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BIRTHRIGHT CITIZENSHIP AND THE ALIEN CITIZEN

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The alien citizen is an American citizen by virtue of her birth in the United States but whose citizenship is suspect, if not denied, on account of the racialized identity of her immigrant ancestry. In this construction, the foreignness of non-European peoples is deemed unalterable, making nationality a kind of racial trait. Alienage, then, becomes a permanent condition, passed from generation to generation, adhering even to the native-born citizen. Qualifiers like "accidental" citizen,[1] "presumed" citizen,[2] or even "terrorist" citizen[3] have been used in political and legal arguments to denigrate, compromise, and nullify the U.S. citizenship of "unassimilable" Chinese, "enemy-race" Japanese, Mexican "illegal aliens," and Muslim "terrorists."

The idea of alien citizenship has had widespread social currency. Its influence derives from the idea that non-European peoples are racially or, in modern expression, culturally backward, that they are unable or unwilling to assimilate, and that they are unfit for liberal citizenship. Racism thus creates a problem of misrecognition for the citizen of Asian or Latino descent and, more recently, the citizen who appears to be "Middle Eastern, Arab, or Muslim."[4]

In addition to the cultural dimensions of citizenship,[5] alien citizenship has been expressed in law and official policy. This suggests not only that alien citizenship is more than a racial metaphor, but also that there is an important relationship between juridical and cultural citizenship that warrants greater investigation. Leti Volpp, for example, has suggested that whereas common juridical status may be the grounds for a culture of solidarity among citizens, the converse may just as well be true—that racial

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1. *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 731 (1898) (Harlan, J., dissenting).

2. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

3. *See, e.g.*, Padilla v. Rumsfeld, 352 F.3d 695, 728 (2d Cir. 2003) (Wesley, J., concurring in part, dissenting in part).

4. *See* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1580-83 (2002).

5. *See* Linda Bosniak, *Citizenship Denationalized*, 7 Ind. J. Global Legal Stud. 447 (2000); Volpp, *supra* note 4; *see also* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405 (2005).

difference and exclusion from social or cultural belonging may lead to differential legal treatment of citizens.[6]

CITIZENSHIP NULLIFICATION

As a legal matter, alien citizenship involves the nullification of the rights of citizenship—from the right to be territorially present to the range of civil rights and liberties—without formal revocation of citizenship status. The repatriation (territorial removal) of 400,000 ethnic Mexicans during the Great Depression, half of them U.S. citizens,[7] and the internment of 120,000 people of Japanese descent during World War II, two-thirds of them U.S. citizens,[8] may be considered instances of official alien citizenship.

In both cases, alien citizenship derived directly from the legal exclusion of the citizens' immigrant forebears from the normative path of immigration and naturalization (i.e., legal entry to settlement to citizenship). The advent of a regime of immigration restriction in the 1920s created unauthorized entry as a mass phenomenon and legal problem, and Mexicans comprised the single largest group of undocumented migrants by the late 1920s. The real and imagined association of Mexicans with "illegal aliens," along with the creation of a landless, migratory agricultural proletariat and the extension of Jim Crow segregation to Mexicans in the southwest, stripped all ethnic Mexicans (regardless of legal status) of legitimate belonging and impelled the construction of Mexican American alien citizens.[9]

Japanese Americans, like other Asian Americans, were excluded from both immigration and naturalized citizenship on grounds of "racial unassimilability" from the late nineteenth century to the mid-twentieth century.[10] Asiatic exclusion was the most complete race-based legal

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6. *See generally* Volpp, *supra* note 4.

7. *See generally* Abraham Hoffman, Unwanted Mexican Americans in the Great Depression: Repatriation Pressures 1929-39 (1974); Raymond Rodríguez & Francisco E. Balderrama, Decade of Betrayal: Mexican Repatriation in the 1930s (1995).

8. *See* Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 175-201 (2004); Michi Weglyn, Years of Infamy: The Untold Story of America's Concentration Camps (1976).

9. *See* Ngai, *supra* note 8, at 56-90, 127-66.

10. *See* Johnson-Reed Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952) (excluding from immigration all persons ineligible for citizenship); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952) (creating barred Asiatic zone from Afghanistan to the Pacific); Chinese Exclusion Act of 1904, ch. 1630, 33 Stat. 428 (repealed 1943) (barring all Chinese laborers); Chinese Exclusion Act of 1892, ch. 60, 27 Stat. 25 (repealed 1943); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974) (barring Mongolian prostitutes); Gentlemen's Agreement, U.S.-Japan, 1908, *acknowledged in* Annual Report of Commissioner-General of Immigration for the Fiscal Year Ended June 30 1908, 125-27 (limiting visas to Japanese laborers) (effectively ended by Immigration Act of 1924); United States v. Thind, 261 U.S. 204 (1923) (upholding exclusion of Asians from naturalization); Ozawa v. U.S., 260 U.S. 178 (1922). Exclusion was gradually eliminated between 1943 and 1952. *See* Chinese Repealer, ch. 344, 57 Stat. 600, 1194 (1943); Luce-Celler Act, ch. 534, 60 Stat. 416 (codified in scattered

exclusion from citizenship since *Dred Scott*[11] and was instituted, significantly, in the 1880s, after the Fourteenth Amendment nullified *Dred Scott*. The legal and cultural force of Asiatic exclusion was so powerful that the idea of permanent foreignness continued to adhere to native-born Asian American citizens even decades after the exclusion laws were repealed, a racism that literary scholar Lisa Lowe describes as the "material trace of history."[12]

Alien citizenship is a defining *legal* characteristic of the racial formation of Asian and Latino ethnic groups. African Americans also have been constructed as "foreign," as evident in early nineteenth century colonization movements to "return" free blacks to Africa.[13] But after passage of the Fourteenth Amendment, the birthright citizenship of African Americans became indisputable, even if demoted to "second class." Indeed, opponents of citizenship for Chinese and other Asians often used African American citizenship as a negative example of the harm that conferring citizenship on unassimilated, backward races brought to the institution.[14]

The concept of alien citizenship is, of course, inherently contradictory. Asian Americans' and Mexican Americans' struggles against racial exclusion and subordination have always included efforts to secure the full rights of citizenship, which is to say, to eliminate the "alien" from "alien citizen." But, from the other direction, there also have been efforts to resolve the contradiction by formally denying territorial birthright citizenship to certain groups, that is, to eliminate the "citizen" from the "alien citizen," to render her wholly alien. These efforts are diverse but invariably involve challenges to the Citizenship Clause of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[15]

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sections of 8 and 9 U.S.C.) (amending Nationality Act of 1940 to repeal Indian and Filipino exclusion from citizenship); McCarran-Walter Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (2000) (repealing all racial barriers to naturalization).

11. *See* Scott v. Sandford, 60 U.S. 393 (1856).

12. Lisa Lowe, Immigrant Acts: On Asian American Cultural Politics 26 (1996); *see also* Ling-Chi Wang, *The John Huang Controversy—A Wake-up Call for Asian-American Activists*, JINN Magazine, Oct. 23, 1996, http://www.pacificnews.org/jinn/stories/2.22/961023-lobby.html; Ling-Chi Wang, *China Spy Scandal Taps Reservoir of Racism*, JINN Magazine, Mar. 18, 1999, http://www.pacificnews.org/jinn/stories/5.06/990318-china.html.

13. African colonization and repatriation movements have been promoted by both Euro-Americans wishing to rid the United States of black people and African Americans seeking freedom via a return to their origins. *See, e.g.*, 10 Anti-Black Thought, 1863-1925: The American Colonization Society and Emigration (John David Smith ed., 1993); Claude A. Clegg III, The Price of Liberty: African Americans and the Making of Liberia (2004); *see also* Kunal M. Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 Utah L. Rev. 75.

14. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

15. U.S. Const. amend. XIV, § 1.

Since its ruling in *United States v. Wong Kim Ark* in 1898,[16] the Supreme Court has upheld the declaratory force of that clause. Commentators have generally agreed that the weight of precedent is considerable and have doubted that it can be overcome.[17] Nonetheless, contemporary concerns about illegal immigration and terrorism have renewed efforts to strip birthright citizenship from groups deemed unworthy of it. The Citizenship Reform Act of 2005, introduced by Republican Representative Nathan Deal of Georgia, would "deny automatic citizenship at birth to children born in the United States to parents who are not citizens or permanent resident aliens," including children born "out of wedlock" to a mother who is not a citizen or permanent resident.[18] John C. Eastman, a leading advocate for exempting children of illegal aliens from birthright citizenship has argued that a reinterpretation of the Fourteenth Amendment became urgent "[i]n the wake of 9/11."[19]

Controversy over the meaning of citizenship also has erupted in England, where British-born citizens of South Asian descent have been implicated in terrorist acts and plots.[20] In recent years, Ireland (2004)[21] and New Zealand (2005)[22] have amended their citizenship laws to confer citizenship at birth only to children with at least one citizen or permanent-resident parent.

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

17. *See, e.g.*, Stephen Dinan, *GOP Mulls Ending Birthright Citizenship*, Wash. Times, Nov. 4, 2005, at A1; The Stupid Shall be Punished: "Birthright Citizenship," http://bubbleheads.blogspot.com/2006/10/birthright-citizenship.html (Oct. 21, 2006, 23:15 EST). But, as noted by Michele Waslin of the National Council of La Raza, "This was always seen in the past as some extreme, wacko proposal that never goes anywhere . . . . But these so-called wacko proposals are becoming more and more mainstream—it's becoming more acceptable to have a discussion about it." *'Birthright Citizenship' Debate Set to Begin*, MSNBC.com, Dec. 26, 2005, http://www.msnbc.msn.com/id/10609068/.

18. H.R. 698, 109th Cong. § 1 (2005). "Out of wedlock" specifically includes "common law marriages." The bill had eighty-seven cosponsors. *See* Information on H.R. 698, http://www.thomas.gov/cgi-bin/bdquery/D?d109:698:./list/bss/d109HR.lst::|TOM:/bss/109search.html| (last visited Feb. 8, 2007).

19. *Hearing on Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 57-72 (2005) (statement of John C. Eastman, Professor of Law); John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over* Bush v. Gore*?* 94 Geo. L.J. 1475, 1484 (2006). Constitutional amendments limiting citizenship to children of citizens and legal residents also were introduced into the Congress in 1993 and 1995. *See* H.R.J. Res. 56, 104th Cong. (1995); H.R.J. Res. 129, 103d Cong. (1993); H.R.J. Res. 117, 103d Congress (1993). Bills amending immigration and nationality laws to the same effect were introduced in 1995. *See* H.R. 1363, 104th Cong. (1995); H.R. 705, 104th Cong. (1995).

20. *See* Serge F. Kovaleski, *Young Muslims in Britain Hear Competing Appeals*, N.Y. Times, Aug. 29, 2006, at A3.

21. *See* Irish Nationality and Citizenship Act, 2004 (Act No. 38/2004) (Ir.) (limiting grant of citizenship by *jus soli* to persons with at least one parent who is an Irish or British citizen or who meets certain criteria of residence or right of residence).

22. *See* Citizenship Amendment Act 2005, 2005 S.N.Z. No. 43 (N.Z.) (limiting territorial birthright citizenship to children with at least one New Zealand citizen or permanent-resident parent).

These developments warn us that access to citizenship, including birthright citizenship in the United States, is not fixed but politically contingent.

THE CITIZENSHIP CLAUSE

In the United States, the Fourteenth Amendment established (or, more precisely, made explicit for national citizenship that which had been the case since the founding of the republic) the rule of *jus soli*, or citizenship based on place of birth, a rule derived from the English common law.[23] The United States also has a tradition of *jus sanguinus* as it grants citizenship to children born to U.S. citizens abroad (as long as they have prior residence in the United States), but this is a statutory corollary to the constitutional principle that assigns citizenship at birth by territory.[24]

Opponents of territorial birthright citizenship argue in terms of history, political theory, and textual interpretation. There has been much discussion and debate on the question, especially since the publication of Peter Schuck and Rogers Smith's *Citizenship Without Consent* in 1985, so I will only summarize the debate here.[25] It is argued first that the English common law of *jus soli*, which aimed to ensure the allegiance of the monarch's subjects in exchange for his protection, is a feudal remnant not compatible with citizenship in a republic, which is (or should be) based on consent.[26] The

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23. See *Calvin's Case*, (1608) 77 Eng. Rep. 377 (K.B.), arguing that a person born in Scotland after James I ascended the throne of England was a "natural-born subject" and as such was entitled to inherit land in England. The ruling held that the king's sovereignty residing in his corporeal body was part of the "divine law of nature" and thus greater than the discrete political jurisdictions under his sovereignty. In seventeenth century England, subjecthood was primarily a matter of allegiance as few benefits accrued to natural-born subjects but these did include the right to inherit land and to sue in the king's courts. English opponents of territorial birthright raised the specter of hordes of Scots acquiring property in England. *See* Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 Yale J.L. & Human. 73, 95 (1997).

24. *See* 8 U.S.C. § 1401 (2000). In cases of children born out of wedlock the law grants citizenship by descent to those born to a citizen mother but not to those with a citizen father unless additional requirements are met, including "clear and convincing" evidence of biological parentage and a history of parental support. *See id.* § 1409. The policy, presumably aimed at limiting citizenship claims by persons fathered by U.S. soldiers abroad, has withstood gender-discrimination challenge. *See* Nguyen v. INS, 533 U.S. 53 (2001).

25. Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity (1985); *cf.* Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History 308-10 (1997); Letter from Professor Rogers M. Smith to Professor Gerald L. Neuman (July 9, 1987), *in* Immigration and Refugee Law and Policy 1308 (Stephen H. Legomsky ed., 4th ed. 2005). For critiques and more discussion, see Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. Rev. 54 (1997); Gerald L. Neuman, *Back to* Dred Scott*?*, 24 San Diego L. Rev. 485 (1987) (book review); David S. Schwartz, *The Amorality of Consent*, 74 Cal. L. Rev. 2143 (1986) (book review).

26. Schuck & Smith, *supra* note 25, at 20-23. The same line of reasoning was at the core of the argument made by the United States in the *Wong Kim Ark* case. *See* Brief of Appellant, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 904), *in* 14 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 3 (Philip B. Kurland & Gerhard Casper eds., 1975).

second argument is that the Fourteenth Amendment's phrase, "subject to the jurisdiction thereof" should not be interpreted as mere territorial jurisdiction exempting only the children of foreign diplomats as the Court ruled in *Wong Kim Ark*, but rather that "jurisdiction" should be interpreted to mean political jurisdiction, which invokes the principle of consent.[27] By this reasoning, the children of illegal aliens and temporary foreign visitors should not be citizens because their parents do not have the government's permission for entry or, in the case of transients, for permanent residence. Here, citizenship is seen as a kind of unjust enrichment, opportunistically acquired.[28]

The focus on *jus soli* as ascriptive elides the fact that *both* basic rules of assigning citizenship at birth are ascriptive, whether by geography or by descent (*jus sanguinus* after all means the rule of blood). No person has control over the circumstances of her birth. Neither type of American birth-citizenship involves consent; moreover, there is no general "consent requirement" upon reaching the age of majority (though draft registration for males can be construed to be a kind of consent).[29] In contrast to the native-born who hold passive citizenship, naturalized citizens and only naturalized citizens give explicit consent to citizenship and its obligations.[30] Finally, to deny citizenship to a person based on her parents' illegal status is to punish the child for the behavior of the parent, something we have long recognized as morally and legally wrong.[31]

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27. Schuck & Smith, *supra* note 25, at 114; Eastman, *supra* note 19; John C. Eastman, Claremont Inst., Citizens by Right, or by Consent? (Jan. 2, 2006), http://www.claremont.org/writings/060102eastman.html [hereinafter Eastman, Citizens]. A related argument claims that the rule of descent avoids the problem of divided allegiances or dual citizenship that can be created when two states vie for a person's allegiance, one by territorial citizenship and one by descent. *Id.*

28. *See* Eastman, Citizens, *supra* note 27; *see also* Andrew Grossman, Birthright Citizenship as Nationality of Convenience (2004), *available at* http://uniset.ca/naty/maternity/; Allan Wall, *Anchor Babies* (Apr. 26, 2001), *reprinted at* http://www.americanpatrol.com/ANCHORBABIES/AnchorBabiesAllanWall.html.

29. Peter Schuck and Rogers Smith address this problem by proposing that the children of U.S. citizens would acquire "provisional citizenship" at birth, which they can renounce at majority and exercise their right of expatriation. Schuck & Smith, *supra* note 26, at 117. Before majority they would have full protection as citizens as an extension of their parents' citizenship rights. The option to renounce at majority, while an inclusive policy that would not punish passive citizens and avoids the problem of determining positive requirements that would invariably result in exclusions, does however seem to fall short of the consensual ideal espoused by Schuck and Smith. Citizens already have the option to renounce and expatriate.

30. Hence Bonnie Honig has argued that mass naturalization ceremonies are so celebrated in American media because they renew the native-born citizen's faith in consensual citizenship. *See* Bonnie Honig, Democracy and the Foreigner 75 (2001).

31. "The son shall not bear the iniquity of the father." *Ezekiel* 18:20. "[N]o child is responsible for his birth . . . ." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); *see* Trimble v. Gordon, 430 U.S. 762, 770 (1977) (citing *Weber*, 406 U.S. at 175) (considering the rights of illegitimate children); *see also* Oyama v. California., 332 U.S. 633 (1948) (ruling alien land laws unenforceable as applied in this case).

Opponents of birthright citizenship generally do not argue directly in terms of racial difference or racial exclusion. This may be because they are not motivated by racism or, if they are, they know it is socially unacceptable and legally dubious. But racial exclusion from citizenship has a long history in the United States, one that has involved different manipulations of territorial and descent-based citizenship. Even if racial exclusion is not the intended result of eliminating birthright citizenship, it is a certain outcome.

More important than the history of the English common law is the history of American citizenship, which has always operated in *both* registers of soil and blood. For Anglo- and other Euro-Americans, territorial birthright citizenship has been the normative rule, not only because of the common-law tradition but in order to crisply define the citizenship of the new republic and then to encourage immigration and settlement. It was, arguably, not a legacy of feudal subjecthood but rather a progressive and optimistic view of assimilation, of building the citizenry with the children of immigrants, who would be more influenced by their experience in the new republic than by the old-country habits and allegiances of their parents.

In contrast, the rule of descent historically has been used to *exclude* people of color from citizenship. *Dred Scott* specified that the social contract implicit in the Constitution was for and among white Euro-Americans and did not intend to include slaves or free black persons.[32] Chinese and other Asians were excluded from naturalized citizenship as racial unassimilables. Filipino, Puerto Rican, and other colonial subjects were legally constructed as "noncitizen nationals," a status in-between alien and citizen.[33] The subsequent statutory grant of citizenship to Puerto Ricans in 1917 remains subject to congressional revocation.[34]

At the same time, territorial birthright citizenship was used to consolidate U.S. conquest over sovereign peoples. After the Mexican-American War, the Treaty of Guadalupe Hidalgo stipulated that all Mexicans residing in the conquered territory would become U.S. citizens within one year unless they explicitly opted to retain Mexican citizenship; fewer than two thousand people did so.[35] The Indian Citizenship Act of 1924, which granted

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32. *See* Scott v. Sandford, 60 U.S. 393 (1856).

33. After the Spanish-American War, Spain ceded to the United States the Philippines, Puerto Rico, and Guam and "relinquished" its sovereignty over Cuba. Under provisions of the Treaty of Paris, the "natives" of the territories became, without choice, noncitizen U.S. nationals, with the further stipulation that the "civil rights and political status of the native inhabitants . . . shall be determined by Congress." Natives of Spain living in the territories at the time of cession had the option to retain their Spanish nationality. Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754 (commonly known as Treaty of Paris); *see* Dudley O. McGovney, *Our Non-Citizen Nationals, Who Are They?*, 22 Cal. L. Rev 593 (1934).

34. *See* Jones-Shafroth Act of Mar. 2, ch. 145, 39 Stat. 95 (1917); *see generally* José A. Cabranes, Citizenship and the American Empire (1979).

35. *See* Ngai, *supra* note 8, at 50-51.

territorial birthright citizenship to all Native American Indians, should properly be seen as a final blow to Indian sovereignty.[36]

For the freed slaves, Chinese Americans, and other immigrant groups, access to territorial birthright citizenship has been a measure of progress against racial inequality and subordination. These groups have recognized that citizenship is the most elemental condition for racial equality because only citizenship guarantees the right to be territorially present and the right to vote; in other words, it is the individual's foundational protection from state authority. The Fourteenth Amendment aimed precisely to accomplish that basic condition, to nullify *Dred Scott*'s exclusion of black people from citizenship.

During the regime of exclusion, Chinese Americans claimed birthright citizenship as a toehold for their civil rights. For example, in the 1885 California case *Tape v. Hurley*,[37] which challenged the exclusion of Chinese from San Francisco's public schools, attorneys for the plaintiff argued that exclusion violated state law and the Fourteenth Amendment, "'especially so in this case, as the child is native-born.'"[38] Throughout the late nineteenth century, there was avid political opposition to recognizing birthright citizenship for Chinese. The anti-Chinese nativists understood that granting citizenship to the children of Chinese assured permanent settlement and an accretion of the Chinese population, thereby undermining the very objectives of exclusion.[39]

It was not until *Wong Kim Ark* in 1898 that the matter was settled.[40] In his dissent, Chief Justice Melville Weston Fuller captured the widely held view against native-born Chinese, asserting that the "imposition" of citizenship on Chinese persons, whose birth on U.S. soil was an "accident," contradicted Congress's intention to exclude Chinese. The majority had no love of the Chinese, but the reasons for its ruling may be deduced as twofold: first, to support the authority of the federal government over all persons under its jurisdiction during this period of national consolidation; and second, to continue to support the immigration of Europeans at a time of industrial development. Denying access to territorial birthright citizenship to the children of aliens, the Court said, would jeopardize "citizenship [for] thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens."[41]

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36. *See* Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

37. *See* Tape v. Hurley, 6 P. 129 (Cal. 1885).

38. *Question of Admitting Chinese Pupils Causes a Debate*, S.F. Daily Evening Bull., Oct. 4, 1884, at 1 (quoting Chinese Consul F. A. Bee).

39. *See In re* Look Tin Sing, 21 F. 905 (1884); *Citizenship and the Interpreter*, S.F. Daily Evening Bulletin, Nov. 10, 1884, at 2.

40. For an excellent discussion of the case, see Lucy E. Salyer, Wong Kim Ark: *The Contest over Birthright Citizenship*, *in* Immigration Stories 51 (David A. Martin & Peter H. Schuck eds., 2005).

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

But, because birthright citizenship existed alongside racial exclusions from immigration and naturalization, there developed over the course of the twentieth century the "alien citizen," with legal exclusions from admission and naturalization serving as constant pressures against realization of full citizenship rights of the native-born. Nevertheless the right to territorial birthright citizenship was a marker of equality and inclusion.

The advantages and disadvantages of birthright citizenship cannot be weighed solely in terms of a political theory of consent, but also must be considered in light of the historical practices of American citizenship. Those practices comprise a combination of soil and blood that have included some and excluded others along the lines of racial difference. Indeed, the racial history of citizenship reveals the principle of mutual consent to be a fiction: The individual's consent to be governed carries far less power than the state's ability to exclude. Seen from this angle, birthright citizenship is a first-line defense of individual rights before the arbitrary exercise of state authority.[42]

The tradition of birthright citizenship as a strategy for immigrant incorporation has been one that European immigrants always enjoyed, Asian immigrants fought to extend to all regardless of race and national origin, and Mexican immigrants now fight to defend. In the words of one immigrant advocate, birthright citizenship is a "tradition of really integrating immigrants into our society in order to unify us as a nation."[43] In light of contemporary migration patterns, eliminating birthright citizenship to children of illegal aliens would create a hereditary caste of illegal aliens in our society, an extreme form of racial marginalization that would impact Mexicans more than any other single ethno-racial group.[44]

The consequences of eliminating birthright citizenship in the United States might instructively be considered in light of recent developments in Europe, where, faced with new populations arising from immigration, states have amended their citizenship laws.[45] Thus, on the one hand, Germany, which has historically practiced citizenship by descent, revised its laws in 2000 to grant birthright citizenship to German-born children of foreigners

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42. *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, 551 (2001).

43. *Bill Would Eliminate Birthright Citizenship*, FOXNews.com, Nov. 27, 2005, http://www.foxnews.com/story/0,2933,176664,00.html.

44. *Societal & Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents, Joint Hearing Before the Subcomm. on Immigration and Claims and Subcomm. on the Constitution, of the Comm. on the Judiciary*, 104th Cong. (1995) (statement of Professor Gerald L. Neuman, Columbia Univ. Sch. of Law); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. Ill. L. Rev. 525; Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 Harv. L. Rev. 1026 (1994).

45. Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* Citizenship Today: Global Perspectives and Practices 17 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

with long-time residence—a move prompted by the growing population of native-born noncitizens of Turkish descent.[46]

On the other hand, Great Britain eliminated territorial birthright citizenship in 1981,[47] after trying for decades to manage the status and rights of immigrants from former colonies in the Caribbean and South Asia. In 1986, Australia, experiencing a wave of immigration from Asia and the Pacific, also restricted citizenship to children of citizens and permanent residents.[48] In the last two years, Ireland[49] and New Zealand[50] have followed suit. In each case, the changes were made at least partly, if not primarily, in response to popular nativist sentiment against nonwhite immigrants.

These postcolonial cases underscore the important historical relationship between immigration and birthright citizenship. Although its origins lie in the ascension of the King of Scotland to the English throne in 1603, in the modern era of global migration, birthright citizenship has been a mechanism for incorporating new immigrants, and its disavowal a mechanism for exclusion.

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46. *See, e.g.*, Federal Ministry of the Interior, Major reform aspects (Act to Amend the Nationality Law of July 15, 1999), http://www.bmi.bund.de/nn_148264/Internet/Content/Themen/Auslaender__Fluechtlinge__Asyl__Zuwanderung/Einzelseiten/Major__reform__aspects__Act__to__Amend__the__Id__85913__en.html (last visited Mar. 26, 2007) (describing Germany's Act to Amend the Nationality Law of 2000). The residency requirements (eight years plus possession of certain permits) are steep. According to one estimate, it would disqualify from birthright citizenship the German-born children of two-thirds of the Turkish foreign-born residents in Germany. Christiane Lemke, Citizenship Law in Germany: Traditional Concepts and Pressures to Modernize in the Context of European Integration (2001) (out-of-print article, on file with the Fordham Law Review).

47. *See* British Nationality Act, 1981, c. 61, §§ 1, 3.

48. *See* Australian Citizenship Amendment Act, 1986, c. 70, § 7.

49. *See supra* note 21.

50. *See supra* note 22.