THE BIRTHRIGHT CITIZENSHIP CONTROVERSY: A STUDY OF CONSERVATIVE SUBSTANCE AND RHETORIC

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This essay is a critique of the conservative rhetoric used in their attack on birthright citizenship—as granted by Clause 1 of the Fourteenth Amendment, which states: “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.” The rhetoric of that attack violates the traditional canons of conservative argumentation and interpretation, such as original intent and plain meaning. As such, their arguments call into question the seriousness of their allegiance to these canons.

My article will not discuss the pros and cons of what we should do if we were writing on a blank slate. The immigration problems of the United States are real and in my opinion do not admit a simple solution.

I. AMERICAN BIRTHRIGHT CITIZENSHIP: A HISTORY

One would think that the language of Clause 1’s plain meaning is that everyone, including the children of illegal aliens, who are born within the United States are American citizens. For years, the meaning of this provision has been noncontroversial. It has been assumed

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1 U.S. Const. amend. XIV, § 1.
2 Three points in clarification. First, in this paper I am not investigating whether someone not a “natural born citizen” can be president. That is the section of the Constitution about the qualifications to be president: “No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.” U.S. Const. Art. 2, § 1. Second, I do not have a precise definition of the term “conservative;” in fact, I do not think there is any precise definition. By “conservative” I mean those who are identified or self-identify as conservatives. Third, I do not mean that all “conservatives,” however defined, ascribe to what I call “the conservative canons of interpretation.” I am saying that these canons are commonly espoused by conservatives.
without discussion by the Supreme Court to cover anyone born within the United States. See, for example, *Plyler v. Doe.* This assumption, however, is now under attack. George F. Will picked up this argument in an op ed piece, and several Members of Congress want to pass legislation or a constitutional amendment to abolish birthright citizenship.

The push to abolish birthright citizenship comes from the concern over the number of illegal immigrants in the United States. “Congress has heard testimony estimating that more than two-thirds of all birth in Los Angeles public hospitals, and more than half of all births in that city, and nearly 10 percent of all births in the nation in recent years, have been to mothers who are here illegally.” There is also a concern about “anchor babies.” Once the baby, an American citizen, turns twenty-one, his citizenship status can be used by the parents to give them a preference for legal admission to the United States.

3 Except for children of foreign diplomats. See infra pages 4 and 44.
7 See H.R. 140, 112th Cong. (Jan 5, 2011), as the latest example. See also, Margaret Mikyung Lee, “Birthright Citizenship Under the 14th Amendment of Persons Born in the United States to Alien Parents,” Congressional Research Service, August 12, 2010, 9-10:

In the 111th Congress four bills have been introduced that would amend INA §301 (8 U.S.C. §1401). These include H.R. 126, H.R. 994 §301, H.R. 1868, and H.R. 5002 §7. One bill, S.J. Res. 6, ha[d] been introduced that would amend the Citizenship Clause of the Fourteenth Amendment of the Constitution.”

For further discussion see infra page 13.
8 Supra note 6.
9 Id.
10 INA § 201(b). Note however, this family-based immigration preference only applies to “immediate relatives,” which includes the parents of citizens 21 years or older, but does not apply to siblings of the U.S. citizen. Id. Siblings (of a U.S. citizen 21 years or older) still enjoy a “preference” in that they legally qualify for immigration into the U.S., but the number of such other non-“immediate relatives” are subject to a yearly quota. Id. it is worth emphasizing here
I will first briefly discuss the history of American citizenship and demonstrate that the anti-birthright arguments are founded neither on textual analysis, historical context, nor intent.\textsuperscript{11} I will then discuss how these conservative arguments use a rhetoric that violates all the conservative cannons of interpretation.

A. Understanding of American Citizenship before \textit{Dred Scott}

Prior to \textit{Dred Scott},\textsuperscript{12} there was little discussion of what American citizenship was, how to get it, or what it meant. In \textit{Murray v. The Charming Betsy},\textsuperscript{13} it seemed implicit in the Supreme Court’s decision that those born in the United States were citizens.\textsuperscript{14} In \textit{Inglis v. Sailors’ Snug Harbor},\textsuperscript{15} concerning the citizenship of the Plaintiff who was born in New York City around the time of the Declaration of Independence, the Court held that in all the Colonies the law of England was controlling and the Plaintiff, therefore, had every right to inherit property as a citizen of New York.\textsuperscript{16} Explaining this general principle the Court stated that:

Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience or, in other words, within the allegiance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, de facto. There are some exceptions which are founded upon peculiar reasons, and which; indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject to the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign,

\textsuperscript{11}What follows is general review of the law on birthright citizenship. It does not claim originality, but is to help in understanding my critique of the conservative rhetoric.
\textsuperscript{12}60 U.S. 393 (1857).
\textsuperscript{13}6 U.S. 2 Cranch 64 (1804).
\textsuperscript{14}See \textit{U.S. v. Wong Kim Ark}, 19 U.S. 649, 658 (1889). This is the only case (which is still good law) in which the Court held, (rather than assuming) that anyone born within the jurisdiction of the United states was a citizen. See infra,
\textsuperscript{15}28 U.S. 3 Pet. 99 (1830).
\textsuperscript{16}See 19 U.S. at 659.
and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince."\footnote{17}

In \textit{Shanks v. Dupont},\footnote{18} the Court held that a woman, born in South Carolina before the Declaration of Independence and who married a British officer with whom she moved to England, never to return to the United States, was a citizen of England (and upon her death the title to land in South Carolina would pass to her descendants, also British subjects, as protected by the Treaty of Peace of 1783).\footnote{19} In a case concerning the inheritance of land in the State of Maryland, the Court in \textit{McCreery v. Sommerville}\footnote{20} said, “It was assumed that children born in that state of an alien who was still living, and who had not been naturalized, were ‘native-born citizens of the United States.’”\footnote{21} In \textit{Levy v. McCartee},\footnote{22} echoing its decision in \textit{McCreery v. Sommerville}, the Court applied the common law principle that a child born in England of alien parents was a natural-born subject (of England) in a case relating to descent in the State of New York.\footnote{23}

\begin{quote}
\textit{Dred Scott}\footnote{24} defined citizenship narrowly: African-Americans were not U.S. citizens, could not be citizens of a state, and therefore could not sue under diversity jurisdiction. They could not be a “citizen of a state” who could sue a “citizen of a different state.”\footnote{25}
\end{quote}

\section*{B. CITIZENSHIP AFTER \textit{DRED SCOTT}}

\footnotesize{\begin{flushleft}
\footnote{17} 28 U.S. 3 Pet. 99, 155 (1830).
\footnote{18} 28 U.S. 3 Pet. 242 (1830). Decided on the same day as \textit{Inglis v. Sailors’ Snug Harbor}.
\footnote{19} \textit{See} 19 U.S. at 660.
\footnote{20} 22 U.S. 9 Wheat. 354 (1824).
\footnote{21} \textit{McCreery v. Sommerville}, 22 (9 Wheat.) 354, 356 (1824).
\footnote{22} 31 6 Pet. 102 (1832).
\footnote{23} \textit{See} supra note 13, at 662.
\footnote{24} \textit{Supra} note 11.
\footnote{25} 28 U.S.C. Sec. 1332. My students in Civil Procedure are always surprised that \textit{Dred Scott} is a federal subject matter jurisdiction case.
\end{flushleft}}
That the principle of citizenship by birth was widely accepted is further evidenced by the November 29, 1862 opinion of then Attorney General Edward Bates.\textsuperscript{26} In response to an inquiry from the then Secretary of the Treasury Salmon P. Chase on whether free black sailors (former slaves) were citizens of the United States and thus fit to command American vessels in the pursuit of coastal trade, Bates responded:

Every person born in the country is, at the moment of birth, prima facie a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the "natural born" right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance.\textsuperscript{27}

There was a problem, however, in that the Thirteenth Amendment had abolished slavery, but did not make African-Americans, whether former slaves or not, citizens.\textsuperscript{28}

In fact, their status was problematic. Many whites thought that the races would never be able to live together and advocated voluntary or involuntary emigration (i.e., deportation).\textsuperscript{29} Lincoln at first advocated voluntary emigration because he felt the races could not live together.\textsuperscript{30} Members of Lincoln’s cabinet, for example Attorney General Edward Bates, also promoted the idea of black colonization.\textsuperscript{31} Unlike Bates, however, Lincoln always maintained that any emigration be voluntary.\textsuperscript{32} Most black Americans, however, did not favor voluntary colonization or involuntary deportation.\textsuperscript{33}

\textsuperscript{28} See U.S. Const. amend. XIII.
\textsuperscript{30} See \textit{id.} at 123, 168, 224, 233.
\textsuperscript{31} See \textit{id.} at 184; \textit{see also} 10 Op. Atty Gen. 382.
\textsuperscript{32} \textit{Id.} at 127, 224 and 233.
\textsuperscript{33} \textit{Id.} at 19, 223. The colonization movement could be divided generally into two camps: those who saw it was a means of ending slavery, and those that sought to rid the country of a free blacks. \textit{See} \textit{id.} at 124. This later group was not limited to southern slaveholders—there was a
Various locations, such as Liberia, Santo Domingo, and Costa Rica, were proposed, but few African-Americans wanted to emigrate.\textsuperscript{34} One project only had one volunteer.\textsuperscript{35} There was a con man who tried to establish a colony on the Ile à Vache off Haiti, but the conditions were so bad and abusive that the United States had to send boats to rescue the settlers.\textsuperscript{36} Lincoln, who had several discussions with African-Americans in the White House, modified his views and, along with many others, gave up on emigration.\textsuperscript{37}

The Civil Rights Act of 1866\textsuperscript{38} made African-Americans citizens by stating, “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”\textsuperscript{39}

\textsuperscript{34} See supra note 28, at 19, 123-124, 223.
\textsuperscript{35} Id. at 200-201.
\textsuperscript{36} See id. at 239-240 and 259.
\textsuperscript{37} See id. at 223-224, 258-261, and 312.
\textsuperscript{38} 14 Stat, 27, April 9, 1866.
\textsuperscript{39} 39th Cong., Sess. 1, Ch. 31, (April 9, 1866).
The Fourteenth Amendment, passed by Congress the next year, dealt with the problem of citizenship in its first sentence: “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.”\(^{40}\) Note that the phrase in the 1866 Act “and not subject to any foreign power” was replaced by “subject to the jurisdiction thereof” in the 14th Amendment. The 1866 Act language excluding “Indians not taxed” was eliminated.

The first case (there are only two) to address citizenship under the 14th Amendment was *Elk v. Wilkins*,\(^{41}\) brought by a Native American seeking the right to vote. The plaintiff had left his tribe. The Court ruled that he was not a citizen, stating that Section 1 of the Fourteenth Amendment did not apply to Native Americans. The Court stated that one cannot become a citizen by his “. . . own will without the action or assent of the United States.”\(^{42}\) This sentence has been seized on by conservative commentators that U.S. citizenship “is a consensual relationship, requiring the consent of the United States.”\(^{43}\)

The other Supreme Court case is *U.S. v. Wong Kim Ark*,\(^{44}\) The plaintiff was born in San Francisco of Chinese subjects who were residents there. At that time, all Chinese were barred from being citizens by Congressional Act and a treaty with China stated that no Chinese would become American citizens.\(^{45}\) Wong Kim Ark travelled to China, but was refused permission to land on his return by the Solicitor of Customs on the ground he was not a citizen of the United States.\(^{46}\) The Court stated the issue as follows:

\(^{40}\) U.S. Const. amend. XIV, § 1.
\(^{41}\) 112 U.S. 94 (1884).
\(^{42}\) Id. at 100.
\(^{43}\) Supra note 5, at 9.
\(^{44}\) 169 U.S. 649 (1898). Note that Justice Gray, who had authored the majority opinion in *Elk*, also wrote the majority opinion in *Ark*.
\(^{45}\) Id. at 653.
\(^{46}\) Id. at 652-653.
The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment of the Constitution, “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.”

The Court noted that nowhere does the Constitution explicitly define the meaning of the words of the Fourteenth Amendment, so the language, “must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.” The Court then went back to the law of English nationality, which was birth within the allegiance of the King and being subject to his protection:

The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligality," "obedience," "faith," or "power" of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual -- as expressed in the maxim *protectio trahit subjectionem, et subjectio protectionem* -- and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance, but were predicable of aliens in amity so long as they were within the kingdom. Children, born in England, of such aliens were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the King.

The Court cited several United States and English cases and commentators that came to the same conclusion. The Court noted that Europe had modified the rule of “jus soli,” citizenship

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47 *Id.* at 653.
48 *Id.* at 654.
49 *Id* at 655. The first statute codifying these standards into law was enacted during the reign of King Edward III. *See* id. at 668.
based on the country of birth, but these modifications “have no important bearing upon the interpretation and effect of the Constitution of the United States.”

The Court described the primary purpose of the first section:

As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford* . . . and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States are citizens of the United States.

Many scholars, however, disagree, stating that the Citizenship Clause was intended to do much more than override *Dred Scott*.

Next the Court came to the difficult part of reconciling inconsistent language in prior cases and *Elk v. Wilkins*. It first dealt with a statement of Justice Miller in the *Slaughter House Cases*: “The phrase, ‘subject to the jurisdiction thereof’ was intended to exclude from its operation children of ministers, consuls and citizens or subject of foreign States, born within the United States.”

The Court declared the statement to be dicta, noting that the statement was not supported by any authorities: “This was wholly aside from the question in judgment, and from the course of

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50 *Id.* at 667.
51 *Id.* at 676.
53 16 Wall. 36, 73 (1872).
54 *Id.*
reasoning bearing upon the question.” The Court also noted that Justice Miller was wrong in classifying consuls and foreign ambassadors together, in that consuls are subject to the jurisdiction to the county in which they reside.

Then the Court quoted other dicta by other Justices who had stated the opposite. Justice Field had said that the amendment “... recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry.” Justice Swayne had stated:

The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language “citizens of the United States” was meant all such citizens, and by "any person" was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes and conditions of men.

The Court then distinguished Elk v. Wilkins, which did deny citizenship to one born within the boundaries of the United States. It stated that Elk was based on the principle that “subject to the jurisdiction of the United States” meant not partially subject to the jurisdiction, but completely subject, “owing them direct and immediate allegiance,” while the Constitution provided that “Indians not taxed” were not counted for Congressional representation, and Congress was empowered to regulate commerce with Indian tribes. The tribes were quasi-

55 169 U.S. at 678.
56 Id. at 678-679.
57 16 Wall. 95, 11.
58 16 Wall. 128, 129.
59 Supra note 43, at 680-681.
sovereigns, “alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States.”

Ark restricted Elk to members of Indian Tribes within the United States, stating that case did not deny citizenship to others born within the jurisdiction of the United States:

The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent not in the diplomatic service of a foreign country.

Therefore, except for three classes of children, those of members of Indian tribes, of alien enemies in hostile occupation, and of diplomats, all those born under United States jurisdiction are citizens by virtue of birth.

Professor Graglia uses the language of the Civil Rights Act of 1866, which includes the qualifier “not subject to any foreign power” to argue that the Fourteenth Amendment also includes this restriction.

Ark, however, specifically rejects the argument that the Act of 1866 and the Fourteenth Amendment must mean the same thing.

By the Civil Rights Act of 1866, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, "not subject to any foreign power," were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright, or, for instance, for the first time in our history, to deny the

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60 Id. at 681.
61 Id., at 682.
62 14 Stat, 27, April 9, 1866.
63 Supra note 5, at 7.
right of citizenship to native-born children of foreign white parents not in the diplomatic service of their own country nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the Civil Rights Act, "not subject to any foreign power," gave way, in the Fourteenth Amendment of the Constitution, to the affirmative words, "subject to the jurisdiction of the United States." 64

There was a dissent by Justices Harlan and Fuller. Harlan also dissented in Elk, which is peculiar. To him, a Native American was a citizen by birth, while one born of foreign nationals was not. One scholar speculates that Harlan was motivated by an anti-Chinese animus. 66 The cases are also distinguishable by the fact that Congress had passed laws stating that Chinese could not be naturalized and made a treaty with China that Chinese could not become American citizens. 67 The cases, however, do not make this distinction. 68

Justice Fuller’s dissent points out that the majority in Ark deprives children of citizens born abroad of citizenship by birth while granting children of aliens citizenship. 69 He rejects the idea that the common law of England should determine the amendment’s meaning, pointing out the English rule meant that a British subject’s allegiance was indissoluble, and therefore promising allegiance to the United States would be high treason, even though Congress since 1795 has required such a rejection for naturalization. 70 Then Fuller argues that one has to be ‘completely subject’ to the United States to be a citizen by birth. He concludes that the Constitution did not rigidly adopt the English common law, and that it does distinguish between birth to temporary or permanent residents. There was no need for the Court in Wong Kim Ark to

64 Supra note 43, at 687-688. The Court also points out that holding Ark not to be a citizen would strip the citizenship of persons of European parentage “who have always been considered and treated as citizens of the United States.” Id. at 694.
67 Id. at 631.
68 Id.
69 See supra note 43, at 706
70 See id. at 707, 711-712.
make the distinction between lawfully and unlawfully present alien parents, nor between legal resident and nonimmigrant alien because Wong’s parents were legal resident aliens.\(^\text{71}\)

After *Wong Kim Ark*, it was just assumed that everyone born within the United States was a citizen. For example, in a case in the ‘80’s dealing with a right to public education,\(^\text{72}\) it was just assumed that children of illegal aliens were citizens.

One can play the law school game of the distinguishing and reconciling *Elk* and *Ark* on their facts. If *Elk* is interpreted broadly as meaning that anyone with any allegiance to another sovereign cannot he a citizen by birth, then *Ark* is wrong. But *Ark* is the later case, and it limits *Elk*’s subject matter to only the citizenship of Native Americans. Certainly it has been assumed for more than a century that *Ark* settled the issue.

But more recently many conservative commentators have argued that children born of illegal aliens are not citizens. The argument seems to have started in a book published in 1984 called *Citizenship Without Consent: Illegal Aliens in the American Polity*.\(^\text{73}\) Professor Eastman wrote an article titled *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?*, adopting the arguments of Schuck and Smith.\(^\text{74}\) Professor Graglia then wrote his article, arguing that the Citizenship Clause does not apply to children of illegal aliens.\(^\text{75}\) His article does not discuss *Ark* other than to say it’s wrong,\(^\text{76}\) but he uses *Elk* to conclude that the United States has to consent to citizenship and the United States has never consented to the presence of illegal aliens.\(^\text{77}\) Furthermore, the drafters of the Fourteenth

\(^{71}\) *See* Lee, *supra* note 7, at 15; *see also* supra note 43, at 652.

\(^{72}\) *Plyer v. Doe*, 457 U.S. 202 (1982). This case was severely criticized by Professor Graglia for, among other things, being authored by Justice Brennan. *See* Graglia, at 11.


\(^{74}\) 94 Geo. L.J. 1475 (2006).

\(^{75}\) *See* supra note 5.

\(^{76}\) *Id.* at 9-10.

\(^{77}\) *Id.* at 9.
Amendment could never have intended to bestow such citizenship because they could never have foreseen the massive influx of illegals from Mexico.\footnote{Id. at 12. See also supra note 72, at 1486. Note, Eastman disagrees with both Gerard N. Magliocca in Indians and Invaders: The Citizenship Clause and Illegal Aliens, 10 U. Pa. J. Const. L. 499 (2008) and Epps.} In a piece published by the Heritage Foundation, Matthew Spalding argued that the Constitutions does not require citizenship for such children.\footnote{Matthew Spalding, “Should the Children of Illegal Aliens be U.S. Citizens?” The Heritage Foundation (August 30, 2010) http://origin.heritage.org/Research/Commentary/2010/08/Should-the-Children-of-Illegal-Aliens-Be-US-Citizens. It should be noted that the Heritage Foundation is a right wing advocacy organization; it is not an academic, scholarly institution.}

The conservative press and commentators, such as George Will and the National Review, have treated the Heritage Foundation piece and Graglia’s article as dispositive.\footnote{One interesting note is that there seems to be two separate discourses going on here. Scholars such as Epps have been writing about the birthright controversy, doing exhaustive investigation into the Fourteenth Amendment, but the conservative commentators ignore this research and instead treat Graglia and Eastman’s work as gospel, not acknowledging the contrary arguments and findings.} Several Congressmen, including the chair of the House Judiciary Committee, have come out against birthright citizenship.\footnote{Note that the House Judiciary Committee has a major role in shaping our immigrant policy. See H.R. 1868 - Birthright Citizenship Act of 2009. See also Daniel B. Wood, “Illegal Immigration: Can states win fight against ‘birthright citizenship?,”’ Christian Science Monitor, January 7, 2011 http://www.csmonitor.com/USA/Politics/2011/0107/Illegal-immigration-Can-states-win-fight-against-birthright-citizenship; and Peter Grier, “14th Amendment: Is birthright citizenship really in the Constitution?,” Christian Science Monitor, August 11, 2010 http://www.csmonitor.com/USA/Politics/2010/0811/14th-Amendment-Is-birthright-citizenship-really-in-the-Constitution.}

**II. THE CONSERVATIVE ARGUMENTS AGAINST BIRTHRIGHT CITIZENSHIP ARE WITHOUT FOUNDATION AND VIOLATE THE CONSERVATIVE CANONS OF INTERPRETATION.**

The anti-birthright citizenship argument can be summarized in six points:
(A) The United States must consent to citizenship. It has not with regards to children of illegal aliens.

(B) “Subject to the jurisdiction of the United States” means allegiance to the United States, with no allegiance to any other sovereign.

(C) From a public policy standpoint, birthright citizenship rewards illegal immigrations.

(D) The legislative history of the amendment shows that born in the United States must have complete allegiance to the U.S. in order to become a citizen by birth.

(E)

(F) The U.S. is one of the few countries to have citizenship by birth.

(G) The drafters of the Fourteenth Amendment never intended it to cover a massive number of illegal aliens because illegal aliens did not exist at the time.

A. The United States must consent to citizenship and it has not with regards to children of illegal aliens.

1. The Requirement of Consent cannot be found in the Constitution.

The concept of consent derives from a sentence in *Elk v. Wilkins* and from Schuck and Smith, who argue that consent is the only legitimate foundation of citizenship. Indians were not citizens because they had never “chosen or been chosen to be United States citizens,” rather, their allegiances were with their individual tribal nations.\(^{82}\)

*Elk*, however, can easily be limited to the peculiar status of Native Americans, and it was so limited by a later case.

\(^{82}\) *Supra* note 72, at 83-84.
Schuck and Smith argue that “born within the jurisdiction” means “subject to the consent of the individual claiming or disclaiming citizenship and the sovereign.” This argument makes the text of the Constitution meaningless. In fact, Schuck and Smith spare little time discussing the intent of the drafters of the citizenship clause. Their argument is that basing citizenship on birth, rather than consent makes no philosophical or utilitarian sense. The philosophers they rely on (e.g., Locke), are more relevant to the intent of eighteenth century drafters of the Constitution, rather than the nineteenth century drafters of the citizenship clause. In the light of the philosophical background of the drafters of the Citizenship Clause it even further strains reason to hold that at the time of drafting of the Fourteenth Amendment there could not have been a true understanding of the implications of outright citizenship by birth:

A proper consideration of nineteenth century political thought—the thought that formed the real background of the Framing of the Citizenship Clause - furnishes strong evidence that the restrictive thesis, based on Locke and other Enlightenment thinkers, is at best implausible. Readily available evidence suggests that the thinkers who guided the Framing saw birthright citizenship as the norm, with the sole exception being children of diplomats—that they saw this as the state of affairs before the ratification of the Amendment, which made explicit a fact they believed to be already present in the Constitution.83

Looking at the text and the context of the Fourteenth Amendment, one can be certain that the Amendment’s purpose was not to require consent, but to deprive state and government the power not to consent to anyone’s right to be a citizen by birth. The drafters of the Amendment must have had the example of Dred Scott in mind, which was based on the premise that the nation could not consent to citizenship. Thus the Amendment not only reversed the decision in Dred Scott, but, moreover, invalidated its reasoning.

2. Reading a Lockean “Consent Theory” into the Law runs counter to the Conservative Antipathy towards Philosophic Arguments.

83 Epps, supra note 26, at 381.
Conservatives do not like philosophical arguments. They are against theory, ideology, abstractions, and rationality.\textsuperscript{84} They prefer practices that have withstood “the test of time.”\textsuperscript{85}

Russell Kirk states that one of the basic principles of conservatism is: “Faith in prescription and distrust of ‘sophisters, calculators, and economists’ who would reconstruct society upon abstract designs. Custom, convention, and old prescription are checks both upon man’s anarchic impulse and upon the innovator’s lust for power.”\textsuperscript{86} He contrasts the conservative view with that of radicalism, which is, “Contempt for tradition. Reason, impulse, and materialistic determinism are severally preferred as guides to social welfare, trustier than the wisdom of our ancestors. Formal religion is rejected and various ideologies are presented as substitutes.”\textsuperscript{87}

The first conservative of the modern age, Edward Burke,\textsuperscript{88} continually contrasted British tradition with French ideology. In a chapter entitled, “British Tradition versus French Enlightenment,” he writes:

We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and ages.\textsuperscript{89}

Schuck and Smith’s argument then contradicts the central conservative premise of preferring tradition to ideology. This premise somehow does not apply to birthright citizenship, whose roots go back at least to the time of Edward III.\textsuperscript{90}

\textsuperscript{84} Ted Honderich, \textit{Conservatism: Burke, Nozick, Bush, Blair?}, 32-33 (2nd ed. 2005).
\textsuperscript{85} \textit{Id.} at 43.
\textsuperscript{87} \textit{Id.} at 10
\textsuperscript{88} “Conscious conservatism, in the modern sense, did not manifest itself until 1790, with the publication of Reflections on the Revolution in France.” \textit{Id.} at 6.
\textsuperscript{90} See supra note 43, at 668.
B. “Subject to the jurisdiction of the United States” means “allegiance to the United States, with no allegiance to any other sovereign.”

1. This argument, from Elk v. Wilkins, where the plaintiff owed loyalty to his tribe, and from the dissent in United States v. Wong Kim Ark has no basis in law and is radical in its scope.

Here Professor Garret Epps, who has written extensively on the Fourteenth Amendment, writes that the conservatives are misinterpreting the meaning of “jurisdiction”. As used in the Fourteenth Amendment, “born within the jurisdiction” does not mean personally owing allegiance to another sovereign but to being within the geographical area of a sovereign’s control. If one is born within that area, one is born “within the jurisdiction” and is a citizen or a subject of that sovereign. The problem with Native Americans was that they were born within the jurisdiction of the Tribes, which were (and are) semi-sovereigns. Thus, a Native American was not born completely subject to the “jurisdiction” of the United States. Also, children of diplomats, according to a fiction of international law, are not born within the United States, but within their own country.91

If sole allegiance is the criterion for citizenship by birth, President Barack Obama and myself might not be citizens. If it is necessary for both parents to be U.S. citizens, then President Obama is not a citizen. My maternal grandparents were not U.S. citizens at the time my mother was born. I do not know when my paternal grandparents became citizens, but they were born in Prussia and Austria. So, my mother and father may not have been citizens, and so I might not be either. What about my children? What about children of dual citizens? Many United States citizens may have dual citizenship. I have a niece who is also a citizen of Ireland, cousins who

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91 See supra note 26 at 333-334. One case, known to all civil procedure teachers and students (including a beggar in Washington Square, New York City, who had attended Harvard Law School) explains the contemporary meaning of “subject to the jurisdiction.” [Cite to Silverberg’s article.] That case is, of course, Pennoyer v. Neff. 95 U.S. 714 (1878).
are dual citizens (U.S. and Denmark), and granddaughter who is also a Mexican citizen. Would their children be American citizens?

Germany repealed the Nazi law stripping Jews of citizenship and made those subject to that law and those forced to flee Germany for political reasons eligible for German citizenship. Anyone who can trace his ancestry such a person can claim a German citizen by a simple registration. If Jews and others of German descent who are American citizens reclaim German citizenship and then have children, are these children U.S. citizens? The conservative argument could call into question the citizenship of descendants (if they had any) born before they became American citizens of such immigrants as Albert Einstein, Hannah Arendt, Mies van der Rohe, Walter Gropius, Joseph Albers, Billy Wilder, Fritz Lang, Erich Remarque, the von Trapps, Marlene Dietrich, Heidi Klum, and Jerry Springer.

2. The Conservative Argument that “Subject to the Jurisdiction” Actually Means “Owing Complete Allegiance” Conflicts with the Conservative Canons.

a. Textualism

We may start our showing how the conservative critics of birthright citizenship disregard the basic tenants of conservatism by an investigation of textualism with Justice Antonin Scalia’s

Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, which lays out his case that a judge must stick to the text. Justice Scalia states that his job is textual interpretation: “Every issue of law I resolve as a federal judge is an interpretation of text –the text of a regulation, or of a statute, or of the

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Constitution.”94 Justice Scalia maintains that “when the text of the statute is clear, that is the end of the matter.”95 Why? Because we should look for objective not subjective intent—“We do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”96 The reason for considering the objective, not the subjective intent, is that relying on objective intent is the only one compatible with democracy. A law focusing on what was meant is tyrannical. “It is the law that governs, not the intent of the law giver.”97

Justice Scalia criticizes Judge Guido Calabresi and Professor William Eskridge’s position that statutes should be re-interpreted to fit modern conditions.98 Professor Eskridge argues “that it is proper for the judge who applies a statute to consider ‘not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean to mean in terms of the needs and goals of our present day society.’”99

To Scalia, the problem with Eskridge’s interpretative theory is that “It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what it is . . . The text is the law, and it is the text that must be observed.”100

94 Id. at 88.
95 Id. at 91.
96 Id. at 92.
97 Id.
98 Id. at 97.
99 Id. at 96-97. William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994), 50 (quoting Arthur Phelps, Factors Influencing Judges in Interpreting Statutes, 3 Vand. L. Rev. 456, 469 (1950)).
100 Supra note 96, at 97.
Here we have a powerful argument against doing what the anti-birthright advocates are doing—ignoring the text. Surprisingly, Justice Scalia is one of them—in *Hamdi v. Rumsfeld* he questioned whether an arrested suspected terrorist who was a child of non-citizens, but born in the United States, was a citizen.

But, as he wrote in *The Rule of Law as a Law of Rules*:

Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction. The raw material for the general rule is readily apparent . . . Similarly, even if one rejects an originalist approach, it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures.

The first sentence of the Fourteenth Amendment seems to possess a plain meaning that does not present any problems of interpretation. Professor Gerald M. Magliocia writes:

All of the confident assertions that the word “jurisdiction” in the Citizenship Clause means “allegiance or consent” runs up against the problem that this is not how the term is usually defined. Justice Holmes gave the standard explanation that “jurisdiction is power,” by which he meant that the willingness of party to be haled before a court is irrelevant. For example, it would be strange if a criminal defendant could assert a defense based on his lack of consent to the state’s prosecutorial authority. Likewise, illegal aliens in deportation proceedings would not get far by asserting that the tribunal lacked jurisdiction because they did not consent.

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102 *Id.* at 554 (Scalia, J., dissenting).
104 *Id.* at 1184.
Professor Magliocca goes on to cite Gerald L. Neuman,107 “The word jurisdiction has various means in America but it has never been defined in terms remotely resembling the elaborate constriction on which the revisionist argument depends.”

The revisionists also make a narrower argument basing their restrictive reading of the amendment on the wording of the Citizenship Clause of the Civil Rights Act of 1866.108

The argument is that that we should read the 1866 Civil Rights Act language, “All persons born in the United States and not subject to any foreign power” into the 14th Amendment.109

This argument ignores the difference in language—compare “not subject to any foreign power” with “subject to the jurisdiction thereof.” Even granted that the Act of 1866 and the Amendment were intended subjectively to mean the same thing110 the language is just not the same. Professor Epps concludes that the Amendment and the Act are just two different enactments:

In fact, the meaning that matters in this context is that of the Citizenship Clause, which was framed by Congress two months after the final passage of the Civil Rights Act and ratified over the ensuing two years by the state legislatures. It has different wording; it emerged from a different political situation; it was adopted under different procedures and had different authors, and it was approved by different voting bodies. Its meaning must stand on its own. If its broad wording,

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108 Supra note 71, at 180; supra note 72, at 1485-86.
109 Historically, the language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section One of the Fourteenth Amendment) was derived so as to provide a more certain constitutional foundation for the 1866 Act, strongly suggests that Congress did not intend to provide for such a broad and absolute birthright citizenship. The 1866 act provides: “All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child’s parents, remained a citizen or subject of the parents’ home country, was not entitled to claim the birthright citizenship provided in the 1866 Act. 94 Geo. L.J. at 1485.
110 The argument that they were is highly debatable. See supra note 81, at 349-53.
which makes no mention of “foreign powers,” is to be read restrictively, it must be because of something in its text or adoption, not because it is viewed as a coded re-enactment of the Civil Rights Act. [Id. at 353]

Judge Frank Easterbrook argues that we should look only at the text of an enactment because all legislation is a product of compromise. One cannot look to the intent or policy of legislation because there were conflicting interests and policies in that legislation’s drafting, all of which are submerged in the final deal expressed in the text. Following Judge Easterbrook, we may conclude that the language of the Amendment embodies a different deal than the Act, a deal which should be honored and not conflated with prior legislation. [See, Frank Easterbrook, Originalism and Pragmatism: Pragmatism’s Role in Interpretation, 31 Harv. J.L. & Pub. Pol’y 901 (2008).

b. Originalism

Originalism blends into textualism. Professor Kermit Roosevelt distinguishes the two: “Justice Scalia’s interpretative methodology can largely be captioned by three themes: textualism, originalism, and democracy.”\textsuperscript{111}

Originalism assumes that the original intent is ascertainable:

The inevitable assumption of provisionally discernible intent, however, is not identical with the constitutional claim of an “originalist” method – that is, with the claim that there exists some dependable mechanism for discerning the overriding, singular “intent” of a group of people that can be meaningfully applied to produce reproducible, falsifiable, dispositive answers.\textsuperscript{112}

To the conservative, there has to be such a method to determine the original position because the conservative must be guided by his ancestors.\textsuperscript{113}

\textsuperscript{111} Kermit Roosevelt, \textit{Justice Scalia’s Constitution – And Ours}, 8 J. of L. and Social Change 27, 27 (2005)
According to Russell Kirk, conservatism is about preserving tradition.\textsuperscript{114} According to Kirk, conservatives have a deep-seated prejudice in favor of traditionalism, being guided by the wisdom of their ancestors.\textsuperscript{115}

Christopher Wolfe writes in his book, \textit{How to Read the Constitution}, that we must follow eternal principles.\textsuperscript{116} Wolfe contrasts the originalist method of interpretation (which he calls “traditionalist”) with “modern constitutional interpretation.”\textsuperscript{117} In the same way that white paint looks whiter if it is next to black paint,\textsuperscript{118} we can better understand the originalism if we study Wolfe’s critique of its opposition. To Wolfe, the “Modernist” reader argues that: “. . . even were it possible to restrict the interpreter of the Constitution to being a ‘mouthpiece of the law,’ it would not be desirable. Especially when one is dealing with a constitution, the notion of a static, unchanging law is not an ideal, but a nightmare.”\textsuperscript{119} The broad principles of a constitution must be constantly applied and adopted to the different circumstances of new eras, and without that adaptation the constitution would soon be outdated.\textsuperscript{120}

To Wolfe, the problem with this approach is that it does more than change the application of a constitutional clause, it changes its meaning. This destroys constitutionalism: “If the very meaning of a provision can be varied, it would therefore seem to be possible to take the constitution out of constitutional law.”\textsuperscript{121} The conservative reading of “Within the jurisdiction” to mean something else does change its meaning, destroying constitutionalism.

\textsuperscript{114} Supra note 84, at 128-129.
\textsuperscript{115} Id. at 145.
\textsuperscript{116} Christopher Wolfe, \textit{How to Read the Constitution}, 18 (1994). He is emeritus professor of political science at Marquette University and currently Co-Director of the \textit{Thomas International Center}, Raleigh-Durham NC, Dr. Wolfe is married to Anne McGowan Wolfe, and they have been blessed with ten children. The Marquette University website also states that “Dr. Wolfe is married to Anne McGowan Wolfe, and they have been blessed with ten children.” http://www.marquette.edu/polisci/faculty_wolfe.shtml.
\textsuperscript{117} Id.
\textsuperscript{118} Try it.
\textsuperscript{119} Supra note 119, at 19.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 89.
So these revisionists ignore original intent in favor of a philosophical discussion. Some revisionists ignore original intent altogether by stating that the Amendment’s drafters could not have foreseen present conditions, so their intent and the text are irrelevant.

Another way of limiting the scope of the Amendment is to restrict it to apply only to African Americans. It was not written in those terms. We then come to an opposition of the “plain meaning of the text’ and the intent. Here the opponents of citizenship by birth are arguing for an intent that is not expressed in the text.

C. From a Public Policy Standpoint, Birthright Citizenship rewards Illegal Immigrants.

Under the conservative argument, it is not only the child of illegal aliens who is not a citizen, but the child of a tourist or legal resident who is a citizen of another country who would have the citizenship of his parent(s). Those arguing for a requirement of complete and sole allegiance may not realize how radical their argument is. John Derbyshire, in a National Review blog, states that, “Birthright citizenship is an obviously lousy idea – other countries have been revoking it at a fair clip this part few years.” He then goes on to say that he is now an American citizen, a dual citizen (he is from the U.K.), and now his children will be American citizens. In one of his columns, he writes that now that that now he is a dual citizen. He is against birthright citizenship. But if he and his fellow revisionists would succeed, his children might not be American citizens.

The breadth this interpretation is shown by the plethora of statutory and constitutional proposals that have been recently made in Congress. Generally these Congressional proposals
come in one of nine basic forms, which limit birthright, or *jus soli*, citizenship. The proposals include limiting citizenship to children of parents *both* of whom are either citizens or lawful permanent residents (does not expressly repeal the current Citizenship Clause); a mother who is a legal resident (expressly repeals the current Citizenship Clause); a mother who is a citizen or legal resident (expressly repeals the current Citizenship Clause); parents one of whom is a citizen (does not expressly repeals the current Citizenship Clause); parents one of whom is a citizen or person who owes permanent allegiance to the United States (does not expressly repeal the current Citizenship Clause); parents one of whom is a legal resident (expressly repeals the current Citizenship Clause); parents one of whom is a citizen or lawful permanent resident (does not expressly repeal the current Citizenship Clause); parents one of whom is a citizen, is lawfully in the United States, or has lawful status under the immigration laws of the United States (does not expressly repeal the current Citizenship Clause); and parents one of whom is a citizen, a lawful permanent resident who resides in the United States, or an alien performing active duty service in the U.S. Armed Forces (does not expressly repeal the current Citizenship Clause).

Evidently, when it comes to citizenship by birth, the bad results of such citizenship are justify such radical change. Professor Eastman points out the bad consequences of the *Ark* case: children became American citizens even though they were of parents who were not citizens and who are indeed ineligible to become citizens (e.g., the Chinese parents of the plaintiff in

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126 “There are two basic doctrines for determining birthright citizenship. *Jus soli* is the principle that a person acquires citizenship in a nation by virtue of his birth in that nation or its territorial possessions. *Jus sanguinis* is the principle that a person acquires the citizenship of his parents, ‘citizenship of the blood.’ The English common law tradition prior to the Declaration of Independence, which was the basis of the common law in the original 13 colonies and which was adopted by most of the states as the precedent for state common law followed the *jus soli* doctrine.” *Id.* at 1.

127 *See* Lee, *supra* note 7, at 10-11.
Ark), of those on temporary student visas (e.g., President Obama) or work visas, and of illegals. Even children of a regime at war with the United States would become citizens.\textsuperscript{128}

Columnists in the National Review argue against birthright citizenship on policy grounds. A typical example is Reihan Salam, who states that birthright citizenship produces less redistribution of wealth, makes countries resistant to economic migrants, produces anchor babies, rewards law breakers, and is simply unfair.\textsuperscript{129} He quotes Will Wilkinson: “Birthright citizenship made sense for a frontier country with open borders, newly freed slaves, and a small, remote bureaucracy.”\textsuperscript{130}

The first sentence of George Will’s op-ed piece focuses on solving a present day problem: “A simple reform would drain some scalding steam from immigration arguments that may soon again be at a rolling boil.”\textsuperscript{131} Wills stresses that immigration is a modern social problem that needs solving: “Congress has heard testimony estimating that more than two-thirds

\textsuperscript{128} Here Professor Eastman argues against the citizenship of children of German, Austrian, Italian, and Japanese nationals born in the United States during World War II, and of North Korean nationals during the Korean War, and of Vietnamese nationals during the Vietnam War.\textsuperscript{129} Reihan Salam, \textit{On Birthright Citizenship}, \textit{The Agenda NRO’s} (National Review Online) domestic policy blog (8/4/10).\textsuperscript{130} \textit{Id. See} also, Mark Krakorian, “Children of Diplomats,” \textit{The Corner}, Nat. Rev. Online (8/13/10). The United States is “lax about citizenship matters.”; \textit{supra} note 150, “Birthright citizenship is an obviously lousy idea – other countries have been revoking it at a fair clip this part few years.”; Jake Morphonios, \textit{The Liberty Tree}, Nolan Chart (9/7/10) arguing in support of the candidacy of Ron Paul, “Today, when an illegal immigrant sneaks across the border and has a child, that child is automatically granted all the rights and privileges of any other U.S. citizen, including access to social welfare programs such as food stamps, housing benefits, free education and medical care. Here birthright citizenship intersects with another conservative position—their hatred of welfare. Ron Paul opposes birthright citizenship for illegal immigrants as is permitted under the 14\textsuperscript{th} Amendment. (1, 2).”\textsuperscript{131} \textit{Supra} note 6.
of all births in Los Angeles public hospitals, and more than half of births in that city, and nearly 10 percent of all births in the nation in recent years, have been to mothers who are here illegally.”\textsuperscript{132}

Another policy argument centers on the problem of the “anchor baby.” Such citizenship, it is said, rewards illegal immigrations. One can have a child who is an American citizen who can upon reaching the age of 21 enter the United States and have his parents admitted as residents.\textsuperscript{133} The child is by a mere accident of birth an American citizen even though he and his parents have no connection with the United States. George Will states that more than half of the children born in Los Angeles are children of illegals.\textsuperscript{134}

Conservatives, however, do not like policy arguments. They are against theory, ideology, abstractions, rationality, and especially social engineering based on policy.\textsuperscript{135} They prefer

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\textsuperscript{132} Id.
\textsuperscript{133} INA § 12-2.1(a) “Citizenship at Birth – Birth Within the United States.”
\textsuperscript{134} See supra note 6. It is worth noting here that:

Federal appellate courts have upheld the refusal by the immigration enforcement authorities to stay the deportation of unauthorized aliens merely on the grounds that they have U.S.-citizen, minor children, because to do so would be unfairly to grant an advantage to aliens who successfully flouted U.S. immigration laws long enough to have a child born in the United State over those aliens who followed the law, and would turn the immigrations statute on its head. Although the mere fact of the existence of U.S.-citizen, minor children would not be sufficient to prevent the deportation of unauthorized alien parents, extreme hardship to the children caused by the deportation of the parents is a factor to be considered in the discretionary suspension of deportation.

Lee, supra note 7, at 15. Although in practice it is probable that the Court finds extreme hardship for the U.S.-citizen minor child, on its face this policy seems to be at least a partial answer to the conservatives’ apprehension over anchor babies. Although, it still does not address the fact that the parents are given favorable treatment in re-entry when the child reaches the age of majority, which obviously goes above and beyond the issue of initial deportation of the parents.
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\textsuperscript{135} See supra note 82.
practices that have withstood “the test of time.” Russel Kirk states that one of the basic principles of conservatism is, “Faith in prescription and distrust of ‘sophisters, calculators, and economists’ who would reconstruct society upon abstract designs. Custom, convention, and old prescription are checks both upon man’s anarchic impulse and upon the innovator’s lust for power.” He contrasts the conservative view with that of radicalism, which is, “Contempt for tradition. Reason, impulse, and materialistic determinism are severally preferred as guides to social welfare, trustier than the wisdom of our ancestors. Formal religion is rejected and various ideologies are presented as substitutes.”

Justice Scalia echoes Edward Burke’s differentiation between British Tradition and French Enlightenment by contrasting the “rule of law” with liberal policy judgments, which are “legitimated by nothing but my own sense of justice.”

The rejection of policy is a necessary corollary of the exclusive focus on original intent and the text. If one only looks at these, one cannot consider policy.

D. The Legislative History of the Amendment shows that those born in the United States must have Complete Allegiance to the U.S. in order to become a Citizen by Birth.

1. The Conservatives violate the Conservative Canon of not using Legislative History in arguing against Birthright citizenship.

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136 Id. at 43.
137 Supra note 84.
138 Id. at 10.
139 See discussion supra, page 16.
140 Supra note 101, at 1185.
141 See Stanley Fish’s point in his essay, The Law Wishes to Have a Formal Existence, “The law wants to be the law and nothing else, not morality, ethics, or utilitarianism.” Stanley Fish, There is no Such Thing as Free Speech, 141 (1994).
Some revisionists, such as Professor Eastman, do make an argument based on original intent as shown by the legislative history. The argument is that the legislative debates and (to a lesser extent) the overall history of American citizenship and political theory show a "clear intent" that birthright citizenship should extend only to children of American citizens and perhaps of lawful permanent residents, but not reach the children of foreign nationals temporarily resident in the United States, whether legally or illegally.142

2. The Revisionists cite legislative history taken out of context and ignore contrary Legislative Statements.

The revisionists rely on speeches made by Senator Lyman Trumbull. Schuck and Smith use Trumbell’s statement “subject to the complete jurisdiction thereof”143 Professor Eastman picks up of Schuck and Smith’s use of Trumbull’s remarks, calling Trumbull “a key figure in the drafting and adoption of the Fourteenth Amendment.”144 Eastman relies on Trumbull’s statement in response to a question about Indian citizenship that “subject to the jurisdiction of the United States means subject to its ‘complete’ jurisdiction, ‘[n]ot owing allegiance to anybody else.’”145 George Will then picked up Eastman’s use of Trumbull’s comment, and used it in his op-ed

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142 Supra note 81, at 342.
143 Supra note 71, at 80.
144 Supra note 72, at 1486.
145 Id. at 1484.
Epps points out that the revisionists take Trumbull’s statement “subject to the complete jurisdiction thereof” out-of-context, which was the discussion of the citizenship of Native Americans:

What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else. That is what it means. Can you sue a Navajo [sic] Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them. If we want to control the Navajoes, [sic] or any other Indians of which the Senator from Wisconsin has spoken, how do we do it? Do we pass a law to control them? Are they subject to our jurisdiction in that sense? Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty?147

Furthermore, they misinterpret the language “subject to the complete jurisdiction,” which was to apply only to the peculiar situation of the American Indians, many of whom lived in reservations, and therefore were not “subject to the complete jurisdiction.”148

147 Epps, supra note 26, at 358-359.
148 Epps quotes from the debates, which restrict the “subject to the complete jurisdiction” issue to the status of Native Americans:

They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States; and the Senator from Maryland, if he will look into our statutes, will search in vain for any means of trying these wild Indians. A person can only be tried for a criminal offense in pursuance of laws, and he must be tried in a district which must have been fixed by law before the crime was committed. We have had in this country and have to-day, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at
Professor Epps is critical of Professor Eastman’s use of legislative history— “[He] distorts the tenor of (or simply neglects to quote) the legislative debates around the Clause itself.” Many of the quotes from Senator Trumbull were from the debates on the Civil Rights Act, not the Amendment. Moreover, the revisionists fail to mention the legislative history that contradicts

pleasure subject to their own laws and regulations, and we do not pretend to interfere with them. They would not be embraced by this provision.”

Senator Thomas Hendricks of Indiana, a Democrat who had been a persistent foe of the Civil Rights Act, then suggested that Congress had the legal authority, if it chose, to extend its laws to the “wild Indians,” even if it lacked the physical power to enforce them at present. Trumbull replied rather tartly that Congress would have “the same power that it has to extend the laws of the United States over Mexico.”

Senator Jacob Howard, the Senate sponsor of the proposed constitutional amendment, now weighed in:

I concur entirely with the honorable Senator from Illinois, in holding that the word “jurisdiction,” as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction.

The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe.”

*Id.* at 360.

149 *Id.* at 349.
150 *Id.* at 352-353. “As originally written, Trumbull's Civil Rights Bill proclaimed that all persons of "African descent" resident in the United States were citizens. However, on January 30, Trumbull withdrew this language and offered an amendment to insert this language: ‘All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States . . .’ It is this Civil Rights Bill language that the proponents of a restrictive reading of the Clause regard as indicating the Fourteenth Amendment Framers'
their view. Senators Howard, Benjamin Wade, John Corwess, and Jacob Howell stated that anyone (except children of diplomats) born within the United States was or would be an American citizen.  

3. The argument on legislative history contradicts the conservative position that we should not look at legislative history, in determining the meaning of the text.

Justice Scalia is particularly scathing in his dismissal of legislative history: “I am sure some of you have heard the humorous quip that one should consult the text of the statute only when the legislative history is ambiguous. Well that’s no longer funny.”  

To Justice Scalia, the use of legislative history enables courts to decide cases based on policy preferences:

Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility . . . In any major piece of legislation, the legislative history is extensive, and there is something for everybody.

Scalia’s warnings have been ignored by the revisionists. None of the conservative writers, Schuck and Smith, Eastman, nor Will, mention anything about Scalia’s warnings about using legislative history. Professor Epps points out that these revisionists in fact do what Scalia says not to be done: use random quotes out of context:

As legislative history goes, then, the Schuck and Smith argument is a fairly unusual one. It slights the actual language of the measure and the debates of the body that formed it, and visits on the primacy of (1) the language of and debates

‘intent’ to limit birthright citizenship to, in essence, children whose parents had no other citizenship status elsewhere in the world.” Id. at 350-351.

151 Id. at 354-361.
152 Supra note 96, at 105.
153 Id. at 110.
about a different measure (the Civil Rights Act) and (2) the unstated intentions of a different body (The Fortieth Congress).\textsuperscript{154}

E. The anti-birthright argument violates the conservative canon of trusting in precedent.

Conservatives love (or are at least supposed to love) precedent. Justices O’Connor, Kennedy and Souter take a classically conservative approach (often the basis for criticizing the Warren Court) that adherence to prior constitutional values breeds stability, certainty and predictability in constitutional law; disrupts constitutional doctrine as little as possible and only when necessary; and permits incremental decision-making building on the judgment of prior Justices and the lessons of experience.\textsuperscript{155}

Conservatives love of precedent is rooted in their love for the past. “In this mode of belief one does not look back to the past to understand where we are and what we must invent for the future. Instead the past is conceived as dictation—nothing less—to the future.”\textsuperscript{156} The common law is also thought to embody accumulated wisdom. “The common law, for example contains information that could not be contained in a legislative program—information about conflicts and resolutions about the sense of their justice in action, and which is never available when the legislation is the sole legal authority.”\textsuperscript{157}

A respect for precedent, then, was a key principle of conservatism:

There is a paradox here. A couple of generations ago, many people would have thought it obvious, true almost by definition, that both judicial restraint and

\textsuperscript{154} Epps, \textit{supra} note 26, at 346,
\textsuperscript{156} William Newman, \textit{The Futilitarian Society}, 322 (Literary Licensing, LLC 2011).
\textsuperscript{157} \textit{Supra} note 147. at 32.
conservatism mean adherence to precedent. Precedent keeps judges from going off in a direction of their own choosing; cut judges loose from precedent, and you invite unrestrained adjudication. As for conservatism, precedent is a matter of adhering to what has gone before, of conserving what has been done in the past. So, according to a common definition of conservatism, adherence to precedent should be a core conservative view.\(^{158}\)

Furthermore, following precedent avoids the morass of policy:

A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy. This in turn would put a premium on legal knowledge and skills, rather than political preferences, in selecting future judges and Justices. The prospect of such a reorientation is reason enough to endorse the strong theory of precedent in constitutional law.\(^{159}\)

There is a conflict, however, between precedent and that other controlling legal conservative principle, originalism: “To a large extent, originalism and precedent reside in parallel universes that do not intersect. The case for originalism starts in the legal positivism, the idea that only enacted law is the law of the land.”\(^{160}\) On the other hand, “if one starts from the universe of precedent, that universe is founded in the Holmesian observation that the law is, ultimately the judgment of the courts . . . what predicts the judgments of the courts is the precedents of the courts, and therefore precedent in the law.”\(^{161}\)

Thus there is a dichotomy between following precedent and going back to the original intent and the text, a basic one in interpretation. The legal dilemma between precedent and originalism has an analogy in the split between the Catholic and Protestant churches, in which

\(^{160}\) Id. at 977-978.
\(^{161}\) Id. at 978.
Catholics emphasize the traditions of the church while Protestants emphasize the Biblical text.\textsuperscript{162} Justice Scalia seems to be firmly committed to originalism, but (according to the Cato Institute) he “blinked” when “faced with a golden opportunity to advance originalism” in \textit{McDonald v. Douglas} because “following a different—and clearly incorrect—line of precedent was ‘easier.’”\textsuperscript{163}

The anti-birthright advocates seek to combine a selective view of original intent with a selective view of precedent to justify their position. We have seen that these advocates use selective out-of-context citations of legislative history to find that the original intent of the citizenship clause in different than the plan meaning of the text. A similar process is used for the precedent. Professor Graglia cites to the dicta in the \textit{Slaughter-House Cases},\textsuperscript{164} emphasizes \textit{Elk v. Wilkins},\textsuperscript{165} and then attacks \textit{U.S. v. Ark},\textsuperscript{166} a case that has been the controlling law for more than one hundred years.

Those debating birthright citizenship have ignored the classic case on personal jurisdiction, \textit{Pennoyer v. Neff}.\textsuperscript{167} Decided not that long after the drafting of the 14\textsuperscript{th} Amendment, and just six years before \textit{Elk v. Wilkins},\textsuperscript{168} the Court saw jurisdiction over persons and property within the territory of the sovereign as axiomatic:

\begin{footnotesize}
\begin{enumerate}
\item See supra note 5, at 8-9.
\item See supra note 40.
\item See supra note 43.
\item 95 U.S. 714 (1878).
\end{enumerate}
\end{footnotesize}
But, except as restrained and limited by that instrument [the Constitution], they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescriber the subjects upon which they may contract, . . .

*Pennoyer’s* basing personal jurisdiction on presence was reaffirmed by the Court (in an I opinion written by Justice Scalia) in *Burnham v. Superior Court.* Justice Scalia there upheld the tradition of jurisdiction based on presence:

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that, once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleet his visit.

Therefore, such jurisdiction satisfies the due process clause:

For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether “traditional notions of fair play and substantial justice” have been offended. *International Shoe,* 326 U.S. at, 316. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and still generally observed unquestionably meets that standard.

The conservatives (including Justice Scalia) ignore these principles and traditions when it comes to birthright citizenship. In *Hamdi v. Rumsfeld,* a habeas petition brought on behalf of an American citizen seized in Afghanistan as an enemy combatant, Justice Scalia (joined by

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170 495 U.S. 604.
171 Id. at 611.
172 Id. at 622.
Justice Rehnquist) described Hamdi as a “presumed American citizen.”\footnote{Id. at 554 (Scalia, dissenting).} Hamdi was born to foreign nationals who were visiting the United States at the time.\footnote{Supra note 72, at 1484.}

Professors Schuck, Smith Eastman, and Graglia all base their rejection of birthright citizenship on *Elk*, reading it to require the consent of the sovereign and allegiance.\footnote{See supra note 7; supra note 72, 1484-90; and supra note 5, at 9-11.} Schuck and Smith just fail to discuss *U.S. v. Ark.*

One can always expand the scope of the decision one likes and refuse to follow that which one does not (even if that one is the later opinion and has been followed for more than one hundred years without question). That is not respecting precedent, however, but being an advocate for a pre-established position.

\section*{F The U.S. is one of the few Countries in the World to have Citizenship by Birth.}

Conservatives hold that the United States should not be influenced at all by foreign law. Their attitude has been long standing; certainly nationalism and conservatism have gone together. The main theme of Edmund Burke’s *Reflections on the Revolution in France* is the contrast between the wisdom of English traditions with the dangerous ideas of France. Russell Kirk decries the influences of foreign ideologies and intellectuals.\footnote{Supra note 84, at 478.} To Kirk, conservatives see society as a spiritual unity “with a bond between the past, present and future,”\footnote{Id.} since each society develops on its own, importation of foreign ideas and laws would be a mistake. Kirk explains how Burke “spoke of society as a spiritual unity, an eternal partnership, a corporation
which is always perishing and yet always renewing, very like that other perpetual corporation and unity, the church. Upon the preservation of this view of society, Burke thought, the success of English institutions depended—defending a view implicit in English thought so early as Hooker, but never before so clearly enunciated.”

Kirk explains how “intellectualism” grew out of pernicious foreign influences:

Only when a doctrinaire hostility toward traditional religion, “capitalism,” and established political forms began to make itself felt in Britain and America, what with the growing influence of Marxism and other European ideologies in the 1920s and the vague discontents of the Depression, did a number of educated Americans and Englishmen begin to call themselves intellectuals.

Burke’s rejection of foreign ideas is present in today’s conservatism. Matthew Shaffer (in his blog on National Review On-line), discussed the internationalism of Christiane Amanpour, then the hostess of ABC’s This Week. Shaffer notes that she sees issues from an international perspective; “despite her physical relocation to Washington, DC, Amanpour still seems to be observing American politics from overseas.” The problem is that her internationalism makes her parochial: her talking only to a “cosmopolitan clique,” whose “new international voice has never conversed with, and cannot sympathize with, the policemen, firefighters, veterans, and Teamsters who protested at Ground Zero on Sunday morning during Amanpour’s broadcast.” The bottom line is that “her distance from American concerns disables her from being a fair moderator of American debates.”

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179 Id. at 22.
180 Id. at 20.
182 Id.
183 Id.
In his *The Meaning of Conservatism*, Rodger Scruton emphasizes the centrality of a particular society:

While conservatism is founded in a universalist philosophy of human nature, and hence a generalized view of social well-being, it recognizes no single “international” politics no unique constitution or body of laws which can be imposed irrespective of the traditions of the society which is to be governed by them.\(^{185}\)

Justices Scalia and Thomas continually criticize the Supreme Court’s use of foreign law. Justice Thomas, in *Foster v. Florida*,\(^{186}\) quoting Justice Scalia in *Lawrence v. Texas*,\(^{187}\) warned “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”\(^{188}\) In *Roper v. Simmons*,\(^{189}\) Justice Scalia stated:

> The Court thus proclaims itself sole arbiter of our Nation’s moral responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our *Eighth Amendment*, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.\(^{190}\)

In his blog, Jim Kelly decries the use of foreign law and opinion:

It is unfortunate that, in the recently decided case of *Graham v. Florida*, the Supreme Court of the United States refers to international opinion against the sentencing of juveniles to life without parole as support for the Court’s decision. Nevertheless, it is important to note that, in the Court’s majority opinion, Justice Anthony Kennedy clarifies and significantly restricts the Court’s use of international opinion, at least in cases where the Court is involved in interpreting the Eighth Amendment’s prohibition against cruel and unusual punishment. The Court explained that the judgments of other nations and the international

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\(^{184}\) 3rd ed. 2002.


\(^{186}\) 537 U.S. 990 (2002).


\(^{188}\) *Id.* at 598.

\(^{189}\) 543 U.S. 551 (2005).

\(^{190}\) *Id.* at 608.
community are not dispositive and are used only for support for the Court’s own independent conclusion on the matter. No doubt, this evolution in the Court’s approach disappoints those transnational progressives who had petitioned the Court to use international laws and practices to guide the Court’s Eighth Amendment analysis, rather than to merely support a decision of the court based exclusively on domestic laws and practice.191

When it comes to birthright citizenship, Conservatives use the fact that many foreign states have rejected it to advocate getting rid of it in this country: Reihan Salam writes in his National Review On-line blog, The Agenda, that “In response to agitation over a growing population of Turkish guest workers, Germany changed its rules to grant citizenship to German children of German-born children of resident foreigners.”192

Another blogger in National Review On-line, John Derbyshire, comments:

Birthright citizenship is an obviously lousy idea – other countries have been revoking it at a fair clip this past four years – but given the ambiguity of the 14th [sic], and a legal environment patrolled by leftist fanatics like Susan Bocton and Vaughn Walker a Constitutional Amendment probably is necessary.193

G The Drafters of the Fourteenth Amendment never Intended it to cover a massive number of Illegal Aliens because Illegal Aliens did not exist at the time.

The contradiction between conservatism and the arguments in favor of rejecting birthright citizenship are, however, nothing compared to Professor Graglia’s argument based on intent—or rather the absence of intent.

How, then, should the jurisdiction requirement of the Citizenship Clause be interpreted in regard to that question? Like any writing, or at least any law, it should be interpreted to mean that it was intended or understood to mean by those who adopted it—the ratifiers of the Fourteenth Amendment. They could not have considered the question of granting birthright citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868, when the amendment was ratified, because there were no restrictions on immigration. It is hard to believe, moreover, that if they had considered it, they would have intended to provide that violators of United States immigration law be given the award of American citizenship for their children born in the United States. 194

This argument was picked up by George Will 195 and since then has gone “viral”—if one does a Google search for “never intended children illegal immigrants” one finds innumerable cites to the conservative blogosphere.

The argument, however, is too good. If the Constitution’s text does not apply to new situations, those not contemplated by the drafters, that text applies to and controls very little. The logic is breathtaking. A law should be interpreted according to the adopters’ intent or understanding—but since they had no intent—indeed could not have had an intent—regarding children of illegal aliens, we are free to read the law the way we want to. I call this technique “the eraser”—it erases the Constitution. An interpretative technique whose claimed virtue lies in preventing subjective judgments has been turned upside down—into one that does just that. If one can ignore the Constitution if the drafter did not foresee the issue in question, why have a written constitution? 196

194 Supra note 5, at 5-6.
195 See supra note 6.
196 George Will writes:

The authors and ratifies could not have intended birthright citizenship for illegal immigrants because in 1868 there were and never had been any illegal immigrants because no law ever had restricted immigration. If those who wrote and ratified the 14th Amendment had imagined laws restricting immigration—a and had anticipated huge waves of illegal immigration—is it reasonable to presume they would have wanted to provide the reward of citizenship to the children of the violators of those laws? Surely not.”
1. The argument that there were no illegal immigrants when the Fourteenth Amendment was drafted is historically incorrect.

Since states regulated immigration before the Civil War, there were illegal aliens. The importation of slaves was banned as of 1807, but many were imported illegally. The “doesn’t apply to illegal aliens” argument would make such illegally imported slaves—and their children—non-citizens. There were many immigrants at the time of the Fourteenth Amendment, many of them unwanted. Professor Epps points out that the Senate debates were concerned with the Chinese and Gypsies who were not citizens and whose presence was not wanted by many, including President Lincoln.

There was a huge population who were not citizens then living in the United States—the African-Americans who had been freed by the Thirteenth Amendment. *Dred Scott* had authoritatively declared that they were not citizens. Their right to live in the United States was in dispute—many proposed that all those of African descent be deported involuntarily. The Fourteenth Amendment was designed, in part, to make them citizens.

In 1860, 13.2 percent of the population in the United States was foreign born. Comparing that to the 12.4 percent reported by the most recent census, the logical conclusion is that the citizens of 1860’s America were no doubt aware of the issue of immigration, as we understand the term today. The United States’ immigration circumstances have not changed:

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*Supra* note 6.

197 *See* Epps, *supra* note 26, at 351-352.

198 *See* Epps, *supra* note 26, at 351-352, 383-384, 386; Cong. Globe, 39th Cong., 1st Sess. 498 *1866); *see also* supra note 40, at 114.

199 *See* supra note 11.

200 *See* supra note 28 and discussion *infra* pg. 5-6.

201 *Id.* at 348-349.

202 *See* id. at 385.

203 *See* id. at 385-386.
America in 1866 was a nation as profoundly transformed by immigration as it is in 2010. Issues of language, culture, religion, social mores and other aspects of the American identity were as salient then as they were now. We would be making a profound historical error to imagine that the generation that framed the Clause was unaware that migration was a transformative and often destabilizing force in American society.\textsuperscript{204}

2. The Constitution is destroyed by the argument that we may ignore the words of the Amendment because the drafters could never have contemplated today’s illegal immigration.

The conservative argument is that the Constitution should be interpreted according to original intent.\textsuperscript{205} The argument is that the drafters of the Amendment had no intent to grant citizenship to illegal aliens because they never could have conceived of the present immigration situation, where the

\textsuperscript{204} Id. at 385. The idea that citizenship by birth alone (excluding children of foreign diplomats) was widely accepted is further evidenced by the November 29, 1862 opinion of then Attorney General Edward Bates. See 10 Op. Atty Gen. 382. In response to an inquiry from the then Secretary of the Treasury Salmon P. Chase on whether free black sailors (former slaves) were citizens of the United States and thus fit to command American vessels in the pursuit of coastal trade, Bates responded:

\textquoteright\text{Every person born in the country is, at the moment of birth, prima facie a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the "natural born" right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance.}\textquoteright

\textsuperscript{205} But it seems as if the conservative argument is more that the Constitution’s drafters did not intend to grant a right, rather than having a positive intent.
United States is a rich country sharing with a long border with a poor one, Mexico.

This argument for original intent is: “We have to follow original intent because that is the only way we can apply what the Constitution actually means, and be judges rather than legislators, but if the drafters had no intent because of unanticipated conditions, we may erase the text and start over, doing the right (unintended pun) thing.”

I am not aware of any discussion on how to interpret the Constitution in light of unanticipated change. The Court does deal with technological change, largely by ignoring the problem. The First Amendment protects “freedom of the press,” but presses are no longer used in printing. Does the First Amendment protect digital publications (e.g., the Huffington Press), TV news shows, and the internet? The answer is generally yes, although regular broadcast TV (now becoming a thing of the past) can be subject to censorship (e.g., Janet Jackson’s “wardrobe malfunction”), although a cable program is not (e.g., *The Tudors, Rome*, and *Entourage*). The Second Amendment was adopted at a time when handguns fired only one or two balls and could be reloaded only with difficulty. (Now one can buy a handgun capable of automatic firing of 32 shells of high velocity ammunition, e.g., the January 2011 Tucson shootings.)\(^\text{206}\) The Supreme Court has ruled that the right to bear arms extends to modern weapons. Evidently, no one has made the argument that” The President shall be Commander in Chief of the Army and Navy of the United States” does not give him power over the Air Force.\(^\text{207}\)

When it comes to what sort of person is protected, it is a different story. Justice Scalia has stated that nobody at the time of the adoption of the Fourteenth Amendment thought that it


\(^{207}\) *See* Epps, *supra* note 26, at 382.
granted any rights to women.\textsuperscript{208} So, according to conservatives, women (and gays) are excluded from strict scrutiny under the Amendment. While women and gays are not protected, corporations are.\textsuperscript{209} Corporations, however, were not around in their present form when the Bill of Rights was adopted.\textsuperscript{210} At that time there were but a few corporations and those were set up for special purposes, such as building a toll road.\textsuperscript{211} So corporations do have rights, unlike women and gays.

As to the type of rights, they are restricted. A conservative argument, now abandoned in favor of the “colorblind constitution” (which was definitely not part of any original intent), was that there was no right to desegregated education because schools were segregated at the time of the Fourteenth Amendment’s adoption.\textsuperscript{212} Generally, conservatives have not recognized a Constitutional right to use contraceptives or have an abortion.

One could generalize here and say that while conservatives recognize an expansion of rights due to technological change, they do not for social change. \textit{Brown v. Board of Education}\textsuperscript{213} rejected the argument based on historical segregation of schools, stating that the social and economic importance of education had grown by the 1950s and was not comparable to its role in the Nineteenth century. Conservatives, however, have rejected this analysis.

\textsuperscript{209} See Citizens United v. FEC, 130 S. Ct. 876 (U.S. 2010).
\textsuperscript{211} See id. at 579. The Framers certainly were aware of corporations. In that era, most corporations were chartered by state legislatures for specific purposes, including banks, canal companies, railroads, toll bridge companies, and trading companies.
\textsuperscript{212} See Barry Goldwater’s, \textit{The Conscience of a Conservative} (1990).
\textsuperscript{213} 347 U.S. 483 (1954)
Similarly, one could argue the social role of women has changed since 1869 and so their rights should change also. Women are now full participants in the workforce. The rights and responsibilities within marriage have shifted. Another social change has been the rise of an openly gay community. Gays are no longer in the closet and refuse to be second-class citizens. Social roles and norms are just different. But this argument falls on deaf conservative ears.

Under the Fourteenth Amendment, the new social roles for women can be seen as in part created by technology, and thus should be accommodated, as the Internet is. Technology has changed housework from a full time to a part time occupation. Effective contraception has allowed women to participate effectively in the labor market. But, as we have seen, rights are not expanded to encompass social change even those changes arguably caused by technologic change.

We now come to the argument based on negative intent with regards to the consequences of birthright citizenship being unforeseen. Generalizing from this argument, it would seem that Constitutional language does not apply whenever something unthought-of situation occurs. There are many problems with this argument. The first is that it is factually wrong; there was a large population living in the United States in 1867 who were not citizens—the ex-slaves. As stated above, many proposed that they be involuntarily deported.\footnote{See discussion supra, page 4.}

The interpretation problem is that this argument from intent, or rather, lack of intent, ignores the text. The text does not admit of any exceptions. Here the argument based on negative intent directly conflicts with another conservative canon of interpretation, the emphasis on the plain meaning of the text.

The real problem with the “never contemplated” argument is that it makes a large part of the Constitution useless. The drafters of the original Constitution, the Bill of Rights, and the
Reconstruction Amendments and could not have conceived of today’s United States in their wildest imagination. A list of the differences between then and now would take a book. I’ll give just one instance: George Washington, a slave owner, was commander-in-chief of an army of 5,000. Barack Obama (of one-half African descent) is commander-in-chief of armed forces with one and one half million men and women on active duty, with the ability to destroy any nation on earth. Certainly the drafters of “shall be Commander-in-Chief” never intended the president to have this power. Should this clause then be discarded, and some other person or committee be given the power? The argument of “never intended” is too good; taken seriously it is an argument against a written constitution.

III. Conclusion

The conservatives whom I have discussed reveal themselves to be arguing for a substantive goal, not for following a formal set of interpretive procedures. While attack liberals for not following rigorous methods of construction, they are all too willing to jettison formalism, originalism, and textualism to argue that the law should be interpreted to solve what they see as a social problem.

These arguments may be persuasive that we should reconsider the Fourteenth Amendment. I have my own view that they are not so persuasive. The history of the state having the power to decide who shall be its members is not a good one, from the expulsion of the Jews, from Spain,\textsuperscript{215} through \textit{Dred Scott},\textsuperscript{216} to the Nuremberg Laws.\textsuperscript{217}

There are choices embodied in the Constitution that I and others disagree with—the Electoral College and the Second Amendment are two examples out of many—but until the Constitution is amended we must live with them.

\textsuperscript{215}See “Edicto de expulsión de los judíos de España del año 1492 (The 1492 Edict of Expulsion of the Jews from Spain).”

\textsuperscript{216}Supra note 11.
