

## BIRTHRIGHT CITIZENSHIP AND THE FOURTEENTH AMENDMENT IN 1868 AND 2008

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### I. THE CITIZENSHIP CLAUSE AS A FAILURE OF ORIGINAL INTENT

The framers of the Fourteenth Amendment sought to override the denial of *jus soli* birthright U.S. citizenship to African Americans in *Dred Scott v. Sandford*<sup>1</sup> while at the same time excluding from such birthright citizenship all indigenous people who remained members of their native tribes. They struggled but ultimately failed to find language that accomplished these two objectives in coherent fashion. They sought to limit birthright citizenship to those who could be presumed to have full allegiance to the United States. But use of the “allegiance” language risked echoing feudal doctrines of perpetual allegiance that the American Revolution and American republican principles had repudiated. The language they ultimately employed—“and subject to the jurisdiction thereof”<sup>2</sup>—instead sought to focus on whether persons were fully and exclusively under the jurisdiction of the United States, as persons still living in tribes were not. But all such tribal members *were* subject to the ultimate jurisdiction of the United States, so the effort to exclude them through the phrase “subject to the jurisdiction thereof” was a logical failure. The original intent was sustained in *Elk v. Wilkins*,<sup>3</sup> but without an interpretation that could render the clause fully coherent—because there is none.

More than two decades ago in *Citizenship Without Consent*, Peter Schuck and I argued that the best, if still imperfect, way to bring logical coherence to the Citizenship Clause consonant with its dual original intentions was to draw on the international law writers invoked by American jurists and legislators when trying to define the status of the native tribes, particularly Emmerich de Vattel and Jean-Jacques

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1 60 U.S. (19 How.) 393 (1857).

2 U.S. CONST. amend. XIV, § 1.

3 112 U.S. 94 (1884).

Burlamaqui.<sup>4</sup> They tried to render *jus soli* citizenship consistent with citizenship based on the consent of persons to mutual political association through contending that parents should be understood to demand the offer of citizenship to their children as a condition of their own consent to membership. Vattel had defined the native tribes as dependent nations who were understood to wish to maintain significant, if limited, autonomy.<sup>5</sup> Their members therefore could not be presumed to seek citizenship for themselves or their children. Schuck and I believed that this interpretation of the Citizenship Clause best accorded with the conflicting aims of its Framers (to include African Americans, but exclude Native Americans in tribes), with theoretical efforts to make birthright citizenship accord with membership via consent, and with the international law traditions upon which they drew.

It nonetheless had difficulties. To include African Americans and children of permanent resident aliens, the Clause had to be interpreted not to require everyone to have citizen parents, so long as the parents were present on American soil by the consent of the U.S. Government. That interpretation represented a modification of Vattel's and (arguably) Burlamaqui's views (however plausible). And, of course, our view also meant that the Clause should not be read as conferring birthright citizenship on the children of aliens never legally permitted into the United States. The choice of their status would be left to Congress, as was and is true for Native Americans living in tribes, whose citizenship stems from congressional legislation enacted in 1924.<sup>6</sup> Many, including both of us, have found that implication politically troubling, and many arguments have been mounted against our view. I would prefer to read the Citizenship Clause as consistently embodying an anti-caste, anti-subordination principle as Cristina Rodríguez has urged, consistent with interpretations of the Fourteenth Amendment's Equal Protection Clause that I have long favored.<sup>7</sup> Yet I cannot escape the conclusion that the framers and ratifiers of that Amendment consciously intended to perpetuate the

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4 PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

5 Chancellor James Kent cited Vattel to define the status of the tribes in this way in an influential 1823 case decision, *Goodell v. Jackson*, 20 Johns. 693, 711-12 (N.Y. 1823). Chief Justice John Marshall followed this view in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 52-53 (1831).

6 Indian Citizenship Act of 1924, Pub. L. No. 175, 43 Stat. 253.

7 Cristina Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363 (2009); Rogers M. Smith, *Equal Protection Remedies: The Errors of Liberal Ways and Means*, 1 J. OF POL. PHIL. 185, 199-200 (1993).

subordination of Native Americans who had not renounced their tribal allegiances, even if they did not intend to subordinate non-white immigrants. And U.S. policies then permitted both Native Americans and non-white immigrants to move from their home tribes or nations without substantive restrictions, so it is at best difficult to say that they meant to extend to those coming to the United States in violation of national policies the anti-subordination protection they denied to members of the native tribes.

There are, to be sure, other arguments for interpreting the Citizenship Clause's intentions inclusively that have force, even if they do not seem to me entirely convincing.<sup>8</sup> Rather than continue all those debates, I contend in the next section that one reply has been strengthened by recent developments: arguments for tacit consent to *jus soli* citizenship for all.

## II. RECENT DEBATES OF FOURTEENTH AMENDMENT BIRTHRIGHT CITIZENSHIP

A variety of our critics have contended that, regardless of the phrasing, history, or original intent of the Fourteenth Amendment, there is no difficulty reconciling birthright citizenship for undocumented aliens with ideals that rest citizenship on consent to mutual political association. The reality is that the nineteenth century Supreme Court upheld birthright citizenship for children of aliens in *U.S. v. Wong Kim Ark*,<sup>9</sup> and it has been accepted with virtual unanimity by the American people ever since then, if not before. As a result, the nation can be said to have effectively consented to a reading of the Fourteenth Amendment that confers *jus soli* birthright citizenship on children of aliens never legally admitted to the United States.

When we wrote in 1985, this argument seemed unconvincing for two reasons. First, *Wong Kim Ark* deals explicitly only with children of legally admitted aliens. The undocumented alien population then was much smaller and may well not have seemed significant; at any

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<sup>8</sup> See, e.g., Joseph H. Carens, *Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States*, 37 U. TORONTO L.J. 413 (1987) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985)); David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278 (1985) (reviewing same); Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing same); and for replies, ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 308–10 & nn.56 & 59 (1997); Peter H. Schuck & Rogers M. Smith, *Membership and Consent: Actual or Mythic? A Reply to David A. Martin*, 11 YALE J. INT'L L. 545 (1986).

<sup>9</sup> 169 U.S. 649 (1898).

rate, the Court gave no attention to the children of such aliens in that decision or any later one. Acceptance of the *Wong Kim Ark* precedent therefore cannot be said to involve explicit acceptance of *jus soli* citizenship for aliens not legally present in the United States, either by the Court or the American public.

Second, at the time we first discussed the topic, even many scholars of American constitutional law were unaware that the Fourteenth Amendment had never been read to provide birthright citizenship to children born to members of the native tribes. Most we encountered had not heard of *Elk v. Wilkins* or assumed it had at some point been overruled. Given this limited knowledge among constitutional experts, it strained credulity to say that the American people had in any real sense ever decided that Fourteenth Amendment birthright citizenship should extend to children of undocumented aliens. Most Americans, even most highly educated Americans, even most Americans in academia or in law, were blissfully unaware that there might be any issue about it. There was admittedly lots of unthinking acceptance of the status quo, but that did not seem to us a very meaningful form of consent.

That situation has now changed, in part because of our book. In its wake, a number of organizations favoring immigration restriction have repeatedly advocated either for congressional legislation denying birthright citizenship to children of undocumented aliens, or for a constitutional amendment to achieve that result, or for both. Beginning in 1993 and continuing in every congressional session thereafter to the present, Representative Elton Gallegly of Simi Valley, California has been particularly energetic in introducing legislation to achieve denial of birthright citizenship to illegal alien children by either of these routes, sometimes citing our book.<sup>10</sup> (Both Schuck and I refused to testify on behalf of these measures.) At the height of his power after the 1994 election, Speaker of the House Newt Gingrich also endorsed these steps and they appeared in the 1996 Republican Party Platform, which read in part: “We support a constitutional amendment or constitutionally-valid legislation declaring that children born in the United States of parents who are not legally pre-

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10 See 139 CONG. REC. 3995 (1993) (statement of Rep. Gallegly) (introducing both a proposed constitutional amendment and a bill limiting citizenship at birth “merely by virtue of birth in the United States to persons born of mothers with citizen or legal resident status”). Gallegly’s most recent version of the latter legislation was introduced on January 6, 2009. H.R. 126, 111th Cong. (2009).

sent in the United States or who are not long-term residents are not automatically citizens.”<sup>11</sup>

These proposals continue to be put forth to this day, backed both by advocacy groups and by many members of Congress. The 109th Congress saw seven measures introduced, one in the Senate and six in the House, which would in various ways have restricted birthright citizenship for children of undocumented aliens.<sup>12</sup> In the 110th Congress, one hundred and four Congressmen have co-sponsored the Birthright Citizenship Act of 2007, which would legislatively interpret the Fourteenth Amendment not to provide citizenship to those born to parents not legally present in the United States, beginning after the date of the law’s enactment.<sup>13</sup>

In sum, since the 1990s, the nation’s legislators and one political party have regularly raised and debated the issue of birthright citizenship for undocumented aliens, with strong advocacy for exclusion. These efforts have all failed. Indeed, none has come anywhere close to winning congressional approval or broader popular support. It

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<sup>11</sup> AM. PRESIDENCY PROJECT, REPUBLICAN PARTY PLATFORM OF 1996, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25848>.

<sup>12</sup> *See, e.g.*, End Birth Citizenship to Illegal Aliens Act, H.R. 6294, 109th Cong. (2006) (proposing legislation that all children born in the United States have the same citizenship and immigration status as the mother); Engaging the Nation to Fight for Our Right to Control Entry (ENFORCE) Act, S. 2177, 109th Cong. § 503 (2005) (proposing to amend the Immigration and Nationality Act to limit citizenship to children with at least one parent who is a citizen or lawfully admitted permanent resident); Enforcement First Immigration Act, H.R. 3938, 109th Cong. § 701 (2005) (proposing an amendment to section 301(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (2006), so that only children born in the United States to a parent who is a “citizen or national of the United States” or “an alien who is lawfully admitted for permanent residence” may be granted U.S. citizenship); Reducing Immigration to a Genuinely Healthy Total (RIGHT) Act, H.R. 3700, 109th Cong. § 201 (2005) (limiting automatic birthright citizen to children with at least one parent who is a citizen or permanent resident); H.R.J. Res. 41, 109th Cong. (2005) (proposing an amendment to the Constitution to provide that no person born in the United States will be United States citizen unless a parent is a citizen or a lawfully admitted permanent resident at the time of the birth); H.R.J. Res. 46, 109th Cong. (2005) (proposing a constitutional amendment to deny United States citizenship to individuals born in the United States to parents who are neither United States citizens nor persons who owe permanent allegiance to the United States); Citizen Reform Act, H.R. 698, 109th Cong. (2005) (proposing an amendment to the Immigration and Nationality Act that would deny United States citizenship to children born in the United States to parents who are not United States citizens or permanent resident aliens).

<sup>13</sup> Birthright Citizenship Act, H.R. 1940, 110th Cong. (2007) (co-sponsor information available at The Library of Congress, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01940:@@N>). Two further bills, with very similar goals, have been submitted: The Loophole Elimination and Verification Enforcement (LEAVE) Act, H.R. 6789, 110th Cong. § 301 (2008); and Optimizing Visa Entry Rules and Demanding Uniform Enforcement (OVERDUE) Immigration Reform Act, H.R. 4192, 110th Cong. § 201 (2007).

therefore makes much more sense than it did in 1985 to say that Americans have, through their representatives and their votes for their representatives, consented to reading the Fourteenth Amendment to provide birthright citizenship to children of all aliens born on American soil, whether legally present or not (with the continuing exception of children of ambassadors, in accordance with the legal fiction that they still reside in their home country). Many critics of our reading of the Fourteenth Amendment will no doubt persist in arguing that it was always erroneous for a variety of reasons. But perhaps we can all now agree that, insofar as consent to the prevailing practice is required for its legitimacy, the case for such consent effectively having been given is now stronger than it once was.

### III. THE NEW CHALLENGE TO BIRTHRIGHT CITIZENSHIP

The academic debate over birthright citizenship has, however, not ended. Instead, it has recently taken a new and highly significant turn. In a series of articles culminating in her new book, *The Birthright Lottery*, Ayelet Shachar (writing sometimes with Ran Hirschl), has called attention to an undeniable reality: the institution of birthright citizenship assigns to a small portion of the world's population a bundle of valuable resources simply due to their places of birth, while it consigns literally billions of others to far harsher circumstances due to their places of birth.<sup>14</sup> For Shachar, it is not the incompatibility of birthright citizenship with democratic principles of consensual membership that is its most disturbing feature. It is rather its incompatibility with egalitarian versions of social justice. Her argument has force. In a new century marked by rising political and social movements seeking to promote greater global justice and a range of cosmopolitan humanitarian concerns, the domestically inclusive and egalitarian features of birthright citizenship increasingly seem less striking than the externally exclusionary and inegalitarian consequences of the policy.

Even so, birthright citizenship *is* inclusive and egalitarian for those residing on the territory of a given political community; and it is hard to envision an arrangement for assigning civic memberships that would be pronouncedly more egalitarian. Shachar and Hirschl have argued for some system of global redistribution of resources to compensate for the unearned advantages of birth into more prosperous

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14 AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (forthcoming 2009).

and peaceful societies, but they recognize that no such proposals are likely to be politically feasible in the foreseeable future.<sup>15</sup> Just as it is plausible to attribute to parents the desire to make their citizenships available to their children, we can also expect many parents to feel that they have contributed to the relative well-being of their communities and that they are therefore entitled to pass those advantages on to their children—even if the advantages conferred seem clearly to outrun anything the parents have contributed to those societies.

But the main point of Shachar's work is to spark a debate over whether we can defensibly maintain the global status quo in regard to birthright citizenship or whether we should seek alternative arrangements, either for conferring civic memberships or for ameliorating their unequal consequences or some combination of both. The results of such debate cannot be foreseen. But if the prior debate over the desirability of birthright citizenship for undocumented aliens that was partly sparked by *Citizenship Without Consent* is any evidence, bringing the issues Shachar is raising into public discussion may well prove to have some desirable consequences, even if no radical change in the status quo ensues. At a minimum, the experience of the modern debate over birthright citizenship in the United States suggests that we should not be too fearful of contributing controversial ideas to democratic contestation and processes of self-governance.

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15 Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 POL. THEORY 253 (2007).