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Constitutional Boundaries: The Endurance of Birthright Citizenship and the Future of US-born Children of Undocumented Immigrants

ABSTRACT. As anti-immigration rhetoric and policies continue to fester in the United States (US), mixed-status immigrant families are often legally vulnerable. This paper evaluates the practicality of revoking the birthright citizenship doctrine found in the Constitution's Fourteenth Amendment. In light of the predominantly conservative US government across all three branches and our current Supreme Court's pattern in reversing long-standing decisions, people are debating the likelihood of a successful attack on birthright citizenship. However, scholars have raised strong doubts about the Court reversing this birthright citizenship standard. A lengthy history of legal statutes and the *stare decisis* doctrine protects the current territorial understanding of birthright citizenship as it pertains to U.S.-born children of undocumented immigrants. Even if the Court makes such a revocation, our current immigration laws do not allow for any means by which the US government could impose the processes of denaturalization, then deportation, upon such children. The rules that dictate whether or not an individual's American status is revoked are limited to citizens who were granted legal status strictly via naturalization. As it stands, the US government cannot exclude these children of the undocumented from retaining their legal US citizen statuses, conferred to them by their right of birth within US borders.

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INTRODUCTION

In an interview with NBC News in December of 2024, President Donald Trump confirmed his plans to end birthright citizenship in the US via executive action during his second presidential term.[1] This is not the first time the president has made such a promise to national media; however, when asked about what would happen to families who have varying immigration statuses, President Trump revealed that he would be revising his previous zero-tolerance policy regarding family separations. He explicitly said, "I don't want to be breaking up families, so the only way you don't break up the family is you keep them together and you have to send them all back."[2] He revealed more of his plans on ending birthright citizenship by proposing that American citizens, namely children with legal status who have immediate family members without valid immigration documents, may be deported as well. Since then, the president has turned his intentions to end birthright citizenship into action. On his Inauguration Day, President Trump signed an executive order titled "Protecting the Meaning and Value of American Citizenship" which calls for the revocation of birthright citizenship for children of undocumented immigrants or noncitizens in the US with temporary status.[3] Almost immediately, about 22 different states responded to this executive order by filing lawsuits challenging the president's ability to undermine the doctrine in question.[4] As Trump's agenda circulates in the media, it is important to distinguish the fear-mongering rhetoric from tangible facts.

Despite what President Trump has previously said, the United States is not the only country in the world that upholds the legal principle of *jus soli*. Thirty-three countries, most of which are in the Americas and the Caribbean, follow this citizenship standard.[5] The *jus soli* principle suggests that citizenship of a country is automatically

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[1] Kristen Welker, *Read the Full Transcript: Donald Trump Interviewed by Kristen Welker on 'Meet the Press'*, NBC News, Dec. 8, 2024, www.nbcnews.com/politics/donald-trump/trump-interview-meet-press-kristen-welker-election-preside nt-rcna182857.

[2] *Id.*

[3] Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

[4] Mattathias Schwartz & Mike Baker, *Twenty-two States Sue to Stop Trump's Birthright Citizenship Order*, N.Y. Times, Jan. 21, 2025, https://www.nytimes.com/2025/01/21/us/trump-birthright-citizenship.html.

[5] Law Library of Congress, *Birthright Citizenship Around the World* (Global Legal Research Directorate 2018), https://www.loc.gov/item/2018655070/.

granted to all those born on its soil and within its borders.[6] It was codified into US law when the Fourteenth Amendment was ratified and has since stood as the legal basis for American citizenship. Section 1 of this Amendment reads, "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."[7]

However, the doctrine of birthright citizenship, found in the latter sentence of the Fourteenth Amendment, is under scrutiny. Throughout the 21st century, conservatives have campaigned for the complete revocation of this doctrine as a means to solve national concerns over undocumented immigration and the growing migrant populations in the US Critics of this doctrine point to the specific language in the Fourteenth Amendment and the Immigration and Nationality Act of 1952 for clarity on where U.S.-born children with undocumented family members stand on the spectrum of retaining their legal citizenship.

This paper investigates whether the law is equipped to handle the ramifications of revoking birthright citizenship should the Supreme Court comply with a complete deviation from precedent. While various elements complicate this issue, I will evaluate the feasibility of excluding U.S.-born children of undocumented immigrants from retaining US citizenship by explicating three relevant elements. First is the historical context behind the foundation of birthright citizenship in conjunction with the precedent that actively protects these children from government interference with their livelihoods. Second is an analysis of a potential Supreme Court decision that calls into question the appropriateness of applying *stare decisis* to the current citizenship law, especially considering the ambiguity of the language in the Fourteenth Amendment. Last is a dissection of the laws that govern denaturalization and deportation to determine whether these proceedings can apply to children of the undocumented who have legal status via birthright citizenship.

The argument proposed is that there is currently an incapacity of our immigration system to facilitate the processes of (1) stripping away the legal status of U.S.-born children of the undocumented and (2) relocating them to their parents' native country. Before our current immigration laws can be reformed to accommodate the latter processes, all three branches of the government must work in agreement with one another to impose such colossal changes to these children's citizenship statuses. These changes would require a constitutional amendment, implementation of revised

[6] Michael Robert W. Houston, *Birthright Citizenship in the United Kingdom and the United States*, 33 Vanderbilt L. Rev. 693, 706 n.67 (2021).
[7] U.S. Const. amend. XIV, § 8, cl.4.

legislation, and a complete restructuring of the US immigration system. As it stands, this demographic of children is legally protected. The government must address and recognize the obstacles confronting it if the Court decides to overturn the birthright citizenship doctrine.

I. HISTORICAL CONTEXT

The United States adopted the legal principles dictating citizenship laws today from its parent country of England, when it established itself as a sovereign nation. Even though England has since abandoned those rules, the *jus soli* principle, which translates to "the right of the soil," was embedded in seventeenth-century English common law regarding nationality.[8] Early England possessed a feudal system where land ownership dictated society, and the king ultimately governed over all English land.[9] This structure gave reason to codify *jus soli* as the basis for English citizenship at the time. In 1608, the English case *Calvin v. Smith*, also known as *Calvin's Case*, solidified territorial birthright citizenship as the determinant for English nationality under the principle of "birth within the allegiance of the king."[10] Robert Calvin was born in Scotland, but the unification of England and Scotland complicated his right to retain English nationality. The court reasoned that Calvin's place of birth was within the King's dominion, meaning "Calvin was born under the King's power or protection; *ergo* he is no alien."[11] While subjectship and citizenship are distinct, the territorial analysis here further established that "all persons born within the king's allegiance, whether or not they were born of alien parents," could rightfully retain English nationality.[12] The only exceptions to this territorial conferment of citizenship were children of foreign ambassadors or diplomats born within British territory and children of alien enemies of the state born in English-occupied territories.[13] These common law principles discussed in *Calvin's Case* have been the legal basis for conceptualizing citizenship guidelines in the US legal system.

The US Constitution granted Congress the enumerated power "to establish a uniform Rule of Naturalization," which is understood to encapsulate all laws

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[8] Michael Robert W. Houston, *Birthright Citizenship in the United Kingdom and the United States*, 33 Vanderbilt L. Rev. 693 (2021).
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.

governing the process of acquiring US citizenship if one was born outside of US borders.[14] The Naturalization Act of 1790 was the first law to establish a federal standard regarding naturalization. Congress declared that "any alien... being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen..."[15] Eligibility for US citizenship, specifically through naturalization, was explicitly defined by one's race, excluding all people of color. The development of citizenship law in America has historically been tied to the nation's evolving perceptions of race. This relationship produced a long history of contention in court over the eligibility of non-white immigrants and non-white US residents for retaining American citizenship; furthermore, these racial limitations set forth by the Naturalization Act of 1790 influenced early American interpretations of who could claim US citizenship by birthright.[16] This act provided specific federal guidelines for naturalization eligibility, though naturalization power is distinct from citizenship power. The ability to confer citizenship was still largely left at each state's discretion.[17]

During the nineteenth century, tensions between the Northern and Southern states were rising, leading to the US Civil War. States were divided on various issues, including, but not limited to, state power and slavery. Polarizing discourse over state versus federal powers and race bled into legal debates over US citizenship. Given that conferring citizenship by birthright was a power delegated to the states during this time,[18] the North and South developed different modes to establish who constituted a US citizen. The federal government eventually had to address the conflicting states' concerns over birthright citizenship as it pertained to slavery. The US Supreme Court was then tasked with reconciling the laws characterizing non-whiteness with the way English common law principles rationalized US citizenship. Hence, the Court was required to rectify conflicting understandings of citizenship: the common law *jus soli* interpretation against the assertion that the Constitution gave states the authority to control the citizenship status of natural-born Black Americans.

A. Pre-Fourteenth Amendment Birthright Citizenship Legal Doctrines

[14] U.S. Const. art. I, § 8, cl.4.
[15] Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103-04 (repealed 1795).
[16] *See* Sandra L. Rierson, *From Dred Scott to Anchor Babies: White Supremacy and the Contemporary Assault on Birthright Citizenship*, 38 Georgetown Immigration Law Journal 1 (2023).
[17] *See* U.S. Const. amend. X.
[18] *See* U.S. Const. amend. X.

The *Dred Scott v. Sandford* case was the first of its kind to debate which persons constitute US citizens as understood and intended by the framers of the Constitution. In 1846, Dred Scott moved from Missouri, where he was enslaved, to reside in Wisconsin, a free territory under the 1820 Missouri Compromise Act.[19] Scott filed a petition in court to sue for his freedom, asserting that he was a US citizen by birth. The courts vigorously debated whether or not Scott's suit was valid given his race and previous enslavement. In 1857, the Supreme Court ruled that Black people, both enslaved and freed, were not US citizens and could not retain the rights and privileges reserved for American citizens, including the ability to sue in federal courts.[20] The judgment in this case was justified by two lines of reasoning. The first was the interpretation that general terms, like "people of the United States" and "citizens," were never intended to include the "enslaved African race," and therefore, they could not enjoy the fruits of citizenship.[21] The second was a reassessment of the states' ability to confer citizenship after the adoption of the Constitution.

First, the Court clarified that the words "persons," "people of the United States," and "citizens" are synonymous with one another, and interpreted these to reference a "sovereign people."[22] They explained that those with African ancestry have historically been considered as a "subordinate and inferior class of beings who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority."[23] The Court referenced two clauses in the Constitution reflecting this understanding, which supported the right to purchase and hold slaves as property and pledged to protect the rights of their masters. The language of the Naturalization Act of 1790 was also cited; the Court wrote, "citizenship was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the government."[24] In Scott's case, the Court considered that his ancestors were imported into the US to serve as slaves, like those of African descent. This understanding that the African race was subservient to the white race meant that Scott could not claim US citizenship and the rights and privileges of a full-fledged citizen. Despite being born on US soil, freed and enslaved Blacks were not individually sovereign people who, of their own accord, could become incorporated into the fabric of the US political community.

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[19] Dred Scott v. Sandford, 60 U.S. 393, 19 (1857).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

Secondly, the Court weighed in on the individual states' ability to grant citizenship to a new class of persons who were not legally eligible to naturalize. They acknowledged that the states possessed the ultimate authority to decide who constituted a citizen and retained all citizenship rights. The Court agreed that the states may continue to confer citizenship upon anyone or any class of natural born persons as they please, however, these parameters would be restricted to that respective state.[25] It is unreasonable for one state to assume that another state should comply with its own rules regarding citizenship. This clarification is key because free states and slave states at this time had opposing views on granting citizenship to those of the African race. Slaveholding states have immense economic stakes in the preservation of Black subjugation, which the Court addressed. The economic prosperity of each state varied, so "it cannot be believed that the large slaveholding States regarded them as included in the word of 'citizens'" when the Constitution was drafted.[26] The Court concluded that "no law of a State... can give any right of citizenship outside of its own territory," nor can it introduce a new class of persons as US citizens within the meaning of the Constitution.[27] Initially, the Court confirmed that citizenship was exclusive to the white class in the US

Approximately a decade after the *Dred Scott* decision, Congress passed the Civil Rights Act of 1866 in direct defiance of the Court's ruling in *Dred Scott*. The act declared that "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[28] This marked the first US law in history to define the bounds of citizenship by the *jus soli* principle, which also extended to everyone born in the US regardless of race and previous slave status.[29] It also provided that such citizens retained the same civil and legal rights as their white counterparts uniformly across all states. These included the rights to sue in court, make and enforce contracts, possess and manage personal property, and more.[30] Congress justified this act under the authority of the Thirteenth Amendment, ratified shortly before.[31] Consistent with the Reconstruction era, the intention was to help incorporate nonwhite citizens, namely freed and formerly enslaved Black people, into American society by refining birthright citizenship. Since

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[25] *Sandford*, 60 U.S., *supra* note 19, at 19.
[26] *Id.*
[27] *Id.*
[28] Civil Rights Act of 1866, ch. 31, § I, 14 Stat. 27-30 (1866).
[29] *Id.*
[30] *Id.*
[31] *See* U.S. Const. amend. XIII.

this act defies the Supreme Court's *Dred Scott* decision, this rule was not legally sound until the ratification of the Fourteenth Amendment. The 1866 Civil Rights Act illustrated the authors' aims of the Fourteenth Amendment.

B. Cementing the Birthright Citizenship Doctrine

The Fourteenth Amendment of 1868 ensured that both freed and enslaved African Americans in the US were granted citizenship because they were born on US soil.[32] The *jus soli* principle, as embedded in this amendment, has since remained the standard for birthright citizenship. Passing this amendment also strengthened the legal foundation for civil rights and protections of US citizens, extending to all persons regardless of race. This addition to the Constitution was purposeful in that it prevented the states from undermining the birthright citizenship doctrine and equal treatment and protection, "as is enjoyed by white citizens", enacted in the 1866 Civil Rights Act.[33] The Fourteenth Amendment ensures the uniform conferment of US citizenship to all persons eligible by birthright and naturalization.

Modern controversy over birthright citizenship demonstrates that the drafters of this amendment did not anticipate the extent to which immigration into the US would grow as centuries passed. Now, many migrant communities, most of which are culturally diverse and consist of nonwhite citizens, legal permanent residents, and noncitizens, are increasingly vulnerable to anti-immigration policies. This includes an estimated 70 percent of mixed-status households of the 6.3 million total households in the US with at least one undocumented occupant.[34] A revocation of the birthright citizenship doctrine would deny citizenship to an estimated 150,000 children born in the US to two undocumented parents annually.[35] This number would increase to an estimated total of 297,000 children, looking at all undocumented mothers regardless of

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[32] Sandra L. Rierson, *From Dred Scott to Anchor Babies: White Supremacy and the Contemporary Assault on Birthright Citizenship*, 38 Georgetown Immigration Law Journal 1 (2023).
[33] Civil Rights Act of 1866, ch. 31, § I, 14 Stat. 27-30 (1866).
[34] Jeffrey S. Passel, *What We Know about Unauthorized Immigrants Living in the U.S.*, Pew Research Center, Jul. 22, 2024,
www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-i n-the-us/.
[35] Nate Raymond, *22 Democratic-Led States Sue over Trump's Birthright Citizenship Order*, Reuters, Jan. 21, 2025,
www.reuters.com/legal/lawsuits-challenge-trumps-birthright-citizenship-other-orders-2025-01-21/.

the father's legal status.[36] Hence, this revocation would drastically increase the population of undocumented people in the US.

The first Supreme Court case interpreting the Fourteenth Amendment Citizenship Clause was *Elk v. Wilkins* in 1884.[37] John Elk, a Native American man born in the US, severed his tribal affiliation to the Native American tribe he was born into and petitioned to claim US citizenship by his birthright. This would entitle him to the privileges and immunities promised to US citizens under the Constitution. The question presented to the Court was whether Native Americans born in the US can claim citizenship after severing ties to their respective tribe. The Court debated this issue by considering if Native Americans were intended to be included in "all persons" per the Citizenship Clause and if their membership of a Native American tribe at birth satisfied the "subject to the jurisdiction" element of US citizenship.

On the first point of analysis, the Court referred to the language of Section 2 of the Fourteenth Amendment to determine whether its drafters intended to include Native Americans under its provisions. Section 2 established the rules for apportionment of representation in Congress, but included the phrase "excluding Indians not taxed."[38] They also cited the Civil Rights Act of 1866 for using the identical phrase to further their argument.[39] The majority opinion reasoned that "Their absolute exclusion from the basis of representation... is wholly inconsistent with their being considered citizens."[40] Therefore, the Court concluded that this phrase is evidence that Native Americans were not intended to be included in any of the provisions of the Fourteenth Amendment, including citizenship. Secondly, the Court considered to which jurisdiction Elk was subject at birth. They clarified that one must be born into the jurisdiction of the United States to lawfully claim US citizenship by birthright.[41] Native American tribes were considered "alien nations" and "distinct political communities" that were separate from US laws.[42] They argued that even though Elk renounced his membership in his tribe, Elk possessed allegiance to that tribe at the time of his birth; therefore, he was not "subject to the jurisdiction of the United States."[43]

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[36] Steven A. Camarota et al., *Births to Legal and Illegal Immigrants in the U.S.*, Center for Immigration Studies, Oct. 9, 2018, cis.org/Report/Births-Legal-and-Illegal-Immigrants-US#2.
[37] Elk v. Wilkins, 112 U.S. 94 (1884).
[38] U.S. Const. amend. XIV, § 2.
[39] Civil Rights Act of 1866, ch. 31, § I, 14 Stat. 27-30 (1866).
[40] *Wilkins*, 112 U.S., *supra* note 37.
[41] *Id.*
[42] *Id.*
[43] *Id.*

The Court concluded that Native Americans, as members of a Native American tribe at birth who were born in the US, did not constitute citizens because they "owed immediate allegiance to their several tribes, and were not a part of the people of the United States."[44] This ruling was effectively overturned when Congress passed the Indian Citizenship Act of 1924, which declared that "all non-citizen Indians born within the territorial limits of the United States be… citizens of the United States."[45] Shortly after *Elk v. Wilkins* declared that Native Americans were not citizens under the 14th Amendment, Congress used its naturalization powers to reverse the ruling.

In the 1898 case known as *United States v. Wong Kim Ark*, the Supreme Court faced the question of "whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China… becomes at the time of his birth a citizen of the United States" via the Fourteenth Amendment.[46] While traveling back to the US from a trip to China, Wong Kim Ark was stopped at customs and barred from re-entry into the US, although he was born in California and permanently resided there.[47] His parents, who retained Chinese nationality, were lawfully residing in the US at the time of Wong Kim Ark's birth; however, due to the 1882 Chinese Exclusion Act[48], they were ineligible for naturalization.[49] The Supreme Court was faced with the question of whether Wong Kim Ark was legally an American citizen solely based on the geographical location of his birth, despite his noncitizen parents and the naturalization restrictions of Chinese migrants during this time.

The Supreme Court deliberated that no place in the Constitution provides any definition, "either by way of inclusion or of exclusion", of a "citizen" or "natural born citizen" of the US.[50] This lack of explicit definition in the original Constitution meant that the Court necessarily interpreted the term "citizen" in respect to English common law because those "principles and history were familiarly known to the framers of the Constitution."[51] The fundamental principle of common law that everyone born "within the allegiance of the king" and "subject to his protection" retained English

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[44] *Wilkins*, 112 U.S., *supra* note 37.
[45] Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924).
[46] United States v. Wong Kim Ark, 169 U.S. 649 (1898).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*

nationality helped fortify the Court's stance on the issue.[52] The reference to "birth" meant that children of noncitizens born on English soil also fell under the allegiance of the king and were extended English nationality and citizenship.[53] This exact rule of citizenship from English common law was uniformly enforced upon the English colonies, and even after American independence, this citizenship standard persisted. The Citizenship Clause of the Fourteenth Amendment reaffirmed this fundamental common law principle 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…"[54] English common law proved effective in strengthening the Court's position that children of noncitizens born in the US are considered citizens by the birthright citizenship doctrine.

The Court found that neither the ruling in *Elk v Wilkins*, nor the racial restrictions in naturalization laws were sufficient enough to deny citizenship to Wong Kim Ark. They addressed the holding of *Elk v. Wilkins* concluding that the explicit denial of US citizenship for Native Americans "had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent…"[55] This analysis indicates that the exclusion of one demographic of foreign people from citizenship, which was inferred by political jurisdiction interpretations that are not relevant to the case of Wong Kim Ark, does not mean that all U.S.-born persons of foreign parents are automatically excluded. The Court stated that:

> To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish German, or other European parentage, who have always been considered and treated as citizens of the United States.[56]

This consideration of the citizenship eligibility of the white race is important to acknowledge, as it served to extend protections to nonwhite children of foreign

[52] *Wong Kim Ark*, 169 U.S., *supra* note 46.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

parentage. It demonstrates an interest in protecting white people's traditional and historical right to US citizenship that originated with the Naturalization Act of 1790. The Court deemed it necessary to differentiate Wong Kim Ark as a Chinese person born in the US from Chinese persons who may immigrate and apply for naturalization.[57] Consistent with the two claims to citizenship by birthright or naturalization listed by the Fourteenth Amendment, citizenship by birthright was decidedly legal for Wong Kim Ark regardless of his Chinese ethnicity and noncitizen parents. The territorial location of his birth cemented his status as a US citizen. This was distinct from the legislative power to deny naturalization per Chinese exclusion laws.[58]

The *Wong Kim Ark* case affirmed the birthright citizenship doctrine in the Fourteenth Amendment for children of undocumented immigrants.[59] This interpretation of the Fourteenth Amendment has since stood as a binding precedent. Throughout the twentieth century, the *Wong Kim Ark* ruling has been repeatedly affirmed by the Supreme Court, including *Morrison v. California* in 1934 and *Plyler v. Doe* in 1982.[60] This history of precedent deeply embeds the birthright citizenship doctrine in American jurisprudence, complicating critiques for undocumented children.

II. THE SUPREME COURT & CONSTITUTIONAL INTERPRETATIONS

The judiciary plays an important role in determining whether birthright citizenship may continue to extend to U.S.-born children of undocumented immigrants. Their primary responsibilities are interpreting the language of the Citizenship Clause in the Fourteenth Amendment as it relates to contemporary times and using their power of judicial review to evaluate the constitutionality of the actions made by the other branches of government. To reiterate, the Citizenship Clause reads, "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."[61] The demographic of U.S.-born children of undocumented immigrants has a *prima facie* showing of US citizenship eligibility from a textualist lens. These children fall under the definition of "all persons" regardless of their parents' immigration status, and they

[57] *Wong Kim Ark*, 169 U.S., *supra* note 46.
[58] *Id.*
[59] *Id.*
[60] Morrison v. People of State of California, 291 U.S. 82 (1934).; Plyler v. Doe, 457 U.S. 202 (1982).
[61] U.S. Const. amend. XIV, § 1.

were born in the US. Throughout the 2000s, legal scholars and lawyers have maintained that it is unclear whether the Supreme Court would decide for or against revoking the birthright citizenship doctrine based on this demographic of children. The Wong *Kim Ark* ruling is a strong precedent in the jurisprudence, given its rigorous historical argument and the principle of *stare decisis*. However, the modern Supreme Court has increasingly balanced the doctrine of *stare decisis* with a renewed emphasis on states' rights, particularly in cases that provoke intense public debate. This trend is most strikingly illustrated in *Dobbs v. Jackson Women's Health Organization*, where the Court overturned long-standing precedent to "return the issue of abortion to the people and their elected representatives."[62] This approach concerns birthright citizenship because the Tenth Amendment arguably grants residual authority over citizenship to states.[63] In Section III, I will analyze the *stare decisis* claim made by *Wong Kim Ark* from the perspective of the reasoning used in *Dobbs.* Further, I will discern if the Court's desire to appear apolitical is for institutional legitimacy or if the changes in immigration trends endanger the citizenship status of native born children of undocumented immigrants.

A. Interpretations of "Subject to the Jurisdiction Of"

The most pressing source of controversy over whether U.S.-born children of undocumented immigrants rightfully retain US citizenship lies in the phrase "subject to the jurisdiction thereof"[64] in the Citizenship Clause. This is often the focal point of arguments made by anti-birthright citizenship critics against the lawfulness of citizen children of undocumented immigrants. The only demographic of U.S.-born children the government has explicitly barred from citizenship is children of foreign ambassadors and diplomats per the Immigration and Nationality Act of 1952.[65] This is reasonably so, given their parents work for a foreign country and are obligated to a foreign jurisdiction despite living on US soil. As undocumented immigration is highly politicized and increasingly criminalized, opponents are plagued with the question: to whose jurisdiction are these children subjected? Originalist criticisms assert that "all children of foreign nationals who managed to be born on US soil" were not intended

[62] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
[63] *See* U.S. Const. amend. X.
[64] U.S. Const. amend. XIV, § 1.
[65] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101 (2018)).

to be conferred citizenship, especially when the goal of the Fourteenth Amendment was to grant citizenship to former slaves.[66] Since drafting the Fourteenth Amendment, this jurisdictional phrase has been interpreted to apply to different demographics of U.S.-born individuals.

Two distinct interpretations of "jurisdiction" have since dominated this debate: territorial versus political jurisdiction. In criticism of the *Wong Kim Ark* ruling, opponents of birthright citizenship have argued that:

> interpreting the Citizenship Clause to confer birthright citizenship on the children of those not subject to the full and sovereign (as opposed to territorial) jurisdiction of the United States, not only ignores the text, history, and theory of the Citizenship Clause but permits the Court to intrude upon a plenary power assigned to Congress itself.[67]

They maintain pragmatic arguments that U.S.-born children of the undocumented remain allegiant to their parents' country of origin.[68] This pragmatism implies that the criminalized status of the parents in this situation affects these children's cultural attitudes. As the US continues to criminalize undocumented immigration, undocumented immigrants, along with their families, are inclined to feel alienated. These children may retreat from the national social culture of America and become a cultural group more aligned with their parents' culture. Anti-birthright citizenship critics argue that this retraction from American culture may feel alienating, making these children feel more allegiant to their ancestral country.[69] This resulting allegiance to the culture of their parents' nationality serves as the foundation for the argument that children should be excluded from rightfully retaining US citizenship, as their allegiance complicates their eligibility for citizenship by birthright.[70] Critics emphasize interpretations of jurisdiction to follow modern political understandings of "allegiance" as opposed to its territorial counterpart.

To support their arguments, critics often look to the Court's interpretation of jurisdiction as political in the rescinded decision in *Elk v. Wilkins*. As discussed

[66] John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 University of Richmond Law Review 955 (2008).
[67] *Id.*
[68] Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Georgetown Law Journal 405 (2020).
[69] *Id.*
[70] *Id.*

previously, *Elk v. Wilkins* held that Native Americans, as members of a Native American tribe at birth, were "completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[71] Their membership in a Native American tribe was inherited from their parents as members of that tribe during their birth, which the Court interpreted as being born under the jurisdiction of their tribe.[72] This notion of foreign allegiance derived from *Elk* is what anti-birthright citizenship critics today assert is the correct interpretation of the jurisdiction clause. Specifically in the debate of U.S.-born children with foreign national parents, they argue that immediate, unquestionable allegiance to the United States at birth should be prioritized over the geographical location of the birth.[73] However, the political interpretation of jurisdiction set forth by *Elk v. Wilkins* has been overturned, voiding this argument. The reason why critics continue to fall back on *Elk* is because they believe that the territorial interpretation argument in *Wong Kim Ark* unintentionally opened up pathways for children of foreign nationals, who are not ambassadors, diplomats, or enemies of the state, to retain citizenship by being born within US borders.[74] These exceptions for birthright citizenship do not include "children of parents residing only temporarily in the United States on a work or student visa," "children of parents who overstayed their temporary visa," and "children of parents who never were in the United States legally."[75] In a post 9/11 society, anti-birthright citizenship proponents argue that this is a national security risk.

Assuming citizen children of the undocumented continue to possess legal status and residency in the US, it would be unnatural to have children abiding by the legal obligations and political responsibilities of their parents' home country. Arguments are made that these children may feel cynical towards the US government for the hardship imposed on their parents and may feel more positively towards the country of their ancestry. However, there is insufficient evidence that children are more legally obligated to their ancestral homeland than the country where they were born, raised, and permanently reside. As it stands, *United States v. Wong Kim Ark* primarily protects legal citizenship status. The territorial interpretation of the jurisdiction phrase established in the Court's reasoning for that judgment has since been affirmed in preceding Supreme Court decisions.

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[71] *Wilkins*, 112 U.S., *supra* note 37.
[72] *Id.*
[73] Eastman, *supra* note 66.
[74] *Id.*
[75] *Id.*

The 1982 Supreme Court case *Plyler v. Doe* addressed the issue of whether Texas educational laws violated the Fourteenth Amendment since it mandated that (1) state funding for education cannot be allocated for the education of undocumented elementary children and (2) local school districts are allowed to deny enrollment to these same children.[76] The Equal Protection Clause of the Fourteenth Amendment asserts that "No State shall deny to any person within its jurisdiction the equal protection of the laws."[77] The Court issued a textual analysis of the phrase "any person within its jurisdiction" to determine whether this applies to the targeted demographic of undocumented immigrants. They reasoned that "an alien is a 'person' in any ordinary sense of the term."[78] The Court then applied a territorial interpretation of jurisdiction, arguing that the "predominantly geographic sense in which the term 'jurisdiction' was used" leads them to interpret the term consistently with "the historical emphasis on geographic territoriality."[79] Consistent with this logic, the Court determined that the Equal Protection Clause does not solely protect citizens, but extends to *all* persons who reside within US borders. Such textualism helped lead to the Court's overall holding that the Texas statute was unconstitutional. The significance of this specific section of the *Plyler* legal analysis is that it builds upon the *Wong Kim Ark* jurisprudence, extending Constitutional protections in the Fourteenth Amendment to both documented and undocumented immigrants.

B. Deviating from Precedent

Stare decisis asserts that courts must adhere to precedent in their judgments of cases with similar or related issues, ensuring that courts decide in alignment with prior court rulings. This doctrine protects birthright citizenship per the ruling in *Wong Kim Ark*, maintaining binding authority over all lower courts and branches of government. Since 1898, various court cases have upheld the *Wong Kim Ark* ruling, establishing a 100-year historical practice of extending birthright citizenship to children born in the US to noncitizen parents. The doctrine of *stare decisis* plays a significant role in protecting past decisions, and precedent is also subject to a *stare decisis* analysis to ensure whether it should maintain legal authority. For instance, when the Court

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[76] Plyler v. Doe, 457 U.S. 202 (1982).
[77] U.S. Const. amend. XIV, § 1.
[78] *Doe,* 457 U.S., *supra* note 76.
[79] *Id*.

deliberated on the decision of *Obergefell v. Hodges*,[80] which legalized same-sex marriage in the US, they decided that the Court should not strictly follow precedent or "specific historical practices" as written in the majority opinion.[81] This line of reasoning that the Court implemented in *Obergefell*, and later in *Dobbs v. Jackson Women's Health Organization*, essentially deviated from judicial precedent. With *Dobbs*, the Court was confronted with the issue of whether a Mississippi state law could constitutionally outlaw abortions after the 15th week of pregnancy; multiple states advocated for the Court to "allow the states to regulate or prohibit pre-viability abortions," which would mean overturning of *Roe v. Wade* and *Casey v. Planned Parenthood*.[82] They ruled based on the technicality that the right to privacy was not explicitly written in the language of the Constitution, rendering *Roe v. Wade* as void.[83] The Court's analysis applied a five-point *stare decisis* analysis to support this deviation from precedent. Justice Alito identified the factors to consider when determining whether precedent should be overturned as (1) the nature of the Court's error, (2) the quality of the Court's reasoning, (3) the "workability" of these rules, (4) its effect on other areas of law, and (5) the concrete reliance interests.[84] While *Wong Kim Ark* stands as precedent, it is still subject to the *stare decisis* analytical framework.

The question of citizenship eligibility that the Court faced in *Wong Kim Ark* considered the Chinese nationality of Wong Kim Ark's parents, who were "domiciled residents of the United States and had established and enjoyed a permanent domicile and residence" in San Francisco, California, at the time of his birth.[85] In adherence to the first *stare decisis* factor, the Court did not egregiously err in disregarding the parents' citizenship statuses when deciding that Wong Kim Ark lawfully retains US citizenship by his birthright. Their decision was grounded in the interpretation of the language in the Fourteenth Amendment, which cements the *jus soli* nature of US citizenship acquisition. Secondly, the quality of the Court's reasoning to support this distinction was sufficiently supported by both constitutional text and history. Justice Horace Gray provided a lengthy common law justification to mandate territorial jurisdiction interpretation as the jurisprudence for citizenship law.[86] He supplemented such common law principles with textual analysis of the language of the Civil Rights

[80] Obergefell v. Hodges, 576 U.S. 644 (2015).
[81] *See* U.S. Const. amend. XIV, § 1.
[82] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
[83] *Id.*
[84] *Id.*
[85] *Wong Kim Ark*, 169 U.S., *supra* note 46.
[86] *Id.*

Act of 1866 and the Fourteenth Amendment. These justifications collectively provide the Court's effective reasoning. Thirdly, the "workability" test focuses on whether a given rule "can be understood and applied in a consistent and predictable manner."[87] *Wong Kim Ark* is sufficiently understood in modern-day contexts, meaning the decision made performs well in this test. The question of parental nationality concerning birthright citizenship eligibility has evolved since 1898 and is now being applied to the case of children of the undocumented. The only distinguishing factor between children with noncitizen parents is that Wong Kim Ark's parents were legally present in the US, and undocumented parents are not authorized to reside here.

However, the criminal nature of their parents' entrance into the US is irrelevant to U.S.-born children retaining citizenship. The *Wong Kim Ark* Court ruled that considering parents' foreign nationality at the time of their child's birth in the US was unreasonable. This standard smoothly transitions to the case of citizen children with undocumented parents. The fourth *stare decisis* factor is the potential detrimental effect on other areas of law. The legal reach of the *Wong Kim Ark* decision does not go beyond the boundaries of immigration law, and therefore, does not infiltrate other areas of law. This factor is also unsatisfied, strengthening the *Wong Kim Ark* jurisprudence. Lastly, the "concrete reliance interests" factor refers to whether the specific interests in protecting a rule are traditional and tangible enough to necessitate significant planning.[88] This novel *stare decisis* requirement used in *Dobbs* functioned to categorize abortion as an "unplanned activity," which meant that it fails to prove its concreteness and deviating from precedent would not interfere with any reliance interests.[89] Overturning *Wong Kim Ark* would upset various concrete reliance interests because it is grounded in the historical practice of granting citizenship to all persons born within US borders since the late 1800s. Such a deviation would grossly interfere with the family unit in American society, especially immigrant families. There is also concern over the integrity of the US immigration legal system. The courts are ill-equipped to address how such a deviation would alter the foundation and framework of citizenship law. Tangible interests, societal, legal, and otherwise, also protect the precedent of *Wong Kim Ark*.

This *stare decisis* analysis of *Wong Kim Ark* demonstrates that this precedent should continue to be followed by the courts. The insufficient evidence and lack of a

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[87] Roe v. Wade, 410 U.S. 113 (1973).
[88] Michael Gentithes, *Concrete Reliance on Stare Decisis in a Post-Dobbs World*, 14 ConLawNOW 1 (2022).
[89] *Id*.

compelling reason to deviate from this commonly challenged ruling amount to the importance of abiding by the *stare decisis* doctrine in the case of U.S.-born children of the undocumented. The Supreme Court would adhere to the precedent set in *United States v. Wong Kim Ark* if faced with congressional or executive attempts to revoke birthright citizenship.

III. THE FEASIBILITY OF DENATURALIZATION AND REMOVAL FROM THE US

Immigrant families across the US are living in fear in response to hardening immigration laws and zero-tolerance policies, with mixed-status families the most at risk from an attack on birthright citizenship. About 6.3 million US households hold such families, roughly 22 million people.[90] The extent to which news media outlets report on anti-birthright citizenship politics and agenda has produced widespread fear-mongering, including concerns over losing one's US citizenship or the likelihood of deporting an entire mixed-status family. While the processes of denaturalization and deportation happen within the courts and with their judicial discretion, it is the legislative branch specifically that sets the rules and regulations by which denaturalization and deportation can occur in the first place.[91] This section delineates what Congress has set in stone for navigating denaturalization and deportation consequences for immigrants guilty of committing a criminal offense. However, current US laws do not explicitly address how birthright citizens could be subject to neither denaturalization nor deportation. Thus, any governmental efforts to pursue either of these proceedings for American-citizen children with undocumented parents require a major overhaul of immigration legislation, upending this entire field of law.

A. Denaturalization

Nearly 4.4 million U.S.-born minor children live with at least one undocumented parent, which constitutes 84 percent of all minor children living with undocumented parents.[92] The fear of mass denaturalization is vast. Several laws form the groundwork for denaturalization proceedings in the US, though the Immigration and Nationality Act of 1952 is the most prominent. The process of denaturalization involves the discovery that a *naturalized* citizen procured their citizenship illegally or fraudulently,

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[90] Passel, *supra* note 34.
[91] U.S. Const. Art. I, § 8.
[92] Passel, *supra* note 34.

and therefore, is stripped of their legal status in the US.[93] By definition, the scope of denaturalization is limited to US citizens who procured their citizenship through naturalization as opposed to physical birth location. This independently demonstrates that the US immigration system and the scope of immigration law, as determined by congressional actions, do not address a situation in which U.S.-born children of the undocumented are stripped of their citizenship.

Aside from the limitations of who can be denaturalized, there are currently four specific grounds written in the law that explicitly describe the situations in which someone's citizenship status may be revoked. First is that their naturalization was procured illegally because they were not eligible to naturalize in the first place.[94] Second is that a person deliberately withheld information that would have impacted their eligibility for naturalization.[95] Third is that a "person becomes a member of, or affiliated with the Communist party, other totalitarian party, or terrorist organization within five years of his or her naturalization."[96] Lastly, the fourth is that a naturalized person had an "other than honorable" discharge from the US military before their minimum five years of honorable service.[97] None of these grounds for denaturalization listed within the Immigration and Nationality Act of 1952 are relevant to the situation of birthright citizen children of the undocumented. The only reference to children's citizenship being stripped due to the citizenship status of their parents is if their status was claimed derivatively and their parent had been decisively denaturalized.[98] This law does not include U.S.-born children whose parents are unauthorized in the US.

Congress would have to expand categories for denaturalization under the Immigration and Nationality Act to apply this legal proceeding. However, this would require amending the Citizenship Clause in the Constitution, which grants birthright citizenship, and the US immigration system that actively complies with the Fourteenth Amendment. Congress's statutory authority over regulating denaturalization proceedings may be reviewed by the Supreme Court, which is consistent with the division of responsibilities regarding citizenship in the 1866 Civil Rights Act.[99] With deference to the naturalization powers of Congress, the Supreme Court's role would

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[93] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101 (2018)).
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] 8 U.S.C. § 1451.
[99] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, §§ 27-30 (1866).

be narrowed to ensure the denaturalization procedure for U.S.-born children of undocumented immigrants does not violate constitutional protections.

Supreme Court rulings have created a pipeline for stripping away citizenship. The primary example is the Supreme Court's 1923 decision in *United States v. Bhagat Singh Thind*.[100] Thind was an Indian native living in the US. At this time, "free white persons" were still the only groups of people eligible for naturalization, so he applied for citizenship on the grounds that he ethnically constituted a "free white person."[101] However, the Court decided that even though Indians and South Asians in general may scientifically be "Caucasian," they do not constitute "the common white man's understanding" of that term; therefore, Thind was ineligible to naturalize.[102] This ruling was eventually repealed with the passing of the Immigration and Nationality Act of 1952, which prohibited racial restrictions on immigration into the US.[103]

While the issue of citizenship here is about a naturalized citizen, not a birthright citizen, the history must be considered because following this Supreme Court ruling, an estimated fifty Indian Americans were denaturalized as the Court deemed South Asians to be "not white" and revoked their American citizenship.[104] The *Bhagat Singh Thind* holding opened up the debate that naturalized citizens who were South Asian obtained their US citizenship illegitimately. The aftermath of *United States v. Bhagat Singh Thind* is alarming because it demonstrates that a Supreme Court ruling denying citizenship to a targeted demographic could open avenues for denaturalizing U.S.-born children of the undocumented by the other branches of the federal government. As I outlined in the second section, however, this doctrine is prevalent throughout our nation's history, making it unlikely this issue will be elevated further.

B. Deportation

Deportation is defined as forcibly removing noncitizens from US soil for any reason or instance in which they are found guilty of violating American immigration laws or committing other criminal offenses.[105] This makes undocumented immigrants at risk of deportation for criminal activity or, if applicable, the unlawful nature by

[100] United States v. Bhagat Singh Thind, 261 U.S. 204 (1923).
[101] *Id.*
[102] *Id.*
[103] 8 U.S.C. § 1151.
[104] Joy Kanwar, *Stories from the Negative Spaces: United States v. Thind and the Narrative of (Non)whiteness*, 74 Mercer Law Review 801 (2023).
[105] 8 U.S.C. § 1227.

which they entered the US. Most undocumented immigrants legally came to the US through visas, but remained here past their expiration date. Undocumented immigrants with an expired visa are also at risk of deportation. Regardless of an immigrant's citizenship status, their children born on US soil are not at risk under the birthright citizenship doctrine. Similar to the case of denaturalization queries, current US immigration laws are not equipped to deal with the magnitude of such a crisis in which birthright citizenship is no longer the standard for automatic citizenship in this country. It is unlikely and impractical that mass deportations of people who have historically and currently been considered legal, full-fledged US citizens would occur.

Assuming that these citizen children were successfully denaturalized, the next legal proceeding that could occur is deportation. If we look at the language of the law that explicates which and when immigrants are subject to removal from the US, there are no specific references to the children or spouses of deportable immigrants also being eligible for deportation due to their familial relation to an undocumented immigrant.[106] Denaturalized citizens are subject to deportation if they are found guilty via material evidence that they procured their citizenship illegally during their application and naturalization processes or are found to be involved in subversive activity that would have barred them from naturalizing in the first place.[107] Neither grounds for deportation for denaturalized citizens would apply to this group of children because they never naturalized. At the time of their birth, when they acquired their citizenship, the procurement was lawful. They also could not have been involved in subversive activity before obtaining citizenship, considering they had not been born. Even though their parents' unlawful entry into the country is illegal conduct, these children could not be held accountable for the conduct of their parents. Therefore, U.S.-born children of undocumented immigrants do not fit under either category in which deportation would be relevant.

Despite various political agendas to combat illegal immigration by retracting the birthright citizenship doctrine, there is no buffer to the numerous, lengthy, and expensive changes to definitions of citizenship, the immigration law field itself, or how the USICS or ICE would modify their operations. Currently, children of undocumented immigrants span multiple generations in the US. Would all first-generation American birthright citizens be at risk of losing their legal status due to their parents' lack of documentation? Can the law allow for whole ancestral lines to be

[106] 8 U.S.C. § 1227.

[107] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 et seq.).

denaturalized and deported from the US, especially when most of the family unit has no ties whatsoever to their ancestral country? Would children who have one US citizen parent and one undocumented parent be subject to citizenship revocation as well? Would these denaturalized children be subject to the same rules, regulations, rights, and protections as stateless individuals and refugees residing in the US? These are only a few issues that Congress must address if birthright citizenship were revoked, and the rest of the country would likely not accept such a ruling.

CONCLUSION

This paper discusses the likelihood of ending birthright citizenship and seeks to approach the issue practically. I investigated the legal processes we currently have in place–or lack thereof–to deal with the revocation of birthright citizenship regarding US birthright citizens whose parents are noncitizens and undocumented. A long history of judicial precedent and tradition currently outweighs anti-birthright citizenship arguments. Such a revocation would require judicial review and an amendment to the Fourteenth Amendment, massive obstacles to overcome. Even if a revocation of the longstanding doctrine were successful, the US immigration system would be faced with expanding citizenship laws to exclude U.S.-born children of undocumented immigrants and determining how denaturalization and deportation laws extend to them. This paper also found that neither denaturalization nor deportation is a likely consequence that would endanger U.S.-born children of the undocumented or render them targets of immigration services and ICE. This would prove to be a complicated, lengthy battle of redefining the boundaries of immigration and citizenship legal fields, as our current immigration system is not fit to direct.

Could the Supreme Court eradicate the birthright citizenship doctrine? Recent changes in the Supreme Court and recurring patterns of the government making decisions that go against precedent are an alarming reality. However, the *stare decisis* analysis definitively concludes that the Court should not deviate from the precedent set in *United States v. Wong Kim Ark*. Despite new arguments highlighting the potential revocation of birthright citizenship, it is clear that all children of undocumented immigrants born in the US rightfully and lawfully retain US citizenship via the Fourteenth Amendment's Citizenship Clause. Even with the nation's increasingly criminalized perceptions of immigration, the field of immigration law, as a whole, is more administrative and involves more civil proceedings than criminal. Under the birthright citizenship doctrine, the legal status of these citizen children cannot be uprooted or jeopardized.