NOTE
ANCHORS AWEIGH:
REDEFINING BIRTHRIGHT CITIZENSHIP IN THE 21ST CENTURY

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I. INTRODUCTION

In the summer of 2006, facing deportation and having exhausted all legal reprieves, Elvira Arellano sought refuge at the Adalberto United Methodist Church in Chicago, Illinois.1 In 1997, Arellano entered the country illegally and had since given birth to a son, Saul, who was born an American citizen.2 After nine years in the United States, Arellano was faced with either taking her son back to the country she had left behind or leaving him here to fend for himself; Arellano refused to do either.3 “It’s wrong to split up families. I am fighting for my son, not myself.”4 Yet, anti-illegal immigration activists contend that she used her son to avoid deportation.5 In November 2007, despite her efforts to remain in the United States with her son, Arellano was deported back to Mexico, leaving young Saul behind.6

One of the most hotly debated issues today is illegal immigration. Not only are there problems securing the border from criminals and those smuggling drugs, but there is the additional problem of pregnant women entering the country illegally for the purpose of gaining American citizenship for their children. After one of these babies is born, the mother remains in the country unlawfully but now has a link to the United States and benefits from the child, who, like Saul, is born a United States citizen. Parents with citizen-children who choose to unlawfully remain in the United States are still subject to deportation.7 However, having a citizen-child allows the illegal parent to appeal to an immigration judge, claiming


2 Id.
3 Id.
4 Id.
7 Lino A. Graglia, Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy, 14 TEX. REV. L. & POL. 1, 3 (2009).
deportation would subject the citizen-child to “extreme hardship” and potentially deprive the child of the benefits associated with his/her citizenship.8

Benefits granted to a child born in the United States include Medicaid coverage and assistance under the Women, Infants, and Children Program (WIC), which provides food and nutrition vouchers for mothers and children.9 However, the illegal parents of citizen children are not eligible for Medicaid or other welfare benefits, and the children may not sponsor citizenship for others until they have reached the age of twenty-one; thus, the parents of the citizen-child have relatively little to gain from their child’s citizenship.10 Approximately 3.8 million illegal immigrants have at least one child who is a citizen.11 The high numbers of illegal immigrants who receive benefits undoubtedly burdens the already-strained welfare system. Sadly, these children, derogatorily termed “anchor babies,”12 have sparked intense debate regarding the interpretation and application of birthright citizenship under the 14th Amendment.

The purpose of this Note is to assert that while the judiciary may have historically misinterpreted the Citizenship Clause, there is still potential for reconciling past precedent with a modern solution to the “anchor baby” problem. One solution is to use a hybrid theory of domicile. This would use an “intent to stay” in conjunction with the traditional standard of the Citizenship Clause. Applying a hybrid theory of domicile as the standard for birthright citizenship would narrow the Citizenship Clause enough to remedy the “anchor baby” problem without requiring a constitutional amendment. Part II of this Note details the history of the 14th Amendment and the case law that has defined “subject to the jurisdiction thereof”; Part III discusses the relevant theories concerning birthright citizenship; and lastly, Part IV discusses potential remedies to the problem of abuse of birthright citizenship.

II. HISTORY AND INTERPRETATION OF THE 14TH AMENDMENT

While the abuse of birthright citizenship is a modern problem, the issue is rooted in the creation of the Civil Rights Act of 1866 and the 14th Amendment, and the conflict between their legislative history and the United States Supreme Court’s interpretations. The Citizenship Clause of the 14th Amendment reads “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction

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8 Id. Notably, “extreme hardship” is difficult to prove but forms the basis of a deportation appeal.
10 Id.
11 Id.
12 See, e.g., id.
thereof, are citizens of the United States, and of the state wherein they reside.” At
first glance, the text appears straightforward, granting citizenship to all persons
born within the territorial boundaries of the United States; however, the debate is
centered on the phrase “subject to the jurisdiction thereof” and the Supreme
Court’s interpretations of this language.

In the spring of 1866, the 39th Congress sought equality for the freed slaves. Despite President Andrew Johnson’s veto attempt, on April 9, 1866 Congress
passed the Civil Rights Act of 1866 with the goal of protecting the civil rights of
freed slaves and their families. The Civil Rights Act of 1866 declared 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.” The
goal of this language was to include African-Americans while excluding Native
Americans, who were not considered to be under the jurisdiction of the United
States.

Despite the successful passage of the Civil Rights Act of 1866, Congress
remained doubtful of the Act’s ability to withstand judicial scrutiny. Out of fear
that the Supreme Court would invalidate the Act, Congress sought to shield the
legislation from invalidation by passing a constitutional amendment. The
language of the 14th Amendment differed slightly from the Civil Rights Act of
1866, replacing “not subject to any foreign power, excluding Indians not taxed”
with “subject to the jurisdiction thereof,” but the purpose behind the act and the
Amendment was the same. The 14th Amendment was submitted to the states for
ratification in the summer of 1866 and was completely ratified two years later in
July 1868.

A. History of the Supreme Court’s Interpretation of the 14th Amendment

In the Slaughter-House Cases of 1872, the Supreme Court granted certiorari
to interpret the relatively new 14th Amendment. Although the case’s focus on
other provisions of the 14th Amendment (the Due Process and Privileges and
Immunities clauses) the majority acknowledged that the purpose of the
Amendment was to “establish the citizenship of the negro.” Moreover, the phrase

13 U.S. CONST. amend. XIV, § 1.
14 John C. Eastman, Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake
15 Civil Rights Act of 1866, ch. 31 § 1, 14 Stat. 27.
16 Id.
17 See Eastman, supra note 14, at 170–72.
18 Reuniting the Union: A Chronology, DIGITALHISTORY.COM, http://www.digital
history.uh.edu/database/article_display.cfm?HHID=126 (last visited Oct. 28, 2010).
19 Id.
20 See generally The Slaughter-House Cases, 83 U.S. 36 (1872).
21 Id. at 73.
“subject to the jurisdiction thereof” was intended to exclude the children of “ministers, consuls, and citizens or subjects of foreign states born within the United States.”

The dissenters in the Slaughter-House Cases acknowledged the Amendment’s purpose of reinforcing the constitutionality of the Civil Rights Act of 1866, which specifically excluded individuals who were subject to any other foreign power. The Court’s express exclusion of children of “citizens or subjects to foreign states born within the United States,” reflects an understanding that “subject to the jurisdiction thereof” encompassed more than being within the territorial boundaries of the United States.

Twelve years later in 1894, the Supreme Court addressed the issue of birthright citizenship. In Elk v. Wilkins, the Court held that although the petitioner, a Native American, was born in the United States and had subsequently severed his ties with his tribal sovereign, he was still not a natural-born citizen under the 14th Amendment. At the time of his birth, the petitioner’s parents were members of an Indian tribe, and therefore he was subject to the jurisdiction of the tribe and not the United States. Because the petitioner was not simultaneously subject to the jurisdiction of the United States at the time of his birth, he was not entitled to citizenship by birth.

To support the holding in Elk v. Wilkins, the majority analogized the status of the Native American with that of a foreign immigrant, saying “if [a Native American] individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.” This analogy suggests and reinforces the Court’s understanding that the exclusionary language of the Citizenship Clause applied to Native Americans and foreign immigrants in a parallel manner, as neither was subject to the complete jurisdiction of the United States.

In 1898, the Supreme Court decided the issue of birthright citizenship, but this time held contrary to Elk v. Wilkins. In United States v. Wong Kim Ark, the Court held that “a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the emperor of China, but have a permanent domicile and residence in the United States,” was a citizen by virtue of his birth in the country. The Court interpreted the Citizenship Clause to only exclude the

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22 Id.; Eastman, supra note 14, at 173.
23 Slaughter-House Cases, 83 U.S. at 91 (Field, J., dissenting); Eastman, supra note 14, at 173.
24 Slaughter-House Cases, 83 U.S. at 73.
25 U.S. CONST. amend. XIV.
26 Elk v. Wilkins, 112 U.S. 94, 121 (1884).
27 Id. at 101 (quoting Dred Scott v. Sanford, 60 U.S. 363 (1857)).
28 United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898); Eastman, supra note 14, at 175.
children of diplomats, who did not owe allegiance to the United States, and children of invading armies born within the U.S. borders during periods of occupation.\textsuperscript{29} The \emph{Wong Kim Ark} Court, however, did not directly address whether the children of \emph{illegal} immigrants are entitled to birthright citizenship by virtue of their birth on American soil.\textsuperscript{30} This narrow holding is the window through which the solution to the “anchor baby” problem should be sought.

\textbf{B. Legislative History}

Based on the legislative intent surrounding the 14th Amendment, there is a strong argument that “subject to the jurisdiction thereof” was wrongly interpreted and thus, wrongly applied since the \emph{Wong Kim Ark} decision. The Civil Rights Act of 1866 explicitly excluded individuals who are “subject to any foreign power” and Congress supplemented this phrase with “Indians not taxed.”\textsuperscript{31} The existence of the second phrase is significant because it indicates that the provision’s denial of birthright citizenship included, but was not limited to Native Americans.\textsuperscript{32} It is largely undisputed that the language was also meant to exclude those within the borders of the United States “in the diplomatic service of a foreign country.”\textsuperscript{33} However, it is less clear whether this language was meant to apply to any other persons within the territory of the United States. The explicit exclusion of those “subject to any foreign power” implies that birthright citizenship was reserved only for those who, unlike the mothers of “anchor babies,” were subject to the jurisdiction of the United States in some way beyond mere territorial jurisdiction.

During the floor debates surrounding the adoption of the 14th Amendment, two of the key creators addressed concerns that the Citizenship Clause would grant citizenship to Native Americans.\textsuperscript{34} Both Lyman Trumbull and Jacob Howard expressly clarified that “subject to the jurisdiction thereof” meant subject to its “full and complete jurisdiction” and “not owing allegiance to anyone else.”\textsuperscript{35} Howard reasoned that because Native Americans still belonged to a tribe and owed allegiance to another sovereign, they did not qualify as “subject to the jurisdiction” under the Citizenship Clause.\textsuperscript{36} Similar to the Court’s rationale in \emph{Elk v. Wilkins}, this can be analogized to illegal immigrants, who are not within the “full and complete jurisdiction” of the United States, and who may also be considered “owing allegiance” to another sovereign. Despite this, the phrase “subject to the

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\textsuperscript{29} \emph{Wong Kim Ark}, 169 U.S. at 678–79; Eastman, supra note 14, at 175.  
\textsuperscript{30} See generally \emph{Wong Kim Ark}, 169 U.S. 649 (addressing the children of immigrants legally living in the United States); Graglia, supra note 7, at 3.  
\textsuperscript{31} Civil Rights Act of 1866 ch. 31 § 1, 14 Stat. 21.  
\textsuperscript{32} Id.  
\textsuperscript{33} \emph{Wong Kim Ark}, 169 U.S. at 682.  
\textsuperscript{34} Eastman, supra note 14, at 172.  
\textsuperscript{35} Id.  
\textsuperscript{36} Id.
“subject to the jurisdiction thereof” has been applied as to grant birthright citizenship to virtually any child born within the territorial boundaries of the United States.

In sum, the interpretation of the 14th Amendment is not consistent with the legislative intent surrounding its creation. Historical evidence suggests “subject to the jurisdiction thereof” was meant to limit birthright citizenship in a much more restrictive way than it has been applied. However, the Supreme Court’s narrow ruling in *Wong Kim Ark* creates an opportunity to remedy the “anchor baby” problem.

### III. Relevant Theories of Birthright Citizenship

Many legal commentators argue that the interpretation of “subject to the jurisdiction thereof” in *Wong Kim Ark* was incorrect because the drafters of the Amendment intended “jurisdiction” to mean complete political jurisdiction, as was suggested by the *Slaughter-House Cases*, rather than the now orthodox interpretation of territorial jurisdiction. The two competing theories offer insight as to possible solutions for narrowing birthright citizenship. However, a hybrid theory of domicile could resolve the problem without requiring a drastic congressional action or a constitutional amendment.

Under the first theory, territorial jurisdiction, birthright citizenship can be acquired by simply being born within the borders of the United States and has nothing to do with parental citizenship, status, or political ties. The current interpretation of citizenship follows this theory. In contrast, under the second theory, referred to as “consensualist,” birthright citizenship is only granted to those within the complete political jurisdiction of the United States, which requires “allegiance to the sovereign,” in addition to being within the physical boundaries.

According to the consensualist approach, to be within the complete political jurisdiction of the United States and therefore “not owing allegiance to anybody else,” one must renounce all allegiance to their original homeland and in turn, receive “reciprocal consent” of the community. The consensualist view is often used to justify efforts to deny birthright citizenship to the children of all illegal immigrants because although they may have been born within the territory of the United States, the parents, and thus the children, are not within the political community with the community’s mutual consent.

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38 Shawhan, supra note 37, at 1356.

39 *Id.* at 1356 (referring to this view also as “revisionist”).

40 *Id.* at 1355.


42 Shawhan, supra note 37, at 1356.

43 *Id.*
While the consensualist view is based on statements made by Senator Lyman Trumbull during the drafting of the Civil Rights Act of 1866 and the 14th Amendment, critics of consensualism contend that the approach is inconsistent with one of Trumbull’s core elements of citizenship, domicile. In a letter to President Jackson summarizing the Civil Rights Act of 1866, Trumbull emphasized the importance of domicile in bestowing birthright citizenship. The letter said, “[t]he Bill declares ‘all persons’ born of parents domiciled in the United States, except untaxed Indians, are to be citizens of the United States.” Domicile, as defined in 1866, could be achieved by “moving to a nation or a particular place with the intention of making it one’s permanent residence.” From this emphasis, it has been inferred that Trumbull intended the words “not subject to any foreign power” to actually mean “of parents domiciled in the United States.”

Additionally, accepting the inference that Trumbull intended domicile to be the standard for birthright citizenship upsets the consensualist logic: the fact that residency was not regulated in 1866 and could take place without any governmental consent negates the assertion that reciprocal community consent is required for birthright citizenship.

While no set amount of time was required to achieve domicile, the intent to permanently remain is significant in both historical and modern contexts. In a historical context, the intent to remain is significant because at the time of the 14th Amendment’s adoption, illegal immigration did not exist. Migration to the United States was encouraged, rather than criticized, and the intent to remain was the key distinction between ambassadors “in the diplomatic service of a foreign country” and foreigners who had migrated to the United States. Furthermore, due to the extreme modes and conditions of transportation, especially those of intercontinental travel, one who migrated to the United States with “the intent to permanently remain” had essentially renounced their original homeland and became “subject to the jurisdiction” of the United States, as opposed to one who was here temporarily, such as a foreign consul or minister. Therefore, children born of parents who were not domiciled in the United States were not “subject to the jurisdiction thereof” for citizenship purposes.

In a modern context, the intent to permanently remain is significant in a more formalistic way. The “intent to permanently remain” is still open for interpretation and could mean (1) achieving legitimate permanent residency status or other lawful status, or (2) living within the country with the intent to permanently reside.

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44 Id. at 1357.
45 Id.
46 Id.
47 Shawhan, supra note 37, at 1357.
48 Id.
49 Id. at 1359.
50 Id.
51 Id. at 1358.
remain, whether illegal or not, as opposed to being a temporary visitor. The first interpretation would be more restrictive in that it would extend birthright citizenship only to children born of permanent residents, such as the parents in *Wong Kim Ark*. The second interpretation, a bare definition of domicile, would grant birthright citizenship to children born of any person in the United States who intended to remain, such as Saul Arellano. While both interpretations are in accordance with the holding of *Wong Kim Ark*, the second interpretation is unlikely to resolve the “anchor baby” problem, as it does not narrow birthright citizenship from its current application. On the other hand, the first interpretation of domicile, requiring permanent residency or some other lawful status, both narrows birthright citizenship in accordance with *Wong Kim Ark* and encourages those migrating to the United States to do so through legal channels.

Although territorial jurisdiction and the consensualist view are well-known theories of birthright citizenship, a hybrid between the two theories, has been presented. The hybrid theory of birthright citizenship requires the parents’ lawful residency in the United States which is supported by the 14th Amendment’s legislative intent. Additionally it is consistent with the case law interpreting 14th Amendment. Application of the hybrid domicile standard reconciles original intent with the past interpretation to resolve the “anchor baby” problem.

**IV. POSSIBLE REMEDIES AND RECONCILIATION**

Based on the legislative intent surrounding the 14th Amendment, many legal commentators believe the *Wong Kim Ark* interpretation was incorrect and that it has resulted in extreme amplification and abuse of birthright citizenship. Such allegations have initiated discourse to resolve the “anchor baby” problem. Suggestions include Congressional action narrowing this interpretation, revision of the Citizenship Clause, or repeal of the 14th Amendment all together. However, the application of domicile as the standard for jurisdiction could circumvent the problem of abusive birthright citizenship without requiring drastic action or alteration of the Constitution.

**A. Repeal of the 14th Amendment**

As of recent, conservative politicians such as Jon Kyl and Lindsey Graham have suggested substantial revision or even complete repeal of the 14th Amendment.

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52 See United States v. Wong Kim Ark, 169 U.S. 649 (1898).
53 See, e.g., Eastman, supra note 14, at 174–76.
Amendment’s Citizenship Clause to deal with the “anchor baby” aspect of illegal immigration.\footnote{Kephart, \textit{supra} note 54.}

However, the idea of repealing the entire 14th Amendment is drastic, unpopular and unwise. Hasty repeal of the 14th Amendment would create more problems than it would solve because it includes several other beneficial provisions such as the Equal Protection Clause, the Privileges and Immunities Clause, not to mention this Amendment determines how representatives to the House are selected.\footnote{See U.S. CONST. amend. XIV.} Further, it is highly unlikely that advocates of this action could muster the required votes to pass both houses of Congress, let alone three-fourths of the states, as is required to amend the Constitution.\footnote{U.S. CONST. art. V; Sam Fulwood III, \textit{Race and Beyond: Effort to Repeal 14th Amendment Canny Like a Fox}, CENTER FOR AMERICAN PROGRESS, Aug. 10, 2010, http://www.americanprogress.org/issues/2010/08/rab_081010.html.} Pepealing such an important part of our Constitution would be foolish and highly unlikely.

\textbf{B. Revision of the 14th Amendment}

Revision of the 14th Amendment, rather than a complete repeal, is a more mild suggestion but would still require a two-thirds vote in both chambers of Congress, as well as ratification by three-fourths of the states.\footnote{U.S. CONST. art. V.} While this proposition has attracted media attention and the support of some high-profile politicians such as John McCain, revision of the 14th Amendment has also been highly criticized as a radical proposal that would mark the first time in history that our Constitution has been amended to make it less egalitarian.\footnote{Carrie Kahn, \textit{Republicans Push to Revise 14th Amendment}, NATIONAL PUBLIC RADIO, Aug. 5, 2010, http://www.npr.org/templates/story/story.php?storyId=129007120.} Critics of such revision believe revising the Amendment is not worth the time and effort it would require, and the energy would be better spent reducing illegal immigration by other means.\footnote{Sandhya Somashekhar, \textit{GOP Push to Revise 14th Amendment Not Gaining Steam}, WASH. POST, Aug. 8, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/07/AR20100807072605.html.} Although the ideas of constitutional repeal or revision appear unpopular and logistically unlikely, many still advocate for remedial action of birthright citizenship.

\textbf{C. Congressional Action}

Because those who believe the Citizenship Clause needs to be revised also believe the text was wrongly interpreted to begin with, another recommendation includes narrowing the interpretation of the words “subject to the jurisdiction
thereof” through legislative action pursuant to Congress’s plenary power to regulate immigration. 61 Although Congress cannot dip below the constitutional minimum protections, it has the power to advise against interpretations by the Supreme Court that provide a broader grant of citizenship than is warranted by the Constitution’s text. 62 Furthermore, Wong Kim Ark has been applied much broader than its actual holding, which only concerned birthright citizenship as applied to permanent residents who were living in the United States lawfully. 63

The Supreme Court has never heard a case dealing with birthright citizenship as applied to children of illegal immigrants; therefore, if Congress were to construe a narrower reading of the Citizenship Clause as applied to persons not considered permanent residents, it would not contradict any existing precedent. However, for all the same reasons previously discussed, the easiest solution to the “anchor baby” problem most likely lies in the hands of the Supreme Court.

D. Application of the Domicile Standard by the Supreme Court

Given another opportunity to hear a birthright citizenship case, one dealing specifically with the children of an illegal immigrant, the Supreme Court could easily redefine the meaning of “subject to the jurisdiction” by distinguishing the matter from Wong Kim Ark. By applying a domicile requirement as the standard to obtaining birthright citizenship, the Supreme Court could rectify the misinterpretation of the Citizenship Clause without having to overturn the holding in Wong Kim Ark. The holding of Wong Kim Ark is in accordance with the domicile requirement because the parents in that case were considered permanent residents at the time of the plaintiff’s birth. 64

In deciphering the meaning of the 14th Amendment and its original purpose, the Supreme Court would likely start with the text of the 14th Amendment and the legislative intent. There is sufficient evidence to imply a narrower meaning of “subject to the jurisdiction” than solely being within the territorial boundaries of the United States. Applying the domicile standard, that is, requiring permanent residency or other lawful status, would narrow the meaning enough to exclude those who do not lawfully reside in the United States without imposing an unreasonable standard for birthright citizenship. Furthermore, because the domicile requirement would not directly contradict the holding of Wong Kim Ark, it would be fairly easy to implement this policy, especially in comparison to a constitutional amendment. 65

61 Eastman, supra note 14, at 178–79.
62 Id.
64 Id.
65 Id.
The main issue for the Court would be interpretation of the phrase “intent to permanently remain” in the definition of domicile. Interpretation of this phrase would hinge on the word “permanent,” which could mean either to include persons who have achieved permanent residency status, or those who generally live here with the intent to remain. The latter is bound to be more controversial because it may not distinguish between those who are here lawfully from those who are not.

While the application of domicile does not rise to the level of amending the constitution nor may it completely resolve the issues of illegal immigration, it would likely receive a warm welcome from those members of Congress who have recently called for drastic measures, such as repeal of the 14th Amendment. Applying domicile as the standard would reserve birthright citizenship for those who have come to the United States through legal channels. In addition, those who illegally come to the United States for the purpose of attaining citizenship for their children would be deterred from doing so, as the incentive to do so would no longer exist. The “anchor baby” problem would essentially be resolved.

IV. CONCLUSION

As the illegal immigration debate continues, a narrower reading of birthright citizenship is urged. Because many believe the Citizenship Clause of the 14th Amendment was wrongly interpreted to begin with, suggestions such as revising or even repealing the 14th Amendment have been proposed. However, while many assert the Supreme Court’s holding in *Wong Kim Ark* is the foundation of the wrongful interpretation, it is likely that this holding will lead to the solution for narrowing birthright citizenship. Because the *Wong Kim Ark* Court only directly addressed whether immigrants holding permanent resident status were eligible for birthright citizenship, the ruling left open the possibility to restrict birthright citizenship from those in the country unlawfully or without permanent residency status. Furthermore, the application of domicile as the standard for birthright citizenship, as the drafters of the 14th Amendment suggested, would be in accordance with the holding of *Wong Kim Ark*, and would also resolve the birthright citizenship debate without amending the Constitution.

Unfortunately, for families like Elvira and Saul Arellano’s, none of the proposed solutions to narrowing birthright citizenship are likely to help their situation. But hopefully for families in the future, clarification of the Citizenship Clause may grant their children U.S. citizenship free and clear of the disparaging term “anchor babies” or claims of undeserved benefits.