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ARTICLE

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

ALLEN R. KAMP

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This essay is a critique of the conservative rhetoric used in attack of birthright citizenship—as granted by Clause One 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 textualism. As such, conservatives’ arguments call into question the seriousness of their allegiance to these canons.

This 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, I argue, do not admit a simple solution. This article simply advances the argument that the conservative position of opposing birthright citizenship is inconsistent with conservative values.

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. II, § 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.
I. AMERICAN BIRTHRIGHT CITIZENSHIP: A HISTORY

Clause One’s plain meaning is that all people, 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. The clause has been assumed without discussion by the Supreme Court to cover anyone born within the United States.3 In Plyler v. Doe, the Supreme Court held that Mexican school children, whether here legally or not, were entitled to constitutional protections.4 This assumption, however, is now under attack.5 George F. Will6 picked up this argument in an opinion piece,7 and several members of Congress want to pass legislation or a constitutional amendment to abolish birthright citizenship.8

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 births in Los Angeles public hospitals, and more than half of all births in that city, and nearly ten percent of all births in the nation in recent years, have been to mothers who are here illegally.”9 American-born children of illegal immigrants lead to the problem of the so-called “anchor child.”10 Once the child, an American citizen, turns twenty-one, his citizenship status can be used by his parents to give them a preference for legal admission to the United States.11

This article briefly discusses the history of American citizenship before and after Dred Scott, and then critiques the anti-birthright citizenship arguments. It concludes that the anti-


4. Plyler v. Doe, 457 U.S. 202, 215 (1982) (“[T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.”).

5. For example, Lino Graglia, a conservative law professor, argues that children born of illegal aliens should not be citizens. Lino A. Graglia, Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy, 14 TEX. REV. L. & POL. 1 (2009).


10. Graglia, supra note 5, at 3.

11. See, e.g., Immigration and Nationality Act (INA) § 201(b), 8 U.S.C. §1151(b) (2009) (noting that 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 United States citizen. Siblings (of a United States citizen 21 years or older) still enjoy a “preference” in that they legally qualify for immigration into the United States, but the number of such other non-“immediate relatives” are subject to a yearly quota. It is worth emphasizing here that these are mere preferences for legal admission to the United States, not a guarantee of automatic citizenship.).
birthright arguments are founded neither on textual analysis, historical context, nor intent. This is followed by a discussion on how these conservative arguments use a rhetoric that violates all the conservative canons of interpretation.

**A. Understanding of American Citizenship before Dred Scott**

Prior to *Scott v. Sandford*, there was little discussion of what American citizenship was, how to get it, or what it meant. In *Murray v. Charming Betsy*, the Supreme Court dealt with the claim of a person born in the United States but living on a Danish island; the Court assumed the plaintiff to be an American citizen despite his being subject to a foreign power. The Supreme Court, in *Inglis v. Sailor’s Snug Harbour*, explained that the United States inherited English common law’s principle that “all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects.” 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 ligenance 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.

In *Shanks v. Dupont*, the Court again stated the principle of birthright citizenship; for the Court, birth in the United States was prima facie evidence of United States citizenship. In a case concerning the inheritance of land in the state of Maryland, the Court in *McCreery’s Lessee v. Somerville* assumed that three girls born in the United States were citizens, although their father was an alien born in Ireland and never naturalized in the United States. In *Levy’s Lessee v. McCartee*, the Court again cited the English common law principle that children born of an alien in England were subjects of England.

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12. What follows is a general review of the law on birthright citizenship. It does not claim originality, but it is to help in understanding my critique of the conservative rhetoric.


16. *Id.* at 120.

17. *Id.* at 155 (Story, J., dissenting). Although Justice Story dissented from the majority opinion, all justices were in agreement as to the American inheritance of the English law of citizenship by birth. See *United States v. Wong Kim Ark*, 169 U.S. 649, 659 (1898).

18. *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 245 (1830). This case was decided on the same day as *Inglis*.


In 1856, as tension between northern and southern states increased over the issue of slavery, the Supreme Court decided the infamous *Dred Scott* case. Dred Scott—a slave—was born in Missouri, taken by his master John Sandford to Illinois—a state that did not recognize slavery—then returned to Missouri.21 Upon his return to Missouri, Dred Scott sued for his freedom in a federal diversity jurisdiction suit, because Sandford was a resident of New York.22 However, the Supreme Court ruled that a person whose ancestors were imported into the United States as slaves could not become a citizen of the United States, and because Scott was not a citizen, he was not entitled to any of the right and privileges granted in the Constitution, including the right to sue in federal court.23 Chief Justice Taney, in a stunning example of originalism, looked to the Declaration of Independence and, citing the provision “that all men are created equal,” concluded “it is too clear for dispute, that the enslaved African race were not intended to be included.”24

**B. Citizenship After Dred Scott**

Although the Court in *Dred Scott* declared rather decisively that African-Americans were not citizens of the United States, that position was, and still is, highly criticized. The November 29, 1862 opinion of then-Attorney General Edward Bates specifically limited the holding of *Dred Scott*, explaining that the Court’s decision was mostly dicta, and the actual holding was nothing more than a dismissal for lack of jurisdiction.25 The Bates opinion offers further evidence that the principle of citizenship by birth was widely accepted in the early years of the United States.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, Attorney General 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.27

Following the end of the Civil War, Congress enacted, and the states ratified, the Thirteenth Amendment to the Constitution, which 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 of emancipated slaves.\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, rejected voluntary colonization or involuntary deportation.\textsuperscript{33}

Various locations, such as Brazil, St. Croix, and Colombia, were proposed, but few African-Americans wanted to emigrate.\textsuperscript{34} The American Colonization Society offered assistance to voluntary emigrants, and found only one volunteer.\textsuperscript{35} President Lincoln authorized Bernard Kock to establish a colony on the Ile à Vache, an island off Haiti, but Kock quickly stole all the emigrants’ money and declared himself governor; living conditions were so bad and abusive that Lincoln, less than a year later, sent boats to bring the settlers home.\textsuperscript{36} After this fiasco and increased opposition from the black community, Lincoln modified his views and, along with many others, gave up on emigration.\textsuperscript{37}

The Civil Rights Act of 1866 made African-Americans citizens by stating “[t]hat 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{38}

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.”\textsuperscript{39} Note that the phrase in the Civil Rights Act language “and not subject to any foreign power” was

\begin{itemize}
\item \textsuperscript{28} See U.S. CONST. amend. XIII.
\item \textsuperscript{29} See ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 17 (2010).
\item \textsuperscript{30} Id. at 224 (“Because of white prejudice, [Lincoln told a black delegation:] ‘even when you cease to be slaves, you are yet far removed from being placed on an equality with the white race. . . . It is better for us both, therefore, to be separated.’”).
\item \textsuperscript{31} Id. at 184.
\item \textsuperscript{32} Id. at 224.
\item \textsuperscript{33} Id. at 19, 223.
\item \textsuperscript{34} Id. at 223.
\item \textsuperscript{35} Id. at 200–01.
\item \textsuperscript{36} Id. at 239–40, 259.
\item \textsuperscript{37} Id. at 223–24, 258–61, and 312.
\item \textsuperscript{39} U.S. CONST. amend. XIV, § 1.
\end{itemize}
replaced by "subject to the jurisdiction thereof" in the Fourteenth Amendment, and the Civil Rights Act language excluding "Indians not taxed" was eliminated in the Fourteenth Amendment.

The first case (out of only two) to address citizenship under the Fourteenth Amendment was Elk v. Wilkins, brought by a Native American who had left his tribe, seeking the right to vote.\(^{40}\) The Court ruled that he was not a citizen, stating that Section One of the Fourteenth Amendment did not apply to Native Americans.\(^{41}\) The Court stated that a person cannot become a citizen by his "own will without the action or assent of the United States."\(^{42}\)

The other Supreme Court case addressing citizenship under the Fourteenth Amendment is United States v. Wong Kim Ark.\(^{43}\) The plaintiff was born in San Francisco of Chinese subjects who were residents there.\(^{44}\) Wong Kim Ark traveled to China, but upon his return was detained by the Solicitor of Customs, on the ground that he was not a citizen of the United States.\(^{45}\) The Court stated the issue as follows:

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 domicile 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 . . . .\(^{46}\)

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 [sic]."\(^{47}\) The Court then explained 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 'lignality,' 'obedience,' 'faith,' or 'power'—of the king. The principle embraced all

\(^{40}\) Elk v. Wilkins, 112 U.S. 94, 94 (1884).

\(^{41}\) Id. at 109.

\(^{42}\) Id. at 100. Conservative commentators have seized this phrase, using it to mean that United States citizenship "is a consensual relationship, requiring the consent of the United States. See infra Part II.A and Graglia, supra note 5, at 9.

\(^{43}\) United States v. Wong Kim Ark, 169 U.S. 649 (1898). Note that Justice Gray, who wrote the majority opinion in Elk, also wrote the majority opinion in Ark.

\(^{44}\) Id. at 653, 701.

\(^{45}\) Id. at 653.

\(^{46}\) Id. at 653.

\(^{47}\) Id. at 654.
persons born within the king’s allegiance, and subject to his protection. Such allegiance and protection 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.48

The Court described the primary purpose of Section One of the Fourteenth Amendment:

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 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.49

Next, the Court came to the difficult task of reconciling inconsistent language from prior cases, namely, the Slaughter-House Cases.50 Those cases dealt with the Privileges and Immunities Clause, but the majority opinion had stated with regard to Section One of the Fourteenth Amendment, “[t]he phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”51 The Court in Ark declared that statement to be dicta, noting that the statement was not supported by any authorities and was completely separate from the issue in question in that case.52 The Court also noted that Justice Miller was wrong in classifying consuls and foreign ambassadors together, because consuls are subject to the jurisdiction to the country in which they reside whereas ambassadors are not.53 The Court found additional support for its interpretation of Section One by citing the dissenting opinions in the Slaughter-House Cases, which disagreed with the majority’s interpretation.54

48. Id. at 655. The first statute codifying these standards into law was enacted during the reign of King Edward III. See id. at 668.

49. Id. at 676. Many scholars, however, disagree, stating that the Citizenship Clause was intended to do much more than override Dred Scott. See, e.g., Garrett Epps, Interpreting the Fourteenth Amendment: Two Don’ts and Three Dos, 16 WM. & MARY BILL RTS. J. 433 (2007); LEE, supra note 8.

50. The Slaughter-House cases were three consolidated cases dealing with rights to conduct the slaughter-house business in New Orleans.


52. Ark, 169 U.S. at 678.

53. Id.

54. Justice Field stated that the amendment “recognizes in express terms, if it does not create, citizens of the United
The Ark court went on to distinguish Elk v. Wilkins, which denied citizenship to Native Americans born within the boundaries of the United States. Distinguishing Elk was crucial to the holding in Ark, because the earlier case could be interpreted to deny citizenship to those born of non-citizens. The Court 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 [the United States] direct and immediate allegiance.” While the Constitution provided that “Indians not taxed” were not counted for congressional representation, it did give Congress the power to regulate commerce with Indian tribes. The tribes were quasi-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.” As mentioned above, the Court in Ark restricted Elk to apply only to members of Indian tribes within the United States, stating the 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 born members of Indian tribes, to alien enemies in hostile occupation, or to 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

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.” Slaughter-House Cases, 83 U.S. at 95 (Field, J., dissenting). Justice Swayne pointed out that the majority had no authority to create an exception to birthright citizenship:

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.

Id. at 128 (Swayne, J., dissenting).

56. *Id.*
57. *Id.* at 681.
58. *Id.* at 682.
59. See *id.* at 657–58, 681.
60. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144
includes this restriction. Ark, however, specifically rejects that argument.

One can play the law school game of 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 be 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. For more than a century, Ark seems to have settled the issue.

After Wong Kim Ark, courts assumed that everyone born within the United States was a citizen. For example, the Supreme Court assumed that children of illegal aliens were citizens in a 1982 case dealing with a right to public education. 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 1985 called Citizenship Without Consent: Illegal Aliens in the American Polity, by Peter Schuck and Rogers Smith. Professor Eastman then wrote an article adopting the arguments of Schuck and Smith. Professor Graglia later wrote his article, arguing that the Citizenship Clause does not apply to children of illegal aliens. Graglia's article does not discuss Ark other than to say it is wrong, but he does use Elk to conclude that the United States has to consent to citizenship, and the United States has never consented to the presence of illegal

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61. Graglia, supra note 5, at 7.
62. Ark 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 [the Civil Rights 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 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.

Ark, 169 U.S. at 680-81.
63. Plyler 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, supra note 5, at 11.
65. Professor John C. Eastman was Dean and teaches at Claremont University School of Law. He clerked for Justice Thomas. See John C. Eastman, CLAREMONT INST., http://www.claremont.org/scholars/scholarID.380/scholar.asp.
67. See Graglia, supra note 5.
68. Id. at 9-10.
Furthermore, Graglia goes on to say that the drafters of the Fourteenth Amendment could never have intended to bestow such citizenship upon children of illegal aliens, because there were no illegal aliens at the time of drafting. In a piece published by the Heritage Foundation, Matthew Spalding argues that the Constitution does not require citizenship for such children.

Conservative press and commentators, such as George Will and the National Review, have treated the Heritage Foundation piece and Graglia’s article as dispositive. Several Congressmen, including the chair of the House Judiciary Committee, have come out against birthright citizenship.

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 seven points:

(A) The United States, as sovereign, must consent to citizenship, but it has not consented to the citizenship of children of illegal aliens.

(B) “[S]ubject to the jurisdiction thereof” means allegiance to the United States, with no allegiance to any other sovereign.

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

69. Id. at 9.

70. Id. at 12; SCHUCK & SMITH, supra note 64, at 95. But see Gerard N. Magliocca, Indians and Invaders: The Citizenship Clause and Illegal Aliens, 10 U. PA. J. CONST. L. 499 (2008) (claiming the drafters of the Fourteenth Amendment did not intend to limit birthright citizenship); Epps, supra note 27, (arguing that the framers of the Fourteenth Amendment were concerned with immigrant rights).


72. Conservative commentators ignore research by liberal authors and instead treat Graglia’s and Eastman’s work as gospel, not acknowledging the contrary arguments and findings, while other, more liberal authors like Epps have responded to and attempted to discredit conservative arguments.

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

(E) Judges should faithfully uphold precedent.

(F) The United States is one of the few countries to allow citizenship by birth.

(G) The drafters of the Fourteenth Amendment never intended the amendment to grant citizenship to a massive number of illegal aliens.

A. The United States, as Sovereign, Must Consent to Citizenship, but it Has Not Consented to the Citizenship of 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* that was picked up by Schuck and Smith, who argue that consent is the only legitimate foundation of citizenship. Native Americans were considered not to be citizens because “they had never chosen or been chosen to be United States citizens”; rather, their allegiances were with their individual tribal nations. *Elk*, however, can easily be limited to the peculiar status of Native Americans, and it was so limited by *Ark*.

Schuck and Smith argue that the “existence of full and reciprocal obligations of individual allegiance and governmental power and protection in this strong sense was the crucial element needed to satisfy the [phrase, ‘subject to the jurisdiction thereof’].” 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. They rely on philosophers such as John Locke, who are more relevant to the intent of eighteenth century drafters of the Constitution, rather than the nineteenth century drafters of the Citizenship Clause. Considering the philosophical background of the drafters of the Citizenship Clause, it seems clear that they did understand the implications of outright citizenship by birth:

74. See SCHUCK & SMITH, supra note 64, at 76.
75. Id. at 83.
76. Id.
77. See id. at 90–92.
78. See id. at 30–31.
79. See Epps, supra note 27, at 381.
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.

Looking at the text and the context of the Fourteenth Amendment, the concept of mutual consent cannot be found. Rather, the absence of a consent requirement and the totality of the statement, “all persons born... in the United States,” strongly suggest that the drafters of the Amendment were attempting to reverse the Dred Scott decision, 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, it eliminated any presumed power of the nation to not consent to citizenship.

2. Reading a Lockean “Consent Theory” into the Law Runs Counter to the Conservative Antipathy Towards Philosophic Arguments

Conservatives do not like philosophical arguments; they dislike theoretical, ideological, and abstract beliefs. They prefer practices that have withstood “the test of time.”

Russell Kirk states that one of the basic principles of conservatism is “[f]aith 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 “[c]ontempt 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.” The first conservative of the modern age, Edward Burke, explained the conservative reliance on tradition:

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

80. Id.
82. See id. at 24.
84. Id. at 10.
85. Id. at 6 ("Conscious conservatism, in the modern sense, did not manifest itself until 1790, with the publication of Reflections on the Revolution in France.").
that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.\textsuperscript{86}

Schuck and Smith's reliance on Locke, then, contradicts the conservative premise of rejecting ideological arguments. The conservative position of opposing birthright citizenship violates conservative reliance on tradition because birthright citizenship, as explained by the Supreme Court numerous times, is a concept inherited from English common law, with roots tracing back at least to the time of Edward III.\textsuperscript{87}

\section*{B. "[S]ubject to the Jurisdiction Thereof" Means Allegiance to the United States, with No Allegiance to Any Other Sovereign}

1. This Argument, from \textit{Elk} \textit{v. Wilkins}, Where the Plaintiff Owed Loyalty to His Tribe, and from the Dissent in \textit{United States v. Wong Kim Ark}, Has No Basis in Law and Is Radical in its Scope

Conservatives argue that the term "jurisdiction" in the Fourteenth Amendment must mean something other than geographical jurisdiction. They picked up this argument from \textit{Elk} \textit{v. Wilkins}, in which the Supreme Court found that a Native American, although born within the geographical jurisdiction of the United States, was not a citizen because he did not owe direct allegiance to the government of the United States, but rather to the sovereignty of his tribe.\textsuperscript{88} And, as the Court pointed out, children of diplomats who are born within the geographical jurisdiction of the United States are not citizens because their parents owe allegiance to a different sovereign.\textsuperscript{89} Here Professor Garret Epps, who has written extensively on the Fourteenth Amendment, writes that the conservatives are misinterpreting the meaning of "jurisdiction."\textsuperscript{90} As used in the Fourteenth Amendment, "subject to the jurisdiction" does not mean personally owing allegiance to another sovereign, but being within the geographical area of a sovereign's control. If we required every child born in the United States to have two parents who owed complete political allegiance to the United States government, then President Barack Obama may not be a citizen, and could therefore not be president.\textsuperscript{91} No doubt this would satisfy many conservative critics; however, the fact that

\begin{thebibliography}{99}
\bibitem{86} EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 251 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790).
\bibitem{87} United States \textit{v. Wing Kim Ark}, 169 U.S. 649, 668 (1898).
\bibitem{88} See Graglia, \textit{supra} note 5, at 9.
\bibitem{89} \textit{id}.
\bibitem{91} President Obama was born in the state of Hawaii, but his mother and father were born in Kansas and Kenya,
Barack Obama is president confirms that jurisdiction is a geographic, rather than political term.

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

Justice Antonin Scalia’s essay on interpretation lays out the basic conservative canon that a judge must stick to the text of any statute. Justice Scalia states that his job is textual interpretation; “[e]very issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution.” Justice Scalia maintains that “when the text of a statute is clear, that is the end of the matter.” Why? Because we should look for objective—not subjective—intent, “the intent that a reasonable person would gather from the text of the law.” The reason for considering the objective—not the subjective—intent is that relying on objective intent is the only method of interpretation compatible with democracy. A law focusing on what was meant is tyrannical. “It is the law that governs, not the intent of the lawgiver.”

Justice Scalia criticizes Judge Guido Calabresi and Professor William Eskridge’s position that statutes should be reinterpreted to fit modern conditions. 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 in terms of the needs and goals of our present day society.’” To Scalia, the problem with Eskridge’s interpretative theory is that “[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is. . . . The text is the law, and it is the text that must be observed.”


93. Id. at 13.
94. Id. at 16.
95. Id. at 17.
96. Id.
97. Id.
98. Id.
99. Id. at 22.
100. Id. (quoting William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 50 (1994) (quoting Arthur Phelps, Factors Influencing Judges in Interpreting Statutes, 3 VAND. L. REV. 456, 469 (1950))).
101. Id.
the jurisdiction of the United States is a citizen. Professor Gerard M. Magliocca writes:

All of the confident assertions that the word “jurisdiction” in the Citizenship Clause means “allegiance or consent” run up against the problem that this is not how the term is usually defined. Justice Holmes gave the standard explanation that “[j]urisdiction is power,” by which he meant that the willingness of party to be hailed 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.102

The revisionists base their restrictive reading of the term “jurisdiction” on the wording of the Citizenship Clause of the Civil Rights Act of 1866.103 The argument is 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 Fourteenth Amendment.104 Professor Magliocca explains that “[t]he word jurisdiction has various meanings in American law, but it has never been defined in terms remotely resembling the elaborate construct on which the revisionist argument depends.”105

The revisionist argument ignores the difference in language—compare “not subject to any foreign power” with “subject to the jurisdiction thereof.” Even granting that the 1866 Act and the Amendment were intended subjectively to mean the same thing,106 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

102. Magliocca, supra note 70, at 512–13 (quoting Cordova v. Grant, 248 U.S. 413, 419 (1919)).
103. Eastman, supra note 66, at 1485–86.
104. As Magliocca explains:

[T]he 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...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.

Magliocca, supra note 70, at 513.
105. Id. at 512 n.66 (quoting Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders and Fundamental Law 171 (1996)).
106. The argument that they were intended to mean the same thing is highly debatable. See Epps, supra note 27, at 349–53.
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, 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.107

When conservatives argue that jurisdiction means something other than geographical jurisdiction, they ignore the plain text of the Fourteenth Amendment and violate their own textualist canon. Justice Scalia, the ultimate textualist, is himself guilty of this inconsistency—in Hamdi v. Rumsfeld, he questioned whether an arrested suspected terrorist who was an American-born child of non-citizens was a citizen.108

C. From a Public Policy Standpoint, Birthright Citizenship Rewards Illegal Immigration

Originalism, another interpretive method lauded by Justice Scalia, "suggests that in seeking to understand the words of the Constitution we should ask how they were understood at the time they were written, not what modern readers might think."109 In his book, How to Read the Constitution, Christopher Wolfe advances the originalist position.110 Those who oppose originalism, Wolfe states, view the "major considerations shaping a judge’s decisions as notions of what is good public policy, in the broad sense of ‘sorting out the enduring values of society.’"111 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."112

Still, conservatives who oppose birthright citizenship based on the Fourteenth Amendment ignore the original context of the clause in order to reach a conclusion that better serves their policy goals: protecting American borders. Conservatives use policy consequences—such as a nation filled with illegal immigrants—to justify their conclusion that the Fourteenth Amendment could not possibly grant birthright citizenship.

Professor Graglia rejects birthright citizenship because illegal entry into the United States can result in a lifetime of welfare benefits.113 This argument relies on the policy consequences of

107. Id. at 353.
110. CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION (1996).
111. Id. at 20 (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 26 (1962)).
112. Id. at 89.
113. Graglia, supra note 5, at 3. ("A parent can hardly do more for a child than make him or her an American citizen,
birthright citizenship, not any misunderstood meaning of the original clause. Professor Eastman supports his argument by pointing out the negative policy consequences of the Ark decision: suspected terrorists like Yaser Hamdi, who was born in the United States to parents merely visiting on a travel visa, escaped prison at Guantanamo Bay because of his supposed citizenship.  

Conservative columnists in the National Review also argue against birthright citizenship on policy grounds. Reihan Salam 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. “We’ve collectively decided,” he writes, “that we have a special interest in our fellow citizens, and that we will give them precedence over those who suffer from grinding poverty in other countries.” Similarly, the first sentence of George Will’s op-ed piece focuses on solving a present-day policy problem: “A simple reform would drain some scalding steam from immigration arguments that may soon again be at a rolling boil.”

Conservative critics of birthright citizenship oppose the matter on policy grounds: the United States should not reward illegal immigration, illegal immigrants should not be entitled to welfare benefits, and so on. But these conservative critics seek a change in the understanding of the Fourteenth Amendment because of the policy consequences interpretation of the amendment has produced. 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.

114. Eastman, supra note 66, at 1484, 1490.


116. Id.; see also, Mark Krikorian, Children of Diplomats, NAT’L REV. ONLINE (Aug. 13, 2010, 10:20 AM), http://www.nationalreview.com/corner/243187/children-diplomats-mark-krikorian (The United States is “lax about citizenship matters.”); John Derbyshire, Birthright Citizenship, NAT’L REV. ONLINE (Aug. 10, 2010, 12:07 PM), http://www.nationalreview.com/corner/242906/birthright-citizenship-john-derbyshire (“Birthright citizenship is an obviously lousy idea – other countries have been revoking it at a fair clip this [sic] past few years.”); Jake Morphinos, Ron Paul: Arrest and Deport Illegal Immigrants, NOLAN CHART (Aug. 6, 2010), http://www.nolanchart.com/article7907-ron-paul-arrest-and-deport-illegal-immigrants.html (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—hatred of welfare.] Ron Paul opposes birthright citizenship for illegal immigrants as is permitted under the 14th Amendment.”).

117. Will, supra note 7.
D. The Legislative History of the Fourteenth Amendment Shows that Those Born in the United States Must Have Complete Allegiance to the United States in Order to Become a Citizen by Birth

The conservatives violate the conservative canon of not using legislative history in arguing against birthright citizenship. Some revisionists, such as Professor Eastman, make an argument based on original intent as shown by the legislative history. The argument goes:

[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.]

1. The Revisionists Cite Legislative History that is Taken Out of Context and Ignore Contrary Legislative Statements

The revisionists rely on speeches made by Senator Lyman Trumbull. Schuck and Smith rely on Trumbull’s statements during debate over the Fourteenth Amendment. Professor Eastman picks up on Schuck and Smith’s use of Trumbull’s remarks, calling Trumbull “a key figure in the drafting and adoption of the Fourteenth Amendment.” Eastman relies on Trumbull’s statement that “subject to the jurisdiction” means “[n]ot owing allegiance to anybody else.” George Will then picked up Eastman’s use of Trumbull’s comment, and used it in his op-ed piece, arguing that we should “correct the misinterpretation of [the Fourteenth Amendment’s first sentence].”

Epps points out that the revisionists take Trumbull’s statement “subject to the complete jurisdiction thereof” out of its 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

118. See Epps, supra note 27, at 342 (explaining the “originalist” argument which he then discards).
119. Lyman Trumbull was a Senator representing Illinois from 1855 to 1873 and Chairman of the Judiciary Committee from 1861 to 1872. He co-wrote the Thirteenth Amendment.
120. Schuck & Smith, supra note 64, at 81–82 (“Senator Trumbull . . . maintained that ‘subject to the jurisdiction’ of the United States meant subject to its ‘complete’ jurisdiction; this meant ‘[n]ot owing allegiance to anybody else,’ . . . . This view prevailed.”).
121. Eastman, supra note 66, at 1486.
122. Id. at 1484.
123. Will, supra note 7.
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? 124

Furthermore, Schuck and Smith misinterpret the language “subject to the complete jurisdiction,” which was to apply only to the peculiar situation of American Indians, many of whom lived in reservations, and therefore were not “subject to the complete jurisdiction.” 125 Professor Epps is critical of Professor Eastman’s use of legislative history; “[he] distorts the tenor of (or

124. Epps, supra note 27, at 358–59 (quoting Sen. Trumbull, CONG. GLOBE, 39TH CONG., 1ST SESS. 2890–91 (1866)).

125. See id. at 359. Epps quotes from the Senate debates on the Fourteenth Amendment, 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 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, then 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.
simply neglects to quote) the legislative debates around the Clause itself.” 126 The revisionists use language from Sen. Trumbull’s debates on the Civil Rights Act, not the Fourteenth Amendment, to interpret the Fourteenth Amendment. 127 Moreover, the revisionists fail to mention the legislative history that contradicts their view. Senators Benjamin Wade, Jacob Howard, and John Conness stated that anyone, except children of diplomats, born within the United States was or would be an American citizen. 128

2. The Revisionists’ Legislative History Argument Contradicts the Conservative Position that Judges Should Never Look at Legislative History when Determining the Meaning of the Text

Justice Scalia is particularly scathing in his dismissal of legislative history; “[r]esort to legislative history has become so common that lawyerly wags have popularized a humorous quip . . . : ‘One should consult the text of the statute,’ the joke goes, ‘only when the legislative history is ambiguous.’ Alas, that is no longer funny.” 129 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. 130

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 against using legislative history. Professor Epps points out that these revisionists in fact do what Scalia says

126. Id. at 349.
127. See id. at 352–53. Epps explains:

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: ‘[A]ll 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’ ‘intent’ to limit birthright citizenship to, in essence, children whose parents had no other citizenship status elsewhere in the world.

Id. at 350–51.
128. Id. at 354–61.
129. Scalia, supra note 92, at 31.
130. Id. at 35–36.
should not 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 framed it, and insists on the primacy of (1) the language of and debates about a different measure (the Civil Rights Act) and (2) the unstated intentions of a different body (the Fortieth Congress). 131

E. Judges Should Faithfully Uphold 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. 132

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 the process of social and political change or to grasp the way men have faced their problems in order to understand where we are and what new things we must invent for the future.” 133 The common law is also thought to embody accumulated wisdom: “information about conflicts and their resolution, about the sense of justice in action, and about human expectations, which is dispersed through the record of the law and is never available when legislation is the sole legal authority.” 134

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 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

131. Epps, supra note 27, at 346.
Moreover, 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.136

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 with legal positivism, the idea that only enacted law is the law of the land.”137 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 is the law.”138

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 Catholics emphasize the traditions of the church while Protestants emphasize the Biblical text.139 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 McDonald v. Chicago because “following a different—and clearly incorrect—line of precedent was ‘easier.’”140

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 is different than the plain meaning of the text. A similar process is used for the precedent. Professor Graglia cites to the dicta in the Slaughter-House Cases,141 emphasizes Elk v. Wilkins,142 and then

137. Id. at 977–78.
138. Id. at 978.
141. See Graglia, supra note 5, at 8–9.
attacks *United States v. Wong Kim Ark*, 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, *Pennoyer v. Neff*. Decided not that long after the drafting of the Fourteenth Amendment, and just six years before *Elk v. Wilkins*, the Court saw jurisdiction over persons and property within the territory of the sovereign as axiomatic:

One of [the principles of public law] 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 prescribe the subjects upon which they may contract . . . .

*Pennoyer*’s basing personal jurisdiction on presence was reaffirmed by the Court, in an opinion written by Justice Scalia, in *Burnham v. Superior Court of California*. 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 fleeting his visit.

Therefore, such jurisdiction satisfies the Fourteenth Amendment.

Conservatives (including Justice Scalia) ignore these principles and traditions when it

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142. See id. at 9.
143. See id. at 9–11.
145. Id. at 722.
147. Id. at 610–11.
148. 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. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

*Id.* at 622 (quoting *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)).
comes to birthright citizenship. In *Hamdi v. Rumsfeld*, a habeas petition was brought on behalf of an American citizen seized in Afghanistan as an enemy combatant; Justice Scalia (joined by Justice Rehnquist) described Hamdi as a “presumed American citizen.”

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. In so doing, they ignore *Ark*, the later precedent.

Although conservatives claim to uphold precedent faithfully, in the case of birthright citizenship, they expand the scope of the precedents they like and refuse to follow the ones they do not; in fact, these conservatives are advocating for a pre-established opinion, not adhering to precedent.

**F. The United States Is One of the Few Countries to Allow Citizenship by Birth**

Conservatives believe 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.

In his book *The Meaning of Conservatism*, Roger Scruton emphasizes the centrality of a particular society:

> While conservatism is founded in a universal 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 subsumed under them.

Justices Scalia and Thomas continually criticize the Supreme Court’s use of foreign law. Justice Scalia warned “this Court[,] . . . should not impose foreign moods, fads, or fashions on Americans.” In *Roper v. Simmons*, Justice Scalia rejected “the views of foreign courts and legislatures. . . .

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150. Id. at 554 (Scalia, J., dissenting) (casting doubt on Hamdi’s citizenship status because he was born to foreign nationals who were visiting the United States at the time, but not explicitly dealing with the issue in a case regarding Hamdi’s right to due process).
In his blog, Jim Kelly, a conservative commentator, decries the use of foreign law and opinion, and thus celebrates the Court’s opinion in *Graham v. Florida*, which stated that judgments of other nations are not dispositive.\(^{155}\)

Matthew Shaffer, in his blog, discussed the internationalism of Christiane Amanpour, then the hostess of ABC’s Sunday morning political talk show, *This Week*.\(^{156}\) His article exemplifies how a clearly knowledgeable political commentator is actually valued less by conservatives when it comes to national discussions, because of her international influences. Shaffer notes that she sees issues from an international perspective; “[d]espite her physical relocation to Washington, D.C., Amanpour still seems to be observing American politics from overseas.”\(^{157}\) 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.”\(^{158}\) The bottom line is that “her distance from American concerns disables her from being a fair moderator of American debates.”\(^{159}\)

But when it comes to birthright citizenship, conservatives use the fact that many foreign states have rejected it to advocate its rejection in this country: Reihan Salam writes in his *National...*

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The Court thus proclaims itself sole arbiter of our Nation’s moral standards—and in the course of discharging that awesome 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.

*Id.*


The Court explained that the judgments of other nations and the international 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 practices.

*Id.*


157. *Id.*

158. *Id.*

159. *Id.*
Review Online blog, The Agenda, that “[i]n response to agitation over a growing population of Turkish guest workers, Germany changed its rules to grant citizenship to Germany-born children of Germany-born children [sic] of resident foreigners.”\textsuperscript{160} John Derbyshire, another National Review Online blogger, comments: “[b]irthright citizenship is an obviously lousy idea—other countries have been revoking it at a fair clip this [sic] past few years—but . . . a Constitutional amendment probably is necessary.”\textsuperscript{161} Although claiming to reject the use of foreign law, conservatives do just that to argue against birthright citizenship.

G. The Drafters of the Fourteenth Amendment Never Intended the Amendment to Grant Citizenship to a Massive Number of Illegal Aliens

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:

Like any writing, or at least any law, [the Citizenship Clause] should be interpreted to mean what 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.\textsuperscript{162}

This argument was picked up by George Will\textsuperscript{163} 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, its text applies to and controls very little. Professor Graglia’s logic destroys the principle of original intent. 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. An interpretative technique whose claimed virtue lies in preventing subjective judgments has been turned 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?

1. The Argument that There Were No Illegal Immigrants When the Fourteenth Amendment

\textsuperscript{160} Salam, supra note 115.
\textsuperscript{161} Derbyshire, supra note 116.
\textsuperscript{162} Graglia, supra note 5, at 5–6.
\textsuperscript{163} See Will, supra note 7.
Was Drafted Is Historically Incorrect

Because 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.\textsuperscript{164} If the Citizenship Clause does not apply to illegal aliens, then such illegally imported slaves—and their children—were not made citizens by the amendment, which was clearly not its purpose. There were many other 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.\textsuperscript{165}

There was also a huge population of non-citizens then living in the United States—the African Americans who had been freed by the Thirteenth Amendment. Their right to citizenship was problematic. The controlling case, \textit{Dred Scott}, had authoritatively declared that they were not citizens.\textsuperscript{166} Their right to live in the United States was in dispute—many proposed that all those of African descent be deported involuntarily.\textsuperscript{167}

In 1860, 13.2\% of the population in the United States was foreign-born.\textsuperscript{168} Comparing that to the 12\% reported by the most recent census,\textsuperscript{169} the logical conclusion is that the citizens of 1860s America were no doubt aware of the issue of immigration, as we understand the term today.\textsuperscript{170} The United States’ immigration circumstances have not changed:

\begin{quote}
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{171}
\end{quote}

\textsuperscript{164}. See Epps, \textit{supra} note 27.

\textsuperscript{165}. See \textit{id.} at 351–52, 383–84, 386; CONG. GLOBE, 39th CONG., 1ST SESS. 498 (1866); \textit{see also} Elk v. Wilkins, 112 U.S. 94, 114 (1884).

\textsuperscript{166}. See \textit{Scott v. Sandford (Dred Scott)}, 60 U.S. (19 How.) 393 (1856).

\textsuperscript{167}. See FONER, \textit{supra} note 29, at 17; \textit{see discussion supra Part I.B (The Fourteenth Amendment was designed to resolve their citizenship problem).}

\textsuperscript{168}. See \textit{id.} at 385.


\textsuperscript{170}. See Epps, \textit{supra} note 27, at 385–86.

\textsuperscript{171}. \textit{Id.} at 385; \textit{see supra} text accompanying notes 25–27. Attorney General Bates’s comment that “every person born in the country is, at the moment of birth, \textit{prima facie} a citizen . . . as recognized by the Constitution,” constitutes perhaps the most damning piece of evidence against the anti-birthrighters. See Epps, \textit{supra} note 27, at 380. Moreover, any discussion of legislative intent violates the fundamental conservative canon of textualism.
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{172} 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 United States is a rich country sharing a long border with a poor one, Mexico. Conservatives argue that we must follow original intent because that is the only way to apply what the Constitution actually means; if the drafters had no intent, then we may erase the text and start over, doing the right (no pun intended) thing.

The Constitution, unfortunately, gives us no guidelines as to how to deal with unanticipated social changes. Still, the Supreme Court has recognized that constitutional rights can still apply, even in unanticipated circumstances. For instance, the Constitution grants the executive the power to “be Commander in Chief of the Army and Navy,” and our society has accepted that this power extends to the Air Force as well, even though the constitutional drafters could not have anticipated a national air force.\textsuperscript{173} The First Amendment protects the freedom of the press, and that freedom has been extended to digital publications, including television news shows and websites, which surely our forefathers could not have intended. The Second Amendment protects the right to bear arms but was adopted at a time when handguns were capable of firing only one or two bullets before reloading. Constitutional protections have extended to modern automatic weapons, such as the semi-automatic pistol used in Arizona to shoot Congresswoman Gabrielle Giffords, among others.\textsuperscript{174} Large, multi-state corporations, which did not exist at the time of the ratification of the Constitution,\textsuperscript{175} are now accepted as having many of the same rights as people.\textsuperscript{176} A unanimous court in \textit{Brown v. Board of Education}\textsuperscript{177} overruled the older, conservative argument that there was

\textsuperscript{172} 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. See, e.g., Graglia, \textit{supra} note 5, at 6 (“It is hard to believe, moreover, that if [the drafters of the Fourteenth Amendment] had considered [the question of granting birthright citizenship to children of illegal aliens], they would have intended to provide violators of the United States immigration law be given the award of American citizenship for their children born in the United States.”).

\textsuperscript{173} \textit{See} Epps, \textit{supra} note 27, at 382.


\textsuperscript{175} \textit{See} Carl J. Mayer, \textit{Personalizing the Impersonal: Corporations and the Bill of Rights}, 41 HASTINGS L.J. 577, 579 (1990). 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{177} \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954).
no constitutional right to desegregated education. These examples show how our society, including conservatives, has accepted the application of constitutional rights to people and circumstances unanticipated by the framers of the Constitution.

We now return to the conservative argument based on negative intent regarding the unforeseen consequences of birthright citizenship. The real problem with this argument is that it makes a large part of the Constitution useless. If constitutional rights only extend to things that existed at the time of the drafting of the Constitution, the document would be worthless because it would apply to almost nothing in our society; taken seriously, the argument against unforeseen consequences 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 attacking 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 that we should reconsider the Fourteenth Amendment may be persuasive, but I do not find them so persuasive. When a nation has the power to decide who may be citizens and who must be relegated to a second-class status, we see such deplorable human rights violations as the expulsion of the Jews from Spain, Dred Scott, and the Nuremberg laws.

The Constitution may not be perfect; there are policy choices within the Constitution with which many, including myself, disagree, such as the Electoral College or the Second Amendment.

178. Some conservatives, however, remained unconvinced:

[T]he federal Constitution does not require the States to maintain racially mixed schools. Despite the recent holding of the Supreme Court, I am firmly convinced—not only that integrated schools are not required—but that the Constitution does not permit any interference whatsoever by the federal government in the field of education. It may be just or wise or expedient for negro children to attend the same schools as white children, but they do not have a civil right to do so which is protected by the federal constitution, or which is enforceable by the federal government.


180. Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393 (1856) (holding African-Americans were not citizens).

However, the Constitution is our governing document, and, until it is amended, we all must abide by the law of our nation.