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Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism

Rachel E. Rosenbloom*

I. INTRODUCTION

It has been a quarter of a century since Peter Schuck and Rogers Smith published *Citizenship Without Consent*, in which they argued that the American-born children of undocumented immigrants should not be accorded citizenship without the express consent of Congress.[1] *Citizenship Without Consent* has been widely credited with inspiring the contemporary movement to limit birthright citizenship.[2] State and federal lawmakers, along with restrictionist advocacy groups, now routinely call for amending or reinterpreting the Citizenship Clause of the Fourteenth Amendment, which guarantees citizenship to all those "born or naturalized in the United States, and subject to the jurisdiction thereof."[3] This growing opposition to birthright citizenship has in turn inspired extensive scholarly debate on both the normative and doctrinal questions underlying the Citizenship Clause.[4]

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

2. Although credited with inspiring the movement to limit birthright citizenship, both authors have distanced themselves from the resulting advocacy efforts, declining to testify in support of proposed legislation to deny citizenship to the children of undocumented immigrants. *See* Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329, 1332 (2009). In a 2010 op-ed in the *New York Times*, Professor Schuck proposed that some but not all children born in the United States of non-citizen, non-permanent-resident parents should be granted citizenship. *See* Peter H. Schuck, Op-Ed., *Birthright of a Nation*, N.Y. TIMES, Aug. 13, 2010, http://www.nytimes.com/2010/08/14/ opinion/14schuck.html (advocating birthright citizenship conditioned on a child having a "genuine connection" to the United States, demonstrated for example through having gone to school in the United States for a requisite number of years). In a 2009 law review article, Professor Smith argued that "the nation can be said to have effectively consented to a reading of the Fourteenth Amendment that confers *jus soli* birthright citizenship on children of aliens never legally admitted to the United States." Smith, *supra*, at 1331.

3. U.S. CONST. amend. XIV, § 1, cl. 1. For an account of proposals to limit birthright citizenship in the 1990s, see Robin Jacobson, *Characterizing Consent: Race, Citizenship, and the New Restrictionists*, 59 POL. RES. Q. 645 (2006). For a discussion of recent initiatives, see Margaret D. Stock, *Is Birthright Citizenship Good for America?*, 32 CATO J. 139, 143–145 (2012). *See also* Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, N.Y. TIMES, Jan. 6, 2011, http://www.nytimes.com/2011/01/06/us/06immig.html.

4. *See Birthright Citizenship Roundtable*, 33 ADMIN. & REG. L. NEWS 3 (2007); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955 (2008); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997); Garrett

This Essay approaches birthright citizenship from a new angle, looking at the largely forgotten history of efforts to curtail the scope of the Citizenship Clause in the early twentieth century. Although terms such as "restrictionist" are most often used to refer to efforts to limit the entry of new immigrants,[5] restrictionist movements in the United States have also frequently focused on policing the borders of citizenship itself. In doing so, such movements have tended to argue that territorial birthright citizenship undermines state and federal policies concerning immigrants. Looking at how citizenship restrictionism has developed over time thus provides an opportunity to consider the nature of the relationship between the Citizenship Clause and immigration policy.

Part II examines the history of efforts to limit the reach of the Citizenship Clause. Such efforts began shortly after the passage of the Fourteenth Amendment, peaked in the 1920s, reemerged briefly in the 1940s, and then subsided for several decades, only to reemerge with renewed vigor at the close of the twentieth century. Historians have chronicled the earliest attempts to restrict Fourteenth Amendment birthright citizenship, which culminated in the test case *United States v. Wong Kim Ark*,[6] in which the Supreme Court broadly interpreted the scope of the Citizenship Clause. However, little attention has been devoted to birthright citizenship as a legal or political issue between the Supreme Court's 1898 decision in *Wong Kim Ark* and the 1985 publication of *Citizenship Without Consent*. Filling in this gap, I seek to show that when immigration restrictionism has been on the upsurge, citizenship restrictionism has rarely been far behind, and that current restrictionist efforts fall into a familiar pattern in which fears about the influx of new immigrants find an outlet in efforts to police the borders of citizenship.

Part III draws on this history to offer some thoughts about the threads that connect three distinct legal regimes: birthright citizenship under the Fourteenth

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Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331 (2010); Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People,"* 76 OR. L. REV. 233 (1997); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 4 (2009); Jacobson, *supra* note 3, at 645; Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 515–22 (2008); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2530 (2007); Cristina M. Rodriguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363 (2009). For an insightful review of *Citizenship Without Consent*, see Gerald L. Neuman, *Back to* Dred Scott?, 24 SAN DIEGO L. REV. 485 (1987) (reviewing SCHUCK & SMITH, *supra* note 1). *See also* AYELET SCHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009) (providing normative critique of birthright citizenship from a global perspective).

5. There is considerable overlap in the popular usage of terms such as restrictionist, exclusionist, and nativist. On the nuances of different movements in different eras, see generally Linda Bosniak, *Immigration Crisis, "Nativism" and Legitimacy*, *in* 88 PROC. OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.) 440 (1994); Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Parea ed.,1997); George J. Sánchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America*, 31 INT'L MIGRATION REV. 1009 (1997). *See also* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 (Rutgers Univ. Press 2002) (1955).

6. 169 U.S. 649 (1898).

Amendment, federal laws governing immigration, and state and local laws governing the rights of noncitizens. Although there are some significant differences between past and present efforts to limit birthright citizenship, one common theme is that opponents of birthright citizenship have consistently viewed the Citizenship Clause as conflicting with the goals embodied in the immigration policies of the day. In the 1890s, birthright citizenship was viewed as undermining federal efforts to exclude Chinese immigrants from the United States.[7] In the 1920s, exclusionists objected to birthright citizenship on the grounds that it conflicted with the racial restrictions contained in the naturalization laws and thus served to undermine state laws, such as the California Alien Land Law, that incorporated such restrictions.[8] In the contemporary era, restrictionists frequently contend that birthright citizenship undermines efforts to control America's southern border.[9]

Contemporary critics of birthright citizenship often argue that new and unprecedented conditions warrant a rethinking of the Citizenship Clause. As the authors of *Citizenship Without Consent* put it, high levels of unauthorized immigration and the rise of the American welfare state, "which neither the Founding Fathers nor the framers of the Citizenship Clause could have anticipated, raise profound questions about distributional justice, national autonomy, and political community in contemporary American life . . . and cast the notions of consensual membership and birthright citizenship in a new and rather different light."[10] Some commentators have responded by arguing that the framers of the Fourteenth Amendment did, in fact, foresee these circumstances.[11] This Essay supplements these critiques with an additional response, arguing that this not the first time that critics of birthright citizenship have pointed to new influxes of immigrants as a reason to pose questions of distributional justice, national autonomy, and political community with regard to the Citizenship Clause. Moreover, to the extent that tensions between immigration policy and birthright citizenship have been resolved in earlier eras, it has been immigration policy, not birthright citizenship, that has ultimately yielded: birthright citizenship did, for example, mitigate the effects of Chinese exclusion, as well as the effects of discriminatory state laws aimed at Asian immigrants.

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7. *See infra* notes 19–28 and accompanying text.
8. *See infra* notes 30–51 and accompanying text.
9. See *infra* notes 76–79 and accompanying text.
10. SCHUCK & SMITH, *supra* note 1, at 4.
11. *See* Epps, *supra* note 4, at 384 (arguing that it is "ahistorical to suggest that the Framers did not foresee the legal and social characteristics of what we today call 'illegal' or 'undocumented' immigrants"); James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 369–74 (2006) (citing discussion of Chinese immigrants and Gypsies in debates on the Citizenship Clause); Neuman, *supra* note 5, at 497–500 (arguing that in according citizenship to the children of illegally imported African slaves, the framers of the Fourteenth Amendment confronted an issue analogous to the issue raised today by the children of undocumented immigrants).

I argue here that defenders of birthright citizenship would do well to engage critically with the tensions that current opponents of birthright citizenship identify, rather than shying away from them. The particular issue that has become a lightning rod in the current debate is the apparent contradiction posed by limiting the entry of undocumented immigrants, on the one hand, and granting citizenship to the children of undocumented immigrants, on the other. Opponents of birthright citizenship, employing the rhetoric of "anchor babies," suggest that birthright citizenship provides a loophole in the immigration laws.[12] Yet a closer look at the phenomenon of mixed-status families reveals a far more complex picture.[13] To the extent that there are tensions between the closed borders of immigration law and the open borders of birthright citizenship, such tensions have been greatly exacerbated by immigration policy changes over the past several decades that, while ostensibly aimed at reducing unauthorized immigration, have had the ironic effect of increasing the number of mixed-status families. These tensions should be resolved, I argue, not by altering the Fourteenth Amendment but instead by addressing the unintended consequences of restrictive immigration laws and heightened border enforcement.

II. THE EVOLVING POLITICS OF BIRTHRIGHT CITIZENSHIP

In 1985, in *Citizenship Without Consent*, Professors Schuck and Smith wrote that with the passage of the Fourteenth Amendment, "[b]irthright citizenship . . . was formally ratified as the principal constitutive status of the American political community" and that "[s]ince that time, its legitimacy has not been seriously questioned."[14] They speculated that the "unquestioning acceptance" of birthright citizenship had persisted "because the Fourteenth Amendment has been thought to render our position unconstitutional, because the problem of illegal aliens has only recently reached critical proportions, or perhaps because the status quo has achieved the tyranny of the familiar."[15] Against this background, they sought to "cast the notions of consensual membership and birthright citizenship in a new and rather different light, dispelling the obscurity to which their long, unreflective acceptance has relegated them."[16] In short, *Citizenship Without Consent* announced itself as heralding a new approach for a new era.

Defenders of birthright citizenship have similarly been known to argue, albeit critically, that the efforts to limit the scope of the Citizenship Clause that have emerged in recent years constitute an unprecedented attack on a

12. *See infra* notes 78–79 and accompanying text.
13. The term "mixed-status families" is used here to refer to families in which at least one member (generally a parent) is undocumented. See *infra* note 81 and accompanying text.
14. SCHUCK & SMITH, *supra* note 1, at 1.
15. *Id.* at 5.
16. *Id.* at 4.

crucial bulwark of equality.[17] Such a characterization, however, glosses over the significant controversy that birthright citizenship has attracted over the nearly century and a half since the passage of the Fourteenth Amendment.[18] In the wake of the publication of *Citizenship Without Consent*, several historians have explored the background of *Wong Kim Ark*, the 1898 case in which the Supreme Court interpreted the scope of the Citizenship Clause. This scholarship has revealed that a significant debate about the meaning of the Citizenship Clause took place among American legal scholars in the decades following the passage of the Fourteenth Amendment,[19] and that advocates for the exclusion of Chinese immigrants identified birthright citizenship as a key issue in the 1880s and 1890s.[20] In 1884, a federal court in California ruled that Look Tin Sing, a U.S.-born child of Chinese immigrants, was a citizen by virtue of his birth in the United States.[21] In the years that followed, citizenship claims, both genuine and fabricated, emerged as one of the few means of circumventing the severe restrictions on immigration from China imposed by the Chinese Exclusion Acts.[22] San Francisco attorney George Collins, an outspoken opponent of Chinese immigration, doggedly urged the Department of Justice to identify a test case to bring the issue of birthright citizenship to the Supreme Court.[23] The Department of Justice finally did so, bringing Collins in to play a key role on the legal team.[24] The Government argued that Wong Kim Ark was not entitled to citizenship under the Fourteenth Amendment because, as the child of Chinese immigrants, he was a subject of the emperor of China and not

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17. *See, e.g.*, Preston, *supra* note 3 (quoting Wade Henderson of the Leadership Conference on Human and Civil Rights stating that "[f]or the first time since the end of the Civil War, these legislators want to pass state laws that would create two tiers of citizens, a modern-day caste system").

18. Controversy over birthright citizenship, of course, predates the passage of the Fourteenth Amendment. *See* Dred Scott v. Sandford, 60 U.S. 393 (1857). My focus here is solely on the debates that have focused on the Citizenship Clause.

19. *See* Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868–1898: States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519 (2001).

20. *See* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, at 103–05 (2003) [hereinafter LEE, AT AMERICA'S GATES]; LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 99 (1995) [hereinafter SALYER, LAWS HARSH AS TIGERS]; Erika Lee, *Birthright Citizenship, Immigration, and the U.S. Constitution: The Story of* United States v. Wong Kim Ark, *in* RACE LAW STORIES 89–109 (Rachel F. Moran & Devon W. Carbado eds., 2008) [hereinafter Lee, *Birthright Citizenship*]; Lucy E. Salyer, Wong Kim Ark*: The Contest Over Birthright Citizenship*, *in* IMMIGRATION LAW STORIES 51–84 (David A. Martin & Peter H. Schuck eds., 2005) [hereinafter Salyer, *Contest Over Birthright Citizenship*].

21. *In re* Look Ting Sing, 21 F. 905, 910 (C.C.D. Cal. 1884).

22. The Chinese Exclusion Act of 1882 barred Chinese laborers from entering the United States for ten years. Subsequent legislation further limited Chinese—and eventually all Asian—immigration. *See generally* LEE, AT AMERICA'S GATES, *supra* note 20; MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); SALYER, LAWS HARSH AS TIGERS, *supra* note 20. On citizenship claims by Chinese Americans, see LEE, AT AMERICA'S GATES, *supra* note 19, at 100–09; SALYER, LAWS HARSH AS TIGERS, *supra* note 20, at 208–12.

23. Salyer, *Contest Over Birthright Citizenship*, *supra* note 20, at 65 (describing Collins's "deluge" of letters to the Attorney General advocating a challenge to birthright citizenship).

24. For discussions of Collins's involvement in the litigation, see Lee, *Birthright Citizenship*, *supra* note 20, at 95-100; Salyer, *Contest Over Birthright Citizenship*, *supra* note 20, at 65–66.

"subject to the jurisdiction" of the United States.[25] The Supreme Court rejected this argument, holding that the Citizenship Clause applied to all those born in the United States, with only three exceptions: children born to parents who were foreign diplomats,[26] members of foreign invading armies,[27] or Native Americans subject to tribal authority.[28]

Although the lead up to *Wong Kim Ark* has attracted considerable attention, little has been written about later efforts to limit birthright citizenship,[29] leaving the impression that the issue lay dormant from 1898 until the 1980s. Yet birthright citizenship continued to be a central focus of exclusionists. *Wong Kim Ark* may have settled the doctrinal questions regarding the scope of the Citizenship Clause, but it did not quell the political fervor surrounding the issue.

By the 1920s, the focus of exclusionists had shifted from Chinese to Japanese immigration, and it was primarily in the context of Japanese exclusion that the issue of birthright citizenship reemerged. In 1919, a number of leading exclusionists founded the California Oriental Exclusion League,[30] laying out a five-point program.[31] The first three points focused

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25. *See* Wong Kim Ark, 169 U.S. 649, 657–68 (1898). The arguments that Collins employed against birthright citizenship in his legal scholarship were largely based on racial difference. *See* Meyler, *supra* note 19, at 546–47.

26. *See Wong Kim Ark*, 169 U.S. at 657–68.

27. *Id.*

28. *Id.* at 680 (citing Elk v. Wilkins, 112 U.S. 94 (1884)). The Indian Citizenship Act of 1924 accorded statutory citizenship to members of Native American tribes. On the implications of the exclusion of Native Americans from constitutional citizenship, see Magliocca *supra* note 3, at 515–22 (arguing that the framers of the Fourteenth Amendment viewed the "subject to the jurisdiction" clause as a way of enhancing tribal autonomy rather than as a tool of exclusion) and Ngai, *supra* note 4, at 2527–28 (arguing that "[t]he Indian Citizenship Act of 1924, which granted territorial birthright citizenship to all Native American Indians, should properly be seen as a final blow to Indian sovereignty").

29. Robin Jacobson has written about the role of race in the opposition to birthright citizenship, linking the movement of the 1890s to the 1990s but skipping over the 1920s and 1940s. *See* Jacobson, *supra* note 3, at 647 (stating that "[the Supreme Court's] interpretation of the Fourteenth Amendment [in *Wong Kim Ark*] didn't come under serious fire until almost a century later"). Bernadette Meyler notes that Schuck and Smith overlook the history of opposition to birthright citizenship, but describes the nature of this oversight as "omit[ting] from its scope the crucial thirty-year period that elapsed between the ratification of the Fourteenth Amendment and the Supreme Court's lengthy justification of *jus soli* citizenship in the *Wong Kim Ark* case." Meyler, *supra* note 19, at 519–20. Keith Aoki and Rose Cuison Villazor have both explored the context of racial nativism from which the alien land laws emerged and Kerry Abrams has discussed the focus of 1920s exclusionists on the reproductive power of Japanese women, but their articles have not touched on the place of birthright citizenship opposition in the nativist agenda. *See* Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 143–54 (2011); Keith Aoki, *No Right to Own? The Early Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 46–64 (1998); Rose Cuison Villazor, *Rediscovering* Oyama v. California: *At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 991–95 (2010). One scholar who has focused specifically on opposition to birthright citizenship in the 1920s is Roger Daniels. *See* ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 83–85 (1962). The 1942 challenge to birthright citizenship, *Regan v. King*, has been briefly discussed in two law review articles. *See* Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 145 (1996); Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497, 503–04 (2001) [hereinafter Chin, *Citizenship and Exclusion*].

30. DANIELS, *supra* note 29, at 84–85. *See also* Gregory Mason, *The 'Possum and the Dinosaur: Staff Correspondence from California*, THE OUTLOOK (N.Y.), Jun. 16, 1920, at 319 (contemporaneous magazine account of founding of League).

on immigration law: cancellation of the so-called "Gentleman's Agreement" that governed immigration from Japan, the exclusion of "picture brides,"[32] and the wholesale exclusion of Japanese immigrants along the lines of the Chinese exclusion laws then in effect.[33] The fourth point concerned restricting Asian immigrants from naturalization.[34] The fifth point, however, extended the exclusionist agenda to the U.S.-born children of Asian immigrants, advocating an "[a]mendment of the Federal Constitution providing that no child born in the United States shall be given the rights of an American citizen unless both parents are of a race eligible to citizenship."[35]

In referencing a parent's "eligibility for citizenship," this proposed amendment sought to incorporate the racial exclusions then contained in the statutes governing naturalization. The original naturalization law, enacted in 1790, limited naturalization to "free white person[s]."[36] Following the Civil War, Congress broadened eligibility for naturalization to include "aliens of African nativity and . . . persons of African descent" but declined to make the statute entirely race-neutral.[37] Beyond the racial prerequisites contained in the naturalization statute, Chinese immigrants were additionally barred from naturalization by the Chinese Exclusion Act of 1882.[38]

The League's five-point platform was not the isolated stance of one group but rather was widely adopted by the other exclusionist organizations across the state.[39] Nor were such advocacy efforts confined to the West Coast: the American Legion took a similar position at its founding convention in Minneapolis in 1919, adopting a resolution calling for an "[a]mendment to Section one of the Fourteenth Amendment to the effect that no child born in the United States of foreign parentage shall be eligible to citizenship unless both parents [are] so eligible."[40] Resolutions calling

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31. DANIELS, *supra* note 29, at 84–85.

32. The term "picture brides" referred to Japanese women who were chosen by matchmakers to join male Japanese immigrants in the United States. For a discussion of picture brides and their relationship to the Gentlemen's Agreement, see Abrams, *supra* note 29, at 143–54.

33. DANIELS, *supra* note 29, at 84–85.

34. *Id.*

35. *Id.*

36. Naturalization Act, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795). A subsequent act altered the residency requirement but retained the racial restriction. Naturalization Act, ch. 20, § 1, 1 Stat. 414 (1795) (repealed 1802); *see generally*, IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2d ed. 2006).

37. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (1870). Senator Charles Sumner unsuccessfully advocated the complete elimination of racial restrictions. *See* Meyler, *supra* note 19, at 523. *See also* United States v. Thind, 261 U.S. 204 (1923) (applicant from India racially barred from naturalizing); Ozawa v. United States, 260 U.S. 178 (1922) (Japanese applicant racially barred from naturalizing).

38. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

39. DANIELS, *supra* note 29, at 84.

40. *Id.* at 86.

for such an amendment were introduced in Congress in 1919,[41] 1921,[42] and 1923.[43]

As the League's platform illustrates, there were close connections between efforts to curtail birthright citizenship and efforts to restrict new immigration from Asia. There were also close connections between such initiatives and discriminatory laws aimed at Asian immigrants within the United States. By the 1920s, the term "ineligible for citizenship" had become a mechanism for incorporating race-based distinctions into state laws. Alien land laws were enacted in Western states, with the aim of driving Japanese immigrant farmers out of business.[44] California enacted the first such law in 1913[45] and other states followed suit up into the 1940s.[46]

Exclusionists were at the center of such efforts in state legislatures, and they drew explicit connections between their state-level agendas and their efforts to amend the Citizenship Clause. In 1920, for instance, Senator James D. Phelan of California noted in a magazine article that "California will solve her immediate problem in the November elections by an amendment to her own State statutes . . . preventing ownership or leasing of the land by the Japanese who have evaded her present land laws," but he opined that "[i]n the enactment of an amendment to Amendment XIV of the Constitution of the United States lies the real solution [to the Japanese problem] and it is here that we of the West look to the east for assistance."[47] Another example of the integration of such efforts was a 1921 meeting in which Congressional representatives from eleven western states converged to address the "Japanese problem."[48] One aspect of the collaboration involved promoting the passage of state alien land laws.[49] Another involved support for a constitutional

41. S. Con. Res. 18, 66th Cong., 59 CONG. REC. 40, (1919) (proposing to amend Section 1 of the Fourteenth Amendment to read: "No child hereafter born in the United States of foreign parentage shall be eligible to citizenship in the United States unless both parents are eligible to become citizens of the United States"). A parallel resolution was introduced in the House. H.R.J. Res. 255, 66th Cong., 59 CONG. REC. 214 (1919).

42. *See* S. Con. Res. 2, 67th Cong., 61 CONG. REC. 424 (1921); *see also Westerners Unite to Curb Japanese*, N.Y. TIMES, Apr. 21, 1921, at 15 (reporting on introduction of proposed constitutional amendment to limit birthright citizenship).

43. S. Con. Res. 1, 68th Cong., 65 CONG. REC. 92, (1923).

44. On alien land laws, see generally, Aoki, *supra* note 29; Chin, *Citizenship and Exclusion*, *supra* note 29; Villazor, *supra* note 29. The California Alien Land Law was one element of the "keep California white" campaign. *See* DANIELS, *supra* note 29, at 46. In the words of the Native Sons of the Golden West, "the 'only thing that will save California is . . . a state law that will make it impossible for Japanese to get possession of the soil.' " *Id.* at 87–88 (quoting the exclusionist publication GRIZZLY BEAR, Nov. 1919, at 10) (internal quotations omitted); *see also* Oyama v. California, 332 U.S. 633, 648 (1948) (Black, J., concurring) ("That the effect and purpose of the law is to discriminate against Japanese because they are Japanese is too plain to call for more than a statement of that well-known fact."); Aoki, *supra* note 28 at 66–70 (discussing race and the alien land laws).

45. *See* Aoki, *supra* note 29, at 55–60.

46. *See* Chin, *Citizenship and Exclusion*, *supra* note 29 (discussing the Wyoming Alien Land Law, enacted in 1943).

47. James D. Phelan, *The Ethics of the Japanese Problem*, OVERLAND MONTHLY AND OUT WEST MAGAZINE, Nov. 1920, at 10.

48. *Westerners Unite to Curb Japanese*, *supra* note 42, at 15.

49. *Id.*

amendment providing that no child "hereafter born in the United States of foreign parentage shall be eligible to citizenship in the United States unless both parents are eligible to become citizens of the United States."[50] While efforts in the 1920s were primarily aimed at curtailing the rights of Asian immigrants and their children, a parallel campaign by the same set of nativist organizations simultaneously sought to have Mexicans placed, alongside Asians, in the group deemed racially ineligible for naturalization, which would have had the effect, under the proposed constitutional amendments, of making their children ineligible for birthright citizenship.[51]

The 1920s, a period of intense anti-immigrant sentiment,[52] marked the high point of early twentieth-century efforts to restrict birthright citizenship. Attention to birthright citizenship largely subsided by the end of the decade, but the issue did emerge once again during World War II. In 1942, in *Regan v. King*,[53] the Native Sons of the Golden West brought suit seeking to overturn the Supreme Court's decision in *Wong Kim Ark*. Represented by former California attorney general Ulysses S. Webb, the organization sued the San Francisco County Registrar of Voters, seeking to have the names of Japanese Americans struck from the voter rolls on the theory that they were not citizens and therefore ineligible to vote. In his oral argument, Webb declared *Wong Kim Ark* to have been "one of the most injurious and unfortunate decisions ever handed down by the Court," and argued that the intent of the Fourteenth Amendment was solely to benefit African Americans and not to open birthright citizenship up to those who were racially barred from naturalization.[54] The case made little headway in the courts but garnered national media attention.[55]

From the late 1940s through the early 1980s, birthright citizenship attracted little attention. It is perhaps not surprising that against this backdrop, the challenge to birthright citizenship presented in *Citizenship Without Consent* appeared to come out of the blue. Yet as the account offered here has sought to establish, *Citizenship Without Consent* did not break new ground in questioning birthright citizenship. Rather, it is more accurately viewed as bringing the perspective of a new era to what was by that point an old problem: how to reconcile the closed borders of immigration law with the open borders of birthright citizenship.

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50. *Id.* (quoting text of constitutional amendment proposed in House of Representatives).

51. *See* Natalia Molina, *"In a Race All Their Own": The Quest to Make Mexicans Ineligible for U.S. Citizenship*, 79 PAC. HIST. REV. 167, 180–87 (2010).

52. *See generally* ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882, at 27–58 (2005).

53. 49 F. Supp. 222 (N.D. Cal. 1942), *aff'd*, 134 F.2d 413 (9th Cir.), *cert. denied*, 319 U.S. 753 (1943).

54. *See Asks U.S. Japanese Lose Citizenship*, N.Y. TIMES, June 27, 1942, at 6 (quoting oral argument).

55. *Id.*; *High Court Denies Citizenship Review*, N.Y. TIMES, May 18, 1943, at 24; *Japanese Citizens Win a Court Fight*, N.Y. TIMES, Jul. 3, 1942, at 7.

III. MAKING SENSE OF EFFORTS TO RESTRICT THE BORDERS OF BIRTHRIGHT CITIZENSHIP

Placing contemporary opposition to birthright citizenship within this broader narrative reveals that the convergence of immigration restrictionism and citizenship restrictionism is not just a contemporary phenomenon. Opposition to birthright citizenship has often been a corollary of efforts to restrict immigration and has often emphasized the apparent tensions between birthright citizenship and immigration policy.[56] Looking at the evolution of opposition to birthright citizenship thus provides an opportunity to consider the relationship between the Citizenship Clause and immigration policy. In this Part, I explore the changing nature of this relationship, how tensions between the two have been resolved in the past, and how they might be resolved in the present.

In the 1880s and 1890s, birthright citizenship appeared to exclusionists to undermine the objectives of Chinese exclusion. As Lucy Salyer has explained, "[c]oncerned that birthright citizenship created a gaping loophole in the American [Chinese] exclusion policy, [exclusionists] pushed for an alternative conception of citizenship based on descent."[57] In its brief in *Wong Kim Ark*, the government criticized the Fourteenth Amendment's " 'disastrous consequences' of forcing the country to accept as native born citizens 'the rag tag and bob tail of humanity, who happen to be deposited on our soil by the accident of birth.' "[58] When litigation efforts met defeat in the courts, federal immigration officials, with the aid of Congress and the courts, turned to other strategies for addressing this "gaping loophole"—for example, by imposing heightened evidentiary standards on Chinese American citizenship claims and by limiting judicial review of agency fact-finding.[59] Ultimately, though, these were partial measures, directed (however imperfectly) at weeding out *fraudulent* citizenship claims. The more basic tension between birthright citizenship and Chinese exclusion remained: Chinese Americans who could prove birth in the United States, or descent from a parent born in the United States, did in fact benefit from a "loophole" in the Chinese exclusion laws, one that significantly mitigated the laws' effects and had a substantial impact, over the generations, on the development of the Chinese American community.[60]

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56. *See supra* Part II; *see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5 (2007) (noting that the deportation system lives in "peculiar equipoise" with birthright citizenship).

57. *See* SALYER, LAWS HARSH AS TIGERS, *supra* note 20, at 99.

58. *See* Lee, *Birthright Citizenship*, *supra* note 20, at 98 (quoting government brief in *Wong Kim Ark*).

59. *See* LEE, AT AMERICA'S GATES, *supra* note 20, at 106–09; SALYER, LAWS HARSH AS TIGERS, *supra* note 20, at 99–102, 106–16, 208–09.

60. A burgeoning literature on "alien citizenship" has insightfully argued that juridical citizenship does not necessarily translate into full social, cultural, and political membership. *See generally* NGAI, *supra* note 22; Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 277 (1997); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1580–83 (2002); Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71 (2001).

Faced with the Supreme Court's decision in *Wong Kim Ark*, opponents of birthright citizenship turned their energies in the 1920s toward amending the Citizenship Clause rather than challenging its interpretation. Although there were slight variations in wording, all of the constitutional amendments that were proposed would have incorporated into birthright citizenship the racial exclusions contained in the naturalization laws.[61] By seeking to harmonize these two forms of citizenship, exclusionists were pointing out a glaring contradiction: how could Asian immigrants be deemed racially unfit for citizenship under the naturalization laws while their U.S.-born children were guaranteed citizenship from birth? More pragmatically, opponents of birthright citizenship were motivated by the fact that the Citizenship Clause threatened to impede their state-level agenda. As noted in Part II, the category of persons "ineligible for citizenship" served as a convenient shorthand for state legislatures seeking to enact racially discriminatory laws. It quickly became apparent, though, that the 1913 California Alien Land Law could be circumvented by Asian immigrants who bought land in the name of a U.S.-born child.[62] Although this loophole was addressed to some extent through a 1920 ballot initiative,[63] California and other states were powerless to bar the ownership of land by Asian Americans after they reached adulthood.

In effect, birthright citizenship imposed a generational limit on state efforts to discriminate. Exclusionists openly acknowledged that they were turning to the issue of birthright citizenship because they had exhausted the possibilities of state law. In a 1921 article, one leading exclusionist, John Chambers, after discussing the California state legislature's efforts to restrict the ownership of land by Asian immigrants, expressed the frustration of California state legislators with the limits on their ability to deal with the "Japanese problem," and their resulting intention to take their battle to the national stage:

> California has gone as far as she could go under the federal and state constitutions and the American-Japanese treaty. If she could have gone further she would have done so. The next development California seeks to bring about is the stoppage of immigration

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Nevertheless, the importance of birthright citizenship has been widely acknowledged. *See, e.g.*, Ngai, *supra* note 4, at 2530 (noting that "birthright citizenship has been a mechanism for incorporating new immigrants, and its disavowal a mechanism for exclusion").

61. *See supra* notes 35–43 and accompanying text.

62. See Phelan, *supra* note 46, at 80 (noting that "the spirit of the Anti-Alien Land Legislation passed in 1913 has been evaded and broken through the resort to certain legal subterfuges, which have frustrated the very purpose of the enactment . . . [including] the device of having native infant children of Japanese parentage made grantees of agricultural lands controlled and operated exclusively by their non-eligible parents") (quoting California Governor William D. Stephens).

63. California voters sought to address this loophole through a 1920 ballot initiative that, among other things, barred noncitizen parents from serving as guardians for their minor children with regard to land conveyances. *See* Aoki, *supra* note 29, at 56–59; Villazor, *supra* note 29, at 992–93. The guardianship provision was struck down by the California Supreme Court in 1922. *In re* Tetsubumi Yano's Est., 206 P. 995, 1001 (Cal. 1922). However, other provisions of the 1920 law imposed onerous restrictions on such guardianships. *See* Oyama v. California, 332 U.S. 663, 673 (1948) (striking down provisions as unconstitutional).

> from Japan through action by Congress; and the third step, the amending of the Constitution of the United States to the effect that children born in this country of parents ineligible to citizenship themselves shall be ineligible to citizenship.[64]

Chambers understood that without the crucial last step of limiting birthright citizenship, the nativist agenda would never be fully realized. This insight highlights an important and underexplored aspect of the Citizenship Clause. It is the Equal Protection Clause that bears the more obvious relevance to laws that discriminate against immigrants,[65] but the Citizenship Clause has also played an important role in imposing practical limits on such discrimination. Moreover, it is clear that the framers of the Fourteenth Amendment anticipated this result. During congressional debates on the language of the Fourteenth Amendment, Senator Cowan, a staunch opponent of the expansive wording of the Citizenship Clause, protested that it would "tie [the] hands" of the Pacific states "so as to prevent them . . . from dealing with [the Chinese] as in their wisdom they see fit."[66] Five decades later, California ran up against just this limitation with regard to Japanese Americans.

Regan v. King, the 1942 legal challenge to birthright citizenship, is best viewed as the last gasp of the advocacy efforts of the 1920s rather than the advent of a new chapter in citizenship restrictionism. Ulysses S. Webb, who argued the case on behalf of the Native Sons of the Golden West, had served for many years as California State Attorney General and in that capacity had been a leading proponent of the California Alien Land Law.[67] His arguments in favor of a narrow reading of the Citizenship Clause proved no more successful in 1942 than similar arguments had in 1898.[68] Beyond Webb's doctrinal arguments, however, there is a larger point to be made about the failure of *Regan v. King*. By 1942, the racial exclusions of the naturalization laws had already begun to be dismantled.[69] In 1952, Congress repealed them

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64. John S. Chambers, *The Japanese Invasion*, 93 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 23, 23–24 (1921). In correspondence, Chambers provided a more candid view of the connections. Describing the founding meeting of the League, he wrote:

> It was agreed . . . that a campaign of education should be started in the Middle West and East that the people of those regions might be taught to understand the Japanese and eventually to cooperate with us to influence Congress and the administration at Washington to enact such legislation, even if the amendment of the Constitution be necessary, as will protect the white race against the economic menace of the unassimilable Japanese.

DANIELS, *supra* note 29, at 84 (quoting letter from John S. Chambers to Chester H. Rowell, Sept. 10, 1919).

65. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory enforcement of local ordinance against Chinese-owned laundries invalidated under Equal Protection Clause); *see also* Laura A. Hernández, *Anchor Babies: Something Less than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331, 340–48 (2010) (reviewing application of Equal Protection Clause to immigrants).

66. CONG. GLOBE, 39TH CONG., 1ST SESS. 2891 (1866).

67. *See* Chin, *Citizenship and Exclusion*, *supra* note 29, at 503–04 (describing Webb's role). Webb defended the constitutionality of the California Alien Land Law in numerous cases, including *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); and *Porterfield v. Webb*, 263 U.S. 225 (1923).

68. See *supra* note 25–28 and accompanying text.

69. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–14 (1998). Members of "races indigenous to the Western Hemisphere" were made eligible for naturalization by statute in 1940, Chinese immigrants were made eligible for naturalization in 1943, and Indian and Filipino immigrants were made eligible in 1946. *Id.*

entirely.[70] Thus, eligibility for citizenship, at least in the sense in which it was used in the alien land laws, ceased to be a meaningful distinction. The particular tension that had so troubled exclusionists in the 1920s—between the Fourteenth Amendment's broad grant of birthright citizenship and the naturalization laws' racial restrictions—was resolved, although not in the way that exclusionists had hoped.

Today's calls to end birthright citizenship seek a substantively different limit on birthright citizenship than that advocated in the 1920s, one based not on a parent's eligibility for citizenship but rather on a parent's actual citizenship or immigration status.[71] Such calls emerge from, and reflect, a racial and geopolitical landscape that has changed in many respects from that of the 1890s and 1920s.[72] One thing that has remained constant, however, is the linkage between the Citizenship Clause and immigration policy. As in the 1920s, contemporary opposition to birthright citizenship overlaps substantially with advocacy efforts to limit the entry of new immigrants,[73] and is frequently articulated in a highly racialized language of crisis and invasion.[74] Such opposition also overlaps with state and local initiatives to

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70. Immigration and Nationality (McCarren-Walter) Act of 1952, Pub. L. No. 82-414, § 311, 66 Stat. 163, 239 (1952).

71. Recent proposals have generally sought to limit birthright citizenship to children born to United States citizens and permanent residents but have varied somewhat in their particulars. For a discussion of recent proposals, see Stock, *supra* note 3, at 143–45.

72. *See* Jacobson, *supra* note 3, at 646 (discussing opposition to birthright citizenship in the 1990s and its dependence on "[the] racialization of the Mexican migrant as female, dependent, and hyper-reproductive"). Jacobson notes that when a congressional hearing was held on birthright citizenship in 1995, "[t]he Chair of the congressional Asian Pacific Caucus asked to serve as a witness. When explaining why she was denied the right to testify, the chair reported being told the issue was about 'Mexicans having children or babies in this country,' not Asians." *Id.* at 648–49 (quoting *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents, Joint Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution, Comm. on the Judiciary*, 104th Cong. 19 (1995)). Although opponents of birthright citizenship have largely focused on undocumented immigrants from Mexico, another locus of such opposition has arisen in the wake of the September 11th attacks. *See, e.g.*, Eastman, *supra* note 5, at 955–58 (introducing a critique of birthright citizenship by citing the example of U.S.-born Guantanamo detainee Yaser Hamdi, the child of Saudi parents who were in the United States on temporary visas at the time of his birth). A recent spate of media coverage has focused on so-called "birth tourists" from China. *See, e.g.*, Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y TIMES, Mar. 28, 2011, http://www.nytimes.com/2011/03/29/us/29babies.html?pagewanted=all. Although the racial politics of nativism have shifted over the past century, a number of scholars have drawn insightful parallels between the past and the present. *See generally* Jacobson, *supra* note 3; Johnson, *supra* note 5; Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Saito, *supra* note 60.

73. *See* Jacobson, *supra* note 3, at 645 (stating that "[o]ut of eleven national immigration restriction groups, nine currently propose a move away from birthright citizenship"). It should be noted, however, that *Citizenship Without Consent* presented an argument for limiting birthright citizenship but simultaneously argued for expanding legal immigration. *See* SCHUCK & SMITH, *supra* note 1, at 120-21.

74. For a contemporary example of the rhetoric of invasion, see Teresa Watanabe, *Activists Push Ballot Initiative to End State Benefits for Illegal Immigrants and Their U.S.-Born Children*, L.A. TIMES, July 13, 2009, http://articles.latimes.com/2009/jul/13/local/me-illegal-immigration13 (quoting Barbara Coe, proponent of California ballot initiative, describing "illegals and their children" as "invasion by birth canal"). *See also* Robin Templeton, *Baby Baiting*, NATION (Aug. 16/23, 2010), http://www.thenation.com/article/38035/baby-baiting (discussing rhetoric of invasion by opponents of birthright citizenship). For historical examples of the rhetoric of invasion, see Chambers, *supra* note 64, at 23; Phelan, *supra* note 62, at 80 ("The facts convict the Japanese of unwelcome intrusion and sound a warning to the American people

curtail the rights of noncitizens: many of the leaders of recent anti-immigrant initiatives in Arizona and elsewhere have been among the most vocal opponents of birthright citizenship.[75]

Contemporary critics of birthright citizenship frequently characterize the Citizenship Clause, at least as interpreted in *Wong Kim Ark*, as undermining efforts to control unauthorized immigration.[76] *Citizenship Without Consent* cites increases in unauthorized immigration and the use of public benefits by the children of undocumented immigrants as the primary reasons to reconsider the merits of birthright citizenship.[77] Others have posited a more direct link, suggesting not only that rising levels of unauthorized immigration necessitate a rethinking of birthright citizenship but that birthright citizenship is one of the primary *causes* of unauthorized immigration.[78] The term "anchor baby," a staple of current restrictionist rhetoric, is a particularly succinct mechanism for asserting this theory of causality.[79]

A number of commentators have insightfully critiqued the term "anchor baby."[80] More fundamentally, there is a need to engage critically with the larger question of how to understand, and respond to, the central focus of opponents of birthright citizenship: the granting of U.S. citizenship to the

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which must be headed [sic]: 'Solve and Survive, or Delay and Be Destroyed.' "). *See also* Aoki, *supra* note 29, at 46–47 (discussing variations on the theme of invasion with regard to Chinese and Japanese exclusion); Jacobson, *supra* note 3, at 650 (discussing both historical and contemporary imagery of invasion in opposition to birthright citizenship).

75. Over the past two decades, state and local anti-immigrant legislation has proliferated across the country. *See* Anita Sinha & Richael Faithful, *State Battles Over Immigration: The Forecast for 2012* (Feb. 7 2012), *available at* http://www.advancementproject.org/sites/default/files/publications/Immigrant%20Rights%202012%20Legislative%20Battles_FINAL%20Feb%201%202012_0.pdf ("The unprecedented pace of introduced bills continued throughout [2011] to set an all-time record with over 1600 immigration bills introduced. Only *eight states* did not enact any anti-immigrant laws in 2011."). There is substantial overlap between the legislators and advocacy groups working to enact such legislation and those advocating limits on birthright citizenship. *See* Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 55–60 (discussing connections between opposition to birthright citizenship and anti-immigrant legislation in Arizona).

76. *See, e.g.*, Graglia *supra* note 5, at 4 ("It is difficult to imagine a more irrational and self-defeating legal system than one which makes unauthorized entry into this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry.").

77. SCHUCK & SMITH, *supra* note 1, at 3–4.

78. *See, e.g.*, Sandhya Somashekhar, *GOP Push to Revise 14th Amendment Not Gaining Steam*, WASH. POST, Aug. 8, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/07/AR2010080702605.html (quoting Sen. Lindsey Graham as saying that birthright citizenship "attracts people here for all the wrong reasons").

79. S*ee Immigration Facts*, FEDERATION FOR AMERICAN IMMIGRATION REFORM http://www.fairus.org/site/PageNavigator/facts/glossary.html (last visited Feb. 12, 2012). The Federation for American Immigration Reform defines "anchor baby" as a

> child born in the United States to illegal immigrants or other non-citizens. The term "anchor" refers to the fact that the child's U.S. citizenship may provide a means for the rest of the family to stay in the United States or, more commonly, to return to the United States as immigrants after the child reaches adulthood.

Id.

80. *See* Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. & POL'Y REV. 385, 400 (2008); *Eliminating Birthright Citizenship Would not Solve the Problem of Unauthorized Immigration*, IMMIGRATION POLICY CENTER (Jan. 4, 2011), http://www.immigrationpolicy.org/just-facts/eliminating-birthright-citizenship-would-not-solve-problem-unauthorized-immigration.

children of undocumented immigrants. The number of such children has risen significantly in recent years: in 2010 there were 4.5 million U.S. citizen children with at least one undocumented parent, up from 2.1 million in 2000.[81] Commentators across the political spectrum have raised concerns about the public policy implications of this demographic trend.[82] As with the tensions that arose in previous eras, however, it would be a gross oversimplification to suggest that the tensions in evidence today stem directly from the Citizenship Clause. Rather, they have arisen from a complex confluence of events.

The Immigration Reform and Control Act of 1986 ("IRCA") is generally viewed as a turning point in American immigration policy, marking the advent of a new era in which federal immigration policies have increasingly focused on enforcement.[83] IRCA authorized an amnesty program that regularized the status of approximately three million undocumented immigrants, but it also imposed sanctions on employers who hire unauthorized workers and increased funding for border security.[84] Funding for border and interior enforcement has continued to rise dramatically since then,[85] and subsequent amendments to the Immigration and Nationality Act in the 1990s imposed new restrictions on admissibility for those with prior unlawful presence in the United States, enhanced the criminal penalties for

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81. Jeffery Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RESEARCH CENTER (Feb. 1, 2011), http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/. A recent article sums up the demographics of mixed-status families as follows:

> An estimated 14.6 million people are living in some sort of mixed-status home where at least one member of the family is not authorized. Currently, *one in ten children* living in the United States is growing up in such a household. There are multiple patterns of mixed authorization: 41 percent have one documented parent with the other parent undocumented; 39 percent have two undocumented parents; and 20 percent live in households headed by a single undocumented parent. Within these mixed-status households are also a range of documentation patterns involving siblings: some born in the States with birthright citizenship, some in the process of attempting to obtain documentation, and some fully undocumented.

Carola Suarez-Orozco et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438 (2011), *available at* http://her.hepg.org/content/g23x203763783m75/fulltext.pdf (internal citations omitted).

82. Restrictionists argue that children of undocumented immigrants are a threat to the nation. *See, e.g.*, PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1996). On the other end of the spectrum, concerns have been voiced about the societal implications of millions of U.S. citizen children growing up with parents who lack legal status. *See, e.g.*, Suarez-Orozco, *supra* note 81 (examining the developmental effects on children of the fear and vigilance that results from having an undocumented family member); *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RESEARCH CENTER (2011), http://www.arc.org/shatteredfamilies.

83. For a detailed analysis of Immigration Reform and Control Act of 1986, see Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193.

84. *Id.* at 201–04.

85. Between 1985 and 2000, "the Mexico-U.S. border was militarized in unprecedented ways, with spending on border enforcement rising by a factor of six, the number of Border Patrol officers doubling, and the hours spent patrolling the border tripling." CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION PROJECT 11 (Jorge Durand & Douglas S. Massey eds., 2004); *see also* BLAS NUNEZ-NETO, CONG. RESEARCH SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL, 5 (2008) ("Over the past two decades, border enforcement has increasingly become a priority, with the border enforcement budget increasing sevenfold from 1980 to 1995 and then more than tripling from 1995 to 2003.").

unauthorized entry, and reduced the availability of discretionary relief from removal.[86] The Department of Justice now devotes over half of its caseload to prosecuting immigration-related offenses such as illegal entry and reentry, eclipsing all other types of federal prosecutions.[87]

The growth of the undocumented population in the United States in recent years is the result of a complex mix of factors, involving conditions in both sending countries and in the United States,[88] but the transformation of the U.S.-Mexico border has certainly played a role with regard to undocumented immigrants from Mexico and Central America. As two leading demographers of Mexican migration have explained, "[r]ather than deterring Mexicans from coming to the United States, the militarization of the border has lowered their likelihood of returning home."[89] In the two decades leading up to 1985, a period in which the border was comparatively open, eighty-five percent of undocumented entries from Mexico were offset by departures.[90] Crossing the border has now become sufficiently risky and expensive, however, that undocumented immigrants tend to stay in the United States once they have arrived.[91] These days, nearly two-thirds of undocumented immigrant adults in the United States have been in the country for at least ten years, and nearly half are the parents of U.S. citizen children.[92]

Another factor in this dynamic is the changing nature of the laws governing admission, deportation, and the regularization of status. Although any system of border control has the potential to be in tension with birthright citizenship in the sense that it may result in a parent having a different status from that of a U.S. citizen child, the salience of such tensions has shifted over time as immigration policies have changed. In the late nineteenth and early twentieth centuries, the draconian nature of Asian exclusion, combined with the anti-Asian sentiment in state legislatures, brought such tensions to the fore with regard to Asian immigrants and their U.S.-born children. However, for immigrants from other regions, in particular Europeans and Canadians, the

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86. For a discussion of changes with regard to discretionary relief for undocumented immigrants, see Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 193–95 (2010). On new inadmissibility criteria relating to prior unlawful presence, see *So Close and Yet So Far: How the Three- and Ten-Year Bars Keep Families Apart*, AMERICAN IMMIGRATION COUNCIL (July 25, 2011), http://www.americanimmigrationcouncil.org/just-facts/so-close-and-yet-so-far-how-three-and-ten-year-bars-keep-families-apart. On new criminal penalties for unauthorized entry, see Jennifer M. Chacón, *Managing Immigration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–39 (2009).

87. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–82 (2010).

88. *See, e.g.*, Damien Cave, *Better Lives for Mexicans Cut Allure of Going North*, N.Y. TIMES, July 6, 2011, http://www.nytimes.com/interactive/2011/07/06/world/americas/immigration.html (discussing recent decline in unauthorized immigration from Mexico due to expanding economic and educational opportunities and lower birthrate).

89. CROSSING THE BORDER, *supra* note 85, at 12.

90. *Id.* at 6.

91. *Id.* at 12.

92. Paul Taylor et al., *Undocumented Immigrants: Length of Residency, Patterns of Parenthood*, PEW HISPANIC CENTER (Dec. 1, 2011), http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/.

tension between birthright citizenship and immigration policy was far less pronounced than it is for undocumented immigrants today. In the early days of federal immigration restriction, unauthorized entrants who remained in the United States for a requisite period of time, varying from one to five years, were not subject to deportation.[93] After this statute of limitations was abolished, legislative and administrative reforms in the 1920s and 1930s gave rise to various mechanisms, including registry, suspension of deportation, and pre-examination, through which undocumented immigrants with strong ties to the United States could obtain lawful status.[94] Hundreds of thousands of immigrants, many of them presumably parents of U.S. citizen children, moved from undocumented status to permanent residence through such channels.[95] This flexibility in the immigration laws served to mute potential conflicts between immigration control and the Citizenship Clause. Crucially, however, it did so primarily with regard to the European and Canadian immigrants who were the principal beneficiaries of such forms of relief. Formal and informal restrictions kept other immigrant groups from accessing such benefits.[96] Tensions between birthright citizenship and immigration policy have thus not only shifted over time, but have also divided along lines of race and national origin.[97]

For undocumented immigrants today, the road to obtaining lawful status is increasingly unclear. Amendments to the immigration laws over the past two decades have eliminated or severely narrowed many of the provisions through which undocumented immigrants were formerly able to obtain lawful status. Registry, which at its creation in 1929 provided status for those who had been present in the United States for eight years,[98] is currently available

93. Prior to 1891, federal immigration restriction focused solely on border control. In 1891, Congress authorized deportation for those who within one year of arrival became public charges. This statute of limitations was later extended to five years but eliminated for some classes of noncitizens in 1917. *See* KANSTROOM, *supra* note 56, at 125; Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States*, *1921–1965*, 21 LAW & HIST. REV. 69, 74 (2003). Chinese immigrants who lacked authorized status were subject to deportation at any time after entry under the Geary Act of 1892. *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

94. *See* NGAI, *supra* note 21, at 82–90; Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 180–95 (2010).

95. *See* NGAI, *supra* note 22, at 82 (noting that approximately 115,000 immigrants, eighty percent of them European or Canadian, obtained status through Registry between 1930 and 1940); *id*. at 89 (noting that between 1925 and 1965, approximately 200,000 European undocumented immigrants obtained lawful status through Registry and other forms of relief).

96. Registry, for example, was not open to those who were racially barred from naturalization. *See* KANTROOM, *supra* note 56, at 165. Neither was pre-examination. *See* NGAI, *supra* note 22, at 86. Although Mexican immigrants were not barred from Registry, "few knew about it, understood it, or could afford the fee." *Id.* at 82. Mexican immigrants were not formally barred from pre-examination, but the American Consul in Ciudad, Juárez, refused to process visas for all but a handful of Mexican pre-examination cases. *Id.* at 86.

97. Although opposition to birthright citizenship in the 1920s focused primarily on Japanese Americans, nativists also sought to restrict citizenship for Mexicans and implicitly for their children. *See supra* note 52 and accompanying text.

98. Registry Act of 1929, Pub. L. No. 70-962, 45 Stat. 1512 (repealed 1940).

only to those who have been in the United States for over four decades.[99] In 1996, Congress curtailed discretionary relief from deportation[100] and imposed a bar on admissibility for those who have accrued prior unlawful status in the United States.[101] Under this bar, many undocumented immigrants who have a legal basis for seeking lawful permanent resident status (for example, a visa petition by a U.S. citizen spouse) are unable to regularize their status without first leaving the United States for either three or ten years.[102] This provision has significantly curtailed one of the primary means through which undocumented immigrants in earlier eras obtained lawful status: a bona fide marriage to a U.S. citizen.

Thus, one reason that the number of undocumented immigrants has surged is that many of those who would have previously transitioned into lawful status through marriage or some other means are now blocked from doing so. The Obama administration has recently signaled a desire to address some of the effects of these legislative changes through regulatory reform[103] and the use of prosecutorial discretion.[104] However, such measures are limited in scope, and broader legislative initiatives have repeatedly failed in recent years.[105]

It is from this confluence of events that the stark disjuncture between birthright citizenship and immigration policy has emerged. The tension that opponents of birthright citizenship identify is real: birthright citizenship does, in fact, serve to limit the effects of restrictive immigration laws and state and local anti-immigrant legislation. But this is an old story, not a new one. Such tensions have arisen before and will undoubtedly arise again in different ways in future eras, as the nature of immigration restriction shifts. To look at the current landscape of mixed-status families and conclude that the source of the problem is the Fourteenth Amendment is no more accurate today than it was in the 1890s or the 1920s. In combination, the militarization of the border and

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99. Under current law, to qualify for Registry, a person must establish that she has been present in the United States since 1971. *See* 8 U.S.C. § 1259(a) (2006).

100. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996), eliminated suspension of deportation under former 8 U.S.C. § 1254 and replaced it with a much narrower form of relief, cancellation of removal, codified at 8 U.S.C. § 1229b.

101. 8 U.S.C. § 212(a)(9)(B).

102. *Id.* In some cases, the statute imposes a lifetime bar on admissibility. *See* 8 U.S.C. § 212(a)(9)(C). Waivers are available only in very limited circumstances. *See* 8 U.S.C. § 212(a)(9)(B)(v), (a)(9)(C)(iii).

103. *See USCIS to Propose Changing the Process for Certain Waivers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95356a0d87aa4310VgnVCM100000082ca60aRCRD&vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD (last updated Feb. 22, 2012).

104. *See* Julia Preston, *In Test of Deportation Policy, 1 in 6 Offered Reprieve*, N.Y. TIMES, Jan. 19, 2012, http://www.nytimes.com/2012/01/20/us/in-test-of-deportation-policy-1-in-6-offered-reprieve.html.

105. For a discussion of the failure of recent attempts to enact comprehensive immigration reform, see Marisa Silenzi Cianciarulo, *Can't Live With 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13, 22–25 (2008). For a discussion of the failure of the DREAM Act, which would have provided permanent status to many undocumented immigrants who were brought to the United States as children, see Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631–38 (2011).

the transformation of the immigration laws have contributed to a large extent to the tension that is evident today between the Citizenship Clause and immigration policy.

The policies that created such tensions in the past have, in time, come to be repudiated. Chinese exclusion, repealed in 1943, was deemed by President Franklin Delano Roosevelt to have been a "historic mistake."[106] The racial restrictions on naturalization were described by the Supreme Court in 1922 as "a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions,"[107] but within two decades Congress had begun to dismantle them, and by 1952 they had been repealed entirely.[108] The alien land laws came to be regarded as an embarrassing artifact of an earlier era.[109] Although the challenges facing the United States are different today than they were a century ago, the current misalignment between birthright citizenship and immigration policy might serve as an opportunity to consider whether our current policies, like the policies that brought such tensions to the fore in the past, warrant scrutiny.[110]

IV. CONCLUSION

The question of the relationship between the Citizenship Clause and immigration policy is not a new one. Legal scholars, politicians, and advocates began to ask it within just a few years after the passage of the Fourteenth Amendment and continued to ask it periodically thereafter. Recent critiques of birthright citizenship are thus part of a long tradition.

In the years since the passage of the Fourteenth Amendment, federal and state policies regarding immigrants have gone through a striking succession of changes. The Citizenship Clause has at times been in tension with these policies, serving to blunt the impact of the harshest measures. Opponents of birthright citizenship have often cited such tensions as a reason to reconsider the scope of the Citizenship Clause. It is instructive to note, however, that over time, the

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106. The President Urges the Congress to Repeal the Chinese Exclusion Laws, 111 PUB. PAPERS 428 (Oct. 11, 1943).

107. Ozawa v. United States, 260 U.S. 178, 194 (1922).

108. The McCarren-Walter Act of 1952 repealed the racial restrictions on naturalization. Immigration and Nationality (McCarren-Walter) Act of 1952, Pub. L. No. 82-414, § 301, 66 Stat. 163, 239 (1952). A 1945 law review article that argued in favor of abolishing the restrictions cited the conflict between the naturalization laws and the Citizenship Clause as one reason for doing so. *See* Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237, 246–47 (1945) (noting that "the racial exclusion from American citizenship does not extend beyond the first generation" and arguing that "[i]t seems difficult to justify the preclusion of parents from enjoyment of citizenship benefits which are available to their children").

109. *See, e.g.*, Oyama v. California, 332 U.S. 663, 673 (1948) (Murphy, J., concurring).

> [I]n origin, purpose, administration and effect, the Alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations. It is an unhappy facsimile, a disheartening reminder, of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms.

Id.

110. For a broad critique of current immigration policy, see KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION POLICY (2007).

particular immigration policies that produced such tensions have fallen by the wayside while the Citizenship Clause has endured. A consideration of this history should lead us to examine the role of our current immigration laws in producing the tensions that are cited today by contemporary critics of birthright citizenship.