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ANCHORS AWEIGH: ANALYZING BIRTHRIGHT CITIZENSHIP AS DECLARED (NOT ESTABLISHED) BY THE FOURTEENTH AMENDMENT

*Elizabeth Farrington **

INTRODUCTION

Much has been and will be said concerning President Donald Trump's immigration policies. The vast majority of commentary has focused on his plans to enforce existing policy by deporting undocumented immigrants currently living in the United States and, of course, to build a wall on the United States border with Mexico. Less has been said, however, about any potential plans to change existing law regarding birthright citizenship—the process by which children of undocumented immigrants born on United States soil are granted full citizenship status.

On what he calls “anchor babies,” President Trump wrote: “[W]omen who have zero connection to the United States cross the border, deliver a baby, and their kid magically becomes an American citizen eligible to receive all the rights and benefits of those who have lived, worked, and paid taxes in our country.”¹ Mr. Trump notes the constitutional provision allowing this practice is, of course, the Fourteenth Amendment. Passed in June 1866² and ratified two years later (after contentious debate),³ it provides in pertinent part: “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.”⁴ This clause has historically granted citizenship to “anyone born on

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1. DONALD J. TRUMP, *TIME TO GET TOUGH: MAKE AMERICA GREAT AGAIN!* 141 (2011).

2. CONG. GLOBE, 39th Cong., 1st Sess. 3040 (June 8, 1866) (recording passage in the Senate); *id.* at 3148 (June 13, 1866) (recording passage in the House of Representatives).

3. 13 Stat. 708–11 (July 28, 1868).

4. U.S. CONST. amend. XIV, § 1, cl. 1.

American territory, no matter their national origin, ethnicity, or station in life.”⁵

Relatively recently, this interpretation has come under fire. Some scholars believe we must repeal this clause due to policy concerns surrounding immigration and undocumented immigrants. Others argue that we could remove the promises of birthright citizenship without repealing the clause or the amendment; they argue that we have misinterpreted this clause.⁶ This is not merely a scholarly debate; the Pew Institute estimates nearly 300,000 children were birthed into citizenship under this clause in 2013.⁷ Though President Trump espoused his views on the issue loudest and most often, every presidential candidate—on both sides of the aisle—spoke publicly about birthright citizenship.⁸ This essay aims to analyze this debate without regard to political party or current policy implications. Rather, this essay will seek to find its own answer to the growing birthright citizenship debate, drawing on primary sources from the time it was passed (and applied to a few nineteenth century cases after the Reconstruction Amendments were passed).

The amendment was passed in response to, *inter alia*, the *Dred Scott* decision denying citizenship to former slaves;⁹ in that respect, the citizenship clause was perhaps included to guarantee the right to citizenship for all newly freed African Americans born within United States borders. Although this clause seemed to put forth a straightforward test, that anyone born within the country's borders is a citizen, some argue it was passed *only* to grant citizenship to former slaves freed by the Thirteenth Amendment and that full birthright citizenship is not warranted.¹⁰

5. Gerald Walping, David B. Rivkin, Jr. & John C. Yoo, *Birthright Citizenship: Two Perspectives*, 17 ENGAGE 21 (Feb. 2016).

6. See *id.* at 21–22; Walping et al., *supra* note 5, at 18–21; John C. Eastman, *We Can Apply the 14th Amendment While Also Reforming Birthright Citizenship*, NAT'L REV. (Aug. 24, 2015, 4:00 AM), <http://www.nationalreview.com/article/422960/birthright-citizenship-reform-it-without-repealing-14th-amendment>; Peter Schuck, *Birthright of a Nation*, N.Y. TIMES (Aug. 13, 2010), http://www.nytimes.com/2010/08/14/opinion/14schuck.html?_r=1.

7. Jeffrey S. Passel & D'Vera Cohn, *Number of Babies Born in U.S. to Unauthorized Immigrants Declines*, PEW RESEARCH (Sept. 11, 2015), <http://www.pewresearch.org/fact-tank/2015/09/11/number-of-babies-born-in-u-s-to-unauthorized-immigrants-declines/>.

8. See Mark Murray, *Where the GOP 2016 Candidates Stand on Birthright Citizenship*, MSNBC (Aug. 18, 2015, 3:39 PM), <http://www.msnbc.com/msnbc/where-the-gop-2016-candidates-stand-birthright-citizenship>.

9. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

10. *Id.* at 406

This essay argues that birthright citizenship is in accordance with both the original intent and public understanding of the Fourteenth Amendment's citizenship clause. Furthermore, it argues that Congress' inclusion of the clause was not to *change* the definition of citizenship, but rather to affirm the practice established long before Reconstruction. For that reason, Part I will briefly address the early English common law of *jus solis*¹¹ (citizenship defined by soil) and the other option available after the revolution, *jus sanguinis*¹² (citizenship defined by blood). Part I will also analyze the effect of *Dred Scott v. Sanford*, where Chief Justice Taney struck down the Compromise of 1850 and held that slaves could never be citizens despite their birth on U.S. soil.¹³

Next, and most importantly, this essay will turn to Reconstruction in Part II. Specifically, it will analyze Attorney General Bates' 1862 opinion regarding the citizenship of a free, black ship master, providing unique insight into the question of citizenship prior to formal Reconstruction. Next, drawing on the citizenship clause debates surrounding both the Civil Rights Act and the clause in the amendment itself, this essay will address the "framers' intent" standard, insofar as anyone can surmise such intent from the text of debates and speeches alone. Finally, Part III will look to Reconstruction-era legal scholarship to provide insight on public meaning and then to instances following Reconstruction when the Supreme Court or lower courts applied or interpreted birthright citizenship immediately after the Fourteenth Amendment was ratified.

Using all of the above, this essay will outline the absurdity of the birthright citizenship debate. That is, the historical analysis proves that the clause was enacted with, at the very least, full acknowledgement of the effect of guaranteeing birthright citizenship and, in some cases, shows the explicit intent to do so. This paper argues the clause was included to overrule *Dred Scott* and was intended to reach beyond newly freed slaves and their children; it was included not to expand citizenship, but to declare and ensure *jus solis* remained the supreme law of the land.

11. *Jus Soli*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *Jus Sanguinis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

13. 60 U.S. at 397–99, 427.

I. LAYING THE GROUNDWORK: HOW DID WE GET HERE?

A. *English Common Law: The First United States Citizens and the Doctrine of Jus Solis*

Citizenship was one of the many doctrines early American courts adopted from the English Common Law. According to Blackstone: "The children of aliens, born here in England, are generally speaking, natural-born subjects, and entitled to all the privileges of such."¹⁴ Across the ocean, then, "[w]ith the exception of a few years before the Civil War, the United States followed the British rule of *jus solis* (citizenship defined by birthplace), rather than the rule of *jus sanguinis* (citizenship defined by that of parents) that prevails in much of continental Europe."¹⁵

This doctrine is seen throughout English and American common law cases;¹⁶ most notably in *Calvin's Case*,¹⁷ "one of the most important English common-law decisions adopted by courts in the early history of the United States."¹⁸ In *Calvin's Case*, the court addressed the question of whether persons born in Scotland, following the descent of the English crown to the Scottish King James VI, would be considered "subjects" in England.¹⁹ The court found that persons born on sovereign land, no matter the status of his or her parents, were "natural subjects."²⁰ This decision established "the American common-law rule of birthright citizenship."²¹ Across the pond, the United States Supreme Court cited *Calvin's Case* and found that "[n]othing is better settled at the common law than the doctrine that the children even of aliens

14. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1765); see also JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 33 (3rd ed. 1827) ("Natives are all persons born within the jurisdiction of the United States."); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 86 (2d ed. 1829) ("[E]very person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution.").

15. Walping et al., *supra* note 5.

16. But see Mark Shawhan, "By Virtue of Being Born Here": Birthright Citizenship and the Civil Rights Act of 1866, 15 HARV. LATINO L. REV. 1, 6 (2012) (discussing a "Consensualist Alternative" to this doctrine).

17. *Calvin v. Smith*, 77 Eng. Rep. 377 (K.B. 1608).

18. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997).

19. *Id.* at 73.

20. *Calvin*, 77 Eng. Rep. at 383 ("By all which it evidently appeareth, that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens.").

21. See Price, *supra* note 18, at 74.

born in a country, while the parents are resident there under the protection of the governments, and owing a temporary allegiance thereto, are subjects by birth.”²² This case remains good law, and is cited to this day.²³

B. *Dred Scott and the Court's Role in the Civil War*

In 1820, President James Monroe signed the Missouri Compromise,²⁴ “which prohibited slavery in all of the federal territories north and west of the state of Missouri.”²⁵ Fourteen years later, enter Dred Scott, a slave belonging to a United States Army surgeon.²⁶ That surgeon, Dr. Emerson, took Scott with him to Illinois and to present day Minnesota, an area covered by the Missouri Compromise’s prohibition on slavery.²⁷ Mr. Scott later attempted to buy his freedom, and when Dr. Emerson’s wife refused (Dr. Emerson himself having died), Scott sued for his freedom.²⁸ After lengthy legal battles, Scott’s case (now in the form of *Scott v. Sandford*) eventually made its way to the United States Supreme Court. This decision is taught in every law school in the country and widely discussed in constitutional scholarship,²⁹ largely due to its timeliness (immediately before the Civil War), its implications, and the nature of the opinion itself, with each of the nine justices penning an opinion. Chief Justice Taney’s majority opinion, despite finding that the Court lacked jurisdiction, found that slaves were ineligible for citizenship and denied Scott his freedom.³⁰ Taney did not discuss the doctrine of *jus soli*, nor did he find the place of Scott’s birth relevant. Rather, he found that black Americans were excluded altogether from citizenship on account of their race and status. Justices Curtis dissented (as

22. *Inglis v. Tr. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 164 (1830).

23. See, e.g., *Tuaua v. United States*, 788 F.3d 300, 304 (D.C. Cir. 2015) (citing *Inglis*, 28 U.S. at 164) (“The doctrine of *jus soli* is an inheritance from the English common law. Those born ‘within the King’s domain’ and ‘within the obedience or ligeance of the King’ were subjects of the King, or ‘citizens’ in modern parlance. The domain of the King was defined broadly. It extended beyond the British Isles to include, for example, persons born in the American colonies.”).

24. Missouri Compromise of 1820, ch. 22, 3 Stat. 545.

25. Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 4 (2007).

26. *Scott v. Sandford*, 60 U.S. 393, 397 (1856).

27. See also Finkelman, *supra* note 25, at 15; Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 51 (2006).

28. Finkelman, *supra* note 25, at 19–20.

29. See, e.g., Finkelman, *supra* note 25, at 3; Balkin & Levinson, *supra* note 27, at 49.

30. See *Scott*, 60 U.S. at 427.

did Justice McLean); in Justice Curtis' seventy-page dissent, he noted:

I can find nothing in the Constitution which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.³¹

Curtis, then, had a fundamentally different understanding of citizenship—and the possibility of black citizenship—than Taney and the rest of the majority. To Curtis, the Constitution's use of "natural-born citizen" "assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth."³² The majority opinion was lauded by Southerners and many Northern Democrats, who "hoped it would forever end debate over slavery in the territories and, thus, eliminate the newly formed Republican Party as a political force in the North."³³ Republicans had a different plan, and the opinion simply fanned the flames of an increasingly fragile union of states: "Though surely an exaggeration, it has been said that the case caused the Civil War. While other forces caused secession and the War, *Dred Scott* surely played a role in the timing of both."³⁴

References to this decision are found throughout the Congressional Globe, even before the records of the 39th Congress and throughout Reconstruction.³⁵ Representative Calvin Chaffee, for example, explained that "[t]he *dictum* of the Court is a very different affair from a *decision*,"³⁶ and that became the party line for Republicans seeking to use the opinion (and Justice Curtis' dis-

31. *Id.* at 576 (Curtis, J., dissenting).

32. *Id.*

33. Finkelman, *supra* note 25, at 5.

34. *Id.* at 3.

35. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1116 (1866) (statement of Rep. Wilson) ("The opinion of the court was soon after given to the country, but instead of becoming a triumphant platform for the Democratic party, it proved to be the scaffold on which the party was executed.")

36. CONG. GLOBE, 35th Cong., 1st Sess. 854 (1858) (statement of Rep. Chaffee).

sent) in their favor. The drafters of the Fourteenth Amendment often cited to the decision when probed on the necessity of the law. Cases following Reconstruction cited the decision as the impetus of the Reconstruction Amendments generally and the Fourteenth Amendment in particular.³⁷ Frederick Douglas “optimistically predicted that, in the long run, the decision would help the antislavery movement. . . . [T]his decision would lead to more support for abolitionists and thus put greater pressure on slavery.”³⁸ And he was right, as the decade that followed brought about the bloodiest war in American history, but also brought with it the abolition of slavery and Reconstruction.

II. RECONSTRUCTION

A. Attorney General Bates on Citizenship

Edward Bates, a Republican Congressman from Missouri, unsuccessfully ran for his party’s presidential nomination in 1860, but his loss was short-lived: President Lincoln appointed him Attorney General in 1861.³⁹ Just one year into his appointment, Treasury Secretary Chase sent Bates a letter asking for his opinion on “whether or not *colored men* can be citizens of the United States.”⁴⁰ The question was posed in response to a ship commanded by a free black man detained off the coast of New Jersey. Bates explained: “The Constitution of the United States does not declare who are and who are not citizens, nor does it attempt to describe the constituent elements of citizenship. It leaves that quality where it found it, resting upon the fact of home-birth, and upon the laws of the several States.”⁴¹ Drawing from *Calvin’s Case*, he wrote that the Constitution “uses the word citizen only to express the political quality of the individual in his relations to

37. See, e.g., *In re Look Tin Sing*, 21 F. 905, 909 (C.C.D. Cal. 1884) (Field, J., on circuit) (“The clause as to citizenship was inserted in the amendment not merely as an authoritative declaration of the generally recognized law of the country, so far as the white race is concerned, but also to overrule the doctrine of the Dred Scott Case, affirming that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States, nor capable of becoming such.”)

38. Finkleman, *supra* note 25, at 12–13.

39. *Cabinet and Vice Presidents: Edward Bates (1793–1869)*, MR. LINCOLN’S WHITE HOUSE, <http://www.mrlincolnwhitehouse.org/residents-visitors/cabinet-vice-presidents/cabinet-and-vice-presidents-edward-bates-1793-1869/> (last visited Feb. 17, 2017); *Edward Bates (1861–1864)—Attorney General*, MILLER CTR. OF PUB. AFFAIRS, UNIV. OF VA., <http://millercenter.org/president/essays/bates-1861-attorney-general> (last visited Feb. 17, 2017).

40. Citizenship, 10 Op. Att’y Gen. 382, 382 (1862).

41. *Id.* at 385.

the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other."⁴²

Much of Bates' opinion is devoted to traits or privileges of citizenship, and understandably focuses on correcting the dangerous notion that there is a lower, "denizen" class of black citizens, but one crucial passage provides insight on birthright citizenship as Bates understood it: "We have *natural born* citizens, not made by law or otherwise, but *born* . . . The Constitution itself does not *make* the citizens . . . It only intends and recognizes such of them as are natural—home-born; and provides for the *naturalization* of such of them as were . . . foreign-born."⁴³ He continued:

[I]t is too late now to deny the political rights and obligations conferred and imposed by nativity; for our laws do not pretend to create or enact them, but do assume and recognize them as things known to all men, because pre-existent and natural; and therefore things of which the laws must take cognizance. . . . [*P*] *prima facie*, every person in this country is born a citizen.⁴⁴

With that, Bates issued his opinion and answered Chase's question about black citizenship with a resounding "yes"—and gave a formal endorsement of birthright citizenship in the process.

B. *The Civil Rights Act of 1866*

As Congress was drafting the Fourteenth Amendment, the Thirty-ninth Congress had already declared "all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed . . . to be citizens of the United States" in the Civil Rights Act of 1866.⁴⁵ On January 5, 1866, Senator Lyman Trumbull (R-IL) introduced S. No. 61, a bill "to protect all persons in the United States in their civil rights and furnish the means of their vindication."⁴⁶ Trumbull believed the Citizenship Clause, which "declares that all persons of African descent shall be citizens of the United States," was "the basis of the whole bill."⁴⁷

Senator Morrill (R-ME) found that the bill was "not an enactment in the sense of the law, in the sense of legislation, but a dec-

42. *Id.* at 388 (internal citation omitted).

43. *Id.* at 389.

44. *Id.* at 395–96.

45. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

46. *Id.* at 129.

47. *Id.* at 474.

laration of a grand, fundamental principle of law and politics,"⁴⁸ and hailed it as such. Responding to opposition from Senator Garrett Davis (D-KY), Morrill said:

As matter of law, does anybody deny here or anywhere that the native born is a citizen, and a citizen by virtue of his birth alone? . . . [Davis] has forgotten the grand principle both of nature and nations, both of law and politics, that *birth gives citizenship of itself*. . . Everywhere where the principles of law have been recognized at all, birth by its inherent energy and force gives citizenship . . . The Constitution speaks of "natural born," and speaks of them as citizens in contradistinction from those who are alien to us. Therefore, sir, this amendment, although it is a grand enunciation, although it is a lofty and sublime declaration, has no force or efficiency as an enactment. I hail it and accept it simply as a declaration.⁴⁹

For purposes of citizenship, then, Senator Morrill understood birthright citizenship in the *jus solis* sense prior to Reconstruction and saw formal codification as nothing more than an affirmation of existing law. Trumbull generally agreed, noting that he and Morrill "desire to arrive at the same point precisely, and that is to make citizens of everybody born in the United States who owe allegiance to the United States."⁵⁰ The qualification Trumbull made was for foreign diplomats: "We cannot make a citizen of the child of a foreign minister who is temporarily residing here."⁵¹

Not everyone agreed with Senator Trumbull, with Senator Garrett Davis (D-KY) serving as the most vocal opponent. He challenged the proposition that the bill was merely declaratory law, and instead insisted that "Congress may create the [uniform rule of naturalization]; it may prescribe the authority to make a citizen; but it cannot exercise that power itself. . . . Congress has no power to make a citizen."⁵² Senator Davis was not alone in his objections,⁵³ but he was unable to convince the Senate; the bill passed on February 2, by a vote of thirty-three to twelve.⁵⁴

As the bill proceeded to the House (where the citizenship clause was not heavily debated), Representative James Wilson (R-IA) concurred with Senator Morrill that the citizenship clause formally declared the already settled law: "This provision, I maintain, is

48. *Id.* at 570.

49. *Id.*

50. *Id.* at 572.

51. *Id.*

52. *Id.* at 597.

53. *See, e.g., id.* at 600 (statement of Sen. Guthrie).

54. *Id.* at 606–07.

merely declaratory of what the law now is."⁵⁵ Representative Wilson proceeded to cite relevant legal authority and precedent in support of his conclusion⁵⁶ before voting for the bill, which passed in the House on March 13 by a vote of 111–38 (with 34 not voting).⁵⁷

Shocking members of both houses, President Johnson vetoed the Civil Rights Bill two weeks later, noting among his objections his concern with "granting" citizenship:

This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood. Every individual of these races, born in the United States, is by the bill made a citizen of the United States. . . . The right of Federal citizenship, thus to be conferred in the several excepted races before mentioned, is now, for the first time, proposed to be given by law. If, as is claimed by many, all persons who are native-born, already are, by virtue of the Constitution, citizens of the United States, the passage of the pending bill cannot be necessary to make them such. If, on the other hand, such persons are not citizens, as may be assumed from the proposed legislation to make them such, the grave question presents itself, whether, when eleven of the thirty-six States are unrepresented in Congress, at this time it is sound policy to make our entire colored population and all other excepted classes citizens of the United States?⁵⁸

Thus, even President Johnson acknowledged the thesis of this essay; that is, many understood birthright citizenship as the existing law, merely declared in this bill, and even those that rejected that premise understood the effect of birthright citizenship. This portion of his veto seems to argue that the citizenship provision is either redundant (because it is already the law) or entrenches birthright citizenship without input from Southern representatives. Crucially, over these and President Johnson's other objections, Congress passed the Civil Rights Bill with the two-thirds majority required to override, and the Act became law on April 9, 1866.⁵⁹

This discussion is valuable to the citizenship clause of the Fourteenth Amendment because the members drafting, debating, and passing the Act were, of course, those same members draft-

55. *Id.* at 1115.

56. *See id.* at 1116 (quoting 1 SHERWOOD'S BLACKSTONE 304).

57. *Id.* at 1367.

58. *Id.* at 1679.

59. *Id.* at 1809, 1861.

ing, debating, and passing the amendment. Moreover, “the [Fourteenth Amendment’s Citizenship] Clause was intended to entrench an earlier *statutory* citizenship guarantee in the Civil Rights Act of 1866.”⁶⁰ Clearest of all, the United States Supreme Court noted that the two pieces of legislation were linked and its use of language was in no way coincidental: “The same congress, shortly [after passing the Civil Rights Act], evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress, framed the fourteenth amendment of the constitution.”⁶¹

C. *The Fourteenth Amendment’s Section One*

One issue with analyzing the Fourteenth Amendment’s citizenship debate is that the same members, having understood it during the Civil Rights Act, felt the matter was settled by the time the clause was introduced in this separate context. The “debate” on the clause was correspondingly much shorter than other provisions (i.e., the Equal Protection Clause debates). Nevertheless, Congress did introduce and discuss the amendment’s citizenship provision, as outlined below. Introducing it on May 30, 1866, the clause’s author Senator Jacob Howard (R-MI) explained:

I do not propose to say anything on that subject except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion. This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.⁶²

That, in and of itself, is not only innocuous, it seems to support the premise that the Citizenship Clause—both in the Civil Rights Act (to which Howard refers) and the Fourteenth Amendment—was merely declaring formally the established doctrine of *jus soli*. Howard did not stop there, though, and his next statement is the loose end to which birthright citizenship opponents cling: “This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors [sic] or foreign ministers accredited to the Government of the

60. Shawhan, *supra* note 16, at 2.

61. *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898).

62. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

United States, but will include every other class of persons.”⁶³ Senator Howard’s proposal was immediately discussed, but mainly within the context of the Indian population.⁶⁴

Senator Cowan (R-PA), the first to give Senator Howard’s clause a closer look, “supposed that every human being within their jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection.”⁶⁵ That concept frightened Cowan, who noted Chinese immigration to California, and feared that if a state “was likely to be invaded by a flood of Australians or people from Borneo, man-eaters or cannibals if you please, [that state] would have the right to say that those people should not come there.”⁶⁶ He went on:

[T]here are nations of people with whom theft is a virtue and falsehood a merit. There are people to whom polygamy is as natural as monogamy is with us. It is utterly impossible that these people can meet together and enjoy their several rights and privileges which they suppose to be natural in the same society; and it is necessary . . . that society shall be more or less exclusive.⁶⁷

That xenophobia notwithstanding, over the course of the next few days, several other Senators weighed in on the matter, and in doing so lent no support to the concept that this proposed Citizenship Clause should (or would) remove the doctrine of *jus soli* from the established law.

Senator Conness (R-CA) responded immediately to Senator Cowan’s fears about the impending invasion of his own California. He succinctly and directly addressed Senator Howard:

The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so. I voted for

63. *Id.*

64. *Id.* (statement of Sen. Doolittle) (“I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians. I move, therefore, to amend the amendment—I presume he will have no objection to it—by inserting after the word ‘thereof’ the words ‘excluding Indians not taxed.’”); *id.* (statement of Sen. Howard) (“Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being quasi foreign nations.”).

65. *Id.*

66. *Id.* at 2891.

67. *Id.*

the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.⁶⁸

He then "beg[ged]" Senator Cowan not to concern himself with the Chinese, and noted with incredulity the notion that the United States was being overtaken by Gypsies and other immigrants while expressing his belief that these individuals must be protected in their civil rights.

Senator Reverdy Johnson, a *Democrat* (D-MD), followed Senator Conness' lead. Expressing concern for the lack of defined United States citizenship, he said:

Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power . . . shall be considered as citizens of the United States. . . . If there are to be citizens of the United States entitled everywhere to the character of citizens of the United States there should be some certain definition of what citizenship is, what has created the character of citizen as between himself and the United States, and the amendment says that citizenship may depend upon birth, and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.⁶⁹

Two weeks later, the Senate once again took up the issue of Senator Howard's Citizenship Clause. Senator Henderson (R-MO) began the discussion and was the last Senator to speak on the issue:

I propose to discuss the first section only so far as citizenship is involved in it. I desire to show that this section will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government. . . . Justice McLean, in the Dred Scott case, said: "Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is a 'freeman.'"⁷⁰

Henderson understood Justice McLean's dissent to mean "that any person, black or white, born upon the soil of a State, is a citizen of that State, unless he be born in slavery, and if he be born a slave, he becomes a citizen so soon as by the laws of the State he becomes a free man."⁷¹ Thus, the citizenship debate ended with Senator Henderson's statement: "All born on the soil free are citi-

68. *Id.*

69. *Id.* at 2893.

70. *Id.* at 3031.

71. *Id.*

zens of the respective States of their birth, and therefore citizens of the United States.”⁷²

III. EVIDENCE OF PUBLIC MEANING

A. Scholarship

Early Supreme Court cases used conventions of British common law to interpret it's constitutional meaning, including not only *Calvin's Case* but also Sir Edward Coke's report on the case, who insisted that the King's reciprocal obligations to a subject's allegiance protected the rights of any subject born within his domain.⁷³ Of course, it was not only the courts that seemed to adopt this understanding. Several prominent law review articles contribute to the discussion, with near unanimous support for the *jus soli* understanding of citizenship.⁷⁴ Thus, pre-Reconstruction, the generally accepted public meaning of birthright citizenship was relatively unchallenged: “[A] child was a citizen at birth if born within the territory of a sovereign and under the sovereign's authority. This was true even if the child's parents were aliens.”⁷⁵ Insofar as scholars can accurately provide evidence of public meaning, this understanding is supported by St. George Tucker,⁷⁶ William Rawle,⁷⁷ Joseph Story,⁷⁸ and James Kent.⁷⁹ “In drafting the Fourteenth Amendment, the framers drew on preexisting legal terminology. Hence, if ‘jurisdiction’ originally meant ‘sover-

72. *Id.*

73. See Price, *supra* note 18, at 73–74; Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Case System*, 28 B.C. THIRD WORLD L.J. 437, 445 (2008).

74. For an overview of this literature, see Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868–1898: States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 532–37 (2001); John A. Hayward, *Who Are Citizens?*, 2 AM. L.J. 315, 317 (1885); Thomas P. Stoney, *Citizenship*, 34 AM. L. REG. 1, 1–2 (1886); D.H. Pingrey, *Citizens, Their Rights and Immunities*, 36 AM. L. REG. 539, 540 (1888); cf. Henry C. Ide, *Citizenship by Birth—Another View*, 30 AM. L. REV. 241, 241 (1896).

75. Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 725 (2012).

76. 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 152 (St. George Tucker ed., 1803).

77. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 236 (2d ed. 1829).

78. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1646 (1833).

79. JAMES KENT, COMMENTARIES ON AMERICAN LAW 15 (William Kent ed., 9th ed. 1858).

eign authority' at the framing, we should expect to see this meaning used in antebellum discourse. A variety of sources demonstrate that it was."⁸⁰

B. Court Cases

Though not entirely helpful for understanding the Framers' intent surrounding birthright citizenship, Supreme Court decisions concerning citizenship (or, as in *The Slaughterhouse Cases*, cases that discuss the concept in dicta) help frame our understanding of the public meaning.

1. The *Slaughterhouse Cases* (and Their Limited Utility)

In the *Slaughterhouse Cases*, just five years after the Fourteenth Amendment was ratified, the Court famously found that the Privileges or Immunities Clause did not protect citizens against state encroachment, but rather protected only those conferred by the federal government.⁸¹ In dicta, the Court wrote that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of . . . citizens or subjects of foreign States born within the United States."⁸² Opponents of birthright citizenship argue that this is "as absolute and complete a statement as can be imagined, and it would deny birthright citizenship to a child born in this country to undocumented immigrants or to a transient alien mother."⁸³ As further proof, opponents point to *Minor v. Happersett*, decided just two years after *Slaughterhouse*, where the same Court "expressly recognized the existence of 'doubts' that citizenship was automatic for 'children born within the jurisdiction without reference to the citizenship of their parents,' after noting that citizenship attaches only when the immigrant owes 'allegiance' to this country."⁸⁴

While noting the non-binding nature of these provisions, Gerald Walpin argues that both opinions "should be considered authoritative insofar as they were expressed by Justices who lived through the enactment of the provision they were construing, and

80. Ing, *supra* note 75, at 725–29 (discussing treatises and state court opinions on the subject).

81. 83 U.S. 36, 73, 80 (1873).

82. *Id.*

83. Walping et al., *supra* note 5, at 18.

84. *Id.* (quoting *Minor v. Happersett*, 88 U.S. 162, 167–68 (1875)).

thus were well positioned to comprehend the meaning and intention of the words."⁸⁵ If that was all the Court said on the matter during the decades immediately following Reconstruction, that would seem a valid proposition. However, that was not the end of the discussion, even in that case. Mr. Justice Field, in a dissenting opinion, in which Chief Justice Chase and Justices Swayne and Bradley concurred, said of the same clause: "It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state or the condition of their ancestry."⁸⁶ What's more, the Court backed away from the majority *Slaughterhouse* decision and, in later cases, seemingly directly overruled that portion of the decision that addressed birthright citizenship.

In 1884, Justice Field was on circuit in California and heard the case of *In re Look Tin Sing* concerning the citizenship of a child born in the United States of Chinese parents.⁸⁷ To use Walpin's own words, Justice Field's decision on the matter is as absolute and complete a statement on the matter as could be imagined, especially since the case was specifically about birthright citizenship.⁸⁸ Quoting the Citizenship Clause of the Fourteenth Amendment, Field explains: "This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States."⁸⁹ He goes on to explain the phrase "subject to the jurisdiction thereof":

They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment.⁹⁰

Justice Field listed those children that would *not* be guaranteed citizenship by virtue of their birth: (1) "children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors";⁹¹ (2)

85. *Id.* ("Note that, because the meaning of the Birthright Citizenship provision did not determine the outcome in either case, the Court's statements in both decisions are dicta, not binding holdings.").

86. *Slaughterhouse*, 83 U.S. at 95.

87. *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884).

88. Walping et al., *supra* note 5.

89. *In re Look Tin Sing*, 21 F. at 906 (C.C.D. Cal. 1884).

90. *Id.*

91. *Id.*

"[p]ersons born on a public vessel of a foreign country, while within the waters of the United States, and consequently within their territorial jurisdiction";⁹² (3) persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country."⁹³ Directly contradicting the *Slaughterhouse Cases*, Justice Field explains:

[T]he words in the fourteenth amendment, "subject to the jurisdiction thereof," . . . do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship, and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.⁹⁴

Of course, Justice Field's opinion is not that of the Court, but rather his opinion binding only on courts within the California Circuit Court's jurisdiction. But it does effectively demonstrate that not all justices agreed with the *Slaughterhouse* dicta's treatment of the Citizenship Clause.

2. *United States v. Wong Kim Ark*

Two months after *Look Tin Sing*, in November 1884, the Court (and not simply Justice Field) issued some guidance in *Elk v. Wilkins*.⁹⁵ Opponents of birthright citizenship also cite to this decision as proof positive that the Court (and public meaning at the time) understood the Citizenship Clause as reported in the *Slaughterhouse* dicta. This mistakes the *facts* of the case; John Elk was a Winnebago Indian, born on an Indian reservation, who later renounced his tribal allegiance in an effort to gain U.S. citizenship.⁹⁶ Thus, when the Court found that Mr. Elk was not a citizen of the United States under the Fourteenth Amendment, it did so within the context of the contentious debate surrounding the sovereignty of Indian tribes and the reach of the court system within that sovereignty.⁹⁷

92. *Id.*

93. *Id.* at 907.

94. *Id.* at 908–09.

95. 112 U.S. 94 (1884).

96. *Id.* at 94–95.

97. *Id.* at 109; see also CONG. GLOBE, 39th Cong. 1st Sess. 2895 (1866) (statement of Sen. Howard) ("I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages . . . are to become my fellow-citizens."); *id.* at 2897 (statement of Sen. Doolittle) (classifying Indians as "utterly unfit to be citizens of the United States").

Conversely, in *United States v. Wong Kim Ark*,⁹⁸ the Court squarely and definitively addressed the issue of birthright citizenship in facts nearly identical to *Look Tin Sing*; that is, the Court was asked to decide whether Ark, a child born in the United States to Chinese parents, was a United States citizen.⁹⁹ After Ark left to visit China temporarily and sought to return, he was denied reentry "upon the sole ground that he was not a citizen of the United States."¹⁰⁰ Distinguishing *Elk* was simple and succinct: "The decision in *Elk v. Wilkins* concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country."¹⁰¹ The Court found: "In the fore front, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms."¹⁰² The majority continued:

As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect.¹⁰³

The Court further distanced itself from *Slaughterhouse*, noting the non-binding nature of the Citizenship Clause discussion. Citing Chief Justice John Marshall, the Court noted the maxim:

[N]ot to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.¹⁰⁴

That maxim is of great use in this essay, because if the best arguments against birthright citizenship, each discussed above, are found in dicta, and in minority theories, they are indeed respected, but do not control the judgment of this subsequent debate.

98. 169 U.S. 649 (1898).

99. *Id.* at 652-53.

100. *Id.* at 653.

101. *Id.* at 682.

102. *Id.* at 675.

103. *Id.* at 676.

104. *Id.* at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

CONCLUSION

The doctrine of *jus soli* was the law of the land prior to the Civil War and was formally constitutionalized by the Fourteenth Amendment. Lawmakers, scholars, and the general public agreed, at the very least, in an understanding that the citizenship clause would guarantee birthright citizenship and, perhaps more likely, intended that consequence. The current debate surrounding birthright citizenship is political, policy-driven, and—with regard to immigration reform—may be necessary. But make no mistake; this debate is not grounded in history. On that, history is clear.
