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TECHNOLOGIES OF TRAVEL, “BIRTH TOURISM,” AND BIRTHRIGHT CITIZENSHIP

LESLIE F. GOLDSTEIN*

This Essay addresses whether “birth tourism,” which has been facilitated by modern travel, advertising, and financing technologies to a degree not imaginable in the mid-nineteenth century, should be viewed as outside the reach of the Fourteenth Amendment’s grant of birthright citizenship.¹ The argument will proceed by first analyzing the history of birthright citizenship in the United States. As Part I will show, it is a deeply rooted phenomenon that long predates the Fourteenth Amendment’s reification of it in the Citizenship Clause, and it covers all groups, irrespective of ethnicity. Birthright citizenship (the rule that all persons born in the United States and subject to its jurisdiction are U.S. citizens) has been reaffirmed twice by Congress (in 1866 and 1870) and once by the U.S. Supreme Court (in 1898). Since 1985, however, both scholars and legislators have begun to challenge its applicability to the children of both undocumented immigrants and birth tourists (people who travel to the United States solely to give birth so that the newborn will obtain a U.S. passport, and then promptly return home with their child). Part II will assess the magnitude of birth tourism and describe the technological changes of the late twentieth century that have rendered birth tourism from many parts of the globe to the United States a thriving industry. Part III will return to the constitutional question: whether the phrase “subject to the jurisdiction of the United States” should be reinterpreted so as to deny birthright citizenship to either undocumented immigrants or birth tourists, or both. Scholars who argue for this proceed on the assumption that neither phenomenon was known in 1868 when the Fourteenth Amendment was adopted. Part III.A will contest this assumption by showing that the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment reveal a congressional awareness of persons who would be thought of today as “illegal immigrants,” and a clear intent to have children born to them within the United States covered by the grant of birthright citizenship. By contrast there was *not* a nineteenth century phenomenon similar to birth tourism. Part III.B will argue that the broad, underlying purpose of birthright

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1. U.S. CONST. amend. XIV.

citizenship, as it was developed in the settler colonies of the western hemisphere, Australia, and New Zealand, was to build a community of citizens who came together from a variety of other countries. This purpose can be fostered by continuing to extend birthright citizenship to children of those undocumented immigrants who set down roots here, but the purpose is undermined by effectively selling citizenship to anyone who can afford to travel here to give birth but who then demonstrates no interest in living here and raising children here.

I. BRIEF HISTORY OF BIRTHRIGHT CITIZENSHIP

The Fourteenth Amendment begins with the Citizenship Clause: “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.”² In fact, however, birthright citizenship prevailed in the United States long before the Fourteenth Amendment, by virtue of adoption and adaptation of English common law.³ For example, in an 1824 inheritance case, the Supreme Court presumed that three girls born in the United States were citizens, although their father was an Irish citizen who never naturalized.⁴ In 1830, the Supreme Court held that the law of England as to citizenship at birth was the law of the English colonies; therefore, persons born in New York after the signing of the Declaration of Independence were U.S. citizens unless they were born in British-occupied territory, left for England as minors, and did not elect to affirm their U.S. citizenship within a reasonable time after attaining their majority.⁵ In another early case, more directly on point, *Lynch v. Clarke*,⁶ a New York court held, in 1844, that Julia Lynch, born to Irish aliens while they were temporarily sojourning in New York, was a U.S. citizen.⁷

2. *Id.*

3. ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44251, BIRTHRIGHT CITIZENSHIP AND CHILDREN BORN IN THE UNITED STATES TO ALIEN PARENTS: AN OVERVIEW OF THE LEGAL DEBATE 3–4 (2015) (describing the legal history of birthright citizenship in the United States).

4. *M’Creery’s Lessee v. Somerville*, 22 U.S. (9 Wheat.) 354 (1824).

5. *See Inglis v. Trs. of the Sailor’s Snug Harbor N.Y.*, 28 U.S. (3 Pet.) 99, 136 (1830) (Johnson, J., concurring) (“By the principles of [common] law, the demandant owed allegiance to the king of Great Britain, as of his province of New York. By the revolution that allegiance was transferred to the state . . . [and thus the demandant] was entitled to inherit as a citizen, born of the state of New York.”); *see also, id.* at 164 (Story, J., dissenting in part on other grounds) (“Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.”); *see also, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 119–20 (1804) (involving the claim of a person born in the United States, whom the Court presumed to be an American citizen in assessing whether he had expatriated or merely resided on a Danish island).

6. 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844).

7. *Id.*

The “temporary sojourn” described in *Lynch* by Assistant Vice Chancellor Lewis Sandford of the First Circuit Chancery Court of New York consisted of a four-year-long “experiment” stay that lasted from 1815 until mid-1819.⁸ During that time, Julia Lynch was born. Some months after her birth, her parents took her back with them to Ireland, where she grew up. She was fourteen years old when her uncle died, leaving her an inheritance of his land in New York (as his only potential intestate heir, by virtue of being a family member who was a U.S. citizen). The opinion affirmed that the parental Lynches never developed a “settled intention of abandoning their native country, or of making the United States their permanent abode.”⁹ The *Lynch* court provided an exhaustive examination of American and international precedents and commentary on *jus soli* versus *jus sanguinis*¹⁰ with respect to the question whether children born in the United States to alien parents were citizens or not.¹¹ Characterizing birthright citizenship as a kind of national, constitutionalized common law, the judge concluded, “Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.”¹²

This uniform legal history was obscured by Chief Justice Taney’s opinion in *Dred Scott v. Sandford*¹³ in 1857, which decided this American common law rule did not apply to free persons of African descent.¹⁴ After the Civil War, Congress began the project of correcting the Taney Court’s error, first by adopting the Civil Rights Act of 1866,¹⁵ which legislated birthright citizenship throughout the land, and then, in the same year, sending the Fourteenth Amendment to the states for ratification. The first sentence of the Fourteenth Amendment reified birthright citizenship. To be sure that there was no misunderstanding, Congress re-legislated the birthright citizenship provision (of the 1866 Act) in Section 18 of the 1870 Civil Rights Act.¹⁶

The legislative history of the Civil Rights Act of 1866 and of the Fourteenth Amendment—proposed by Congress that same year and ratified in 1868—indicates that not only European Americans and African Americans, but also Asian Americans and children of off-reservation Native Americans

8. *Id.* at 638.

9. *Id.*

10. *Jus soli* citizenship refers to citizenship based on place of birth, whereas *jus sanguinis* citizenship is based on descent from a citizen parent or parents.

11. *Lynch*, 1 Sand. Ch. at 646–83.

12. *Id.* at 250.

13. 60 U.S. 393 (1857).

14. *Id.* at 454.

15. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27–30.

16. Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (also known as the Enforcement Act of 1870).

were explicitly considered by the framers of each and understood to be included in the grant of birthright citizenship.¹⁷ Although foreign-born Chinese would still not be allowed to naturalize,¹⁸ persons of Chinese descent born in the United States would be covered by the grant of birthright citizenship. This grant also applied to children born to Native Americans who had severed their ties to the tribe by moving off tribal territory and were residing within a state, outside of tribal jurisdiction.

There was ambiguity as to whether Native Americans born within tribal jurisdiction who then chose to move off of tribal land and settle elsewhere counted for Fourteenth Amendment purposes as “under state jurisdiction.” Was the place of their birth for constitutional purposes birth “in the United States?” In 1884, the Supreme Court majority in *Elk v. Wilkins*¹⁹ focused on allegiance and jurisdiction at the moment of birth, ruling that once born in tribal territory under tribal jurisdiction, it would take a treaty or naturalization to confer citizenship on a Native American; a Native American could not voluntarily sever his tribal allegiance by simply moving away and taking up residence in territory that was under state jurisdiction. The *Elkins* Court reasoned as follows:

[A]lthough in a geographical sense born in the United States, [such persons] are no more “born in the United States and subject to the jurisdiction thereof,” within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.²⁰

Three years later, in the Dawes Act of 1887,²¹ Congress corrected this interpretation to allow Native Americans who participated in the allotment program, giving up life within the tribe, thereby to attain citizenship. In 1924, Congress granted U.S. citizenship to all remaining Native Americans who did not yet have it.²²

The anti-Asian hysteria of late nineteenth-century United States gave rise to a Supreme-Court-level Justice Department challenge to claims of birthright citizenship by American-born persons of Chinese descent in 1897. The *Slaughterhouse Cases*,²³ in dicta, had rejected birthright citizenship for

17. Leslie F. GOLDSTEIN, *THE U.S. SUPREME COURT AND RACIAL MINORITIES: TWO CENTURIES OF JUDICIAL REVIEW ON TRIAL* 96–99 (2017).

18. *Id.* at 98–99 n.54. Chinese immigrants were permitted to become naturalized U.S. citizens only in 1943 (when China was our wartime ally).

19. 112 U.S. 94 (1884).

20. *Id.* at 102.

21. Dawes General Allotment (or Severalty) Act of 1887, ch. 119, 24 Stat. 388.

22. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924). For information on prior citizenship grants to large groups of Native Americans, see GOLDSTEIN, *supra* note 17, at 240.

23. 83 U.S. 36 (1873).

children of all foreign-born persons,²⁴ and the Supreme Court in *United States v. Wong Kim Ark*²⁵ explicitly rejected that dicta in 1898.²⁶ The Supreme Court Justices, as had the New York judge in *Lynch* a half-century earlier,²⁷ exhaustively traced the development of *jus soli* within English common law and American precedents and countered the arguments for *jus sanguinis* with analysis of both legal commentary and precedents.²⁸ Thus, the *Wong Kim Ark* decision conclusively settled the birthright citizenship question, as of 1898, as follows:

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of *resident* aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. *The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.*²⁹

The Court then went out of its way to add that the Constitution denied Congress the power to alter this rule: “The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.”³⁰

Then in 1985, Professor Peter Schuck and Professor Rogers Smith published a book-length analysis of the Citizenship Clause as it would apply to the “purportedly unforeseen situations” of unlawful immigrants’ children born within the United States, and also, although with less attention, the phenomenon of births to transient visitors. The book concludes that the Citizenship Clause, properly interpreted, permits Congress to alter the practice of granting citizenship to both these groups and that Congress should do so.³¹

24. *Id.* at 73.

25. 169 U.S. 649 (1898).

26. *Id.* at 678 (“It was unsupported by any argument, or by any reference to authorities; and . . . was not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase . . .”).

27. *See supra* notes 6–12 and accompanying text.

28. *Wong Kim Ark*, 169 U.S. at 653–89.

29. *Id.* at 693 (emphases added).

30. *Id.* at 703.

31. PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 116–17 (1985).

The book argues that *jus soli* is an outdated remnant of medieval thinking and it needs to be modified so as to better fit the idea of government by consent of the governed. Much like Professor Sanford Levinson's famous article about liberal scholars' obligation to think seriously about the Second Amendment,³² Professors Schuck and Rogers's book set off a flurry of scholarly discussion³³ and also gave rise to some legislative proposals with which the authors disagree.³⁴

II. NEW TECHNOLOGIES LED TO BIRTH TOURISM

Birth tourism to the United States in the twenty-first century is a real practice, fostered by an industry that spans the globe. It is particularly popular in China, Taiwan, South Korea, Nigeria, Turkey, Russia, Brazil, and Mexico.³⁵ The most reliable estimate available suggests approximately 36,000 babies were born to foreign tourists in the United States between July 2011 and July 2012.³⁶ Birth tourism itself—i.e. traveling to the United States for the purpose of having a baby there with the sole goal of obtaining a U.S. passport for the baby—is not illegal, although some of its practitioners also

32. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

33. Scholarship rejecting the Smith-Schuck thesis that Congress is free to (and should) alter the Citizenship Clause's reach to exclude children of unlawful immigrants includes the following: Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997); Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 383 (2010); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008); Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363 (2009); Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (book review). Scholarship agreeing that birthright citizenship for unauthorized immigrants should be modified by Congress includes these: Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, 7 STAN. L. & POL'Y REV. 127, 130 (1996); Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J. L. & PUB. POL'Y 465 (1999); Richard Posner, *The Controversy over Birthright Citizenship*, BECKER-POSNER BLOG (Oct. 17, 2010), <https://www.becker-posner-blog.com/2010/10/the-controversy-over-birthright-citizenshipposner.html>.

34. *E.g.*, H.R. 3605, 102d Cong. (1991); *see also Birthright Citizenship: Is It the Right Policy for America?: Hearing Before the Subcomm. on Immigration & Border Security of the H. Comm. on the Judiciary*, 114th Cong. 11–12 (2015) (statement of Jon Feere, Legal Policy Analyst, Center for Immigration Studies) (noting legislation to limit birthright citizenship has been introduced in "nearly every Congress" since the early 1990s); WYATT, *supra* note 3, at 17; Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, 41 NAT'L AFF. (2018) (online only), <https://www.nationalaffairs.com/publications/detail/the-question-of-birthright-citizenship> ("[T]he current climate presents the danger that political deliberations over any changes to current birthright-citizenship practices might lead to policies of heightened deportations of otherwise-law-abiding long-term residents, and of reduced legal immigration. We oppose both of these policies.")

35. Jesusemen Oni, *Foreigners Seeking U.S. Citizenship for Children Flout Law, Can Endanger Babies*, VOICE AM. ONLINE (Dec. 06, 2016, 7:15 PM), <https://www.voanews.com/a/foreigners-seeking-american-citizenship-children-flout-law-endanger-babies/3626080.html>.

36. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, THERE ARE POSSIBLY 36,000 BIRTH TOURISTS ANNUALLY (2015), <https://cis.org/Camarota/There-Are-Possibly-36000-Birth-Tourists-Annually>. This estimate is for July 1, 2011 through June 30, 2012. *Id.*

commit immigration fraud.³⁷ The U.S. Department of State has granted visas to people who openly profess to being “birth tourists,” so long as they can pay their medical costs.³⁸

Of the two phenomena that cause both scholars and officials to question the applicability of birthright citizenship—birth tourism and illegal immigration—the latter is far more prevalent. A recent Pew Research Center study reported, “275,000 babies were born to unauthorized-immigrant parents in 2014, or about 7[%] of the 4 million births in the U.S. that year.”³⁹ Although birth tourism is lawful and is outnumbered 7.5:1 by births to unlawful immigrants, and although both were arguably unforeseen by the framers of the Fourteenth Amendment,⁴⁰ this Essay argues that (1) unlawful immigration was in fact foreseen by the framers of the Fourteenth Amendment (and therefore deliberately not exempted from the reach of the birthright citizenship clause); (2) birth tourism is more at odds with the principle underlying the rule of birthright citizenship than is the granting of birthright citizenship to the newborns of unlawful immigrants; and, finally (3) therefore, birth tourism should (in contrast to the issue of children of undocumented immigrants) be addressed with a policy change by Congress.

Before addressing these constitutional issues, this Part presents a brief discussion of the technological changes that produced a multimillion-dollar birth tourism industry. To be sure, nineteenth century America did attract numerous, curious tourists to the United States. The University of Delaware library contains a whole wall of bookshelves filled with nineteenth century travelogues about the United States written by foreigners for a foreign audience.⁴¹ But in the 1860s, a trip from Liverpool to New York took nine days.⁴² If one simply extrapolates for the extra mileage between Beijing and San Francisco, a trip in the 1860s would take around fifteen and a half days. Today, the flight time for London to New York is eight hours and Beijing to

37. Oni, *supra* note 35.

38. Devin Dwyer, *A New Baby Boom? Foreign “Birth Tourists” Seek U.S. Citizenship for Children*, ABC NEWS (Apr. 14, 2010), <https://abcnews.go.com/Politics/birth-tourism-industry-markets-us-citizenship-abroad/story?id=10359956>; *see also* Oni, *supra* note 35.

39. ANDREW R. ARTHUR, CTR. FOR IMMIGRATION STUDIES, BIRTHRIGHT CITIZENSHIP: AN OVERVIEW, n.50 (2018), <https://cis.org/Report/Birthright-Citizenship-Overview> (citing Jeffrey S. Passel & D’Vera Cohn, *Number of Babies Born to Unauthorized Immigrants in U.S. Continues to Decline*, PEW RES. CTR. (Oct. 26, 2016)).

40. *E.g.*, SHUCK & SMITH, *supra* note 31; Schuck and Smith, *supra* note 34.

41. The relatively well-known ones by Alexis De Tocqueville (*Democracy in America*), Harriet Martineau (*Society in America*), and Frances Trollope (*Domestic Manners of the Americans*) make up only a very small tip of the iceberg. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Bantam Dell 2004) (1835); HARRIET MARTINEAU, *SOCIETY IN AMERICA* (Cambridge University Press 2009) (1837); FRANCES TROLLOPE, *DOMESTIC MANNERS OF THE AMERICANS* (Dover 2003) (1832). For one study of some of this literature, *see* Leslie F. Goldstein, *Europe Looks at American Women, 1820–1840*, 54 SOC. RES. 519 (1987).

42. *Linear Transatlantic Crossing Times, 1833-1952 (in days)*, THE GEOGRAPHY OF TRANSPORT SYSTEMS, https://transportgeography.org/?page_id=2135 (last visited Oct. 20, 2019).

San Francisco is eleven and a half hours. Travel from Moscow to Miami (a popular birth tourism path⁴³) is thirteen hours; travel from Istanbul to New York, is merely eleven hours. In sum, trips that used to take more than a week, and sometimes two weeks, now take half of one day. Moreover, there is a far more affluent middle class worldwide (able to afford a trip for a couple of months in the United States, along with attendant medical costs) than there was in the mid-nineteenth century. Most decisively, world-wide communication via television, films, cellphones, and the internet have made world populations far more aware than in the past of differences between life in their society and in U.S. society and of the ease of attaining birthright citizenship here.⁴⁴

While American cities did advertise in Eastern Europe to attract workers at the end of the nineteenth century,⁴⁵ and there was a flourishing travel industry at the time to bring immigrants to America,⁴⁶ the author of this Essay can find no evidence of deliberate birth tourism in the nineteenth century. One can attribute the difference today only to these technological changes.

III. CONSTITUTIONAL DISCUSSION

In the effort to think about adapting the birthright citizenship clause to a phenomenon produced by technological change that was unforeseen by the architects and ratifiers of the Fourteenth Amendment, the first embarrassment to be encountered is the fact that *Lynch*, the germinal precedent on the subject from 1844, which contained a thoroughly analyzed and carefully reasoned discussion of the durability of a *jus soli* approach to citizenship in Anglo-American law, would seem at first blush to have dealt with someone who was not *entirely* different from a modern day birth tourist.⁴⁷ Julia Lynch was born in New York to parents who were merely on a “temporary sojourn” in the United States, albeit one that endured for about four years.⁴⁸ To the contrary,

43. Iuliia Stashevskaya, *Mother Russia: South Florida Sees a Boom in Russian “Birth Tourism,”* ASSOCIATED PRESS (Mar. 22, 2019), <https://apnews.com/161a0db2666044dc8d42932edd9b9ce6>.

44. Oni, *supra* note 35 (offering a sample of an ad from China, selling birthright citizenship travel packages, and a description of an ad offering Russian birth tourism packages to a hospital in New Jersey).

45. In the National Museum of American History, part of the Smithsonian Institute, the author of this Essay personally viewed a large poster from Cleveland, Ohio, dated around 1900, advertising work in eighteen languages of central and Eastern Europe.

46. *On the Water–Ocean Crossings 1870-1969*, SMITHSONIAN NAT’L MUSEUM OF AMERICAN HIST. KENNETH E. BEHRING CTR., https://americanhistory.si.edu/onthewater/exhibition/5_1.html (last accessed Oct. 23, 2019) (“In the late 1800s, ocean liners were mainly in the business of delivering immigrants across the Atlantic and Pacific to American shores.”); *U.S. Immigration Timeline*, HISTORY, <https://www.history.com/topics/immigration/immigration-united-states-timeline> (last updated May 14, 2019) (“Between 1880 and 1920, more than 20 million immigrants arrive [in the U.S.A.]. The majority are from Southern, Eastern and Central Europe . . .”).

47. *See supra* Part I.

48. *Lynch v. Clark*, 1 Sand. Ch. 583, 583 (N.Y. Ch. 1844).

however, the two situations—birth tourism and the one of the Lynch family—exhibit enough difference to justify a legal distinction. Arguably, the *Lynch* situation was more akin to that of someone who had come to the United States on a temporary work visa, stayed for a few years and then returned home, rather than applying for permanent residence.

Children born in the United States to persons with bona fide long-term, albeit nonpermanent, residence would seem to differ in important ways from persons who visit for, say, one to six months, and essentially never consider this country their actual residence. It is not unimportant that the *Wong Kim Ark* ruling exempted from the reach of the clause persons born on “foreign public ships” docked in U.S. ports and included in its description of the coverage of the clause the phrase limiting its reach to children of “resident aliens,” or to persons “domiciled” within the United States (as distinguished from simply present in the United States).⁴⁹ This combination of inclusions and exclusions seems to at least suggest the importance of distinguishing truly transient travelers from persons actually living in the United States, in order to decide which births the clause properly covers. Granted, at the edges this may be difficult, but one obvious path would be to create a rule excluding the children of persons in the United States merely on tourist visas from the reach of the birthright citizenship clause. Even those undocumented immigrants who live here (who are the prime target of virtually all critics of birthright citizenship) both desire and have sought to become a bona fide part of the American community. The same cannot be said for tourists who simply travel to the United States as a way of buying a U.S. passport for their children.

Thus, anything truly akin to birth tourism was lacking in the United States in the 1860s. In contrast, there is evidence that awareness of the potential for illegal immigration was far more likely in 1866 to 1870⁵⁰ than potential imagining of a practice of, and flourishing industry promoting, birthright tourism. For this reason, as well as for others set forth below, the original understanding of the Citizenship Clause of the Fourteenth Amendment appears to be far more compatible with allowing birthright citizenship to the offspring of persons unlawfully residing in the United States than with allowing it to be marketed and acquired through the birthright tourism industry.

A. *Original Understanding of the Citizenship Clause*

In 1975, Gary A. Greenfield and Don B. Gates provided a thorough analysis of the legislative and presidential discussions of the meaning of the

49. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

50. This was the period between discussion and explicit statutory affirmation of the Civil Rights Act of 1866, the repetition of that affirmation in the Fourteenth Amendment, and the second repetition in Section 18 of the Civil Rights Act of 1870.

Citizenship Clause at the time of the enactment of the Civil Rights Act of 1866, amply documenting the conclusion that the Citizenship Clause would cover, among others, children of Chinese immigrants, despite the reigning prohibition on Chinese persons attaining naturalization.

During congressional debate over the Act, “Senator Cowan asked: ‘[W]hether it will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?’ Senator Trumbull simply replied: ‘Undoubtedly.’”⁵¹

One aspect of the legislative history of the birthright citizenship clauses (of the 1866 and 1870 Acts and the Fourteenth Amendment) that has been mostly neglected in the scholarship is the mention of “Gypsies,” (i.e. persons now known as Roma or Romany) who along with the Chinese, could be parents of birthright citizens. It is possible that “gypsies” was simply an allusion to purportedly non-white persons who, unlike persons of African or European descent, could not obtain naturalized citizenship. I would suggest, however, that more importantly it would have been a direct allusion to a group of (at least imagined) illegal immigrants. Individual states’ police powers were understood in longstanding common law to be permitted to bar entry by “paupers and vagabonds,” and states did enact such prohibitions.⁵² In the traditional and stereotypical understanding, “Gypsies” were itinerants who were often beggars.⁵³ In other words, they were what the law understood to be both “vagabonds” and “paupers,” and therefore illegal immigrants under traditional state police power laws. In short, the category “gypsy” stood in verbally for a category of immigrant long banned under state immigration laws.⁵⁴

51. Gary A. Greenfield & Don B. Kates Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 673–74 (1975) (citing CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866)). Greenfield and Kates also document that Congress considered the Citizenship Clause of the Fourteenth Amendment to be constitutionalizing those rules on such citizenship that were first put in place by the 1866 Civil Rights Act. *Id.* at 663–64.

52. The four categories of persons traditionally excludable under the state police power were: (1) persons bringing disease; (2) “paupers”; (3) “vagabonds”; and (4) fugitives from justice. The U.S. Supreme Court upheld such exclusions despite the dormant commerce clause in *New York v. Miln*, 36 U.S. 102, 142 (1837) and the *Passenger Cases*, 48 U.S. 283 (1849). The *Passenger Cases* specifically mention anti-vagabond laws. 48 U.S. at 319, 329–33, 425–28, 457. States eventually lost their traditional right to exclude the poor and the unemployed, at least those who were traveling interstate, in *Edwards v. California*, 314 U.S. 160, 176 (1941).

53. *Roma*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Rom> (last accessed Feb. 25, 2019) (stating that Roma were “traditionally itinerant people,” of whom the women often served as beggars).

54. Eventually (once Congress’s attention turned to excluding the Chinese) federal immigration law incorporated these longstanding forbidden categories. The 1882 Immigration Act, besides barring the Chinese, prohibited ships from landing “any person unable to take care of himself or herself without becoming a charge.” Immigration Act of 1882, ch. 376, 22 Stat. 214. “The 1891 Immigration Act . . . excluded ‘all idiots, insane persons, paupers, or . . . persons likely to become a public charge,’ as well as those with ‘loathsome diseases.’ It also excluded entry to [non-political] felons, polygamists, and [contract laborers].” Janet Golden, *Visiting Public Health History: Ellis Island*,

One can observe pointed confirmation of this interpretation of the term “gypsy” in the congressional debates on the Fourteenth Amendment citizenship clause. Senator Cowan objected to the draft amendment as follows:

Are [the people of California] to be immigrated out of house and home by Chinese? I should think not . . . [And in my state of Pennsylvania, we] contend with a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own—an *imperium in imperio*; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen, and perform none of the duties which devolve upon him, but, on the other hand, have no homes, pretend to own no land, live nowhere, settle as trespassers wherever they go . . . I mean the Gypsies.⁵⁵

Senator Conness then replied, in acceptance of birthright citizenship for such persons, to the effect that the Chinese would and should be covered by the Amendment as would the children of any race or nationality, and that he believed the fear of “gypsy hordes” to be overblown.⁵⁶

Like Senator Cowan, President Andrew Johnson, too, singled out “Gypsies” as problematic under the birthright citizenship rule. He cited them specifically as one of the reasons for his veto of the 1866 Civil Rights Act.⁵⁷ This veto was, of course, then overridden by Congress.

As already noted, the Supreme Court settled any lingering ambiguity about birthright citizenship in 1898 in *United States v. Wong Kim Ark*, when the Court acknowledged the right of citizenship in persons of Chinese descent born within the United States.⁵⁸ By this time, immigration by Chinese workers had already been outlawed more than once,⁵⁹ so there certainly could have been a sizable number of immigrants who already entered the United States

PHILA. INQUIRER (June 17, 2014), https://www.philly.com/philly/blogs/public_health/Visiting-public-health-history-Ellis-Island.html. Like the state laws before them, prior to 1891, federal immigration restrictions applied only to ships in ports. The land border with neighboring British, French, or Spanish territories was not policed. The 1891 law changed this for the first time, authorizing the creation of federal inspectors for the Canadian and Mexican borders whose job it was to keep persons out who fit the forbidden categories. Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1086.

55. CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866) (remarks of Sen. Cowan) (emphasis added).

56. *Id.* at 2891–92.

57. Epps, *supra* note 33, at 383. On different grounds, Epps too argues that “Gypsies” served as a nineteenth-century analog for today’s undocumented immigrants. *Id.* at 361, 381.

58. 169 U.S. 649 (1898); *see supra* note 29 and accompanying text.

59. Congress enacted the Chinese Exclusion Acts in 1882, 1884, 1888, 1892, and at multiple times after the *Wong Kim Ark* decision. *See* GOLDSTEIN, *supra* note 17, at 143–53. Federal enforcement of U.S. land borders did not even begin until 1891, and immigration restrictions applied to ships in U.S. ports and to those who could land from them. Golden, *supra* note 54.

contrary to immigration laws. Once prohibitions were enacted, there were likely violators of the prohibitions.⁶⁰

Two things should be noted about this history of the Citizenship Clause. First, the discussion of Romany people suggests an awareness of (at least imagined) longstanding illegal immigration to the United States as early as 1866 and, therefore, an “original” understanding that the offspring of such persons would certainly be covered by the birthright citizenship clause. Second, the discussion of birthright citizenship for persons of Chinese descent by the Supreme Court of 1898, who surely would have been conscious of the probable presence in the country of some Chinese person who had entered unlawfully, makes a point of speaking of “children here born of *resident* aliens” and of “the children born, within the territory of the United States, of . . . persons . . . domiciled within the United States.”⁶¹ In other words, even the *Wong Kim Ark* Court, generous in its interpretation of birthright citizenship (dispensing it seemingly even to some who must have been offspring of unlawful immigrants), did not imagine citizenship for children of persons who were just passing through.⁶² These facts of 1866 and 1898 provide reason to believe that if someone had suggested to postbellum Americans that the Fourteenth Amendment was being interpreted in a way that allowed U.S. citizenship, with its attendant passport and voting rights, to be turned into commodities marketed to persons who had no interest in residing in the United States, the language of the Amendment would have been altered to exclude such an application of it.⁶³

B. Birthright Citizenship for Nontourists Fits U.S. History

In addition to the argument that the original understanding of birthright citizenship is compatible with granting it even to unlawful immigrants but not to birth tourists, one can argue that birthright citizenship, for persons who *do* reside in the United States is important to maintain. It is, in a sense built

60. Scholars disagree on how to interpret this history with respect to unlawful immigration. Compare SCHUCK & SMITH, *supra* note 31 (claiming that because there was no illegal immigration in 1866, the Fourteenth Amendment does not definitively settle whether the children of illegal immigrants were part of the original Congressional understanding of birthright citizenship), with Epps, *supra* note 33, at 344–63, and Neuman, *supra* note 33 (arguing that such children would have been understood to be covered by the clause).

61. *Wong Kim*, 169 U.S. at 693 (emphases added).

62. Candor compels acknowledgement that after the passage just quoted, the Court went on to quote a few Anglo-American authorities stating that even persons in the United States only temporarily (“independently of any domiciliation”), of whatever citizenship, are “subject to the jurisdiction of the United States” in the limited sense that they “owe obedience to the laws.” *Id.* at 693–94. Nevertheless, this Essay is proposing that the Supreme Court and Congress should break with this line of thinking to the degree that it might suggest a constitutional entrenchment of birth tourism.

63. John Marshall suggested this test for deciding whether to include a particular unforeseen instance within the reach of the words of a clause, irrespective of the instance’s having been unforeseen by the people adopting the clause. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644–45 (1819).

into our history as a kind of DNA. It is no coincidence that most of the countries that retained birthright citizenship into the twenty-first century are those in the Western hemisphere, plus Australia and New Zealand.⁶⁴ For countries like ours—former settler colonies where the indigenous population is so small as to be politically weak—a *jus soli* rule served as a unifying force for the citizenry. Countries with populations made up largely of the descendants of immigrants would have been unable to unite around a *jus sanguinis* rule. Such a rule would have permanently fractionalized the population.

Professors Peter Schuck and Rogers Smith have recently discussed the kinds of reform of birthright citizenship they would like to see from Congress.⁶⁵ They emphasized the value of premising citizenship on an actual residential and cultural tie to the United States of several years' duration and cited Australia's reform with approval. Australia, in 2007, abolished birthright citizenship except for birth to lawful residents and citizens but added that citizenship also accrued to persons born in Australia who were "ordinarily resident in Australia throughout a period of 10 years' beginning at birth."⁶⁶

The directions of these proposed and actual reforms highlight the problem of birth tourism. To commodify the acquisition of citizenship, marketing it to people who can afford it but who have no experiential, emotional, or cultural tie to the country, undercuts the meaning of citizenship: To be a citizen is to be a member of the *civis*, the political community. Although birth tourism is a small phenomenon in the United States, accounting probably for under one percent of the annual births of 4 million people,⁶⁷ it is nonetheless a corrosive phenomenon. Allowing birthright citizenship to the children of bona fide residents—people who contribute to their communities and have plans to put down roots here, irrespective of how they got here, fits within the broad umbrella of the Fourteenth Amendment. In contrast, allowing citizenship to be bought and sold to mere tourists who are just passing through, but have no tie to this community, makes no sense. For such tourists, the reigning interpretation of the "subject to the jurisdiction" phrase of the Birthright Citizenship Clause can and should be altered.

IV. CONCLUSION

Some recent scholarly and political discussion has zeroed in on the Citizenship Clause of the Fourteenth Amendment and argued that its meaning should be altered by congressional interpretation and that the alteration should be upheld by the Supreme Court. This Essay has argued, partially to

64. WYATT, *supra* note 3, at 2 n.9; SCHUCK & SMITH, *supra* note 34. The latter two countries modified their birth citizenship rules in the twenty-first century.

65. Schuck & Smith, *supra* note 34.

66. *Id.*

67. *See supra* note 36.

the contrary, that both the original understanding and the broad purpose underlying the Citizenship Clause counsel for continuing to allow birthright citizenship to apply to undocumented aliens: those who, with their families, reside within the United States for the long run and work productively in society and form ties to other members of the U.S. community. By contrast, the original understanding and the purpose underlying the Citizenship Clause mitigate against continuing to allow birthright citizenship to apply to the offspring of transient visitors—so-called birth tourists. Instead, Congress and the Court should interpret the “subject to the jurisdiction” phrase of the Citizenship Clause as requiring actual domicile in the United States. Persons passing through on tourist visas should not be permitted to claim U.S. citizenship for their children who chance to be born here. Persons here on relatively long-term visas, by contrast—student visas, work visas—along with actual resident aliens should continue to enjoy this privilege for their children. Such persons may well end up developing long-term ties to the community and become U.S. citizens themselves. Social cohesion may be threatened if the United States were to continue to maintain a long-term undercaste of (undocumented) residents never eligible for citizenship. By contrast there is no good reason to give U.S. citizenship to the offspring of anyone wealthy enough to purchase a maternity vacation in the United States but who has no interest in living here as member of the community.