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In Defense of Birthright Citizenship

Shannon Auvil

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.¹

I. Introduction

What to do with undocumented immigrants already in the U.S. has become a hot topic issue of the 2016 presidential race. GOP candidate Donald Trump endorses deportation of all undocumented immigrants and an end to birthright citizenship.² Additionally, former GOP candidate, Senator Rand Paul, reiterates that the U.S. Supreme Court has never made a decision as to the citizenship of persons born to undocumented immigrant parents in the U.S. This paper will address and explore the ways in which this new, proposed immigration policy of repealing birthright citizenship undermines the family rights of immigrants. Further, this paper seeks to refute Trump and Paul's incorrect and unrealistic proposals regarding birthright citizenship and argues that birthright citizenship is not only a hallmark of the U.S. Constitution, but also a major component of family structure in the U.S. today.

II. Background of the Argument Against Birthright Citizenship

A. Alien Rights vs. Citizen Rights

Certainly, an immigrant takes on a peculiar role in the U.S. legal system. While undocumented immigrants have no constitutional right to admission into the U.S., those seeking entry into the U.S. or requesting a visa outside of the U.S. likewise lack traditional due process rights.⁴ Indeed, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁵ Typically, the right to due process of an undocumented immigrant detained near the U.S. border requires only notice and a right to be heard.⁶ Finally, detention of immigrants in removal proceedings, including children, is constitutional.⁷ In fact, detention is a lawful incident to exclusion from the U.S., and the length of detention does not change the constitutional analysis for aliens seeking admission.⁸

The U.S. federal government has authority over immigration enforcement, and thus enjoys plenary power over American borders. Because of this federal authority, states are not permitted to interfere with federal government determinations in the context of immigration, and, if a state law interferes with immigration enforcement, the law is preempted by the authority of the federal

¹ U.S. CONST. amend. XIV, § 1.

² Asma Khalid, *What's In Donald Trump's Immigration Plan And How It Could Affect The GOP*, NPR (Aug. 17, 2015), <http://www.npr.org/sections/itsallpolitics/2015/08/17/432605103/whats-in-donald-trumps-immigration-plan>.

⁴ U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 545 (1950).

⁵ *Id.* at 544.

⁶ *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903).

⁷ *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

⁸ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217 (1953).

government.¹⁰ While this broad sweeping power of the federal government is not expressly enumerated in the Constitution, it is found to be inherent in the sovereign powers of an independent nation.¹¹ Accordingly, the Supreme Court has articulated that independent nations are responsible for deciding who can enter the nation and who cannot.¹² Thus, in the same vein, and per the Constitution, the U.S. federal government has the power to “declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, [and] secure republican governments to the states.”¹³

B. Wong Kim Ark & Birthright Citizenship

Citizenship did not fall onto the Supreme Court’s plate in a major way until the notorious *Dred Scott* decision. Chief Justice Taney, relying on an originalist interpretation, wrote that the Constitution denied citizenship to American-born descendants of slaves.¹⁴ While dissenters in the case urged that the notion of citizenship was meant to be in the arena of state law – the Constitution remained silent on the issue in 1856.¹⁵ Although state constitutions and federal laws mentioned citizenship and its accompanying rights, there were few definitions of this privilege.¹⁶ Moreover, even prior to the enactment of the Fourteenth Amendment, most courts of the time found that native-born, free individuals were deemed to be citizens. Furthermore, before the divisions of the Civil War, even southern Judges found free Blacks to hold the same status as citizens.

However, passage of the Fourteenth Amendment marked an important shift in the scope of American citizenship.¹⁹ As provided by the Citizenship Clause of the Fourteenth Amendment, “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.”²⁰ The text leaves open a significant question: who is born in the United States and not subject to its jurisdiction? After clarifying the jurisdictional question so as to exclude Native Americans, at the close of the nineteenth century,²¹ amidst growing nativist sentiment and the passage of anti-Chinese immigration legislation, the Supreme Court held that children born in the U.S. to non-citizen parents were in fact American citizens entitled to the same rights and protections of citizens.²² In denying the Government’s argument that citizenship should be determined by the allegiance of a person’s parents, the Court remarked that

[t]o hold that the [F]ourteenth [A]mendment of the [C]onstitution excludes from citizenship the children born in the United States of citizens or subjects of other

¹⁰ *Id.*

¹¹ *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

¹² *Id.*

¹³ *Id.* at 604.

¹⁴ *Scott v. Sandford*, 60 U.S. 393, 430 (1857).

¹⁵ *Id.* at 572.

¹⁶ Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 62 (1997).

¹⁹ U.S. CONST. amend. XIV, § 1.

²⁰ *Id.*

²¹ *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding Indians were not subject to U.S. jurisdiction if born in a tribe, and despite leaving a tribe later in life, could not be citizens); *see also Wong Kim Ark*, 169 U.S. 649, 658 (noting persons born to enemies during time of war and persons born to parents in official diplomat capacity were not citizens because they were not subject to U.S. jurisdiction).

²² *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898).

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.²³

By extending the Government's reasoning to descendants of European immigrants, the Court revealed racist motivations behind the anti-Chinese legislation. Accordingly then, the Court rejected the government's argument in *Wong Kim Ark* which reasoned that, European immigrants, similar to the Chinese targeted in California, should be rejected as non-citizens. Surely contrary to the goal of the proposed legislation, any such result would have created harmful and severe political implications. Therefore, after the Court's holding in *Wong Kim Ark*, it follows that , people born in the U.S. regardless of parentage, were deemed citizens.²⁴ Even today, *Wong Kim Ark* remains good law.

It is important to note that birthright citizenship has several limitations. One such limitation is implicated when territories rather states are involved.²⁵ Specifically, the Citizenship Clause of the Fourteenth Amendment maintains a territorial limitation that excludes individuals born in U.S. territories.²⁶ In other words, the Fourteenth Amendment's text which includes the phrase "United States" means only the 50 states, and not U.S. territories like Puerto Rico or Guam, for example.²⁷ Thus, while individuals born in U.S. territories, are subject to the U.S. jurisdiction, they do not attain the same rights as citizens "born" "in the United States" within the meaning of the Fourteenth Amendment.²⁸

Today, modern debates challenge interpretations of the provision "subject to the jurisdiction thereof," as to whether the text specifically applies to persons born to parents who are present in the U.S., but remain in the country illegally. Some argue that the Supreme Court applied its reasoning under *Wong Kim Ark* to children of legally and illegally present immigrants, although this was seemingly only dicta.²⁹ Consequently then, no decision to date has directly addressed this issue. Further, despite *Wong Kim Ark*'s broad holding, birthright citizenship opponents assert a more narrow interpretation of the Fourteenth Amendment's text, by urging instead that it applies only to children of legal immigrants, rather than undocumented and documented immigrants alike.³⁰

C. In Support of the Maintenance of Birthright Citizenship

Donald Trump and many other GOP actors utilize inflammatory remarks about repealing birthright citizenship in order to maintain a demand for immigration reform at bay. For instance, officials have even withheld birth certificates from babies born to undocumented Latino parents in Texas. .³² While politicians may use rhetoric about repealing birthright citizenship as a strategy to gain voter support, such a result would negatively effect both non-citizen immigrants and

²³ *Id.*

²⁴ *Id.*

²⁵ *Rabang v. I.N.S.*, 35 F.3d 1449, 1452-53 (9th Cir. 1994).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Plyler v. Doe*, 457 U.S. 202, 211 (1982) (observing "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between" legal and illegal aliens).

³⁰ *Epps*, *supra* note 3.

³² Julián Aguilar, *Some Birth Certificates Issued, But Battle Continues*, TEXAS TRIBUNE (Nov. 25, 2015), <http://www.texastribune.org/2015/11/25/birth-certificate-suit-moves-forward-after-some-pa/>.

American citizens in many ways. First, repealing birthright citizenship would create a disabled class of people without rights as a result of their non-American lineage. These implications would place a severe and unfair burden on recently immigrated families and their American citizen relatives. Second, it would exacerbate the split of citizens and non-citizens within families. Third, it is repugnant to the ideal of “the American dream.”

1. *Unfair Burden on New Immigrants*

In Germany and most European countries, citizenship is passed from parents to a child by *jus sanguinis*, or by right of the blood.³³ This applied regardless of where the birth took place. In other words, this means that, if two parents are German citizens, their child would also be a German citizen, despite the country of the child’s birth. To the contrary, the child would not enjoy birthright citizenship, or *jus soli* (by right of the soil), if the child was born in Germany to parents without German citizenship. Instead, the child would be required to naturalize later in life if he or she sought German citizenship.³⁴ Unfortunately, Germany’s citizenship laws have resulted in “a vast underclass of second- and third-generation Turkish migrants.”³⁵ In the 1960s, Germany invited hundreds of thousands of immigrants to remedy its labor shortages.³⁶ While this was intended to be a temporary migration, thousands of Turkish nationals remained in Germany in the following decades and started families.³⁷ Now these non-citizens are more likely to face racial and religious discrimination, tend to go to worse schools, and earn lower median incomes than German citizens.³⁸

Similarly, the Dominican Republic’s experience with repealing birthright citizenship likewise reflects damaging outcomes. In 2013, “the Constitutional Court of the Dominican Republic ruled that children born in the Dominican Republic to undocumented parents were children born in transit.”³⁹ The decision was retroactive to 1929 – more than 200,000 people of Haitian descent living in Dominican Republic were rendered stateless.⁴⁰ “They and their parents had lived and worked in the Dominican Republic for generations; they had registered as Dominicans; they speak Spanish, not Creole; many of them had never been to Haiti.”⁴¹ Without the rights and protections of citizenship, the stateless population of Dominican Republic is vulnerable to governmental abuse and deportation to another, usually unfamiliar country.⁴² Subsequently, as a vulnerable population, they are less likely to move upward through society and more likely to avoid seeking police or medical assistance when they are in need.

In the U.S., such a system would create a similarly large population of legally disabled persons without citizenship. Because the U.S. immigrant population is so massive and continues

³³ Jon Feere, *Birthright Citizenship in the United States: A Global Comparison* at 5, Center for Immigration Studies, <http://www.cis.org/sites/cis.org/files/birthright-final.pdf> (2010).

³⁴ *Id.*

³⁵ Charlotte Alfred et al., *These Countries Show Why Losing Birthright Citizenship Could Be A Disaster*, HUFFINGTON POST (Aug. 28, 2015), http://www.huffingtonpost.com/entry/birthright-citizenship-other-countries_us_55df2a82e4b08dc0948699f3.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Maryellen Fullerton, *Comparative Perspectives on Statelessness and Persecution*, 63 U. KAN. L. REV. 863, 872 (2015).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

to grow, repealing birthright citizenship would in effect create an even larger undocumented immigrant population than we currently have. In the cases of new immigrants, or even first, second, or third-generation immigrants, a class system determined by parental lineage is likely to emerge. If born to immigrant parents, a child would lack citizenship until the age of majority, at which point he or she would only then be permitted to gain status through the naturalization process (as in the French model), which is an expensive, difficult, and demanding burden.

First, applicants must confirm they are eligible for naturalization. To be eligible, applicants must be: (1) at least 18 years old, (2) a lawful permanent resident for at least five years, (3) fluent in English, and (4) demonstrate that they are of good moral character.⁴³ Next, the process requires payment of an application fee of \$680,⁴⁴ completion of an interview, and passage of English (writing, reading, and speaking) and U.S. government and civics exams.⁴⁵ If an immigrant chooses to naturalize, he would be able to vote, bring family members into the U.S., apply for federal jobs, and even become an elected official.⁴⁶ However, because the naturalization process is a substantial financial and time-consuming burden for immigrants, many do not seek to pursue it. Further, those living in the country unlawfully are ineligible to naturalize, including children who might have been brought to the U.S. at age 2, and were functionally Americans their entire lives. Children whose parents happen to be descendants of American Revolution soldiers or Irish, Spanish, French, or German immigrants from the turn of the twentieth century would be on markedly more powerful political and social footing.

Furthermore, if the Citizenship Clause of the Fourteenth Amendment was abrogated to deny birthright citizenship, the country would consequently have “native-born non-citizens,” a hereditary subordinate caste of persons, who are in turn, subjected to American law but do not belong to American society.”⁴⁷ If they do not “belong” to American society, to what society do they belong? While some may argue this population would have no society with which they belong, becoming “stateless” is perhaps the worst possible outcome of repealing the Citizenship Clause.⁴⁸

Citizenship implicates a multitude of civil rights – voting, employment, education, housing, travel, and health care. Creating a population of second-class individuals without the benefits of citizenship would consequently inhibit productive contributions to our society. The creation of a subclass of people without the benefit of citizenship – perhaps only because their ancestors came 100 years too late – is an unfair and repulsive result. The burden of no citizenship is too great to revoke birthright citizenship, and amending the Fourteenth Amendment in such a drastic and punitive measure. In addition, requiring proof of parental lineage from every child who seeks citizenship would also create an administrative nightmare. Such a requirement would directly affect Americans most opposed to governmental overreach – do Americans really desire

⁴³ *Naturalization Information*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/citizenship/teachers/naturalization-information#eligibility_reqmts (last visited Feb. 1, 2016).

⁴⁴ Department of Homeland Security, U.S. Citizenship and Immigration Services Form G-1055 (2010), *available at* http://www.cpvisa.com/Fees_2010.pdf.

⁴⁵ *Naturalization Information*, *supra* note 32.

⁴⁶ *A Guide to Naturalization: What Are the Benefits and Responsibility of Citizenship?*, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/sites/default/files/files/article/chapter2.pdf> (last visited Feb. 1, 2016).

⁴⁷ Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 AM. U. L. REV. 331, 389 (2010).

⁴⁸ *See generally* Sam Fulwood III & Marshall Fitz, *Less than Citizens: Abolishing Birthright Citizenship Would Create a Permanent Underclass in Our Nation*, Center for American Progress (May 11, 2011, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2011/05/11/9690/less-than-citizens/> (remarking that without birthright citizenship, perhaps hundreds of thousands of stateless babies would be born per year in the U.S.).

the burden of registering themselves and their ancestors with the government? Tangentially, considering the American history of slavery and the Supreme Court's refusal to recognize citizenship of slaves,⁴⁹ how would the descendants of slaves prove their citizenship? Not only would new immigrants be severely burdened under a system without birthright citizenship, but also long-term American families would face the bureaucratic quicksand of proving their citizenship.

2. *Splits within Families*

The second error to repealing birthright citizenship is the inevitable break among families between citizens and non-citizens. One of the most important goals of immigration policy of the U.S. is family unity. What is accomplished by making some family members citizens and others not?

Consider the following example: Anna immigrated to the U.S. from Panama in 2010. She came with two children, Ben and Christina, who were born in Panama, and are thus not American citizens by birth. Anna gave birth to David in Arkansas in 2013, and later Elizabeth in 2018, after President Trump (potentially) convinces Congress to repeal birthright citizenship in 2017. David, presumably, would be a citizen via birthright. Elizabeth, however, would not – and her future children may not be either. Elizabeth would lack the benefits of citizenship, whereas David would not, by virtue of his birth occurring before birthright citizenship was (potentially) repealed. Unlike David, Elizabeth would be at risk to a multitude of hardships, such as, for example: facing deportation consequences for criminal convictions; difficulty obtaining a job or driver's license; and she could face negative treatment from her peers or teachers.⁵⁰ David, as a citizen, could never be deported – although under such a system, all of his family members could.

Accordingly, repealing birthright citizenship and revoking David's citizenship, would have disastrous effects on immigrant families long-term. Although the family would be deportable together, it would reduce the ease of David and Elizabeth's assimilation into society by maintaining them as legal outsiders in the place they have always lived, and would make it much more difficult for David and Elizabeth to eventually start their own American families by withholding citizenship benefits from them even as they age and grow to become productive adults in society. Tragically, David and Elizabeth would remain part of a secondary class of non-citizens despite their birth, residency, and upbringing in the U.S.

3. *The American Dream*

The third error opponents of birthright citizenship make is underestimating the importance and influence of the "American dream" on immigration policy and the U.S.'s role in the global community. Historically, immigrants flocked to the U.S. in pursuit of the American dream: home ownership, a college education, and upward mobility. Non-citizens are more likely than native citizens or naturalized citizens to own a home and to have paid off a home mortgage "full and

⁴⁹ *Scott v. Sandford*, 60 U.S. 393, 430 (1857).

⁵⁰ Caroline May, *Obama Admin. Releases Guide for Educators to Meet Illegal Immigrant Needs*, BREITBART NEWS (Oct. 21, 2015), <http://www.breitbart.com/big-government/2015/10/21/obama-admin-releases-guide-educators-meet-illegal-immigrant-needs/>.

clear.”⁵¹ Two-thirds of citizens own homes, whereas two-thirds of non-citizens rent.⁵² Undocumented immigrants, or those who would be born here without citizenship if birthright citizenship were abrogated, would face difficulty in obtaining mortgages.⁵³ Additionally, without a Social Security number, undocumented immigrants struggle to find lenders.⁵⁴ As the housing market has slowly recovered since the recession, only in recent years have lenders started to accept undocumented immigrants as borrowers.⁵⁵ Some banks accept Individual Taxpayer Identification Numbers (ITIN) in lieu of SSNs.⁵⁶ The IRS issues ITINs to foreign nationals regardless of immigration status.⁵⁷ Thus, without birthright citizenship, and without American citizenship derived from immigrant parents in the U.S., home ownership is less accessible.

Second, college education and upward mobility are closely intertwined. With a college degree, incomes grow and upward mobility is more attainable.⁵⁸ The DREAM Act, first introduced in the Senate in 2001, proposed a process by which certain undocumented young people can earn American citizenship. Although the DREAM Act has not yet passed in Congress, several states such as California have enacted state laws which are similar to the Act.⁵⁹ Most other states do not offer in-state college tuition or state scholarships to undocumented students, even if they were raised in the U.S. for nearly all their lives.⁶⁰ Undocumented immigrants cannot apply for student loans and financial aid either, because these are public benefits unavailable to non-citizens.⁶¹

In 2012, President Obama announced the Deferred Action for Childhood Arrivals (DACA) Program for DREAMers, or students who came into the U.S. as minors and who are eligible to earn citizenship by serving in the military or going to college.⁶² DACA is not the DREAM Act but is simply a “stay of deportation” for a period of two years, revocable by the government at any time.⁶³ Accordingly, DACA allows DREAMers stay in the U.S. free from the fear of deportation for a brief period. While DACA does not offer a path to citizenship and the associated benefits that the DREAM Act seeks to provide, DACA does serve to protect DREAMers from losing their dreams altogether.⁶⁴

Although promising, the application of DACA or the DREAM Act – if either are passed in the future – to American-born descendants of immigrants who would not be citizens without birthright citizenship, is not an acceptable or smooth fix for the loss of rights at stake. Although passage and implementation of their principles may afford some benefits, it would further a virtual caste system created by the repeal of birthright citizenship and make a subset of American-born

⁵¹ Edward N. Trevelyan, Yesenia D. Acosta, & Patricia De La Cruz, *Homeownership Among the Foreign-Born Population: 2011*, American Community Survey Briefs (2013).

⁵² *Id.*

⁵³ Suzy Khimm, *The American Dream, undocumented*, MSNBC (Aug. 28, 2014), <http://www.msnbc.com/msnbc/american-dream-undocumented>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. TIMES, May 27, 2014.

⁵⁹ William Whaley, *The California Dream Act: A DREAM (Not D.R.E.A.M.) Come True*, 43 MCGEORGE L. REV. 625, 627 (2012).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Marisa Bono, *When a Rose Is Not a Rose: DACA, The DREAM Act, and the Need for More Comprehensive Immigration Reform*, 40 T. MARSHALL L. REV. 193, 195 (2015).

⁶³ *Id.* at 205.

⁶⁴ *Id.* at 207.

residents practically undocumented. Someone whose ancestors immigrated to the U.S. during the California Gold Rush suffers under no burden because he or she is presumed American. On the other hand, someone whose parents only recently came to the States, would lose important benefits of citizenship in the realm of higher education: student loans and in-state tuition. The child of immigrants would have to satisfy the parameters of DACA and the DREAM Act and either go to college (without the help of financial aid) or serve in the military, perhaps earning his citizenship with his own blood. Conversely, the great, great grandchild of the Gold Rush is expected to do nothing to earn citizenship. By making the process of citizenship and access to higher education more difficult to obtain for a specific class of people, the American dream and the potential for upward mobility will inevitably suffer.

Ultimately, birthright citizenship makes it easier for second-generation immigrants to assimilate into American society. Additionally, birthright citizenship helps immigrant families become *American* families and fosters a stronger sense of patriotism and national pride in the citizen, and thus their community. The American-born children of immigrants demonstrate a desire to live, work, and participate in American society. Although the main objective of immigrant families may be to find safety or opportunity, citizenship for their children born in the U.S. is a promising piece of the immigration puzzle, helping to complete their transformation into productive participants in American life.

IV. Case Study: Withholding Birth Certificates from U.S.-Born Babies

There is a disturbing trend in some states toward blocking the issuance of birth certificates to rightfully entitled, American-born children. For instance, Texas has allegedly made it a “policy, practice, and pattern” to withhold birth certificates from immigrant parents for their children born in the state.⁶⁵ Where a *matrícula consular* (Mexican consulate ID) used to be a valid form of identification, Texas has now made this insufficient.⁶⁶ As of 2013, Texas specifically demands from parents a U.S.-issued form of ID before granting American birth certificates, which is more difficult for immigrant parents to obtain.⁶⁷ About 30 parents are now challenging this policy in court, and have requested a temporary order from the court to obtain birth certificates for their children.⁶⁸ After U.S. District Court Judge Robert Pitman denied their request, the case is now set for trial.⁷⁰

In 2011, Texas attempted to pass discriminatory laws based on immigration status. Although state legislation purporting to regulate immigration should typically fail as a result of being preempted by federal law, this does not keep states from legislating outside their bounds. Accordingly, Texas House Bill 292 (HB 292) proposed a modification of birth certificates that would require a listing of the parents’ citizenship.⁷¹ Specifically, HB 292 would allow the issuance of birth certificates only if one of the parents was an American citizen.⁷² If neither parent could

⁶⁵ Mercedes Olivera, Birth certificate rule frustrates, DALLAS MORNING NEWS (Jan. 8, 2016), <http://www.dallasnews.com/news/news/2016/01/08/birth-certificate-rule-change-frustrates>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁷⁰ *Id.*

⁷¹ Alberto R. Gonzales, *Essay: An Immigration Crisis in a Nation of Immigrants: Why Amending the Fourteenth Amendment Won't Solve Our Problems*, 96 MINN. L. REV. 1859, 1872 (2012).

⁷² *Id.*

prove American citizenship, the child—although born in the U.S.—would not receive a birth certificate.⁷³

On the federal level, the Birthright Citizenship Act of 2011 proposed a similar result by modifying who is covered under the language “subject to the jurisdiction” of the U.S.⁷⁴ Also known as H.R. 140, the Birthright Citizenship Act would have denied birthright citizenship to children born to non-citizens.⁷⁵ In effect, only children of American citizens would be citizens at birth and children of undocumented immigrants would most likely inherit the citizenship of the country of their parents.⁷⁶ H.R. 140 failed, as did similar legislation that has repeatedly come up since the Clinton administration.⁷⁷

As in the case of Texas, withholding birth certificates or determining citizenship status based on parental citizenship status, was rejected clearly by the Department of Justice in 1995.⁷⁸ More than 20 years ago, Congress considered H.R. 1363, which would have amended the INA to invalidate birthright citizenship.⁷⁹ Specifically, children born to non-citizens or unlawfully present aliens would not derive citizenship from their birth in the U.S.⁸⁰ H.R. 1363 is directly echoed in late attempts by states like Texas to alter the definition of citizenship. According to H.R. 1363, two categories of children born on U.S. soil would be deemed “subject to the jurisdiction of the United States” and would therefore acquire birthright citizenship: (1) a child born to wedded parents, at least one of which is a United States citizen or a noncitizen national, or a person lawfully admitted for permanent residence (LPR) who resides in the United States; or (2) children born to an unmarried woman with one of these statuses.⁸¹

The DOJ found the legislation unconstitutional and urged that it would be ““a grave mistake to alter the opening sentence of the Fourteenth Amendment without sober reflection on how it came to be part of our basic constitutional character.””⁸²

If anti-immigrant momentum was strong enough and legislation like H.R. 1363 came to pass successfully today, there are various issues implicated by an adjustment of the definition of birthright citizenship. By categorically excluding children born to non-citizens and non-LPRs, such a law would be facially unconstitutional. Not only would it require an amendment invalidating the Citizenship Clause of the Fourteenth Amendment, it would be a violation of the equal protection of the laws.⁸³ “Pejoratively described as ‘anchor babies,’” children born to certain immigrant parents would suffer statelessness and lack of constitutional protection based only on their parents’ status.⁸⁴ This result is similar to what the Supreme Court in *Plyler* rejected: the class harmed by such legislation would suffer for reasons outside its control.⁸⁵ It would hardly be fair or just for a class of people—children born to undocumented immigrants—to face the loss of citizenship because of their parents’ status as non-citizens.

⁷³ *Id.*

⁷⁴ *Id.* at 1870.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1873.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1873-74.

⁸² *Id.*

⁸³ Laura A. Hernández, *Anchor Babies: Something Less Than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331, 340 (2010).

⁸⁴ *Id.* at 331.

⁸⁵ *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

In cases of housing discrimination toward undocumented immigrant parents with American citizen children, equal protection may be specifically implicated.⁸⁶ Several municipalities around the country have enacted ordinances requiring proof of citizenship to live in apartment homes.⁸⁷ It has been argued that access to housing is a quasi-fundamental right, and as such, regulations interfering with it should be subject to strict scrutiny.⁸⁸ Further, even if access to housing is not considered a quasi-fundamental right, arguably, perhaps undocumented immigrants should be treated as a suspect class.⁸⁹ A class is suspect when “(1) the classification was irrelevant to any proper legislative goal; or, (2) the legislation imposed special disabilities upon a disfavored group for reasons beyond its [the groups’] control, resulting in caste-like treatment.”⁹⁰ In the case of housing ordinances that prohibit rentals to undocumented immigrants, the American children of those immigrants suffer – the result is caste-like treatment of American citizen children who have no say in their parents’ status.⁹¹ Housing ordinances like these deprive citizen children of housing based on their parents’ status; again, a result squarely prohibited and rejected by our Supreme Court in *Plyer*.⁹² Citizen children suffer legislative punishment for their parents’ illegal actions and are robbed by the state of the rights and protections of their American citizenship.

V. Conclusion

Under the umbrella of family rights with regard to immigration policy, repealing birthright citizenship would severely harm families by creating splits within newly immigrated families, placing unfair burdens on new immigrants, and disabling the American dream. As a hallmark of immigration law, family unity in the U.S. would be at risk of dissolution without birthright citizenship, and immigrant families who are already at an economic disadvantage in the U.S. would face a greater struggle to support themselves and succeed in American society. Most importantly, without birthright citizenship, citizenship in the U.S. would become the basis for a caste system – at the top, a class of Americans, and at the bottom, a class of descendants of modern immigrants, politically, legally, and socially disabled without the privilege of citizenship in the place they call home.

⁸⁶ Hernández, *supra* note 83 at 360-61.

⁸⁷ *Id.* at 348-57.

⁸⁸ *Id.* at 360.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 361.