 2008, a similar proposal was the subject of a ballot initiative petition in Arizona, but it failed to meet the requirements for inclusion on the general election ballot.

<sup>3</sup> Black’s Law Dictionary 775 (5<sup>th</sup> Ed. 1979); entry for “jus soli.”

<sup>4</sup> *Id.*; entry at “jus sanguinis.”

<sup>5</sup> *Lynch v. Clarke*, 1 Sandford Ch. 583, 646 (N.Y. 1844); 4 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 92.03[1][b] (2005); Isidor Blum, *Is Gov. George Romney Eligible to be President? [part two]*, New York Law Journal, p. 1, col. 5 (October 17, 1967).

doctrine.<sup>6</sup> Persons born within the dominion of the sovereign and under the protection and allegiance of the sovereign were subjects of the sovereign and citizens of England; this included persons born to “aliens in amity” who owed temporary allegiance to the sovereign while in his territory.<sup>7</sup> The exceptions were persons born to members of a hostile occupying force or to diplomats representing another sovereign.<sup>8</sup> The reason was that the children of a hostile occupying force did not owe allegiance to nor were born under the protection of the proper sovereign of the occupied territory. The children of diplomats, although enjoying the temporary protection of the sovereign while in his/her dominions, actually owed allegiance to and had a claim to the protection of the sovereign whom their parents represented at the court of the sovereign in whose dominions they were born. All civilized nations recognize and assent to the immunity of foreign diplomats from their jurisdiction, without which a foreign ambassador might not be able to effectively represent the sending sovereign, but it would be “inconvenient and dangerous to society ... if [private individual aliens] did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.”<sup>9</sup>

The original framers of the U.S. Constitution did not define citizenship of the United States, although the Constitution required that a person have been a citizen of the United States for seven years to be a Representative and for nine years to be a Senator,<sup>10</sup> and that a person be a natural-born citizen or a citizen at the time of the adoption of the Constitution in order to be eligible to be President (and therefore, Vice President).<sup>11</sup> The Naturalization Act of 1790 and subsequent acts until the Civil Rights Act of 1866 and the ratification of the Fourteenth Amendment did not define citizenship by birth within the United States.<sup>12</sup> These naturalization acts specified that only free white persons could be naturalized. As a result of the absence of any definition in the Constitution or federal statutes of U.S. citizenship by birth in the United States, citizenship by birth in the United States generally was construed in the context of the English common law.<sup>13</sup> This provided the frame of reference and definition of “citizenship” that the framers of the Constitution would have understood and also provided the pre-independence precedent for state common laws. The acquisition of citizenship by birth and by naturalization in the United States depended on state laws, both statutory and common law, until the enactment of the naturalization law in 1790.<sup>14</sup> The

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<sup>6</sup> 4 GORDON, MAILMAN & YALE-LOEHR, *supra* footnote 5, at § 92.03[1][a & b]; Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881, 886 & n. 24 (1988).

<sup>7</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 655-668 (1898); *Lynch v. Clarke*, 1 Sandford Ch. at 670; *Calvin’s Case*, 7 Coke’s Reports 1, 8-21 (1607)(as reprinted in vol. 4 of the 1826 edition edited by John H. Thomas & John F. Fraser).

<sup>8</sup> *United States v. Wong Kim Ark*, 169 U.S. at 675, 682-688; *Calvin’s Case*, 7 Coke’s Reports at 10-11.

<sup>9</sup> *United States v. Wong Kim Ark*, 169 U.S. at 683-688, citing the case of *The Exchange*, 7 Cranch. 116 (1812).

<sup>10</sup> U.S. Const. art. I, §2, cl. 2 (Representatives), U.S. Const. art. I, § 3, cl. 3 (Senators).

<sup>11</sup> U.S. Const. art. II, § 1, cl. 5.

<sup>12</sup> Act of March 26, 1790, 1 Stat. 103; Act of January 29, 1795, 1 Stat. 414; Act of April 14, 1802, 2 Stat. 153; Act of February 10, 1855, 10 Stat. 604.

<sup>13</sup> *Lynch v. Clarke*, 1 Sandford Ch. at 646, 658; Isidor Blum, *supra* footnote 5, at p. 1, col. 5.

<sup>14</sup> One should note that the determination of U.S. citizenship by naturalization also depended on state laws prior to the enactment of the first federal naturalization act. The election of Albert Gallatin to the U.S. Senate in 1793 was successfully challenged on the grounds that he had not been a U.S. citizen for nine years as required by the Constitution. 4 ANNALS OF CONGRESS, 3<sup>rd</sup> Cong. 47-55, 57-62 (Gales & Seaton 1849—there may be some difference in the pagination between different printings of the same congressional debates) (covering period of February 20-28, 1794). He claimed that he had become a citizen of either Virginia or Massachusetts at least nine years before his election. But a majority of the Senate, upon an examination of the Virginia and Massachusetts citizenship laws, decided that Gallatin had not satisfied the residency of either state prior to moving to Pennsylvania, where he ultimately settled (continued...)

Naturalization Act of 1790, enacted pursuant to the Congress's powers under the Constitution,<sup>15</sup> clearly established the definition of citizenship by naturalization, but Congress's silence on the issue of citizenship by birth in the United States caused some confusion and disagreement as to what the appropriate definition was. For example, some persons rejected the idea that English common law provided the proper rule for citizenship by birth in the United States.<sup>16</sup> And until the Civil War, some eminent jurists and legal scholars believed that there was no real citizenship of the United States separate from citizenship in a state; that is, a person was a citizen of a state which was part of the Union, therefore a person was a citizen of the United States by virtue of his citizenship in a state.<sup>17</sup>

Although the English common law at the time of the adoption of the Constitution considered a person born in the English dominions to alien parents to be an English citizen unless those alien parents fit into the exceptions described above, and although American law apparently generally accepted this position, there nevertheless appeared to be some uncertainty as to whether persons born in the United States to alien parents were, in fact, citizens of the United States. Some scholars ascribe this uncertainty to the desire of Americans to embrace both a "consensualist" doctrine of citizenship,<sup>18</sup> by which a person and a government consent to be mutually obligated,

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(...continued)

and was elected to Congress. He had not been resident in Pennsylvania for nine years prior to election. This example also illustrates the pre-Constitution position that U.S. citizenship could not exist without state citizenship, which some legal scholars continued to espouse until the Civil War. Although Gallatin had resided in the United States for 13 years, he had not satisfied all the requirements for citizenship in the states where he had resided nine years before election. Gallatin tried to argue, *inter alia*, that U.S. citizenship was not dependent on state citizenship laws which had existed before independence because U.S. citizenship depended on allegiance to the new nation and even persons who had been natural-born citizens of the states were not considered citizens of the United States if they had not shown allegiance to the new government and nation.

<sup>15</sup> U.S. Const. art. I, § 8, cls. 4 & 18.

<sup>16</sup> See, e.g., *Lynch v. Clarke*, 1 Sandford Ch. at 657; 4 GORDON, MAILMAN & YALE-LOEHR, *supra* footnote 5, at § 92.03[1][b]. n. 9; PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY*, 50-54 (1985).

<sup>17</sup> *Slaughter-House Cases*, 16 Wallace 36, 72 (1873); Leonard W. Levy, Kenneth L. Karst & Dennis J. Mahoney, *Citizenship (Historical Development)*, Encyclopedia of the American Constitution 258 (1986).

<sup>18</sup> Cases arose in the United States through the early nineteenth century concerning the issue of citizenship of natural-born state citizens whose allegiance to the United States was in question. Generally, such citizens had left the United States for England or English dominions before or during the Revolutionary War and no act by them or their home state had affirmed their allegiance to the independent state or the United States. Factors relevant to this consensual citizenship included whether the person was born before or after July 4, 1776; whether the person left for England before or after July 4, 1776; whether the person was a minor at the time of departure for England; whether the person elected to affirm U.S. allegiance upon attaining majority; and whether the person was born or residing in territory during its occupation by the British on or after July 4, 1776. For example, if a person was born a British subject, i.e., before July 4, 1776, and as an adult did not adhere to the independent states after July 4, 1776, he remained a British subject. Generally, if he was born after July 4, 1776, he was a U.S. citizen, unless he was born in British-occupied territory, left for England as a minor, and did not elect to affirm his U.S. citizenship within a reasonable time after attaining his majority. See *Inglis v. Sailor's Snug Harbor*, 28 U.S. (3 Peters) 99 (1830). But see *McIlvaine v. Cox*, 8 U.S. (4 Cranch) 208 (1808), where the Court held that a person who joined the British Army and left for England still had inheritance rights because initially he had remained in New Jersey after July 4, 1776, and after New Jersey had passed legislation declaring itself an independent and sovereign state and its residents to be citizens of the independent state, and thus he had become a citizen of independent New Jersey. See also *Shanks v. Dupont*, 28 U.S. (3 Peters) 242 (1830), holding that a woman born in South Carolina before July 4, 1776, and remaining there afterward, was a citizen of independent South Carolina and her subsequent marriage to a British soldier during the occupation of her hometown did not change this status. However, her subsequent removal to England with her husband in 1782 rendered her a British subject within the meaning of the treaty of 1794 which recognized inheritance rights for British subjects with property in the United States. For a discussion of case law, legislative history of the Fourteenth Amendment, and a theory of citizenship based on fairness, reciprocity, and consent, see William Ty Mayton, *Birthright Citizenship And* (continued...)

and an “ascriptive” doctrine by which a person is ascribed citizenship by virtue of circumstances beyond his control, such as birth within a particular territory or birth to parents with a particular citizenship.<sup>19</sup>

Apparently, *Lynch v. Clarke*, an 1844 New York case,<sup>20</sup> was the first case to decide the issue of whether the U.S.-born child of an alien was a U.S. citizen.<sup>21</sup> It held that the U.S.-born child of an Irish resident of the United States who returned to Ireland after the child’s birth and died without ever declaring even an intent to be naturalized was a U.S. citizen. It held that the right of citizenship was a national right not pertaining to the individual states;<sup>22</sup> that state laws could no longer define U.S. citizenship;<sup>23</sup> and that national laws instead determined citizenship.<sup>24</sup> In determining the appropriate national law, the court rejected the consensualist doctrine in favor of the traditional English common-law doctrine of *jus soli*.<sup>25</sup> It rejected the argument that the application of the common-law doctrine was based on feudal principles inappropriate to the United States, which had been founded on the principles of consent between the government and the people to be governed, and found instead that the silence of the Constitution and the federal statutes indicated that Congress approved the adoption of the traditional common-law position.<sup>26</sup> The court also believed that even if federal laws did not indicate acquiescence in common-law doctrine, the common-law rule provided a well-defined, unambiguous, reliable rule without confusing recourse to the status of the parents.<sup>27</sup> It held that the national law defined any person born within the dominions and allegiance of the United States as a citizen, regardless of the status of the parents.<sup>28</sup> Notwithstanding the general acceptance of *jus soli*, in the minds of many persons, the issue of automatic citizenship upon birth in the United States to alien parents was still not to be decided definitively for many years, particularly where the parents were of a minority race or ethnicity.

Until the Civil Rights Act of 1866 and the Fourteenth Amendment, African Americans were not considered citizens of the United States. In the case of *Dred Scott v. Sandford*,<sup>29</sup> the United States Supreme Court held that African Americans could not be citizens of the United States, even if they were free, because they were descended from persons brought to the United States as slaves; the terms of the Constitution demonstrated that slaves were not considered a class of persons included in the political community as citizens;<sup>30</sup> and the various state laws indicated that African Americans had not been considered to be state citizens and that it was widely permitted to treat

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*The Civic Minimum*, 22 Geo. Immigr. L.J. 221 (2008) (arguing that fairness dictated that the children of lawfully present aliens should be birthright citizens under the Citizenship Clause, but did not dictate that children of unlawfully present aliens must be birthright citizens).

<sup>19</sup> SCHUCK & SMITH, *supra* footnote 16, at 42-62.

<sup>20</sup> 1 Sandford Ch. 583

<sup>21</sup> SCHUCK & SMITH, *supra* footnote 16, at 57.

<sup>22</sup> 1 Sandford Ch. at 641.

<sup>23</sup> 1 Sandford Ch. at 643-5.

<sup>24</sup> *Id.*

<sup>25</sup> 1 Sandford Ch. at 656-663.

<sup>26</sup> *Id.*

<sup>27</sup> 1 Sandford Ch. at 658.

<sup>28</sup> 1 Sandford Ch. at 663.

<sup>29</sup> 60 U.S. (19 How.) 393 (1856).

<sup>30</sup> 60 U.S. (19 How.) at 411.

them as property at the time of the adoption of the federal Constitution.<sup>31</sup> The descendants of slaves could not have a citizenship right which their ancestors had not had upon the formation of the Union and which no law had subsequently granted them at the time of the *Dred Scott* decision.

## **The Fourteenth Amendment and the Civil Rights Act of 1866**

Although the primary aim was to secure citizenship for African Americans, the debates on the citizenship provisions of the Civil Rights Act of 1866 and the Fourteenth Amendment indicate that they were intended to extend U.S. citizenship to all persons born in the United States and subject to its jurisdiction regardless of race, ethnicity or alienage of the parents.<sup>32</sup> The Civil Rights Act of 1866 declared that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”<sup>33</sup> The Fourteenth Amendment declared that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>34</sup> The Civil Rights Act of 1866 differs from the Fourteenth Amendment by using the terms “not subject to any foreign power” and “excluding Indians not taxed.”

During the debates on the act, Senator Trumbull of Illinois, chairman of the committee that reported the civil rights bill, moved to amend the bill so that the first sentence read, “All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States without distinction of color.”<sup>35</sup> Senator Cowan of Pennsylvania, who opposed both the Civil Rights Act of 1866 and the Fourteenth Amendment, asked “whether it will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?” Senator Trumbull replied, “Undoubtedly.” The two disagreed as to whether, under the law in existence prior to the enactment of the Civil Rights Act of 1866, Chinese Americans were citizens of the United States. Cowan raised the specter of unfettered Chinese immigration to California, resulting effectively in something tantamount to a takeover of California by the Chinese empire, if the proposed language were adopted. Trumbull asked Cowan whether the children born in Pennsylvania to German parents were not U.S. citizens, to which Cowan replied that Germans were not Chinese, Australians or Hottentots or the like. Trumbull replied that the law made no distinction between the children of Germans and Asiatics “and the child of an Asiatic is just as much a citizen as the child of a European.” Later in the debates, Senator Johnson of Maryland urged Senator Trumbull to delete the phrase “without distinction of color” because it was

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<sup>31</sup> 60 U.S. (19 How.) at 407-416.

<sup>32</sup> For additional analyses of the legislative history of the Fourteenth Amendment’s Citizenship Clause, see testimony of witnesses representing opposing positions at the *Joint Hearing Before the Subcommittee on Immigration and Claims and the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives*, Serial No. 50, 104<sup>th</sup> Cong. (1995) (hereinafter *Joint Hearing*); see also, Garrett Epps, *The Citizenship Clause: A “Legislative History,”* (June 20, 2010), available at Social Science Research Network website, <http://ssrn.com/abstract=1627665>; James C. Ho, *Defining “American”:* *Birthright Citizenship and the Original Understanding of the 14<sup>th</sup> Amendment*, and Elizabeth B. Wydra, *Debunking Modern Arguments Against Birthright Citizenship*, in Immigration Policy Center, *Made in America: Myths & Facts About Birthright Citizenship* (Sept. 2009); Charles Wood, *Losing Control of America’s Future: the Census, Birthright Citizenship, and Illegal Aliens*, 22 Harv. J. L. & Pub. Pol’y 465, 504-519 (1999); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 2 N.Y.U.L. Rev. 54 (1997).

<sup>33</sup> C. 31, § 1, 14 Stat. 27.

<sup>34</sup> Ratified July 9, 1868.

<sup>35</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 498 (1866).

unnecessary since even without the phrase he understood that Trumbull's proposed amendment "comprehends all persons, without any reference to race or color, who may be so born." Trumbull felt that it was better to retain the phrase to eliminate any doubt or dispute as to the meaning of his amendment.<sup>36</sup>

There was also a debate over whether Indians should be included or excluded from the citizenship provision.<sup>37</sup> Trumbull believed that if the Indians were separated from their tribes and incorporated into the mainstream community then they already were U.S. citizens under the law. Senator Lane of Kansas disagreed and felt that a more explicit bill was needed to extend citizenship to Indians, which he favored. Other Senators wished to exclude Indians not taxed, which apparently was intended to exclude unassimilated Indians, who were deemed to be mostly living in an uncivilized condition in their tribes.<sup>38</sup> When the exclusion was adopted, Senator Henderson of Missouri objected that the citizenship of white persons did not depend on whether or not they were taxed and that it was unfair to make such a distinction for Indians, particularly since the issue of taxation was irrelevant to the issue of assimilation.<sup>39</sup>

During the debates on the Fourteenth Amendment, Senator Howard of Michigan moved to amend it by adding the first sentence in its present form, minus the phrase "or naturalized."<sup>40</sup> Senator Cowan again objected to language that he felt would include races such as the Chinese and prevent California from dealing with the massive Chinese immigrant population as it saw fit.<sup>41</sup> He again invoked the fear that California would be overrun by Chinese, Pennsylvania by Gypsies. He believed that the people of different races and cultures could not mingle. Senator Conness of California replied that he had supported the Civil Rights Act of 1866 and had no problem with constitutionally guaranteeing the U.S.-born children of Mongolian parents civil rights and equal protection, his support apparently influenced by his belief that the population of non-European immigrants and their descendants would not increase significantly.<sup>42</sup>

There was also debate as to whether Indians should be excluded from the scope of the Citizenship Clause of the Fourteenth Amendment and whether they were excluded by the phrase "subject to the jurisdiction thereof."<sup>43</sup> Apparently most of the Senators supported the idea of excluding Indians but disagreed as to whether the phrase "excluding Indians not taxed" should be inserted as it had been in the Civil Rights Act of 1866. Several Senators argued that "subject to the jurisdiction" meant the full and complete jurisdiction of the United States, and the Indians had always been considered subject to the jurisdiction of their tribes, which were quasi-foreign nations;<sup>44</sup> some also felt that the taxation requirement was problematic. Some Senators argued that "excluding Indians not taxed" was good enough for the Civil Rights Act so it was appropriate for the Fourteenth Amendment; they also argued that Indians were subject to U.S. jurisdiction for

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<sup>36</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 573-574 (1866).

<sup>37</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 498-499 (1866).

<sup>38</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 571-573 (1866).

<sup>39</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 571 (1866).

<sup>40</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2890 (1866).

<sup>41</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2890-2891 (1866).

<sup>42</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2891-2892 (1866).

<sup>43</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2890-2897 (1866).

<sup>44</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2890, 2893, 2895, 2897 (1866) (remarks of Senator Howard of Michigan, Senator Trumbull of Illinois, Senator Williams of Oregon).

a variety of purposes so the “subject to the jurisdiction” language was insufficiently clear.<sup>45</sup> Ultimately, the Senate rejected the insertion of “excluding Indians not taxed,” although at least one Senator said he voted against this insertion because he favored extending citizenship to Indians and not because he believed that the “subject to the jurisdiction language” excluded Indians already.<sup>46</sup>

### ***United States v. Wong Kim Ark and Elk v. Wilkins***

Despite the clarification in the debates that race, ethnicity, and alienage of parents would not affect the right to citizenship by birth in the United States, the issue concerning the meaning of the Civil Rights Act of 1866 and the Fourteenth Amendment was not settled until the 1898 case of *United States v. Wong Kim Ark*.<sup>47</sup> As the debates about those laws indicate, an underlying problem appears to have been the attitude that certain alien races and Native Americans, like the African Americans in *Dred Scott*, could not be members of the American political community because they had not been members of the community that yielded the Declaration of Independence and the Constitution. The United States Supreme Court discussed the congressional debates described above, noting that although they were not admissible as evidence to control the meaning of the Fourteenth Amendment, they were important as an indication of the contemporaneous legal opinion of jurists and legislators and showed that Congress had explicitly considered the application of the Fourteenth Amendment to the Chinese (and other U.S.-born children of aliens).<sup>48</sup>

The Court traced the history of the statutory and common law regarding *jus soli* in England and America<sup>49</sup> and distinguished another case in which an alleged Chinese American had been found not to be a U.S. citizen, noting that the issue had been the insufficiency of proof that the claimant had been born in the United States.<sup>50</sup> But where birth in the United States was clear, a child of Chinese parents was, in the Court’s opinion, definitely a citizen under the Fourteenth Amendment, even though Chinese aliens were ineligible to naturalize under then-existing law.<sup>51</sup> The Court rejected the argument that the child was born subject to the jurisdiction of the Chinese emperor and outside the jurisdiction of the United States because his allegiance and citizenship derived from his parents’ remaining subjects to the Chinese emperor under treaties between the United States and China and the naturalization laws.<sup>52</sup> It noted and rejected the *Slaughter-House* Court’s inaccurate statement that the exceptions to *jus soli* included the children of consuls and other aliens generally in addition to the children of ambassadorial-level diplomats and the children of hostile, occupying forces.<sup>53</sup> The decision alludes to a contemporaneous New Jersey case that held that a U.S.-born child of Scottish parents domiciled but not naturalized in the United States was born subject to the jurisdiction of the United States within the meaning of the

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<sup>45</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2892, 2893, 2895 (1866) (remarks of Senator Doolittle of Wisconsin, Senator Johnson of Maryland, Senator Hendricks of Indiana).

<sup>46</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2897 (1866) (remarks of Senator Saulsbury of Delaware).

<sup>47</sup> 169 U.S. 649 (1898).

<sup>48</sup> 169 U.S. at 697-699.

<sup>49</sup> 169 U.S. at 655-675.

<sup>50</sup> 169 U.S. at 696-697.

<sup>51</sup> 169 U.S. at 705.

<sup>52</sup> 169 U.S. at 694-705.

<sup>53</sup> 169 U.S. at 675, 682-688.

Fourteenth Amendment and not subject to the jurisdiction of a foreign country within the meaning of the Civil Rights Act of 1866.<sup>54</sup> The Court held that the Fourteenth Amendment affirmed the traditional *jus soli* rule, including the exceptions of children born to foreign diplomats, to hostile occupying forces or on foreign public ships, and added a new exception of children of Indians owing direct allegiance to their tribes.<sup>55</sup> It further held that the “Fourteenth Amendment ... has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship”<sup>56</sup> and that it is “throughout affirmative and declaratory, intended to allay doubts and settle controversies which had arisen, and not to impose any new restrictions upon citizenship.”<sup>57</sup>

Even after the Civil Rights Act of 1866, the Fourteenth Amendment and the *Wong Kim Ark* decision secured automatic birthright citizenship for all persons born in the United States and subject to its jurisdiction, Native Americans were not considered to be Fourteenth Amendment citizens because the U.S. Supreme Court determined that they were not born “subject to the jurisdiction” of the United States. Following earlier cases that had held that Indian tribes and their members were not subject to the jurisdiction of the United States, and language in the Constitution and the Civil Rights Act of 1866 that included only “Indians not taxed,” the Court in *Elk v. Wilkins*<sup>58</sup> held that Indians were not citizens of the United States unless they had been naturalized by treaty or by a federal collective naturalization statute, or taxed or recognized as a citizen by the United States or a state. At the time of the decision, Native Americans were not eligible to be naturalized on an individual basis according to the usual naturalization procedures and were only naturalized by treaty or statute.<sup>59</sup> The Court found that Native Americans who had not been taxed or naturalized still owed immediate allegiance to the tribe and were members of an independent political community and thus were not subject to the jurisdiction of the United States and were not citizens of the United States.<sup>60</sup> The argument echoes those in the debates about the Fourteenth Amendment. John Elk had separated from his tribe and lived “under the jurisdiction of Nebraska” and had assimilated into mainstream society. Despite these facts, the Court held that he was not a U.S. citizen nor could he become one in the absence of treaty or federal statutory action regarding his tribe. Native Americans are still not Fourteenth Amendment citizens;<sup>61</sup> they are citizens by virtue of one of the various statutes and treaties naturalizing specific tribes, the Citizenship Act of 1924 (which was ambiguous regarding those born after the act),<sup>62</sup> the

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<sup>54</sup> 169 U.S. at 692.

<sup>55</sup> 169 U.S. at 693.

<sup>56</sup> 169 U.S. at 703; *see also Afroyim v. Rusk*, 387 U.S. 253, 266-267 (1967), which noted at footnote 23 that some have referred to this statement as a holding and others have referred to it as obiter dictum, but which deemed it entitled to great weight regardless of whether it was dictum or a holding.

<sup>57</sup> 169 U.S. at 688.

<sup>58</sup> 112 U.S. 94 (1884).

<sup>59</sup> Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 *Nebraska L. Rev.* 462, 487-489 (1991).

<sup>60</sup> 112 U.S. at 102, 109.

<sup>61</sup> Under *Rogers v. Bellei*, 401 U.S. 815 (1971), the United States Supreme Court’s current position appears to be that there are three types of citizenship: the two defined in the Fourteenth Amendment, birth and naturalization in the United States when subject to the jurisdiction thereof, and non-Fourteenth Amendment statutory citizenship, e.g., the citizenship of Native Americans, persons born abroad to U.S. citizens, and persons born in Puerto Rico, Guam and the Virgin Islands. *See* J. Michael Medina, *The Presidential Qualification Clause in this Bicentennial Year: The Need to Eliminate the Natural Born Citizen Requirement*, 12 *Oklahoma City Univ. L. Rev.* 253, 265 (1987).

<sup>62</sup> Act of June 2, 1924, c. 233, 43 Stat. 253.

Nationality Act of 1940 (which finally and unambiguously declared all Native Americans born in the United States to be U.S. citizens),<sup>63</sup> or the Immigration and Nationality Act.<sup>64</sup>

## Legislative Proposals

### Constitutional and Statutory Amendments

In recent Congresses there have been various proposals aimed at excluding the children of unauthorized aliens and even nonimmigrant aliens from automatic birthright citizenship, partly to remove an incentive for aliens to enter the United States illegally, or enter legally on a nonimmigrant visa and then illegally stay beyond the visa period.<sup>65</sup> These proposals take the form of amendments to the Citizenship Clause of the Fourteenth Amendment or to the statutory provisions on birthright citizenship and comprise various approaches.<sup>66</sup> Although such proposals have been introduced in the 111<sup>th</sup> Congress, none of them have progressed beyond introduction.<sup>67</sup>

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<sup>63</sup> C. 876, § 201(b), 54 Stat. 1137, 1158.

<sup>64</sup> C. 477, § 301(a)(2), 66 Stat. 163, 235 (1952); codified as amended at 8 U.S.C.A. § 1401(b) (Supp. 1994).

<sup>65</sup> Aliens are seen as willing to enter the United States illegally in order to have a child here, because they realize that when the U.S.-citizen child reaches his/her majority, he/she may bring immediate relatives over to the United States, even if the immigration enforcement authorities decide to deport the parents, or they choose to leave, in the interim. So the automatic birthright gives unauthorized aliens a foot in the door to the United States and its benefits. 151 Cong. Rec. E816 (daily ed. April 28, 2005) (Rep. Paul); 149 Cong. Rec. E547 (daily ed. March 21, 2003) (statement of Rep. Paul); 143 Cong. Rec. H.R. 8 (daily ed. September 16, 1997) (statements of Rep. Smith of Texas and Rep. Bilbray); 142 Cong. Rec. H2487 (daily ed. March 20, 1996) (statement of Rep. Deal); 141 Cong. Rec. E127-8 (daily ed. January 19, 1995) (statement of Rep. Beilenson); 140 Cong. Rec. E456 (daily ed. March 16, 1994) (statement of Rep. Taylor); 139 Cong. Rec. S11997 (daily ed. September 20, 1993) (statement of Sen. Reid), E 2168-2169 (daily ed. September 15, 1993) (statement of Rep. Gallegly), S10378 (daily ed. August 4, 1993) (statement of Sen. Reid), H4437 (daily ed. July 1, 1993) (statement of Rep. Gallegly), H1005 (daily ed. March 3, 1993) (statement of Rep. Gallegly), E409 (daily ed. February 23, 1993) (statement of Rep. Beilenson); 138 Cong. Rec. E2572-3 (daily ed. September 10, 1992) (statement of Rep. Gallegly), E1847 (daily ed. June 16, 1992) (statement of Rep. Gallegly), E441 (daily ed. February 26, 1992) (statement of Rep. Gallegly); 137 Cong. Rec. H8180 (daily ed. October 22, 1991) (statement of Rep. Gallegly), H7788 (daily ed. October 10, 1991) (statement of Rep. Dornan).

Senator Inhofe cited the Center for Immigration Studies (CIS), a nonprofit immigration reform organization, and the National Center for Health Statistics for the statistic that in 2002 there were about 383,000 babies born to unauthorized aliens, which represented about 9.5% of all U.S. births in 2002. 152 Cong. Rec. S2582 (daily ed. March 30, 2006); see also Steven A. Camarota, CIS, *Backgrounder: Births to Immigrants in America, 1970 to 2002*, at 1, 5, 26, and 28 (July 2005).

Compare these statistics with a recent statistical analysis done by the Pew Hispanic Center, a Pew Research Center Project, estimating that about 340,000 babies were born to unauthorized aliens in 2008, representing about 8% of all U.S. births in 2008, and that about 4 million U.S.-born children of unauthorized alien parents resided in the United States in 2009. Jeffrey S. Passel and Paul Taylor, Pew Hispanic Center Report, *Unauthorized Immigrants and Their U.S.-Born Children* (Aug. 11, 2010), available at <http://pewhispanic.org/reports/report.php?ReportID=125>.

<sup>66</sup> The legislative proposals discussed in this report were suggested in Schuck & Smith, *supra* footnote 16, at 116-140, as a more appropriate law of citizenship. Their proposal is to exclude children of unauthorized and nonimmigrant aliens, because the nation has not consented to the permanent residence of the parents. The children of legal residents, i.e., permanent resident aliens, would be provisional citizens at birth and until their majority. They note that the United Kingdom, which shares common origins with our common law of citizenship, has adopted laws which do not extend birthright citizenship to children of unauthorized or nonimmigrant aliens. For a contrary analysis, see the discussion of different principles/bases for birthright citizenship, including a response to Schuck & Smith and a consideration of the detrimental repercussions of restricting birthright citizenship, in Eisgruber, *supra* footnote 32.

<sup>67</sup> In the 111<sup>th</sup> Congress four bills have been introduced that would amend INA §301 (8 U.S.C. §1401). These include H.R. 126, H.R. 994 §301, H.R. 1868, and H.R. 5002 §7. One bill, S.J.Res. 6, has been introduced that would amend the (continued...)

The legislation discussed in this section is intended to discourage unlawful entry and presence of aliens in the United States and the perceived anomaly of automatically granting citizenship to persons who, despite birth in the United States, are not raised and do not act in accordance with allegiance to the United States.<sup>68</sup> It may accomplish this but may also throw into question the ultimate status of many born here, that is, persons whose parents are in the United States initially on temporary visas but ultimately obtain lawful permanent status. Also, the additional record-keeping necessary to document who becomes a citizen automatically upon birth in the United States may present bureaucratic challenges, particularly since birth records are a matter for state laws.<sup>69</sup>

## **Constitutional Amendments and Related Statutory Amendments**

There have been several variations on proposals for constitutional amendments. The versions differ in defining what status a parent must have to enable automatic birthright citizenship for a child born in the United States.<sup>70</sup> Proposals would variously limit *jus soli* citizenship under the Constitution to persons born to

- parents *both* of whom are either citizens or lawful permanent residents (does not expressly repeal the current Citizenship Clause);<sup>71</sup>
- a mother who is a legal resident (expressly repeals the current Citizenship Clause);<sup>72</sup>
- a mother who is a citizen or legal resident (expressly repeals the current Citizenship Clause);<sup>73</sup>
- parents one of whom is a citizen (does not expressly repeal the current Citizenship Clause);<sup>74</sup>
- parents one of whom is a citizen or person who owes permanent allegiance to the United States (does not expressly repeal the current Citizenship Clause);<sup>75</sup>
- parents one of whom is a legal resident (expressly repeals the current Citizenship Clause);<sup>76</sup>

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(...continued)

Citizenship Clause of the Fourteenth Amendment of the Constitution.

<sup>68</sup> For additional discussion of the detrimental effect of the current birthright citizenship laws, see Wood, *supra* footnote 32, at 493-503. See also *Joint Hearing*, *supra* footnote 32.

<sup>69</sup> For additional criticism of proposals to restrict birthright citizenship and the possible detrimental effect of such legislation, see Eric Ward, *A New Nativism: Anti-Immigration Politics and the Fourteenth Amendment*, and Margaret D. Stock, *Policy Arguments in Favor of Retaining America's Birthright Citizenship Law*, in *Made in America: Myths & Facts about Birthright Citizenship*, *supra* footnote 32. See also *Joint Hearing*, *supra* footnote 32.

<sup>70</sup> One should note that the constitutional Citizenship Clause provides the baseline for birthright citizenship—Congress can provide for broader bases by statute.

<sup>71</sup> *E.g.*, H.J.Res. 4, 105<sup>th</sup> Cong. (1997); H.J.Res. 190, 104<sup>th</sup> Cong. (1996).

<sup>72</sup> *E.g.*, H.J.Res. 357, 102<sup>nd</sup> Cong. (1992).

<sup>73</sup> *E.g.*, H.J.Res. 64, 104<sup>th</sup> Cong. (1995); H.J.Res. 129, 103<sup>rd</sup> Cong. (1993).

<sup>74</sup> *E.g.*, H.J.Res. 60, 105<sup>th</sup> Cong. (1997); H.J.Res. 88, 104<sup>th</sup> Cong. (1995); H.J.Res. 396, 103<sup>rd</sup> Cong. (1994).

<sup>75</sup> *E.g.*, H.J.Res. 46, 110<sup>th</sup> Cong. (2007); H.J.Res. 46, 109<sup>th</sup> Cong. (2005); H.J.Res. 42, 108<sup>th</sup> Cong. (2003).

<sup>76</sup> *E.g.*, H.J.Res. 56, 104<sup>th</sup> Cong. (1995); H.J.Res. 117, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (1993).

- parents one of whom is a citizen or lawful permanent resident (does not expressly repeal the current Citizenship Clause);<sup>77</sup>
- parents one of whom is a citizen, is lawfully in the United States, or has lawful status under the immigration laws of the United States (does not expressly repeal the current Citizenship Clause);<sup>78</sup>
- parents one of whom is a citizen, a lawful permanent resident who resides in the United States, or an alien performing active duty service in the U.S. Armed Forces (does not expressly repeal the current Citizenship Clause).<sup>79</sup>

Even as a baseline for defining citizenship, some of the distinctions drawn are unclear. The term “legal resident” used in some of the proposals would appear to implicitly include citizens, nationals, and lawful permanent residents, but it may also be interpreted to include certain categories of nonimmigrants who typically reside in the United States for several years and other aliens permanently residing under the color of law. Other proposals refer to citizens, but not to nationals who are not citizens (e.g., American Samoans). One type of proposal refers to persons who owe permanent allegiance to the United States, which is how the INA defines nationals. Therefore, for the sake of clarity, proposed language that includes an explicit enumeration of the applicable categories of parents—citizens, nationals, lawful permanent residents, nonimmigrants (if any) may be preferable to language that only explicitly refers to parents who are legal residents or to citizens without mentioning nationals. Some proposals focus on the mother as the conduit for birthright citizenship, excluding a father who is a U.S. citizen or legal resident from being the conduit for such citizenship. All of these proposals would only apply prospectively to those born after the date of the ratification of an amendment by the legislatures of three-fourths of the states within seven years of its submission for ratification and all provide that Congress shall have the power to enforce the article by appropriate legislation.

Some of the above proposals to amend the Constitution have parallel proposals to amend the INA to conform to the new baseline of the Citizenship Clause once it is amended, including legislation to limit citizenship by birth in the United States to persons born to

- mothers who are legal residents<sup>80</sup> or
- mothers who are citizens or legal residents.<sup>81</sup>

By their own terms, these types of statutory amendments would not take effect until a related constitutional amendment had been ratified and would only apply to those born after the date of ratification. These statutory proposals raise the same issues as the parallel constitutional amendments.

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<sup>77</sup> *E.g.*, H.J.Res. 41, 109<sup>th</sup> Cong. (2005); H.J.Res. 44, 108<sup>th</sup> Cong. (2003).

<sup>78</sup> *E.g.*, H.J.Res. 59, 107<sup>th</sup> Cong. (2001); H.J.Res. 10, 106<sup>th</sup> Cong. (1999); H.J.Res. 26, 105<sup>th</sup> Cong. (1997); H.J.Res. 93, 104<sup>th</sup> Cong. (1995); H.J.Res. 340, 103<sup>rd</sup> Cong. (1994).

<sup>79</sup> *E.g.*, S.J.Res. 6, 111<sup>th</sup> Cong. (2009); S.J.Res. 31, 110<sup>th</sup> Cong. (2008).

<sup>80</sup> *E.g.*, H.R. 3605, 102<sup>nd</sup> Cong. (1991).

<sup>81</sup> *E.g.*, H.R. 126, 111<sup>th</sup> Cong. (2009); H.R. 705, 104<sup>th</sup> Cong. (1995); H.R. 1191, 103<sup>rd</sup> Cong. (1993).

## Statutory Amendments Without Related Constitutional Amendments

One set of proposals would limit birthright citizenship in a way that its proponents believe would not necessitate a constitutional amendment (see discussion in the following section). It essentially would *statutorily* define who is born “subject to the jurisdiction” of the United States under the Citizenship Clause notwithstanding the U.S. Supreme Court holdings in *United States v. Wong Kim Ark*. These proposals variously define

- persons, whose birth mothers are not citizens, nationals, or lawful permanent residents of the United States *and* who are citizens/nationals of another country of which a natural parent is a citizen/national, as not being born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment, but rather as being born subject to the jurisdiction of the other country;<sup>82</sup>
- persons, whose birth mothers are not citizens or lawful permanent residents of the United States *and* who are citizens/nationals of another country of which a natural parent is a citizen/national, as not being born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment, but rather as being born subject to the jurisdiction of the other country;<sup>83</sup>
- persons born subject to the jurisdiction of the United States as including persons born *in wedlock* to a mother or father who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, or persons born *out of wedlock* to a mother who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States;<sup>84</sup>
- persons born subject to the jurisdiction of the United States as including persons born *in wedlock* to a mother or father who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, or persons born *out of wedlock* to a mother who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, or to a father who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, but only if paternity has been established by clear and convincing evidence and the father has satisfied certain requirements;<sup>85</sup>

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<sup>82</sup> *E.g.*, H.R. 190, 107<sup>th</sup> Cong. (2001); H.R. 319, 106<sup>th</sup> Cong. (1999); H.R. 346, 105<sup>th</sup> Cong. (1997); H.R. 375, § 301, 104<sup>th</sup> Cong. (1995). These bills specify that the persons in question are either born citizens/nationals of another country of which either of his/her natural parents is a citizen/national or *entitled* upon application to become a citizen/national of that other country.

<sup>83</sup> *E.g.*, H.R. 2162, § 701, 104<sup>th</sup> Cong. (1995); H.R. 4934, § 701, 103<sup>rd</sup> Cong. (1994); H.R. 3862, § 401, 103<sup>rd</sup> Cong. (1994); S. 1351, § 1001, 103<sup>rd</sup> Cong. (1993). These bills specify that the persons in question are either born citizens/nationals of another country of which either of his/her natural parents is a citizen/national or *entitled* upon application to become a citizen/national of that other country.

<sup>84</sup> *E.g.*, H.R. 3938, § 701, 109<sup>th</sup> Cong. (2005); H.R. 4313, § 322, 109<sup>th</sup> Cong. (2005); H.R. 698, 109<sup>th</sup> Cong. (2005); H.R. 1567, 108<sup>th</sup> Cong. (2003); H.R. 73, 106<sup>th</sup> Cong. (1999); H.R. 7, 105<sup>th</sup> Cong. (1997); H.R. 1363, 104<sup>th</sup> Cong. (1995). All but the last of these defines “wedlock” as not including common-law marriage.

<sup>85</sup> *E.g.*, H.R. 133, 110<sup>th</sup> Cong. (2007). The requirements that must be satisfied by the out-of-wedlock father are the same as the requirements that must be satisfied for transmission of citizenship to a child born abroad and out-of-wedlock to a U.S. citizen father under INA § 309(a) (8 U.S.C. § 1409(a)).

- persons born subject to the jurisdiction of the United States as including persons born in the United States to a mother or father who is a national of the United States (this would include citizens and non-citizen nationals) or a lawful permanent resident who maintains his or her residence in the United States;<sup>86</sup>
- persons born subject to the jurisdiction of the United States as including persons born in the United States to a mother or father who is a citizen or national of the United States, a lawful permanent resident whose residence is in the United States, or an alien performing active duty service in the U.S. Armed Forces.<sup>87</sup>

The first two of these proposals would avoid the problem of rendering a person stateless by permitting persons born to unauthorized alien or nonimmigrant mothers to be citizens at birth if they have no viable claim to citizenship in another country.<sup>88</sup> These two proposals could result in a scenario in which a person may be born in the United States to a mother who is a nonimmigrant or unauthorized alien and a father who is a U.S. citizen, national or lawful permanent resident (in or out of wedlock) and not be born a U.S. citizen because that person has a claim to citizenship in the mother's country. The third proposal does not permit a person born out of wedlock to a father who is a U.S. citizen, national or lawful permanent resident to be considered born subject to the jurisdiction of the United States and does not provide for the acquisition of U.S. citizenship by such a person through a U.S. citizen father. Without conforming amendments to § 309 of the INA, this proposal would mean that persons born abroad out of wedlock to a U.S. citizen father and an alien mother would have a process by which they could be deemed U.S. citizens at birth and, paradoxically, persons born in the United States of similar parentage would not. These proposals are all therefore arguably unconstitutional on due process/equal protection grounds as well as Citizenship Clause grounds.<sup>89</sup> The fourth proposal avoids such issues by providing for the birthright citizenship of a person born out-of-wedlock to a father who is a U.S. citizen, national, or lawful permanent resident as long as requirements like those of INA § 309 are satisfied. The fifth and sixth proposals listed above would not raise these constitutional issues because they make no distinctions based on the gender of the parent.

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<sup>86</sup> *E.g.*, S. 1269, §503, 110<sup>th</sup> Cong. (2007); S. 2117, Title V, 109<sup>th</sup> Cong. (2005).

<sup>87</sup> *E.g.*, H.R. 994, §301, 111<sup>th</sup> Cong. (2009); H.R. 1868, 111<sup>th</sup> Cong. (2009); H.R. 5002, §7, 111<sup>th</sup> Cong. (2010); H.R. 1940, 110<sup>th</sup> Cong. (2007); H.R. 6789, §301, 110<sup>th</sup> Cong. (2008).

<sup>88</sup> International law generally views statelessness as undesirable and seeks to prevent or discourage leaving persons unprotected by and unallied with any nation. The United States apparently is not a party to any conventions or agreements with binding obligations to prevent statelessness. It is unclear whether such an obligation exists under customary international law, although some authorities argue that it does, given the near-universal condemnation of statelessness in the laws of many nations and in various international agreements. *See* 8 Gordon, Mailman & Yale-Loehr, *supra* footnote 5, at §§ 91.01[3][e] and 100.02[2][b][v]; J.M Spectar, *To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System*, 39 Cal. W. L. Rev. 263, 296-301 (2003); Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of Abuzineh V. Federal Laboratories, Inc.*, 11 Am. U.J. Int'l L. & Pol'y 195, 198-202 (1996); Milton C. Lorenz, Jr., *Note: Aliens—Renunciation of Nationality Leaves Individual Stateless and Excludable as Any Alien*, 46 Tul. L. Rev. 984, 989-990 (1972).

<sup>89</sup> The U.S. Supreme Court has upheld the provisions for transmission of citizenship by a U.S. citizen father to a child born out of wedlock outside the United States as consistent with constitutional equal protection despite the fact that their requirements are more stringent than those for transmission by a U.S. citizen mother to a child born in the same circumstances. *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001). However, in that case, there was a possibility for transmission; the more stringent requirements were substantially related to the congressional purpose of requiring a demonstrable bond between the U.S. citizen father and child. The absence of any possibility of basing citizenship on the father's citizenship, nationality, or resident status may be unconstitutional.

## Other Statutory Amendments

One type of proposal in the 110<sup>th</sup> and 109<sup>th</sup> Congresses, without statutorily defining “born subject to the jurisdiction” of the United States, would have provided that, with respect to a person born after the date of the enactment of the proposal, the person shall not be a national or citizen at birth under §301 of the INA (8 U.S.C. §1401) unless at least one of the parents is, at the time of birth, a citizen or national of the United States or an alien lawfully admitted for permanent residence.<sup>90</sup>

Last, a proposal in the 108<sup>th</sup> Congress was *sui generis*; it did not purport to be a congressional interpretation of the Citizenship Clause but would have imposed a statutory limitation on H-visa holders and therefore would have been unconstitutional under the Citizenship Clause. Under this proposal, children born to a parent who is a nonimmigrant employee under § 101(a)(15)(H) of the INA would not be a U.S. citizen by birth in the United States unless the other parent were a U.S. citizen or lawful permanent resident.<sup>91</sup>

## Congressional Act Without Constitutional Amendment

As noted above, proponents of certain proposals to amend the INA argue that congressional interpretation of the Citizenship Clause to limit automatic birthright citizenship may be permissible without an accompanying constitutional amendment because, under § 5 of the Fourteenth Amendment, Congress has the power to “enforce, by appropriate legislation, the provisions of this article.” In a still evolving area of law, the United States Supreme Court has held that Congress has some power to define the substance of the rights that are protected under the amendment and may even, under some circumstances, legislate contrary to judicial decisions by going beyond judicial decisions defining such rights in order to enforce the amendment.

In *Katzenbach v. Morgan*,<sup>92</sup> the Court found that Congress could define the substantive scope of equal protection for the purpose of determining whether state laws violate equal protection. The Court rejected the dissent’s concern that Congress could legislate to dilute the equal protection and due process decisions of the Court, saying that Congress may adopt measures only to enforce Fourteenth Amendment rights, not to restrict, abrogate or dilute them.<sup>93</sup> However, Congress has passed legislation that purported to overrule the Court’s expansion of the right against self-incrimination and the right-to-counsel and expressly relied on *Katzenbach v. Morgan*, although the Court, contemporaneously with the legislation, changed course to adopt a view in alignment with that of Congress.<sup>94</sup> Congressional abortion opponents have tried to initiate legislation restricting the right that the Court has derived from the Constitution.<sup>95</sup> Other more recent cases

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<sup>90</sup> H.R. 4192, §201, 110<sup>th</sup> Cong. (2007); H.R. 3700, § 201, 109<sup>th</sup> Cong. (2005).

<sup>91</sup> H.R. 3534, § 213(b), 108<sup>th</sup> Cong. (2003).

<sup>92</sup> 384 U.S. 641, 654-656 (1966). *See also*, *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 717-20, 726-727 (1989); *Fullilove v. Klutznick*, 448 U.S. 448, 476-8, 482-4 (1980); *City of Rome v. United States*, 446 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 108-17, 2041-2047 (2002 & 2008 Supp.) (Johnny H. Killian, George A. Costello & Kenneth R. Thomas eds.) [hereinafter CONSTITUTION ANNOTATED].

<sup>93</sup> 384 U.S. at 651, n. 10. *See also* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731-733 (1982).

<sup>94</sup> CONSTITUTION ANNOTATED, *supra* footnote 92, at 2042-3, n. 1990.

<sup>95</sup> *Id.* at 2044, n. 1999.

show that the Court will not always defer to Congress's determination as to what legislation is appropriate to enforce the provisions of the Fourteenth Amendment.<sup>96</sup>

Thus, there may be an issue as to whether Congress could define "subject to the jurisdiction thereof" in a manner that would curtail a long-assumed right of persons born to aliens in the United States to be U.S. citizens regardless of the immigration status of their parents. One could argue that Congress has no power to define "subject to the jurisdiction" and the terms of citizenship in a manner contrary to the Court's understanding of the Fourteenth Amendment as expressed in *Wong Kim Ark* and *Elk*, particularly since that understanding includes a holding that the Fourteenth Amendment did not confer on Congress a right to restrict the effect of birth on citizenship as declared by the Constitution. In other words, there may be a distinction between the existence of a right under the Fourteenth Amendment (e.g., citizenship), which depends on the text and judicial interpretation, and the implications or scope of the right, which is subject to some degree of congressional regulation. However, since Congress has broad power to pass necessary and proper legislation to regulate immigration and naturalization under the Constitution, Art. I, § 8, cls. 4 & 18,<sup>97</sup> arguably Congress has the power to define "subject to the jurisdiction thereof" for the purpose of regulating immigration.

The federal courts arguably support an interpretation of the Constitution that would foil those who attempt to gain an immigration advantage by breaking U.S. laws, although *Wong Kim Ark* made no distinction between lawfully and unlawfully present alien parents, nor between legal resident and nonimmigrant aliens. However, the *Wong Kim Ark* Court did not have to make such distinctions, because Wong's parents were legal resident aliens. Federal appellate courts have upheld the refusal by the immigration enforcement authorities to stay the deportation of unauthorized aliens merely on the grounds that they have U.S.-citizen, minor children, because to do so would be unfairly to grant an advantage to aliens who successfully flouted U.S. immigration laws long enough to have a child born in the United States over those aliens who followed the law, and would turn the immigration statute on its head.<sup>98</sup> Although the mere fact of the existence of U.S.-citizen, minor children would not be sufficient to prevent the deportation of unauthorized alien parents, extreme hardship to the children caused by the deportation of the parents is a factor to be considered in the discretionary suspension of deportation.<sup>99</sup> The United States Supreme Court has upheld the discretion of the Attorney General and the immigration

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<sup>96</sup> *Id.* at 2044-7.

<sup>97</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (1976); *Mathew v. Diaz*, 426 U.S. 67 (1975).

<sup>98</sup> See, e.g., *Hernandez-Rivera v. I.N.S.*, 630 F.2d 1352, 1356 (9<sup>th</sup> Cir. 1980); *Gonzalez-Cuevas v. I.N.S.*, 515 F.2d 1222, 1224 (5<sup>th</sup> Cir. 1975). See generally Annotation, *Infant Citizen as Entitled to Stay of Alien Parents' Deportation Order*, 42 A.L.R. Fed. 924 (1979 & Supp. 2001), and Annotation, *What Constitutes "Extreme Hardship" or "Exceptional and Extremely Unusual Hardship," Under § 244(a) of Immigration and Nationality Act (8 U.S.C.S. § 1254(a)), Allowing Attorney General to Suspend Deportation of Alien and Allow Admission for Permanent Residence*, 72 A.L.R. Fed. 133 §§ 7-12 (1985 & Supp. 2001).

<sup>99</sup> *Urbano de Malaluan v. I.N.S.*, 577 F.2d 589, 594 (9<sup>th</sup> Cir. 1978). This particular case actually held that suspension of deportation proceedings should be reopened, and it distinguished consideration of the children's existence from a consideration of extreme hardship under proceedings for the suspension of deportation, because the latter proceedings required a seven-year continuous presence in the United States. However, later cases, while acknowledging extreme hardship as a statutory factor, limited review of the immigration court's discretion to grant suspension of deportation and did not seem to consider seven-years continuous presence to be a significant reduction of any loophole based on U.S.-citizen children. See *infra* footnote 100 and footnote 101 and accompanying text. See also Annotation, *supra* footnote 98, 72 A.L.R. Fed. at 133, §§ 7-12. The annotation lists and summarizes a number of cases which do and do not find extreme hardship, including cases involving U.S.-citizen minor children. The specific facts in some cases resulted in a finding of extreme hardship.

enforcement authorities to define “extreme hardship” under proceedings for the suspension of deportation<sup>100</sup> and to deny suspension of deportation and refuse to reopen proceedings for the suspension of deportation even if a prima facie case for suspension is demonstrated.<sup>101</sup> The Court held that a court could not substitute a liberal definition of “extreme hardship” for a narrow one preferred by the Attorney General and the immigration enforcement authorities, noting that otherwise “any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years can change his status from that of tourist or student to that of permanent resident without the inconvenience of immigration quotas. This strategy is not fair to those waiting for a quota.”<sup>102</sup> A U.S.-citizen child must be 21 years old to bring alien parents into the United States as immigrants.<sup>103</sup> Federal courts have found that this requirement is meant “to prevent wholesale circumvention of the immigration laws by persons who enter the country illegally and promptly have children to avoid deportation,”<sup>104</sup> and does not violate equal protection by distinguishing between U.S.-citizen children who are minors and those who have attained majority.<sup>105</sup>

The courts apparently have never ruled on the specific issues of whether the native-born child of unauthorized aliens as opposed to the child of lawfully present aliens may be a U.S. citizen or whether the native-born child of nonimmigrant aliens as opposed to legal resident aliens may be a U.S. citizen.<sup>106</sup> However, *Wong Kim Ark* specifically held that under the Fourteenth Amendment a child born in the United States to parents who, at the time of his birth, were subjects of the Chinese emperor, but had a “permanent domicil [*sic*] and residence in the United States”<sup>107</sup> and were not diplomats of the emperor, was born a U.S. citizen. The holding does not make a distinction between illegal and legal presence in the United States, but one could argue that the holding is limited to construing the Fourteenth Amendment in the context of parents who are legal permanent residents. However, the Court’s own discussion of the common law doctrine of *jus soli* and the Fourteenth Amendment as an affirmation of it indicates that the holding, at the least, would not be limited to permanent legal residents as opposed to nonimmigrant, transient, legal aliens<sup>108</sup> and currently accepted law would also weigh against this argument.<sup>109</sup> Also, the

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<sup>100</sup> *I.N.S. v. Jong Ha Wang*, 450 U.S. 139, 145 (1981).

<sup>101</sup> *I.N.S. v. Rios-Pineda*, 471 U.S. 444, 446, 451 (1985).

<sup>102</sup> 450 U.S. at 145.

<sup>103</sup> Section 201(b)(2)(A)(I) of the Immigration and Nationality Act, codified as amended at 8 U.S.C. § 1151(b)(2)(A)(I).

<sup>104</sup> *Hernandez-Rivera v. I.N.S.*, 630 F.2d at 1356, citing *Urbano de Malaluan v. I.N.S.*, 577 F.2d at 594.

<sup>105</sup> *Hernandez-Rivera v. I.N.S.*, 630 F.2d at 1356.

<sup>106</sup> SCHUCK & SMITH, *supra* footnote 16, at 117.

<sup>107</sup> 169 U.S. at 705.

<sup>108</sup> *United States v. Wong Kim Ark*, 169 U.S. at 693-694. The Court also states:

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, “All persons born in the United States,” by the addition, “and subject to the jurisdiction thereof,” would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law.) [*sic*] the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. [Citations omitted.]

169 U.S. at 682.

<sup>109</sup> Shavers, *supra* footnote 59, at 489.

cases involving the deportation of unauthorized aliens simply take for granted that their U.S.-born children are U.S. citizens in considering whether the existence of extreme hardship to U.S.-citizen, minor children should stay the deportation of the parents.<sup>110</sup> This is true regardless of whether the children were born during the period of any lawful stay by the parents, during the period of any unlawful stay, or after an immigration court's finding of deportability of the parents. However, some scholars argue that the Citizenship Clause of the Fourteenth Amendment should not apply to the children of unauthorized aliens because the problem of unauthorized aliens did not exist at the time the Fourteenth Amendment was considered in Congress and ratified by the states.<sup>111</sup> Although the *Elk* decision construed the phrase, "subject to the jurisdiction thereof," the situation of Native Americans is unique, so any interpretation that the U.S.-born children of unauthorized aliens are not born "subject to the jurisdiction" of the United States arguably could not rely on the *Elk* decision.

Because of the Supreme Court interpretations of U.S. citizenship laws and constitutional provisions, one could argue that a constitutional amendment is necessary to clarify the meaning of "subject to the jurisdiction of the United States." On the other hand, *amicus curiae* (friend of the court) briefs submitted by several interested organizations to the U.S. Supreme Court for consideration during the case of *Hamdi v. Rumsfeld*<sup>112</sup> argued, among other things, that the

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<sup>110</sup> See, e.g., *I.N.S. v. Rios-Pineda*, 471 U.S. at 446; *Braun v. I.N.S.*, 992 F.2d 1016, 1020 (9<sup>th</sup> Cir. 1993); *Hernandez-Rivera v. I.N.S.*, 630 F.2d at 1356; *Wang v. I.N.S.*, 622 F.2d 1341, 1348 (9<sup>th</sup> Cir. 1980); *Urbano de Malaluan v. I.N.S.*, 577 F.2d at 594; *Gonzalez-Cuevas v. I.N.S.*, 515 F.2d at 1224.

<sup>111</sup> SCHUCK & SMITH, *supra* footnote 16, at 95-98. See also Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: an Irrational Public Policy*, 14 Tex. Rev. Law & Pol. 1 (2009) (arguing that the federal courts should recognize the irrationality of interpreting the Constitution as mandating birthright citizenship for children of unauthorized aliens and permit Congress to legislate birthright citizenship based on public policy discouraging the detrimental effects of expansive birthright citizenship). This article cites Judge Richard Posner's concurring opinion in *Oforji v. Ashcroft*, 354 F.3d 609, 620-21 (7<sup>th</sup> Cir. 2003), in which he argues:

... Congress should rethink ... awarding citizenship to everyone born in the United States (with a few very minor exceptions, ... [citation omitted]), including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children. This rule, though thought by some compelled by section 1 of the Fourteenth Amendment, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and in any event codified in 8 U.S.C. § 1401(a), which provides that "the following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof," makes no sense....

We should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children. But the way to stop that abuse of hospitality is to remove the incentive by changing the rule on citizenship.... A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it. [Citation omitted.] The purpose of the rule was to grant citizenship to the recently freed slaves, and the exception for children of foreign diplomats and heads of state shows that Congress does not read the citizenship clause of the Fourteenth Amendment literally. Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense.

However, the opinion of the court majority in the *Oforji* case asserts, "The law is clear that citizen family members of illegal aliens have no cognizable interest in preventing an alien's exclusion [citations omitted]. Under the present law a woman who is otherwise a deportable alien does not have any incentive to bear a child (who automatically becomes a citizen) whose rights to stay are separate from the mother's obligation to depart." 354 F.3d at 618.

<sup>112</sup> 59 L. Ed. 2d 578, 124 S. Ct. 2633 (2004). *Amicus Curiae* briefs addressing the interpretation of the Citizenship Clause were submitted by (1) the Eagle Forum Education and Legal Defense Fund; (2) the Claremont Institute Center for Constitutional Jurisprudence; and (3) the Center for American Unity, Friends of Immigration Law Enforcement, National Center on Citizenship and Immigration, and Representatives Steve King, Dana Rohrabacher, Lamar S. Smith, Thomas G. Tancredo, Roscoe Bartlett, Mac Collins, Joe Barton, and John J. Duncan, Jr. Ultimately, Hamdi was released by the United States and allowed to return to Saudi Arabia on the condition that he renounce his U.S. (continued...)

Supreme Court interpretations never contemplated or intended to include the granting of automatic citizenship by birth in the United States to persons whose parents were aliens who entered or stayed in the United States unlawfully or who were transiently present. The Court itself made its decision in the *Hamdi* case based on the assumption that Hamdi was a U.S. citizen. Most other *jus soli* countries have limited citizenship by birth in their territories.<sup>113</sup>

## **Author Contact Information**

Margaret Mikyung Lee  
Legislative Attorney  
mmlee@crs.loc.gov, 7-2579

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citizenship. Eric Lichtblau, *U.S., Bowing to Court, to Free 'Enemy Combatant,'* N.Y. TIMES (Sept. 23, 2004).

<sup>113</sup> See Constance A. Johnson, Law Library Of Congress Report 2010-004604, *Birthright Citizenship In G-20 Countries* (Aug. 2010), available at [http://www.loc.gov/law/help/reports/pdf/2010-004604\\_G-20\\_chart.pdf](http://www.loc.gov/law/help/reports/pdf/2010-004604_G-20_chart.pdf); U.S. Citizenship and Immigration Services, *Citizenship in the United States*, at 5 and Appendix II at 69 (2004).