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THE COST TO AMERICANS AND AMERICA OF ENDING BIRTHRIGHT CITIZENSHIP

BY MARGARET STOCK

EXECUTIVE SUMMARY

In recent years, calls to change the Fourteenth Amendment's Citizenship Clause, which guarantees U.S. citizenship to most American-born babies, have been a regular feature of the political landscape. A change to the Citizenship Clause superficially appeals to some who have not considered the cost and implications of verifying the immigration or citizenship status of every parent of every child born in the United States each year. Based on current costs to verify the citizenship status of children born overseas to U.S. citizens, changing the Citizenship Clause of the Fourteenth Amendment will cost new parents in the United States approximately $600 in government fees to prove the citizenship status of each baby and likely an additional $600 to $1,000 in legal fees. This represents a "tax" of $1,200 to $1,600 on each baby born in the United States, while at the same time doing little to deter illegal entry to the United States. Direct fees to the federal government would reach $2.4 billion a year, based on current estimates.

There are many costs to Americans and American society of changing the Fourteenth Amendment's Citizenship Clause. Among the costs of changing the Citizenship Clause:

- **Creating a two-tier American caste system that will result in a significant decrease in the population of younger U.S. citizens.** The change would create a large class of unauthorized and stateless children who are born and raised in the United States but who have no strong ties to any other nation. The change would increase the undocumented population significantly. The Migration Policy Institute (MPI) has estimated that America would lose somewhere between 4.7 million and 13.5 million future citizens by the year 2050 if the Citizenship Clause is changed to deny U.S. citizenship to the children of unauthorized immigrants. Instead, those children would be born here but would lack legal status and have no right to stay in the United States.

- **Increasing the shadow economy.** The major demographic issues should be obvious: Even a change restricted only to the children of unauthorized immigrants will cause the U.S. to lose a large cohort of U.S. citizens in the youngest demographic groups. While some of these birthright undocumented immigrants will possibly qualify to immigrate legally through one channel or another eventually, and a smaller group of those will eventually earn U.S. citizenship through naturalization channels, most will be ineligible for any legal immigration status and will likely enter the shadow economy.

- **Reducing the tax base, including contributions to Social Security, and reducing the military recruiting base.** Because individuals pay a "wage penalty" for lacking legal status, creating unauthorized residents in the place of U.S. citizens will reduce the amount of taxes collected in a time of already large deficits.

- **More, not less government and bureaucracy.** Any change to the current bright-line rule will inevitably add more complexity and bureaucracy to the lives of all Americans. The current rule is easy to administer, but any new rule will require major changes to the way Americans document their lives to the government. Under the current interpretation of the Clause, the status of one's parents is not taken into account in citizenship determinations, except in cases where diplomats with diplomatic immunity have children in the United States. Thus, a change to the Clause will necessarily require the creation of a new system to manage and administer the new rules; this system will necessarily apply to all Americans who have children in the United States, as well as unauthorized immigrant parents.

- **Added cost to American parents.** While proponents of change have not agreed on any one new rule, they do agree that any new rule should create different classes of American-born babies, based on the status of the babies' parents at the time of the birth. Creating two classes of babies will necessarily be more expensive to administer than the current system. The parents' status will have to be verified by a government official, who will then determine whether a newborn is a U.S. citizen (or not). After making the determination, the official will then issue different documents to the two different groups of children, resulting in a two-tier caste system for babies born in America. Distinguishing between the babies in each category will necessarily require more bureaucracy than what exists today.

- **Creation of a centralized citizenship authority and National ID card.** Changing the Citizenship Clause will not be a mere matter of changing the Fourteenth Amendment itself, but will also at a minimum require each state to establish a system for verifying claims to U.S. citizenship; more logically, a change to the Citizenship Clause will lead to the creation of a central and authoritative Federal citizenship records system that will register all U.S. citizens—and ultimately, this would likely in turn lead to a National Identification card.

- **Additional bureaucratic costs.** New verification systems—including the existing employment verification system, the REAL ID system, Secure Communities, and the new E-Verify system—have cost the American taxpayer billions of dollars. There is no reason to believe that a change to the Citizenship Clause requiring the verification of parents' immigration status would be any less expensive than other verification systems. The estimated cost to U.S. employers of operating the E-Verify system will be at

least $2.7 billion per year or more. It is conceivable that similar costs estimates would emerge in segments of the federal bureaucracy needed to respond to requests for verification involving four million babies every year.

Current U.S. immigration law does not provide any lawful immigration status—other than U.S. citizenship—to babies born in the U.S. who are not diplomats' children. The Citizenship Clause of the Fourteenth Amendment to the United States Constitution states 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." Ratified after the end of the Civil War in repudiation of the infamous U.S. Supreme Court decision in *Dred Scott v. Sandford*,[1] the Clause is a simple, bright-line rule that has been a familiar feature of the U.S. Constitution for more than a hundred years. Proponents of a change to the Clause seek to move from a simple, bright-line, inclusive rule to a more complex one that would deny U.S. citizenship at birth to hundreds of thousands of American-born babies. These children would have no legal status unless Congress concurrently enacts comprehensive immigration reform to provide them with legal immigration status.

The proper way to change the Citizenship Clause is through a Constitutional Amendment. It is unlikely that Congress can use its Section 5 power to reinterpret the meaning of the Citizenship Clause, anymore than Congress can use its Article I, section 1 powers to "reinterpret" the First or Second Amendments.

Countries that have changed their citizenship laws have not found that the change led to a significant drop in illegal migration. As the Migration Policy Institute study explained, a change to the Citizenship Clause will cause a substantial increase in the population of unauthorized immigrants. Although proponents of a change to the Citizenship Clause often argue that changing the Clause will deter undocumented immigrants from coming to the United States and having babies here, thereby reducing undocumented migration, evidence from other countries suggests that a change to the birthright citizenship rule will not be a deterrent to unauthorized migration.

Most illegal migration to the United States is driven by economic factors (jobs), or a desire to reunite with family members, not the attraction of birthright citizenship. Unauthorized parents mostly don't benefit from their child's U.S. citizenship; a birthright citizen can't sponsor his or her parents for lawful immigration status until the citizen is 21 years old and has a middle-class income; if the parent entered the U.S. unlawfully, the parent must depart the United States to obtain an immigration visa, and the parent's departure triggers a 10-year bar from the U.S.—a bar that cannot be waived just because someone has a U.S. citizen child. Some parents of U.S.-born children can be granted "cancellation of removal" by an immigration judge—but such grants are subject to a strict

[1] Scott v. Sandford, 60 U.S. 393 (1857).

nationwide quota of 4,000 per year, and the parent must show "exceptional and extremely unusual hardship" to the U.S. citizen child, a standard that few can meet.

The proposed change will impose burdensome bureaucratic costs on all newborns and their parents at a time when many Americans favor less government, not more. This proposal threatens to become the latest in a long line of expensive verification systems that fail a basic cost-benefit analysis and threaten to drown Americans in bureaucracy at every stage of their lives. The perceived benefits of a change in the Clause—a reduction in illegal migration and deterring "birth tourism"—could be achieved in a much less costly manner through enactment of sensible immigration reforms. A Constitutional Amendment to change the Citizenship Clause is unnecessary and threatens to undermine fundamental principles of American equality.

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WHAT IS THE CURRENT BIRTHRIGHT CITIZENSHIP RULE?

The Citizenship Clause of the Fourteenth Amendment to the United States Constitution states 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." Ratified after the end of the Civil War in repudiation of the infamous U.S. Supreme Court decision in *Dred Scott v. Sandford*,[2] the Clause is a simple, bright-line rule that has been a familiar feature of the U.S. Constitution for more than a hundred years. Recently, however, the Clause has come under attack, as many people have proposed a change in the Clause as one way to solve America's vexing immigration problems.

Under longstanding judicial, Congressional, and Executive branch interpretations of the Clause, the Clause confers U.S. citizenship on anyone born within the United States whose parents are subject to U.S. civil and criminal laws—which has historically meant that only babies born in the United States to persons immune to U.S. laws—such as diplomats, invading armies, or members of certain sovereign Native American tribes—have been excluded from birthright citizenship. In modern America, where few people are immune from the application of our laws and where Native Americans have been accorded birthright citizenship by statute,[3] fewer than a dozen children are born each year without U.S. citizenship. Proponents of a change to the Clause seek to move from a simple, bright-line, inclusive rule to a more complex one that would deny U.S. citizenship at birth to hundreds of thousands of American-born babies.

Complexity in rules invariably requires more complex bureaucratic decision making; more complex decision making invariably requires more governmental resources and people to administer the process. Accordingly, a change to the Citizenship Clause will inevitably cost more to administer than the current rule. But just how much more expensive will it be? Although this paper primarily discusses the cost of such a change, the Appendix provides a discussion of how the current bright-line rule evolved, which may give the reader additional insight into the complexity of any proposed change.

WHY CHANGE THE BIRTHRIGHT CITIZENSHIP RULE?

Proponents of a change to the Citizenship Clause argue that times have changed, and America should today abandon its longstanding Constitutional birthright citizenship rule because a rule allowing citizenship only through one's parents or by naturalization will deter unauthorized migration and bring America in line with the most

[2] Scott v. Sandford, 60 U.S. 393 (1857).
[3] Indian Citizenship Act of 1924, 43 U.S. Stats. At Large, Ch. 233, p. 253 (1924) ("all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States"). Proposed by U.S. Representative Homer Snyder (R-NY), this law is also called "the Snyder Act."

common international law rule. They also see a change to the Citizenship Clause as a way to punish unauthorized migrants or certain U.S.-born children of whom they do not approve. Typically, for example, they argue that changing the Citizenship Clause will stop wealthy Asian "birth tourists" from coming to the United States to have babies, or will deter poor women from Latin America from trying to migrate to the United States to seek a better life for their offspring. They describe the U.S.-born children of such women using the pejorative term "anchor babies" in an obvious attempt to devalue the children's worth—and in the mistaken belief, apparently, that such children can provide a way for the parents to gain U.S. citizenship.

In fact, a U.S. citizen cannot sponsor his or her parents to immigrate to the United States until he or she is twenty-one years old—and if the parent entered the U.S. illegally, the parent must leave the United States to seek an immigrant visa; the parent's departure from the United States will trigger an immigration law bar, which will cause the parent to be banned from the United States for ten additional years. Even if the parent is eventually able to obtain an immigrant visa and lawful permanent residence, the parent must independently qualify for U.S. citizenship, and will not earn U.S. citizenship automatically by virtue of having a child born in the United States. The term "anchor baby" is a misnomer.

HOW WOULD THE RULE BE CHANGED?

Proponents of a change to the Citizenship Clause do not agree on what the new rule should be. Some argue that a new rule should confer U.S. citizenship only on the American-born children of people who are already U.S. citizens; others prefer a rule that benefits the U.S.-born children of citizens, lawful permanent residents, and active duty members of the military; yet others want a rule that grants citizenship to the U.S.-born children of non-citizens who are lawfully present. Still others have argued for a rule that would deny U.S. citizenship to the American-born children of persons who hold dual citizenship, a change that potentially affects the millions of Americans who hold dual citizenship with the United States and another country.

Without agreement on what any new rule should be, it is challenging to evaluate the exact cost and consequences of a change to the Citizenship Clause, but one thing is certain: Any change to the current bright-line rule will inevitably add more complexity and bureaucracy to the lives of all Americans. The current rule is easy to administer, but any new rule will require major changes to the way Americans document their lives to the government. Under the current interpretation of the Clause, the status of one's parents is not taken into account in citizenship determinations, except in cases where diplomats with diplomatic immunity have children in the United States. Thus, a change to the Clause will necessarily require the creation of a new system to manage and administer the new rules.

While proponents of change have not agreed on any one new rule, they do agree that any new rule should create different classes of American-born babies, based on the status of the babies' parents at the time of the birth. Creating two classes of babies will necessarily be more expensive to administer than the current system. The parents' status will have to be verified by a government official, who will then determine whether a newborn is a U.S. citizen (or not). After making the determination, the official will then issue different documents to the two different groups of children, resulting in a two-tier caste system for babies born in America. Distinguishing between the babies in each category will necessarily require more bureaucracy than what exists today.

WHY CAN'T A NEW RULE BE ADMINISTERED EASILY?

To understand why a change to the Citizenship Clause will be expensive, one must understand how American birth certificates are created. Today, the States issue birth certificates, not the Federal Government. Unlike many countries, the United States has no national registry of vital records, and no national ID card. The Social Security Administration relies on the States and their birth registration records when issuing Social Security numbers to U.S.-born citizens;[4] the Department of State's Passport Services Directorate relies on State birth certificates when issuing U.S. passports to U.S.-born citizens; the E-Verify employment verification system in turn relies on the same reports to determine whether someone is authorized to work in the United States; DHS's new "Secure Communities" system relies on databases showing birth in the U.S. to determine whether someone who is arrested is likely subject to deportation.[5]

If the fact of someone's birth within the U.S. is no longer sufficient to prove the person's claim to U.S. citizenship, all of these bureaucratic systems must be re-tooled. This is obviously a major undertaking, one not easily or inexpensively accomplished. Changing the Citizenship Clause will thus not be a mere matter of changing the Fourteenth Amendment itself, but will also at a minimum require each State to establish a system for verifying claims to U.S. citizenship; more logically, a change to the Citizenship Clause will lead to the creation of a central and authoritative Federal citizenship records system that will register all U.S. citizens—and ultimately, this would likely in turn lead to a National Identification card.

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[4] Social Security Administration, "Documents You Need for a Social Security Card," available at http://www.ssa.gov/ssnumber/ss5doc.htm (stating that a U.S. state-issued birth certificate is sufficient proof of citizenship to allow issuance of a Social Security number).

[5] James Pinkerton, "Mass Deportations Coming For Jailed Illegal Immigrants," *Houston Chronicle*, Apr. 10, 2008 (describing how the Secure Communities program by Immigration & Customs Enforcement (ICE) will cost $2 to $3 billion per year).

WHAT ABOUT A CONSTITUTIONAL AMENDMENT?

The proper way to change the Citizenship Clause is through a Constitutional Amendment.[6] Along this line, Sens. David Vitter (R-Louisiana) and Rand Paul (R-Kentucky) have introduced a proposed Constitutional Amendment that would change the right of citizenship under the Fourteenth Amendment. The proposed Vitter-Paul Constitutional Amendment would not allow birthright citizenship for those born in the United States unless at least one parent is a citizen, a lawful permanent resident, or an immigrant in active military service. Of course, a Constitutional Amendment is notoriously difficult to pass, and would not affect the citizenship of persons born in the United States prior to its effective date—so it would not take away the citizenship of anyone born in America prior to its effective date. But a Constitutional Amendment is clearly the "path forward" for proponents of a change to the Citizenship Clause. Thus, for the sake of argument, consider what would happen if America amended its Constitution to change the Citizenship Clause.

ALL AMERICANS WILL BE AFFECTED BY THE CHANGE

First, a Constitutional Amendment would affect all Americans from the date of ratification forward. The former bright-line rule would be replaced with a more complex rule that would establish a two-tier caste system: Some babies born in America would be citizens at birth, and others would not be. A government agency of some sort would have to determine which babies would fall into each category.

A CHANGE TO THE CLAUSE WILL BE COSTLY TO TAXPAYERS

As a preliminary matter, consider the scope of the projected change: Every year, about four million babies are born in the United States. The Fourteenth Amendment says that all those babies born "subject to the jurisdiction" are U.S. citizens. As a practical matter, few babies born in the U.S. today are not "subject to the jurisdiction"—there are very few people present in the United States today who hold immunity from U.S. civil and criminal laws. Under the original understanding of the Fourteenth Amendment, only three groups of U.S.-born babies were not "subject to the jurisdiction"—the U.S. born children of sovereign Native American tribes; the U.S. born children of any occupying foreign military forces; and the U.S. born children of diplomats who held immunity from U.S. civil and criminal laws. In 1924, however, Congress passed the Indian Citizenship Act, so today all Native Americans born in the U.S.—whether born in a sovereign tribe or not—have birthright citizenship as a statutory matter (but not as a matter of Constitutional law).[7] No foreign military force occupies any U.S. state or territory at the

[6] See James C. Ho, "Defining 'American': Birthright Citizenship & the Original Understanding of the 14th Amendment." The Green Bag, Vol. 9, No. 4 (2006).

[7] The Vitter-Paul Amendment would overturn the Indian Citizenship Act of 1924, which grants birthright citizenship to Native Americans born in the United States. Native Americans would henceforth only be U.S. citizens if they could prove the immigration or citizenship status of their parents at the time of their birth.

moment, so there are no babies immune to U.S. laws and bereft of birthright U.S. citizenship on that basis. This leaves only the children of diplomats—and statistical data indicates that at most, a dozen or so babies are born in the U.S. each year to immunized diplomats.[8]

Accordingly, almost 100 percent of the 4 million babies born in the U.S. each year are born as U.S. citizens. Yet how many of those babies would not be U.S. citizens if birthright citizenship were eliminated?

One problem with estimating the number is that proponents of changes to the Citizenship Clause all agree that the Clause should be changed, but they do not all agree on what the new rule should be; or in other words, they do not agree on which parental citizenship or immigration statuses should deprive a U.S.-born child of citizenship under a new rule. Some say that the Clause should be changed so that a baby's parents must be U.S. citizens or lawful permanent residents ("green card" holders) at the time of the child's birth. Some want to allow U.S. citizenship for the U.S.-born children of active duty military personnel (even if those parents have no legal status). Yet others would allow citizenship for the U.S.-born children of long-term legal residents such as refugees or asylees, or for children who would be stateless if they were not accorded birthright citizenship. Under some proposed rules, the children of unauthorized immigrants could still claim U.S. citizenship, but the children of lawfully present temporary workers could not; under the language of a proposed state compact, for example, the U.S.-born children of unauthorized immigrants would be U.S. citizens if their parents failed to claim any foreign citizenship for them, or if a foreign country failed to allow derivative citizenship to the U.S. born children of its nationals.[9]

Others assert that one parent must merely be in the United States with the consent of the U.S. government, so that only the children of two unauthorized immigrants should be excluded from birthright citizenship. Still others argue that the parents must owe undivided loyalty to the United States; they would deny citizenship to the children of individuals who hold any sort of foreign citizenship, including those holding dual U.S. and foreign citizenship. (Dual citizenship is held by millions of Americans, so this latter interpretation would potentially affect the largest group of American-born children, potentially causing the loss of U.S. citizenship, for example, to the children of Americans who have one Irish grandparent and therefore hold dual citizenship in Ireland and the United States.)

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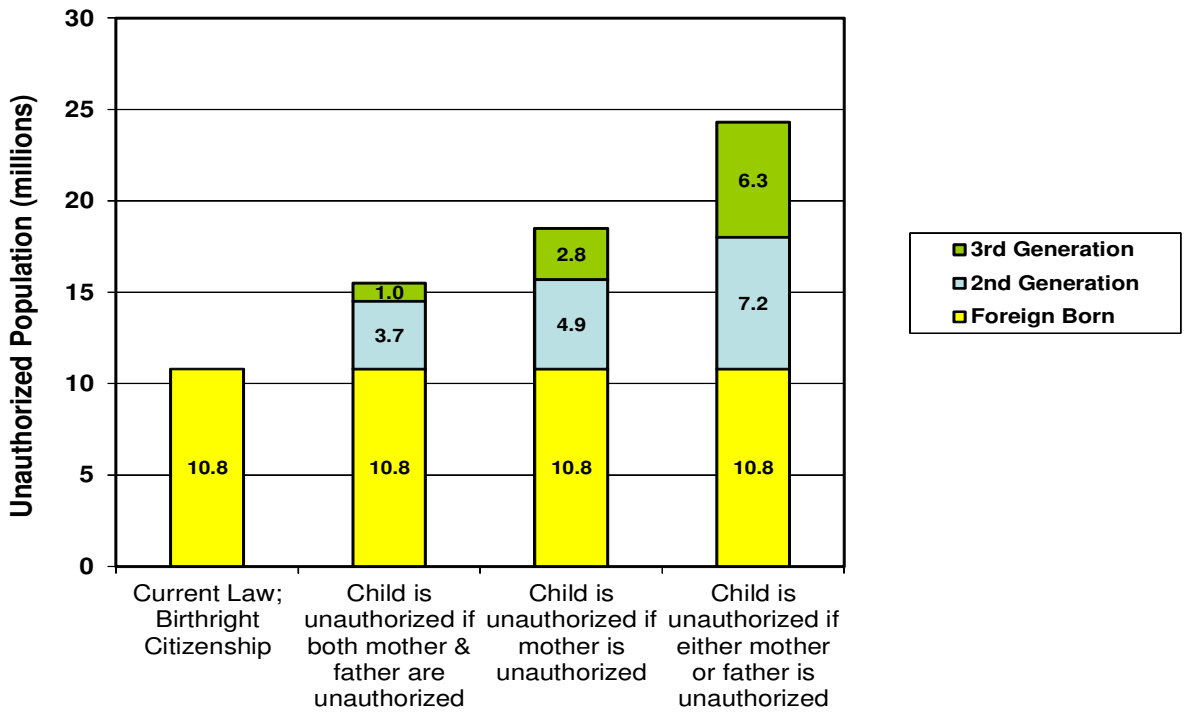
[8] These children are allowed to apply for U.S. lawful permanent residence ("green cards") if they so desire. They are not recognized as U.S. citizens by the U.S. government and cannot get U.S. passports. In 2010, thirteen of them were approved for green cards. Some, presumably, did not apply for green cards, preferring to maintain their diplomatic immunity from U.S. civil and criminal laws (and thereby avoiding U.S. tax liability and other legal obligations).

[9] Thus, for example, under the proposed state compact, if Mexico passed a law stating that the U.S.-born children of Mexican citizens were not Mexican citizens at birth, those children would be birthright U.S. citizens—leaving the determination of U.S. citizenship in the hands of foreign countries.

Without agreement on what any new rule should be, it is hard to calculate how many U.S.-born babies would be affected by a change to the Citizenship Clause, but the Migration Policy Institute recently published an estimate of the growth in the unauthorized immigrant population if birthright citizenship in the U.S. were discontinued for the children of unauthorized immigrants.[10] Using standard demographic techniques, MPI projected the size of the unauthorized immigrant population under four different rules—one in which the U.S. retained the current birthright citizenship rule; one in which the U.S. denied birthright citizenship to children only if both parents were unauthorized; one in which the U.S. denied birthright citizenship to children only if the mother were unauthorized; and one in which the U.S. denied birthright citizenship to children if one parent was unauthorized (even if the other parent was a U.S. citizen). Under all three of the scenarios that contemplated changes to the current birthright citizenship rule, MPI projected large increases in the unauthorized immigrant population.

Figure 1
Increase in Unauthorized Immigration Population by 2050 If Birthright Citizenship Is Repealed



Source: Jennifer Van Hook and Michael Fix, *The Demographic Impacts of Repealing Birthright Citizenship*, Migration Policy Institute (Sept. 2010).

[10] Jennifer Van Hook and Michael Fix, *The Demographic Impacts of Repealing Birthright Citizenship*, Migration Policy Institute (Sept. 2010).

The flip side of these estimates, of course, is a large decrease in the size of the U.S. citizen population: The children denied birthright citizenship—or in other words, the children who become unauthorized immigrants instead of birthright citizens in the MPI estimates—are children who would have been future U.S. citizens under the current rule. Thus, another way to think about MPI's numbers is to think of them as a rough estimate of how many potential U.S. citizens America will lose if the Citizenship Clause is changed. Under the three different changes used in its scenarios, MPI projected that America would lose somewhere between 4.7 million and 13.5 million future citizens by the year 2050.

Depending on what change to the rule is adopted, however, the decrease in U.S. citizens may be much larger than MPI data projects. Importantly, MPI did not calculate the number of children affected by a change to the Citizenship Clause that would exclude from citizenship the children of lawfully present parents who are dual U.S. citizens or tourists.

Turning Citizens Into Undocumented Immigrants

Underlying MPI's estimations, of course, is an overlooked fact: Current U.S. immigration law does not provide any lawful immigration status—other than U.S. citizenship—to babies born in the U.S. who are not diplomats' children (as mentioned above, babies born to diplomats get green cards, and can later apply to "naturalize" as U.S. citizens, although they are not U.S. citizens at birth). Current proposals to change the Fourteenth Amendment do not fix this problem: Such proposals provide no alternative lawful immigration status for U.S. born children who are not born to diplomats, and current immigration law also provides no means for them to naturalize.

Thus, if these proposals become law as written, the children who are henceforth to be denied birthright citizenship would all immediately become unauthorized immigrants at the moment of their birth; they do not qualify for green cards, and they cannot naturalize. Thus, for example, if the Citizenship Clause is changed as Senators Vitter and Paul have suggested, an Alabama college professor with a temporary work visa who gives birth to a child in Alabama would be giving birth to an unauthorized immigrant baby (and someone who provides the unauthorized baby's care could be arguably prosecuted criminally by the state of Alabama under its new immigration law). Presumably Congress could fix this problem by passing laws to give some immigration status short of citizenship to these U.S.-born babies—but no one has yet made any such proposal.

This point takes us back to the original question: What will be the cost to America if a few million U.S.-born babies become undocumented immigrants, rather than U.S. citizens? What will be the fiscal impact on America of losing all those birthright U.S. citizens?

One obviously unquantifiable cost to the United States will be the foregone potential of all these babies, a benefit that is obvious from a quick review of the history of past generations of birthright citizens. While a handful of U.S.-born Americans whose parents lacked American citizenship or lawful permanent residence status have been badly behaved, millions more have contributed to American society in positive ways. Like other Americans, Americans whose parents were undocumented immigrants or in temporary immigration status have joined the U.S. military, founded prosperous businesses, served the United States as diplomats, and served in high political office. These birthright citizens have contributed to the United States in the same way as other Americans. One can infer that taking away the U.S. citizenship of future babies will prevent many of them from contributing similarly in the future. But this loss is not quantifiable. What quantifiable impacts will result from a change to the Citizenship Clause?

The major demographic issues should be obvious: Even a change restricted only to the children of unauthorized immigrants will cause the U.S. to lose a large cohort of U.S. citizens in the youngest demographic groups. While some of these birthright undocumented immigrants will possibly qualify to immigrate legally through one channel or another eventually, and a smaller group of those will eventually earn U.S. citizenship through naturalization channels, most will be ineligible for any legal immigration status and will likely enter the shadow economy. The change would create a large class of stateless children who are born and raised in the United States but who have no strong ties to any other nation. Some will voluntarily leave the U.S. as children or perhaps upon reaching adulthood. Some will be deported (at taxpayer expense).

Those of the group who stay in the U.S. will have the right to attend public school through the end of high school, but upon graduating, they will not be eligible to join the U.S. military, get jobs, run for political office, contribute to Social Security, purchase health insurance, or do a myriad of other mundane daily activities that young American citizens do—and which keep the U.S. economy going. If the thought of thousands of unauthorized young people living in the U.S. and being unable to participate fully in American society sounds familiar, it's because America has seen this picture before: Right now, there are more than a million U.S. resident young people in a similar situation. They are popularly called "the DREAM Act students,"[11] and their future is bleak. The end of birthright citizenship will inevitably result in more than quadrupling the numbers of these young people.

The loss of all these citizens and their entry into the shadow economy will also have a significant long term tax impact. As members of the underground economy, these millions of young people will be paying less in federal,

[11] The DREAM Act is the Development, Relief, and Education for Alien Minors Act, a bill to give temporary lawful immigration status to young people who were brought to the United States as young children but who have gone to school here and stayed out of trouble with the law. Although originally proposed more than a decade ago by Senator Orrin Hatch (R-Utah) and Richard Durbin (D-Illinois), the DREAM Act has repeatedly failed to pass Congress and become law.

state, and local taxes than they would if they were deemed to be citizens at birth. If they physically leave the United States, they will escape U.S. tax obligations, which they would be unable to do if they were U.S. citizens at birth. The United States is one of the few countries in the world that taxes its citizens even when they do not live or work in the United States. As the warning in every U.S. passport states, "All U.S. citizens working and residing overseas are required to file and report on their worldwide income." Most non-citizens, on the other hand, are only required to pay U.S. taxes if they live and work in the United States. The loss of a large cohort of millions of younger U.S. citizens will cause a significant long-term reduction in the U.S. tax base. We can't be sure exactly how large the resulting revenue reduction will be—many U.S. citizens who live overseas may cheat Uncle Sam by failing to report their overseas income or failing to file tax returns as required—but we know it is likely to be substantial. Similar impacts will also affect the Social Security retirement fund and other similar entitlement programs that depend on younger workers contributing to fund the withdrawals of older workers.

As the MPI study explained, a change to the Citizenship Clause will cause a substantial increase in the population of unauthorized immigrants. Although proponents of a change to the Citizenship Clause often argue that changing the Clause will deter undocumented immigrants from coming to the United States and having babies here, thereby reducing undocumented migration, evidence from other countries suggests that a change to the birthright citizenship rule will not be a deterrent to unauthorized migration. Countries that have changed their citizenship laws have not found that the change led to a drop in illegal migration; rather, these countries have instead ended up with several generations of undocumented immigrants (France has recently gone back to a modified version of birthright citizenship for just this reason). One saving grace of the U.S. system has always been that birthright U.S. citizenship cuts off illegal migration at the first generation. Far from being a means to solve complex immigration problems, a change to the Citizenship Clause is likely to make those problems even worse.

THE COST OF A CHANGE TO A MORE COMPLEX, TWO-TIERED RULE

Apart from the demographic and tax impacts, however, there is one massive lurking problem with changing the current rule, a problem that advocates for change never discuss: Changing the rule will create a huge new bureaucratic hurdle to the issuance of U.S. birth certificates and will be expensive to implement.

Unlike many other countries, the United States has no national identification card and no national registry of its citizens; if the United States had such a comprehensive registry, making a change to the Citizenship Clause would presumably be easier as a bureaucratic matter. But U.S. birth certificates are not issued by the national government; instead, they are issued by state and local governments. Right now, most U.S.-born Americans demonstrate their U.S. citizenship by producing a locally-issued birth certificate demonstrating that they were born within the territory of the United States—but under any change to the current interpretation of the Fourteenth

Amendment's Citizenship Clause, being born in the U.S. will no longer suffice to prove American citizenship without additional proof of one's parents' citizenship or immigration status. Once a change to the Citizenship Clause goes into effect, newborns claiming U.S. citizenship will necessarily be required to demonstrate not just the fact of their birth in the U.S., but also the citizenship or immigration status of their parents at the moment of birth—and presumably, newborns will have to demonstrate this fact to some bureaucracy that has the technical and legal capacity to determine what their parents' status was at the moment of their birth.

From past experience, Americans know that new government verification systems are costly. The REAL ID system, which has not yet been fully implemented, has been projected by the Department of Homeland Security to cost between $9.9 billion and $23.1 billion.[12] The E-Verify system is projected to cost U.S. employers about $2.7 billion per year, if it is mandated nationwide.[13] Secure Communities, which merely involves sending fingerprints electronically to the Department of Homeland Security, is expected to cost $2 billion to $3 billion per year when rolled out nationwide in 2012.[14] And as discussed above, all of these systems rely on the current interpretation of the Citizenship Clause, so they would all have to be re-tooled once the Citizenship Clause was changed. Moreover, new verification systems are in and of themselves always expensive: Examining a bill in 2008 to make E-Verify mandatory nationwide, for example, the Congressional Budget Office (CBO) estimated that the bill, if enacted, would increase federal spending by approximately $6 billion from 2009 to 2013 and by about $12 billion from 2009 to 2018. This includes an estimate of over $3 billion in costs associated with the employment verification system from 2009 to 2018 and about $9 billion during the same period for SSN (Social Security Number) verification.[15]

But let's assume that Americans decide to amend the Constitution to make one's U.S. citizenship depend on one's mother or father's status. Proving one's parents' citizenship or immigration status at the moment of one's birth can be difficult, because apart from the simple birthright citizenship rule, U.S. citizenship and immigration laws are complex, and a parent's status is often a moving target. A person can change his or her immigration status frequently over the person's lifetime, and even those who have U.S. citizenship can expatriate themselves. Today, a parent's immigration or citizenship status is not verified before a U.S. birth certificate is issued—and requiring such verification will impose significant new costs on every baby born in the United States. Parents will presumably be required to submit paperwork proving their citizenship or immigration status to a government agency tasked with determining whether a child is a citizen or not; that agency will have to review the paperwork,

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[12] Electronic Privacy Information Center, REAL ID Implementation Review: Few Benefits, Staggering Costs, May 2008, at page 21.
[13] Jason Arvelo, "'Free' E-Verify May Cost Small Business $2.6 Billion: Insight," Bloomberg Government, January 27, 2011.
[14] James Pinkerton, "Mass Deportations Coming For Jailed Illegal Immigrants," Houston Chronicle, Apr. 10, 2008 (describing how the Secure Communities program by Immigration & Customs Enforcement (ICE) will cost $2 to $3 billion per year).
[15] Stuart Anderson, *We Should Trust, But Not E-Verify: An Analysis of H.R. 2164*, National Foundation for American Policy, NFAP Policy Brief, July 2011, available at http://www.nfap.com/pdf/EVerify_NFAP_Policy_Brief_July2011.pdf.

determine what the parents' status was at the time of the child's birth, and make a decision about the child's citizenship.

We can estimate the cost of a change to the Citizenship Clause because the U.S. government already does such parental status verifications for children who are born overseas to American citizen parents. To obtain proof that their child is a U.S. citizen, the parents are required to submit forms and fees to one of the two U.S. government agencies, the U.S. Department of State or U.S. Citizenship and Immigration Services (USCIS), an agency within the U.S. Department of Homeland Security. Both agencies are authorized to issue documents proving the U.S. citizenship of foreign-born children, but USCIS is a user-fee agency, so the fees that USCIS charges to issue such documents are a reasonable estimate of the cost of making such determinations. Currently, USCIS charges $600 to check the parents' documents and verify the citizenship status of children born overseas to U.S. citizens, and a similar bureaucratic process will presumably be required for U.S.-born children if the Citizenship Clause is changed.

Accordingly, we can calculate that changing the Fourteenth Amendment will be roughly equivalent to a $600 baby tax on every child born in the United States—or as an alternative way of thinking about it, we can say that changing the Citizenship Clause will have direct costs of about $2.4 billion per year. This estimate, of course, is just the direct bureaucratic cost—not the cost of hiring a lawyer who can help a person submit the documents to the bureaucracy, or the cost of litigation and damages when the bureaucracy makes a mistake.

Thus, in addition to the other unsavory side effects noted above—an increase in the population of undocumented immigrants, a large decrease in young citizens, the loss of a substantial chunk of the tax base—changing the birthright citizenship rule will increase the cost of getting a U.S. birth certificate dramatically. The effects of the change will fall disproportionately on the poor and minorities; most middle class and wealthier Americans will have access to lawyers and the documentation necessary to prove their parents' immigration status and will have the funds to pay the $600 fee necessary to get the government to give their children proof of U.S. citizenship. But the change will impose burdensome bureaucratic costs on all newborns and their parents at a time when many Americans favor less government, not more.

There is one other side effect of a possible change to the Fourteenth Amendment—full employment for U.S. immigration and citizenship lawyers. U.S. immigration and citizenship law has long been known as one of the most complex legal fields in American jurisprudence; in the 1977 case of *Lok v. Immigration & Naturalization Service*, a federal judge famously termed it "King Minos's labyrinth in ancient Crete."[16] In this highly complex and technical area of the law, the birthright citizenship rule has always been the one bright-line rule saving most

[16] Lok v. Immigration & Naturalization Service, 548 F.2d 37 (2d Cir. 1977).

Americans from the need to hire an immigration or citizenship lawyer. The proposed changes to the Citizenship Clause will inexorably alter that reality. If proponents of changing the Fourteenth Amendment have their way, every baby born in America will now face a bureaucratic hurdle before he or she gets a birth certificate—and clearing that bureaucratic hurdle will often require expert legal services.

Four years ago, the 2008 Presidential election campaign gave Americans a flavor of what the future will look like if the Citizenship Clause is changed. During that election campaign, John McCain spent large sums of money fending off lawsuits that claimed that he was not qualified to be president because he was not born in the U.S. but derived U.S. citizenship from his parents. As Professor Gabriel Chin explained in an exceptionally thorough law review article,[17] Sen. McCain's eligibility for the Presidency turns on the intricacies of the laws according U.S. citizenship to persons who earn it by descent, rather than by birth in U.S. territory—and, due to hundreds of years of complicated congressional legislation on citizenship by descent, those intricacies are substantial. The complexity of the arguments made against Sen. McCain's eligibility serves as a reminder of how difficult it can be for someone to prove U.S. citizenship through one's parents—and how a change to the Citizenship Clause will make challenges to a person's U.S. citizenship into a new political sport.

John McCain's eligibility for the Presidency has been repeatedly challenged, but there was a 2008 Democratic Presidential contender whom the Citizenship Clause saved from similar challenges—former New Mexico governor William Blaine "Bill" Richardson III. Richardson 's father was a Mexico-based Citibank executive; Richardson's father had been born in Nicaragua, but had derived U.S. citizenship from his father (Richardson's grandfather), who was born in the U.S. Richardson's mother was Mexican, and the Richardson family lived in Mexico, but Richardson happened to be born in the United States because his father sent Richardson's pregnant mother on a train to California just before Richardson's birth. Having been born in the United States, Richardson did not have to undergo the process of proving that he met the complex criteria for obtaining citizenship by descent.[18] As the history books show, Richardson went on to a notable career as a U.S. diplomat, Cabinet secretary, business consultant, and governor of New Mexico.

[17] Gabriel J. Chin, "Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship," Michigan Law Review 107 (1) First Impressions at 1-21 (2008).

[18] Richardson was born in 1947, and his father was born (in Nicaragua) in 1891. Richardson's father had been educated in the United States, but had lived most of his life outside the U.S. At the time of Richardson's birth, if Richardson had been born in Mexico where his parents resided, Richardson could have derived U.S. citizenship from his father if the family had been able to prove that Richardson's father had resided in the U.S. for ten years prior to Richardson's birth (five of those years had to be after Richardson's father turned 16). The law is different today (and has changed repeatedly over the decades, largely because citizenship by descent laws have been statutory, not Constitutional). Proving these facts would have been a complicated endeavor—but if he had been born in Mexico, determining Richardson's "natural born" citizenship would have turned on them.

IS IT NECESSARY TO CHANGE THE CITIZENSHIP CLAUSE?

Those who advocate for a change to the Citizenship Clause argue that such a change will be good for America because America's generous treatment of newborn babies encourages unauthorized migration, rewards parents who have broken immigration laws, brings wealthy tourists to the U.S. who are only interested in providing their children with the freedoms of an American passport, and is out of step with trends in other countries. But are these good reasons to change a longstanding, simple, bright-line rule that has benefited the United States? Furthermore, is a constitutional change necessary to address these concerns?

In fact, most illegal migration to the United States is driven by economic factors (jobs), or a desire to reunite with family members, not the attraction of birthright citizenship. Unauthorized parents mostly do not benefit from their child's U.S. citizenship; a birthright citizen can't sponsor his or her parents for lawful immigration status until the citizen is 21 years old and has a middle-class income; if the parent entered the U.S. unlawfully, the parent must depart the United States to obtain an immigration visa, and the parent's departure triggers a 10-year bar from the U.S.—a bar that cannot be waived just because someone has a U.S. citizen child. Some parents of U.S.-born children can be granted "cancellation of removal"—but such grants are subject to a strict nationwide quota of 4,000 per year, and the parent must show "exceptional and extremely unusual hardship" to the U.S. citizen child; this is a standard that few can meet.

There is some evidence that wealthy Asian women are coming to the United States to have babies so as to gain the security of a U.S. passport for their newborn children—but a constitutional change is probably not necessary to deter this behavior. The State Department could simply condition the issuance of a U.S. passport on demonstrated compliance with U.S. tax laws. Warnings about a lifetime of filing U.S. tax returns and potential U.S. military and legal obligations as a consequence of being born in the United States have not been part of the pitch to wealthy mothers given by those in the birth tourism industry—but they probably should be. Alternatively, Congress could simply make it unlawful for a person to enter the United States solely for the purpose of having a baby here; this would be a much more direct way of punishing parents than changing the Citizenship Clause.

Lastly, proponents of change argue that "other countries don't have birthright citizenship"—and it is true that only about twenty-eight countries have the birthright citizenship rule that the United States has. But the fact that "other countries don't do it" should not be convincing—there are many things that America does that other countries do not do. America is the only country that has the First and Second Amendments, too—does that mean that we should discard them?

CONCLUSION

Opponents of birthright citizenship believe that a bright-line citizenship rule for babies born in the United States is bad for America—that America's generous treatment of newborn babies encourages unauthorized immigration, encourages birthright tourism, and is out of step with trends in other countries. But the evidence indicates that birthright citizenship has been of great benefit to the United States—and the most obvious benefit has been a bright-line, easily understood rule that requires no vast bureaucracy to implement and treats almost all American-born babies equally. America has always prided itself on its unique adherence to principles of equality for all—and the birthright citizenship rule is the bedrock of that principle.

The birthright citizenship rule has been socially, economically, and politically beneficial to Americans for more than a century. The immigration problems that proponents of a change cite can likely be solved by measures short of altering the Citizenship Clause. Changing the Fourteenth Amendment's Citizenship Clause to set up a new American caste system may seem superficially appealing at first glance—but Americans concerned about out of control bureaucracies will want to take a hard look at the future social, economic, and political consequences of implementing a change to the Fourteenth Amendment's Citizenship Clause.

APPENDIX

WHAT IS THE HISTORY OF THE BIRTHRIGHT CITIZENSHIP RULE?

At the time of the Founding, the new United States encouraged immigration and also encouraged qualified foreigners to become Americans. In 1787, the United States recognized three different ways that a person could obtain American citizenship: First, a person could be born a foreigner and later apply to become a U.S. citizen through the naturalization process; this avenue was governed by Article I, Section 8 of the United States Constitution, which established Congress's power to create a "uniform rule of naturalization." Second, following the international law rule, a person might inherit citizenship from his or her citizen parents; this method of obtaining American citizenship—termed the "jus sanguinis" or the citizenship by blood or descent rule—was within Congress' power to legislate, and was first recognized in U.S. law when Congress passed the Naturalization Act of 1790, according "natural born citizen" status to the foreign-born children of certain U.S. citizens if the child's father had resided in the United States.[19] Finally, however, the United States also adopted the British common law rule of "jus soli" ("law of the soil") for persons born within the territorial jurisdiction of the United States whose parents were subject to U.S. civil and criminal laws. This common law birthright citizenship rule was most famously described in the 1844 New York state court case of Lynch v. Clarke, in which Judge Lewis Sandford opined that he could "entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen. The entire silence of the constitution in regard to it, furnishes a strong confirmation, not only that the existing law of the states was entirely uniform, but that there was no intention to abrogate or change it."[20]

In 1857, however, in the case of *Sandford v. Scott* (commonly termed the *Dred Scott* case),[21] the U.S. Supreme Court determined, as a matter of Constitutional law, that the original political community in America had not consented to the inclusion of Africans or their descendants as full members of the American community.[22] Using

[19] The Naturalization Act of 1790 (March 26, 1790) stated: "And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."
[20] Lynch v. Clarke, 1 Sandford 583 (N.Y. 1844).
[21] Scott v. Sandford, 60 U.S. 393 (1857).
[22] The U.S. Supreme Court was wrong on this point—several States had recognized persons of African descent as citizens. Abraham Lincoln famously criticized Chief Justice Taney's underlying assumptions: "Chief Justice Taney, in delivering the opinion of the majority of the Court, insists at great length that Negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States. [In several of the original States], free Negroes were voters, and, in proportion to their numbers, had the same part in making the Constitution that the white people had." Abraham Lincoln, Speech on Dred Scott (1857), in Lincoln, The Collected Works of Abraham Lincoln, Vol. II, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 403-407.

its power of judicial review, the Supreme Court reinterpreted the common law birthright citizenship rule to exclude persons of African descent. According to the majority opinion written by Chief Justice Roger Taney, Africans and their descendants born in America were not included within the common law's concept of birthright citizenship, and thus were forever barred from being U.S. citizens. In reaching its decision, the Supreme Court held that mere birth on U.S. soil was not enough to confer U.S. citizenship; one also had to show that the American political community had consented to one's presence. Notably, this is the same argument that modern proponents of a change to the Fourteenth Amendment make, except that they argue that the American political community has not consented to the presence of unauthorized immigrants on American soil, and so their children should not be considered to be U.S. citizens at birth.

After the Civil War, the *Dred Scott* decision was explicitly reversed and repudiated by the Fourteenth Amendment's Citizenship Clause. The ratifiers of the Fourteenth Amendment chose to amend the Constitution so as to ensure that the U.S. Supreme Court would not have the power to decide which people would be U.S. citizens at birth; instead, the birthright citizenship rule would be made into an explicit Constitutional right. During debates leading up to passage of the Fourteenth Amendment, there was vigorous discussion over the fact that the Citizenship Clause would apply to the children of foreigners, even if those foreigners were in the U.S. in violation of various laws. Senator Edgar Cowan of Pennsylvania, for example, expressed concern that the Citizenship Clause would expand the number of Chinese and Gypsies in America by granting birthright citizenship to their children, although the parents owed no "allegiance" to the U.S. and were committing "trespass" by being in the United States.[23] Arguing against him, supporters of the Citizenship Clause defended the right of these children to be U.S. citizens at birth. Both sides in the debate agreed that the Clause would extend U.S. birthright citizenship to the children born in the U.S. to all foreigners who were subject to U.S. civil and criminal laws—thus excluding only the children of foreign diplomats, invading armies, and sovereign Native American tribes.

Following ratification of the Fourteenth Amendment, the U.S. Supreme Court consistently followed this interpretation of the Citizenship Clause (there was a passing comment in the *Slaughterhouse Cases*[24] that has caused some to argue otherwise, but *Slaughterhouse* was not a birthright citizenship or immigration case). As conflicts over Asian immigration arose in the Western United States in the late 1800s, however, some government officials began to deny the rights of U.S. citizenship to U.S.-born children of Chinese descent. Thus, in 1898, the U.S. Supreme Court had occasion—in the *Wong Kim Ark* decision[25]—to confirm unequivocally that birthright citizenship belonged to any child born within the territorial jurisdiction of the United States, as long as the child—at the time of his or her birth on U.S. soil—was subject to U.S. civil and criminal laws. The Court held that an

[23] Elizabeth B. Wydra, "Truths and Untruths About the Constitutional Origins of Birthright Citizenship," Huffington Post, Jan. 21, 2011, available at http://www.huffingtonpost.com/elizabeth-b-wydra/truths-and-untruths-about_b_811880.html.
[24] Slaughterhouse Cases, 83 U.S. 36 (1873).
[25] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

American-born child of Chinese immigrants was entitled to citizenship because the "Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes."[26] The dissenting view—which is the view espoused by modern proponents of a change to the Citizenship Clause—was resoundingly rejected by the Court's majority.

The net result, then, was that following passage of the Fourteenth Amendment, the U.S. government recognized all non-diplomatic persons born within the territorial jurisdiction to be Americans, regardless of the status of their parents. The U.S. Department of State began issuing U.S. passports to all such children—unless their parents were diplomats who held immunity from U.S. civil and criminal laws. Congress also passed a number of statutes recognizing the extension of birthright citizenship to persons born within newly-acquired U.S. territories, including Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. More recently, in the 1982 case of *Plyler v. Doe*, the U.S. Supreme Court confirmed this view in an explicit statement that the 14th Amendment extends to anyone "who is subject to the laws of a state," including the U.S.-born children of unauthorized immigrants. Similarly, in the 1985 case of *Immigration & Naturalization Service v. Rios-Pineda*, the Court stated that a child born on U.S. soil to an unauthorized immigrant parent is a U.S. citizen from birth.[27]

In the modern era, some have argued that the Fourteenth Amendment was never intended to cover the children of persons who are not legally present in the United States, but American history suggests otherwise. From 1808—when Congress banned the slave trade—until the end of the Civil War, thousands of Africans were illegally trafficked into the United States in violation of law. Their children and grandchildren—despite being the children and grandchildren of unauthorized migrants—were granted U.S. citizenship under the explicit terms of the Fourteenth Amendment. The U.S.-born children of other unauthorized immigrants—including unauthorized Irish and other European immigrants—were also routinely recognized as U.S. citizens.

CAN THE MEANING OF THE CLAUSE BE CHANGED BY JUDGES?

Administrative issues aside for the moment, how would a change to the Citizenship Clause be made? Some have argued that the United States Supreme Court can change the Citizenship Clause by reversing or reinterpreting its decision in the *Wong Kim Ark* case. Wong Kim Ark was an 1898 case in which the Supreme Court held that all children born in the U.S. are U.S. citizens at birth unless they are immune from U.S. civil and

[26] 169 U.S. at 693.
[27] Immigration & Naturalization Service v. Rios-Pineda, 471 U.S. 444 (1985).

criminal laws—such as the children of diplomats or children born in certain sovereign Native American tribes. It is possible that a modern Supreme Court could reverse this decision and instead adopt the opinion of the Wong Kim Ark dissenting justices, reinstating the discredited theory of "consent" that resulted in the Dred Scott decision. But this is not likely to happen. The Court has had the opportunity to do so, as recently as 2006, and declined to take up the invitation. In an amicus brief filed with the U.S. Supreme Court in the Yaser Hamdi case,[28] Professor John Eastman of Chapman University School of Law argued that a change in the Supreme Court's interpretation of "subject to the jurisdiction" language of the Citizenship Clause could retroactively take away the U.S. citizenship of Yaser Hamdi, a U.S.-born citizen who was captured fighting against American forces on the battlefield in Afghanistan; Professor Eastman argued that the Court could punish Hamdi by reinterpreting the Citizenship Clause to take away Hamdi's birthright citizenship, because Hamdi was born in the U.S. to parents who held temporary work visas at the time of his birth. Professor Eastman's proposed new interpretation, however, would have taken away not only the U.S. citizenship of Yaser Hamdi, but also the citizenship of millions of other Americans born under similar circumstances (including some of the U.S. military personnel who captured Hamdi). Unsurprisingly, the U.S. Supreme Court ignored Professor Eastman's invitation. Having been offered and having declined the chance to change its longstanding interpretation of the Citizenship Clause in the past few years, the Supreme Court is not likely to change its mind—even if a relevant case ends up before the Court again (and none are currently in the appellate pipeline).

CAN THE CITIZENSHIP CLAUSE BE CHANGED THROUGH LEGISLATION?

In the *Hamdi* case, Professor Eastman urged a new U.S. Supreme Court interpretation as a means of changing the Citizenship Clause, but others have urged Congressional and state legislative approaches instead. Some have proposed Congressional legislation, some have introduced state legislation to bring back the concept of "State citizenship" so as to create a two-tier system that would distinguish between babies born in the U.S. with citizenship and babies born in the U.S. who do not hold U.S. citizenship. Yet others have suggested a Constitutional Amendment.

In line with the first approach, some have argued that changing the Citizenship Clause requires no Constitutional Amendment because Congress can change the Fourteenth Amendment's meaning by passing a statute that "clarifies" that "subject to the jurisdiction" means "subject to the complete or full jurisdiction." They point to Section 5 of the Fourteenth Amendment, which states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[28] Hamdi v. Rumsfeld, No. 03-6696, Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of Respondents, March 29, 2004, available at http://www.claremont.org/repository/doclib/hamdimeritsbrieffinal.pdf.

It is unlikely that Congress can use its Section 5 power to reinterpret the meaning of the Citizenship Clause, anymore than Congress can use its Article I, section 1 powers to "reinterpret" the First or Second Amendments. Section 5 of the Fourteenth Amendment merely answers critics of the draft Fourteenth Amendment who said that the original text of the Constitution contained no language giving Congress any enumerated power to enforce the Fourteenth Amendment; Section 5 was not a grant of legislative power to change the meaning of the Amendment. Section 5 also allows Congress to define the geographic jurisdiction of the United States, thereby allowing the Fourteenth Amendment to apply in after-acquired States and territories; it does not allow Congress to limit the application of the Fourteenth Amendment by changing the meaning of the text. Furthermore, Congress has already acted to enforce the Citizenship Clause by enacting numerous statutes reaffirming the "traditional" meaning of the Clause.[29] Even if it were possible to legislate a "new interpretation" of a Constitutional Amendment, these existing statutes would have to be repealed before any new "interpretation" could take effect.

Attempts at such a "reinterpretation" are aimed at depriving babies of U.S. citizenship if their parents do not hold certain specified lawful immigration statuses, on the theory that those parents are not subject to the "complete" jurisdiction of the United States because they hold allegiance to a foreign country. In line with this view, Rep. Steve King (R-Iowa) and Sen. David Vitter (R-Louisiana) have introduced "The Birthright Citizenship Act of 2011," which would restrict citizenship under the Citizenship Clause to a child at least one of whose parents is a citizen, lawful permanent resident, or on active duty in the armed forces. It is unclear what effect, if any, the courts would give such a statutory re-interpretation of the Fourteenth Amendment, but if enacted, the law would immediately throw into confusion the citizenship of thousands of babies.

CAN THE CLAUSE BE CHANGED BY A STATE COMPACT?

"State Legislators for Legal Immigration (SLLI)," a coalition of immigration restrictionist legislators from forty states, has proposed state legislation that would resurrect the notion of state citizenship and restrict it so as to create a two-tier caste system by using the fact that states are the entities that issue birth certificates. Although its proposal has not yet been enacted in any state, SLLI suggests an interstate compact strategy under which states would agree to "make a distinction in the birth certificates" of native-born persons so that Fourteenth Amendment citizenship would be denied to children born to parents who owe allegiance to any foreign sovereignty. The interstate compact would be subject to the consent of Congress under Article I, Section 10 of the Constitution. The effect of this approach would be to seek a change in the meaning of the Citizenship Clause without having to secure the approval of the President or a veto override.

[29] See. e.g., 8 USC 1401 ("a person born in the United States, and subject to the jurisdiction thereof" is a United States citizen); 8 USC 1402 ("All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth").

A significant problem with this approach—which would be expensive to implement—is that the Federal government could easily override it. The State Department would not recognize any distinction in the birth certificates. Thus, a person who is given a "lesser" birth certificate could use that birth certificate to obtain a U.S. passport, and once given a U.S. passport, turn around and sue the state for discrimination.[30] Some state Constitutions also prohibit such discriminatory state legislation.

[30] See, e.g., 42 USC 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .").

ABOUT THE AUTHOR

Margaret D. Stock is Counsel to the Firm at the Anchorage office of Lane Powell PC, and a member of the Alaska Bar Association. A retired U.S. Army Reserve officer in the Military Police Corps, she has written and testified extensively on U.S. citizenship, immigration, and national security matters. She is also a Member of the American Bar Association Commission on Immigration.

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