The Labor Origins of Birthright Citizenship

Michael H. LeRoy

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hlelj

Part of the Labor and Employment Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hlelj/vol37/iss1/3
THE LABOR ORIGINS OF BIRTHRIGHT CITIZENSHIP

Michael H. LeRoy*

I. INTRODUCTION ........................................................................................................ 42
   A. Historical Context ............................................................................................... 42
   B. Overview of Legal Evolution of Birthright Citizenship ..................................... 44

II. BIRTHRIGHT CITIZENSHIP: THE FALLACY OF MAJORITY CONSENT ........ 47
   A. Citizenship without Consent: A Veil for Racial Consent .................................. 47
   B. The Fallacy of Racial Consent: Immigration and Labor in American Colonies .... 52

III. ROMAN AND UNIVERSAL CITIZENSHIP: THE LABOR FACTOR .... 59
   A. Citizenship and Compulsory Labor ................................................................... 62
   B. Birth and Citizenship .......................................................................................... 63
   C. Slaves and Free Labor ....................................................................................... 64

IV. ENGLAND AND BIRTHRIGHT CITIZENSHIP ............................................ 66
   A. The Overstated Significance of Calvin’s Case .................................................. 66
   B. English Labor: Aliens and Citizens .................................................................. 68

V. THE UNITED STATES AND BIRTHRIGHT CITIZENSHIP: THE LABOR FACTOR ..... 74

*Professor, School of Labor and Employment Relations, and College of Law, University of Illinois at Urbana-Champaign.
A. Birthright Citizenship and Labor in Early America .......... 75
B. The Fourteenth Amendment and Birthright Citizenship: Free and Immigrant Labor .................................................. 79
C. Wong Kim Ark and Jus Soli ........................................... 84
VI. WORKFORCE IMPLICATIONS OF LIMITING BIRTHRIGHT CITIZENSHIP ...................................................................... 85
   A. Nine-Month Entry Exemption for Immigrant Mothers ...... 87
   B. U.S.-Born Children of Unlawful Immigrants .................. 88
   C. Eurocentric Citizenship .................................................. 91
VII. CONCLUSION ..................................................................... 92
This study refutes current efforts to limit birthright citizenship. Opponents to this broad Fourteenth Amendment right object to the granting of public benefits to U.S.-born children of undocumented immigrants, contending that this automatic right bypasses consent from American citizens. I demonstrate that the birthright principle evolved from pragmatic immigration and citizenship policies that emerged in three empires: Rome, the United Kingdom, and the United States. As these empires stretched across the globe, they adopted permissive citizenship policies to exploit the competitive labor advantage of foreigners and their native-born children.

The American form of birthright citizenship is clearly rooted in Roman and English legal principles, many of which were fueled by expansionist territorial ambitions coupled with mercantile economies. Colonies adopted birthright citizenship in common law cases; Congress enacted this right in the Fourteenth Amendment; and the Supreme Court upheld it in *Wong Kim Ark v. U.S.* Records from the Thirty-Ninth Congress in 1866 clearly show that the birthright citizenship debate centered on the labor utility of foreigners and their children in spurring the West’s economic development – a debate that also rejected nativist arguments depicting foreigners as indolent, parasitic, and unassimilable. I conclude that current efforts to limit American birthright citizenship are motivated by a thinly veiled racial theory of consent, a view that contradicts nearly two millennia of laws that valued the labor of foreigners and their native-born children so much as to grant them citizenship.

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.\(^1\)

**U.S. CONST., ART XIV, SEC. 1.**

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory ...\(^2\)

*Wong Kim Ark v. U.S.*

"We’re the only country in the world where a person comes in and has a baby, and the baby is essentially a citizen of the United States for 85

---

years, with all of those benefits. It’s ridiculous. It’s ridiculous. And it has to end.”

President Donald Trump

I. INTRODUCTION

A. Historical Context

President Donald Trump plans to issue an executive order ending birthright citizenship. No single action could add more bleach to America’s complexion. Abolishing this type of citizenship, which birthright critics advocate, would return the United States to its white settler origins. Birthright citizenship – also called jus soli (“right of the soil”) – is a longstanding right: It applies to any person born “within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown . . .” The right of jus soli has a long history in the United States; the colonies adopted birthright citizenship through the common law. The Fourteenth Amendment, ratified in 1868, has a


4. Id. An executive order to modify the birthright citizenship clause would be a radical departure from past legislative efforts – all of which failed – to legislate limits to this right. See ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44251, BIRTHRIGHT CITIZENSHIP AND CHILDREN BORN IN THE UNITED STATES TO ALIEN PARENTS: AN OVERVIEW OF THE LEGAL DEBATE 1, 17-19 (reviewing failed legislative efforts to modify birthright citizenship).

5. See, e.g., Edwin J. Feulner, The Bane of Birthright Citizenship, THE HERITAGE FOUND. (Nov. 7, 2018), https://www.heritage.org/immigration/commentary/the-bane-birthright-citizenship (discussing that President Trump should be applauded for attempting to bring the current interpretation of the Fourteenth Amendment back to the original intent of the framers of the Constitution; Michael Anton, Birthright Citizenship: A Response to My Critics, CLAREMONT REV. BOOKS (July 22, 2018), https://www.claremont.org/crb/basicpage/birthright-citizenship-a-response-to-my-critics/ (“The American people did not willingly, knowingly, or politically adopt birthright citizenship. They were maneuvered into it by the Left and by the Left-allied judiciary.”).

6. See Amy Briggs, How the Founding Fathers understood U.S. citizenship, NAT’L GEOGRAPHIC (Oct. 31, 2018), https://www.nationalgeographic.com/culture/2018/10/birthright-citizenship-explainer-united-states-history/. Most nations outside the Western Hemisphere have adopted jus sanguinis (“right of blood”), which grants citizenship when one or both parents are citizens. Id.


Under the common law principle of jus soli (law of the soil), persons born on British soil, even of two alien parents, were “natural born” subjects and, as noted by the Supreme Court, this “same rule” was applicable in the American colonies and “in the United States afterwards and continued to prevail under the Constitution . . .”
birthright citizenship clause: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."9 The Supreme Court upheld birthright citizenship in *Wong Kim Ark v. U.S.*10

Nonetheless, there is significant opposition to birthright citizenship, with thirty-seven percent of the American public in agreement that this right should end for U.S.-born children of unlawful immigrants.11 In Section II, I show that a common view among birthright citizenship critics is that American citizens must consent to enlarge the original conception of citizenship, a right that was limited in the first federal immigration law to free white people.12 Birthright opponents offer no specific policy plan for what is to become of people born in the United States who fail to meet their criteria for citizenship.13

My study refutes these views by offering an alternative theory: Birthright citizenship has served a special purpose for great empires.14

---

with respect to citizens. In textual constitutional analysis, it is understood that terms used but not defined in the document must, as explained by the Supreme Court, "be read in light of British common law" since the Constitution is "framed in the language of the English common law."

*Id.*

11. On Immigration Policy, Wider Partisan Divide Over Border Fence Than Path to Legal Status, PEW RES. CTR. (Oct. 8, 2015), https://www.people-press.org/2015/10/08/on-immigration-policy-wider-partisan-divide-over-border-fence-than-path-to-legal-status/ (demonstrating support for changing the Constitution to bar citizenship of U.S.-born children whose parents are not legal residents has been between 39 percent and 42 percent between 2006 and 2015).
12. Compare Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent, 19 SOC. CONT. 20 (1996) (mentioning that offering "a democratic community the power to shape its own destiny by granting or refusing its consent to new members is essential") [hereinafter "Citizenship Without Consent"], with List of the Public Acts of Congress, in 156 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA FROM THE ORGANIZATION OF THE GOVERNMENT IN 1789; TO MARCH 3, 1845 (Richard Peters ed., 1848) (including an "Act to establish an [sic] uniform: Rule of Naturalization" that provided "any alien, being a free white person, who shall have relied [sic] within the limits and under the jurisdiction [sic] of the United States for the term of two years, may be admitted to become a citizen thereof . . . .")
13. See Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity 119 (Yale University Press 1985) [hereinafter "Citizenship Without Consent: Illegal Aliens in the American Polity"] (mentioning that "[s]ince the proposed doctrine would require reinterpretation of the Citizenship Clause, the change would be made prospectively, assuring citizenship to those born in the United States while the current understanding has been in effect."). The authors end their sweeping policy idea there, without explaining how U.S.-born children who fall outside their birthright citizenship criteria are to be classified under immigration laws.
14. See infra Sections III, IV, V.
Rome, England, and the U.S adopted birthright citizenship to achieve a competitive labor advantage over the rivals.\textsuperscript{15} Over two millennia, this idea introduced foreigners – often people of different races and religions – to these homogeneous states.\textsuperscript{16} In England and the United States, nativists persistently opposed these measures.\textsuperscript{17} Over time, however, birthright citizenship’s pluralism prevailed and made these empires great.\textsuperscript{18}

\textbf{B. Overview of Legal Evolution of Birthright Citizenship}

My defense of American birthright citizenship utilizes primary documents authored by emperors, monarchs, legislatures, and courts.\textsuperscript{19} I place these legal developments in context by examining economic conditions and labor issues that motivated these public policies.\textsuperscript{20}

By way of overview, Section II frames the current controversy over birthright citizenship by examining arguments advanced in \textit{Citizenship by Consent: Illegal Aliens in the American Polity}, a 1985 book published by two Yale professors.\textsuperscript{21} I evaluate their point that birthright citizenship for U.S.-born children of unlawful immigrants should depend on the consent of American citizens. My critique shows that birthright citizenship was established in a 1606 charter to colonize Virginia, predating the United States Constitution by nearly 200 years.\textsuperscript{22}

In Section III, I show that Roman emperor, Justinian, formalized birthright citizenship in 515 A.D.\textsuperscript{23} He drew from Emperor Caracalla’s edict in 212 A.D. that naturalized foreigners to enlarge Rome’s tax base and broaden participation in public service.\textsuperscript{24} This legal evolution explicitly accounted for the occupations and skills foreigners who lived under Roman rule – for example, Egyptians.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{15} See infra Sections V, VI.
  \item \textsuperscript{16} See infra Section IV.
  \item \textsuperscript{17} See infra Sections IV, V.
  \item \textsuperscript{18} See infra Section VII.
  \item \textsuperscript{19} See infra Sections III, IV, V, IV(C).
  \item \textsuperscript{20} See infra Sections VI, VI(B).
  \item \textsuperscript{21} See \textit{Citizenship Without Consent: Illegal Aliens in the American Polity}, supra note 13.
  \item \textsuperscript{22} The Three Charters of the Virginia Company of London with Seven Related Documents; 1606-1621, at 6 (1957).
  \item \textsuperscript{23} See infra Section V(A).
  \item \textsuperscript{24} See infra Section III.
  \item \textsuperscript{25} See infra Section III.
\end{itemize}
England followed a similar path through its Anglo-Saxon founder, William the Conqueror, who established the main principles of birthright citizenship in the twelfth century. Edward III broadened birthright citizenship in 1368. In Calvin's Case, the English common law adopted this principle. Over the next two centuries, England naturalized refugees from religious persecution. Often, immigration laws added new skills and industries that benefitted English natives. Birthright citizenship applied in England to the children, and their descendants, of naturalized workers. These laws introduced people of diverse religions and trades to the Anglican nation.

Section V, shows that America followed these imperial traditions. King James I chartered the first Virginia colony in 1606 with a grant of birthright citizenship to subjects who ventured to the New World. Colonial courts were bound by Calvin's Case. During the drafting of the United States Constitution in 1787, the framers considered place of birth and citizenship only for qualifications of officeholders. They did not repeal or limit birthright citizenship.

The Reconstruction Congress in 1866 enacted a comprehensive birthright citizenship law. Proponents offered differing reasons for the law, including the labor utility of immigrants and their children.

27. LETTERS OF DENIZATION AND NATURALIZATION, 1603-1700 iii-iv (William A. Shaw, ed., 1911).
29. See infra discussion Sections II(B), III, IV, V.
31. JUDICATURE; LAW COURTS (SCOTLAND); NATURALIZATION AND ALLEGIANCE, NATIONALITY STATUTES: APPENDIX TO THE REPORT, IN 14 REPORTS FROM COMMISSIONERS: TWENTY-TWO VOLUMES 107 (1869).
33. See infra Section V.
34. First Charter, ch. XV, I The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, at 64 (William Waller Hening ed., Richmond, VA., George Cochrane 1823) [hereinafter "Laws of Virginia"]).
37. Wyatt, supra note 4, at 3-6.
39. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866).
Debates highlighted conflicting views as to whether America was conceived as a nation governed by whites for whites.\footnote{40} The Supreme Court adopted an expansive interpretation of birthright citizenship in \textit{Wong Kim Ark}.\footnote{41} The majority opinion relied heavily on \textit{Calvin’s Case}, and legislative intent from the 1866 Congress.\footnote{42} Nothing of legal significance has changed since 1898.\footnote{43}

As these historical examples show, labor and immigration are often intertwined when nations broaden legal immigration: But they are also intertwined when nations limit immigration.\footnote{44} American labor unions offer a shameful example: In the late 1800s many leaders successfully argued for the restriction of Chinese immigration.\footnote{45} By the 1920s, labor protectionism and eugenics brought America’s working class and intellectuals together to support legal restrictions for Asians and most Europeans.\footnote{46}

The United States reversed this pattern with enactment of the Immigration and Nationality Act of 1965 – the current comprehensive immigration law in the United States – which allows immigrants with various skills to work in the United States.\footnote{47} It created employment classifications that lead to naturalization.\footnote{48} The children of these

\begin{itemize}
  \item \footnote{40} CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 595 (1866); S. JOURNAL, 39th Cong., 1st Sess. 280 (1866).
  \item \footnote{41} United States v. Wong Kim Ark, 169 U.S. 649 (1898).
  \item \footnote{42} \textit{Id.} at 654-56.
  \item \footnote{43} See Wyatt, \textit{supra} note 4, at 2-3.
  \item \footnote{44} CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866); see also Andri Chassamboulli & Giovanni Peri, \textit{The Labor Market Effects of Reducing the Number of Illegal Immigrants} 36-37 (Nat’l Bureau of Econ. Research, Working Paper No. 19932).
  \item \footnote{48} \textit{See} 8 C.F.R. § 214.2(c)(ii) (defining criteria for a specialty occupation in the H-1B visa).  
\end{itemize}
immigrant workers – like Wong Kim Ark, the American-born son of Chinese immigrants – are citizens by birthright.\textsuperscript{49}

In Section VI, I conclude by expounding three policies that could limit birthright citizenship.\textsuperscript{50} The most limited policy would curb birthright tourism by requiring a mother to reside in the United States more than nine months to qualify her newborn infant for American citizenship.\textsuperscript{51} A much broader policy would deny citizenship to any child born to an unlawful immigrant.\textsuperscript{52} An extremely broad exclusion of birthright citizenship would take a Eurocentric approach, limiting birthright citizenship to children born to parents of English and Nordic ancestry.\textsuperscript{53} For these policy scenarios, I present data to estimate the adverse impact of each proposal on the United States labor force.\textsuperscript{54} Overall, I conclude, that what makes America a great empire is a confluence of naturalization and birthright citizenship laws, which harness human capital for territorial expansion and create a robust mercantile economy.\textsuperscript{55} Limiting birthright citizenship would not only reverse a longstanding constitutional principle, but it would also contribute to the decline of the United States as a whole by limiting the nation’s stock of human capital.\textsuperscript{56}

II. BIRTHRIGHT CITIZENSHIP: THE FALLACY OF MAJORITY CONSENT

A. Citizenship without Consent: A Veil for Racial Consent

\textit{Citizenship Without Consent: Illegal Aliens in the American Polity} is part of a larger group of academic publications that opposes birthright

\textsuperscript{specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.}

\textit{Id.}

\textsuperscript{49.} Wyatt, supra note 4 ("Wong Kim Ark held that a person born in the United States to resident aliens became a U.S. citizen at birth, even when the person's parents were barred from ever naturalizing.").

\textsuperscript{50.} See infra Section VI.

\textsuperscript{51.} See discussion infra Section VI(A).

\textsuperscript{52.} See discussion infra Section VI(B).

\textsuperscript{53.} See discussion infra Section VI(C).

\textsuperscript{54.} See discussion infra Sections VI(A)-(C).

\textsuperscript{55.} See discussion infra Section VI(D).

\textsuperscript{56.} See discussion infra Section VI(D).
citizenship. They professedly desire dangerous illegal immigration on the welfare state. Nor could Congress foresee that migrants would enter America to exploit welfare benefits to the detriment of native-born Americans.

Citizenship without Consent promotes a theory of majority consent to citizenship. Peter Schuck and Rogers Smith suggest that Congress is the institution for deciding the scope and criteria for birthright citizenship. This proposal means, however, that representatives and senators of a white-majority polity would consider anew whether children


58. See, e.g., Citizenship Without Consent, supra note 13, at 21.

59. See id.; see also Brimelow, supra note 57, at 152.

60. See Citizenship Without Consent, supra note 13 at 21-23 ("citizenship at birth would not be guaranteed to the native-born children of those persons -- illegal aliens and nonimmigrant aliens -- who have never received the nation's consent to their permanent residence within."). The policies preferred by the authors appear to be similar to those in Japanese Immigration Legislation: Hearing on S.2576 Before S. Comm. on Immigration, 68th Cong. 5 (1924). Here, V.S. McClatchy stated: "Of all the races ineligible to citizenship under our law, the Japanese are the least assimilable and the most dangerous to this country." Id. McClatchy continued: "They do not come to this country with any desire or any intent to lose their racial or national identity. They come here specifically and professedly for the purpose of colonizing and establishing here permanently the proud Yamato race. They never cease to be Japanese." Id.

61. Id. at 22-23 ("Congress, which bears the ultimate responsibility for fashioning the structure of our immigration policy, would also decide the role of birthright citizenship for the children of illegal and nonimmigrant aliens.").
of mostly dark-skinned undocumented aliens are 'birthright citizens.\textsuperscript{62}

Three interrelated streams of evidence support my contention that Schuck and Smith have proposed a theory of racial consent to citizenship:

- First, racial gerrymandering that results from Republican map-drawing is common in the United States, and usually packs Democrats into few districts to dilute their broader electoral influence.\textsuperscript{63}

- Second, Republican seats in the House of Representative have significantly lower foreign-born populations compared to seats held by Democrats.\textsuperscript{64} This suggests why Republican lawmakers prefer anti-immigration policies more than Democrats.\textsuperscript{65}

- Third, foreign-born residents in the United States are overwhelmingly nonwhite. Census data from 2016 indicate among the foreign-born population in the United States 7,895,629 people were "White Only" (18.1%).\textsuperscript{66} This means that the term foreign-born population in the United States refers to a group that is more than eighty percent people of color.

\textsuperscript{62} See generally id. (describing how Congress (a group of predominantly white men) could decide the fate of immigrants and their children).


\textsuperscript{65} Id. ("House seats held by Republicans generally have significantly lower foreign-born populations than those held by Democrats, a likely indication of why the two parties are so far apart on immigration . . .").

In short, the confluence of Republican-controlled racial gerrymandering, the concentration of foreign-born residents in Democratic districts, and the packing of foreign-born people of color in these Democratic districts all serve as proof that the majority-consent theory proposal in *Citizenship without Consent* is a veil for racial consent.67

The authors suggest a theory of white nationalism when they propose “a return to the legal immigration total population ratio that prevailed during the 1920s, the decade in which the quota system was firmly in place, would constitute a policy improvement” over illegal immigration.68 They build their theoretical case for consent by stating that republican forms of governments are meant to create “a powerful sense of civic identity and devotion” that occurs in a polity that is “small and homogeneous, with citizens ‘like a single family.’”69 Writing in 1985, they concede that their theory has alarming implications.70

The authors use a modest amount of sources to validate their sweeping assertions.71 Their breezy analysis skims over contributions made by unlawful immigrants and their children.72 They employ

67. See Shaw, 517 U.S. at 920; Owens & Canipe, supra note 64; *Citizenship without Consent: Illegal Immigrants in the American Polity*, supra note 13.


69. *Id.* at 27.

70. *Id.* at 119 (stating “although we would not want this reinterpretation to make it easier for the United States to adopt harshly restrictive immigration policies, this deplorable result need not and should not follow.”).

71. *Citizenship without Consent: Illegal Immigrants in the American Polity*, supra note 13, at 141-67 (relying on 334 footnotes, with 156 notes comprised of repetitious references (counting the use of *id.* and supra notes)).

72. See *id.* at 113 (claiming that illegal immigration is mostly disadvantageous for American citizens, however, they made no attempt to engage with contrary evidence. They minimized contributions made by unlawful aliens and their children – their generation of tax revenues, service in the military, contributions in the workforce specifically, and more generally to society. They begrudgingly acknowledge that “illegal aliens defray the costs of public benefits and services through their tax benefits . . . [though] [t]he magnitude of this compensating effect is a complex question.”). At the time that *Citizenship without Consent: Illegal Immigrants in the American Polity* was published, research showed that “recent immigrants typically earn less than the native born, several studies have suggested that the initial lower earnings of immigrants are reduced or even reversed after a period of residence and labor market experience in the United States.” Charles Hirschman & Morrison G. Wong, *Socioeconomic Gains of Asian Americans, Blacks, and Hispanics: 1960-1976*, 90 Am. J. Soc. 584, 599 (1984).—Schuck and Smith also overlooked the contributions by aliens and their conscripted and enlisted children make in the military. *See, e.g.*, James B. Jacobs & Leslie Anne Hayes, *Aliens in the U.S. Armed Forces*, 7 *Armed Forces & Soc’y* 187, 199 (1981) (“[T]he opportunity and obligation of military service has, for the most part, been open to and borne by citizens and aliens alike.”). Schuck and Smith also engage in pointless speculation about long-
occasional dog whistles, for example, "birthright citizenship is something of a bastard concept in American ideology," a phrasing that connotes not only the illegitimate citizenship status of unlawful immigrant children but also suggesting their parents are unmarried race-breeders. They posit a "moral" justification for their consensualist viewpoint but simply equate immorality with welfare and public benefits such as schooling for children of unlawful immigrants.

Their timeline reaches back to Calvin’s Case. They dismiss birthright citizenship precedents as codified in the Fourteenth Amendment, referring to "an anachronistic understanding of the clause." The context they frame omits a millennium of Roman and English laws that liberalized naturalization and birthright citizenship. This blind spot appears again when they suggest that John Locke and Niccolò Machiavelli viewed immigrants as threats to republican
dterm effects of illegal immigration, stating another difficulty "relates to possible longer-term changes in the pattern of benefits to illegal aliens," thus implying the problem will worsen. Citizenship Without Consent: Illegal Immigrants in the American Polity, supra note 13, at 113. This speculation is contradicted by states that currently deny welfare benefits to undocumented immigrants. Alabama administers a federally funded Family Assistance Program which provides temporary financial assistance for needy families with a dependent child under age 18 but excludes undocumented individuals who would otherwise qualify. See Ala. State Dep’t of Human Res., Temporary Assistance for Needy Families (TANF) State Plan Renewal (2016) (specifying that citizens and qualified non-citizens are eligible to participate).

73. Citizenship Without Consent: Illegal Immigrants in the American Polity, supra note 13, at 2. Schuck and Smith give an overly rosy picture of life in America for so-called "illegal alien parents" and their children, and supposes that these families have interests that directly oppose American citizens and their children. "But if the centrality of American citizenship has declined for those here legally, it remains valuable nonetheless, for those who seek to escape the turbulent social conditions that prevail today outside their borders." Id. at 109. They continue:

Consider the consequences of successfully obtaining . . . [birthright citizenship], both for the native-born child and for the illegal alien parents. For the child, American citizenship will mean the ability to come and remain here whenever and for as long as he likes, to participate in public life, to work in the American economy without blatant exploitation, and to claim the full protection of American law, including all of the benefits of the welfare state. Viewed purely in economic terms—surely a revealing, albeit inadequate, measure of the value of guaranteed citizenship at birth—these advantages are enormous.

Id.

74. See id.

75. Id. at 6 ("[T]he consensual position possesses far more moral weight today . . ."); id. at 98 ("[O]ur point is that even if moral obligations to illegal aliens exist and are compelling, they by no means imply a moral claim—and certainly not birthright entitlement—to American citizenship."); id. at 114 ("Another normative argument against birthright citizenship for [children of illegal aliens] . . . relates to the relative weakness of their moral claims.").

76. Id. at 141-67 (using footnotes that range in date).

77. Id. at 122.
governments. As I will show below, Locke and Machiavelli expressed favorable views of immigration.

B. The Fallacy of Racial Consent: Immigration and Labor in American Colonies

There is broad agreement among legal scholars that birthright citizenship applies to all people born in the United States. Citizenship without Consent’s call for reinterpretation of the Birthright Citizenship Clause contradicts expert opinions rendered much closer in time and memory to passage of this constitutional amendment. The theory of racial consent in Citizenship without Consent omits analysis of naturalization and birthright policies in promoting migration to the colonies. Virginia’s original charter, granted in 1606, conferred birthright citizenship to English subjects in the newly formed colony. Because of this omission, the authors fail to understand that birthright citizenship was essential for people to seek opportunities in the New World. In the seventeenth century, immigrants gave up freedom in their

78. See, e.g., Elizabeth Farrington, Anchors Aweigh: Analyzing Birthright Citizenship as Declared (Not Established) by the Fourteenth Amendment, 51 U. RICH. L. REV. ONLINE 71, 88-89 (2017) (demonstrating that legal and judiciary history is in favor of a broad reading of the Fourteenth Amendment); see also Mark Shawhan, “By Virtue of Being Born Here”: Birthright Citizenship and the Civil Rights Act of 1866, 15 HARV. LATINO L. REV. 1, 36 (2012) (“From a purely textual standpoint, there are several problems with the argument that ‘subject to the jurisdiction’ should be read as creating a consent-based requirement for birthright citizenship.”); Taunya Lovell Banks, Dangerous Woman: Elizabeth Key’s Freedom Suit – Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia, 41 AKRON L. REV. 799, 800-01 (2008) (discussing a case where an “Afro-Anglo woman, was born . . . in the Virginia Colony [and] [t]wenty-five years later she sued” for her and her son’s freedom).

79. See International Law of the United States, 2 WHARTON DIGEST, ch. VI, § 183, at 394 (questioning whether United States-born children of foreign parents who were eventually brought back to the country of their father’s origin and reside there “are entitled to protection as citizens of the United States . . . . [A]ccording to the common law, any person born in the United States . . . may be considered a citizen thereof until he formally renounces his citizenship.”); see also FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 6-7 (1904) (providing that before the Civil Rights Act of 1866 and the Fourteenth Amendment “all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native born citizens of the United States.”).

80. CITIZENSHIP WITHOUT CONSENT: ILLEGAL IMMIGRANTS IN THE AMERICAN POLITY, supra note 13, at 42-89 (mentioning nowhere within Chapters 2 and 3 which discuss the historical lead up to birthright citizenship).

81. Laws of Virginia, supra note 34.
home countries to find work in America.\textsuperscript{82} Many were indentured servants.\textsuperscript{83} Most immigrants were English.\textsuperscript{84} By the eighteenth century, colonies enacted English naturalization laws to promote economic development.\textsuperscript{85} These laws replaced denization (a permit for residency) with naturalization (a type of citizenship).\textsuperscript{86}

Citizenship rights emerged as a flash point in the 1760s. Colonial leaders decried England’s protectionist duties on American manufactured and agricultural exports.\textsuperscript{87} In presenting their grievances to Parliament in 1764, they believed their ancestors had secured privileges and immunities associated with English birthright citizenship.\textsuperscript{88} This undergirded their


\textsuperscript{83} Id. at 54; Aaron S. Fogelman, From Slaves, Convicts, and Servants to Free Passengers: The Transformation of Immigration in the Era of the American Revolution, 85 J. AM. HIST. 43, 44 (1998) (noting that from 1607-1699 198,400 immigrants came to the colonies. Of those, 66,000 (33%) were free, 96,600 (49%) were indentured servants, 33,200 (17%) were slaves, and 2,300 (1%) were prisoners and convicts. From 1700-1775, 585,800 immigrants entered, including 151,600 (26%) as free people: 103,600 (18%) were indentured servants, 278,400 (47%) were slaves, and 52,200 (9%) were prisoners and convicts.).

\textsuperscript{84} Fogelman, supra note 83, at 45.

\textsuperscript{85} Ezra Risch, Encouragement of Immigration: As Revealed in Colonial Legislation, 45 VIRG. MAG. HIST. & BIO. 1, 5-10 (1937) (mentioning that Colonies structured inducements around work and land ownership – for example, South Carolina’s law in 1751 to allocate certain bounties to paid for “the encouragement to shipwrights and caulkers to become settlers in the province.”).

\textsuperscript{86} Id. at 7. Initially, governors issued letters of denization, allowing immigrants to own land, as well as to inherit and transmit property to their children. The practice broadened as colonial legislatures passed special acts relating to particular persons. Eventually, colonies enacted general naturalization laws. In addition to permitting immigrants to own land, these laws created voting privileges. Id. These laws originally were limited, however, to the jurisdiction of the colony. Id.

\textsuperscript{87} See Virginia House of Burgesses, Petition of the Virginia House of Burgesses to the House of Commons, AVALON PROJECT (Dec. 18, 1764), http://avalon.law.yale.edu/18th_century/petition_va_1764.asp (asserting a right for British subjects to have representation in deliberations over duties and other exactions. “[I]t is essential to British liberty that laws imposing taxes on the people ought not to be made without the consent of representatives chosen by themselves.” They argued that the “privilege, inherent in the persons who discovered and settled these regions, could not be renounced or forfeited by their removal hither . . . but licensed and encouraged by their prince and animated with a laudable desire of enlarging the British dominion, and extending its commerce.”); see also Charleston Non-Importation Agreement, AVALON PROJECT (July 22, 1769), https://avalon.law.yale.edu/18th_century/charleston_non_impotation_1769.asp (objecting to “the abject and wretched condition to which the British colonies are reduced by several Acts of Parliament lately passed,” including duties imposed “to the support of new-created commissioners of customs, placemen, parasitical and novel ministerial officers” and resolving to “encourage and promote the use of North American manufactures in general, and those of this province in particular . . .”).

\textsuperscript{88} Charles Callan Tansill, Declaration and Resolves of the First Continental Congress 1, 2 (Oct. 14, 1774) (stating “N.C.D. 2. That our ancestors, who first settled these colonies, were at the
arguments for political representation and freedom from oppressive taxes and restrictions. In a manifesto, Thomas Jefferson declared that England usurped the rights of citizens in colonies by restricting their labor to benefit workers in England. Two years later, he penned the Declaration of Independence. Among its grievances, this revolutionary document emphasized the importance of immigration to the colonies and complained of the king’s repeated attempts to obstruct naturalization.

Citizenship without Consent treats events leading up the Declaration of Independence with vague generalities, lacking details of the complicated trade and labor issues that revolved around the citizenship of colonists. By 1750, the colonies brimmed with opportunities for colonial

time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

89. Id. at 2-3 (stating “N.C.D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.”).


[W]e take leave to mention to his majesty certain other acts of British parliament, by which they would prohibit us from manufacturing for our own use the articles we raise on our own lands with our own labour. By an act passed in the 5th Year of the reign of his late majesty king George the second, an American subject is forbidden to make a hat for himself of the fur which he has taken perhaps on his own soil . . . . By one other act, passed in the 23d year of the same reign, the iron which we make we are forbidden to manufacture, and heavy as that article is, and necessary in every branch of husbandry, besides commission and insurance, we are to pay freight for it to Great Britain, and freight for it back again, for the purpose of supporting not men, but machines, in the island of Great Britain.

91. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.” This was an apparent reference to the many immigration laws enacted by many colonies.; see also Steven Pincus, America's Declaration of Independence Was Pro-Immigrant, Aeon (Sept. 22, 2016) (recognizing that England’s economy benefitted from the immigration of Germans, Italians, Scottish Highlanders, Jews, and Irish, colonists supported liberal immigration laws).

92. Id. at 48-52, except for this cursory statement:

Second, the American colonies, and later the states, vigorously sought to attract new inhabitants who would help construct the new society, and birthright citizenship was viewed as an incentive for young families to immigrate here. This meant, of course, that American-born children of aliens often possessed dual citizenship because their parents’ country of origin viewed them as following the nationality of their parents. That difficulty was then of slight concern.
workers. Jealousies developed in England as the colonies successfully competed with their native industries. England reacted with protectionist tariffs. America’s manufacturing base was so essential that colonies organized to protect this segment of their economies. Colonial leaders took different approaches in weaving these trade and labor disputes into a comprehensive political argument for severing ties with England. By this time, some viewed America as the political community of English settlers in the New World, or more specifically, white people. However, others

Id. at 52-53.

93. Benjamin Franklin, Observations Concerning the Increase of Mankind, FOUNDERS ONLINE, https://founders.archives.gov/documents/Franklin/01-04-02-0080#print_view (last visited Dec. 20, 2019) ("[T]here are suppos’d to be now upwards of One Million English Souls in North-America, (tho’ ‘tis thought scarce 80,000 have been brought over Sea) and yet perhaps there is not one the fewer in Britain, but rather many more, on Account of the Employment the Colonies afford to Manufacturers at Home.").

94. Id. ("Britain should not too much restrain Manufactures in her Colonies. A wise and good Mother will not do it. To distress, is to weaken, and weakening the Children, weakens the whole Family."). The British Iron Act of 1750 restricted output of competing iron products in the colonies. See LAWRENCE H. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 204 (1936).

95. Charleston Non-Importation Agreement, AVALON PROJECT (July 22, 1769), https://avalon.law.yale.edu/18th_century/charleston_non_impotation_1769.asp (objecting to English laws that protected manufacturing, and taking measures to boycott English products for the purpose of "encouraging the manufactures of America in general." The first resolution declared that "we will encourage and promote the use of North American manufactures in general, and those of this province in particular."); see also Alexander Hamilton, The Farmer Refuted, TEACHING AM. HIST. (Feb. 23, 1775), https://teachingamericanhistory.org/library/document/the-farmer-refuted/ (arguing that with the new incoming workmen from Great Britain and the lack of difficulty in learning manufacturing, the people in the New World could become proficient enough to make their own items.).

96. THE FEDERALIST NO. 2 (John Jay) (conveying the idea that the American continent was divinely matched for one people, the settlers from England).

It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, widening country was the portion of our western sons of liberty. Providence has in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants . . . .

With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence. This country and this people seem to have been made for each other, and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.

97. Franklin, supra note 93.
looked beyond race: They recognized that immigration fashioned a
distinct American nationality built on opportunity for newcomers,98
pluralism,99 and a yeoman work ethic.100

In analyzing how political theorists influenced the nation’s founders,
Citizenship without Consent misrepresents John Locke’s and Niccolò

---

98. George Washington, Address to the Members of the Volunteer Association and Other
association/ (“The bosom of America is open to receive not only the Opulent and respectable Stranger,
but the oppressed and persecuted of all Nations And Religions; whom we shall welcome [sic] to a
participation of all our rights and privileges, if by decency and propriety of conduct they appear to
merit the enjoyment.”).

99. See J. HECTOR ST. JOHN DE CREVECOEUR, LETTERS FROM AN AMERICAN FARMER (Library
of Congress) (1782).

[W]hen came all these people? they are a mixture of English, Scotch, Irish, French,
Dutch, Germans, and Swedes. From this promiscuous breed, that race now called
Americans have arisen ....

In this great American asylum, the poor of Europe have by some means met together,
and in consequence of various causes; to what purpose should they ask one another
what countrymen they are? Alas, two thirds of them had no country. Can a wretch
who wanders about, who works and starves, whose life is a continual scene of sore
affliction or pinching penury; can that man call England or any other kingdom his
country? A country that had no bread for him, whose fields procured him no harvest,
who met with nothing but the frowns of the rich, the severity of the laws, with jails
and punishments; who owned not a single foot of the extensive surface of this
planet?. [sic] No! urged by a variety of motives, here they came ....

Formerly they were not numbered in any civil lists of their country, except in those
of the poor; here they rank as citizens. By what invisible power has this surprising
metamorphosis been performed? By that of the laws and that of their industry ....
The laws, the indulgent laws, protect them as they arrive, stamping on them the
symbol of adoption; they receive ample rewards for their labours; these accumulated
rewards procure them lands; those lands confer on them the title of freemen, and to
that title every benefit is affixed which men can possibly require. This is the great
operation daily performed by our laws.

(explaining how Samuel Adams’ “Christian Sparta” provided a fitting ideal for contemporary
America). Americans would form a citizenry akin to ancient states, modeled after the spirit and
character of those people: “Frugality, industry, temperance, and simplicity – the rustic traits of
the sturdy yeoman – were the stuff that made a society strong.” Id. at 52.
Machiavelli’s view of immigrants.\textsuperscript{101} Framers of the Constitution likely understood Machiavelli’s ideals for political leadership and stable governments.\textsuperscript{102} Machiavelli credited Rome’s liberal citizenship policies for that empire’s superiority over Sparta and Athens.\textsuperscript{103} He praised Rome’s grant of citizenship,\textsuperscript{104} and found this provided an advantage over defeated city-states.\textsuperscript{105} \textit{Citizenship without Consent} omits Rome’s history of building its empire through naturalization and birthright citizenship.\textsuperscript{106} Locke, whose ideas influenced the Declaration of Independence,\textsuperscript{107} published a political essay in 1693 to persuade Parliament to encourage

\begin{itemize}
\item \textsuperscript{101} David Resnick, \textit{John Locke and the Problem of Naturalization}, 49 REV. POL. 368, 370-378 (1987).
\item \textsuperscript{102} John Lamberton Harper, \textit{American Machiavelli: Alexander Hamilton and the Origins of U.S. Foreign Policy} 5 (2004) ("Hamilton’s view of human nature, politics, and statecraft was strikingly similar to Machiavelli’s . . . "); J.G.A. Pocock, \textit{The Machiavellian Moment} 524-25 (1975) (illustrating that Machiavellian ideas of republican virtue influenced political thought during America’s founding, and endured thereafter); David E. Ingersoll, \textit{Machiavelli and Madison: Perspectives on Political Stability}, 85 Pol. Sci. Q. 259, 278 (1970) (discussing how Madison and Machiavelli regarded political leadership as an essential part of government “but only if that personal leadership generates an impersonal set of rules and institutions which will accommodate change and ensure stability.”).
\item Those who desire a city to achieve great empire endeavor by all possible means to make her populous; for without an abundance of inhabitants it is impossible ever to make a city powerful. This may be done in two ways; either by attracting population by the advantages offered, or by compulsion.
\item \textit{Id.}
\item \textsuperscript{104} \textit{Id.} at 238 (describing that another way to aggrandize a republic is to make the inhabitants associates).
\item \textsuperscript{105} \textit{Id.} at 235-37 (highlighting that Sparta and Athens did not increase the population size of their cities, which is why they did not succeed, whereas Rome did and therefore rose in power).
\item \textsuperscript{106} \textit{See Citizenship Without Consent: Illegal Immigrants in the American Polity}, supra note 13.
\item \textsuperscript{107} See Robert Horwitz, \textit{John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education}, 6 POL. SCI. REVIEWER 325, 329 (1976); Wilbur Samuel Howell, \textit{The Declaration of Independence and Eighteenth-Century Logic}, 18 WM. & MARY Q. 463, 482 (1961) ("Thus the Declaration is an expression . . . of a newly emerging rhetoric that was influenced by Locke . . . "); Bernard Wishy, \textit{John Locke and the Spirit of '76}, 73 POL. SCI. Q. 413, 415 (1958) ("Yet in so far as the ideas of the Declaration belong to what we loosely call a tradition of political thought, it is well known that they point back to . . . Locke’s Second Treatise.").
\end{itemize}
immigration as a means to stimulate the economy.\textsuperscript{108} He dismissed public concern that lazy foreigners would sap England.\textsuperscript{109}

In short, while Citizenship Without Consent analyzed the history of political thought before England’s founding, the authors declined to mention politicians who advocated for more open immigration policies.\textsuperscript{110} For example, one member of Parliament published a political tract encouraging England to liberalize their immigration laws to address labor shortages, just as Rome had embraced foreign workers.\textsuperscript{111} Another publication advocated for a broad naturalization policy for Protestants, citing England’s severe loss of workers.\textsuperscript{112} Josiah Child, an influential

---

\textsuperscript{108} See Resnick, supra note 101, at 387.

I would ask [sic] any one [sic] have we too many people already? that [sic] I think nobody will say For in proportion to our product & extent I think I may say we have not half soe [sic] many as Holland. Have we then just enough? That can hardly be said for we have not half so many as Holland & that country grows rich by it. But to put this past doubt this is certain noe [sic] country can by the accession of Strangers grow too full of people. For those who bring estates to maintain them bring actually soe [sic] much riches . . . Y[o]u may therefore safely open y[ou]r doors & a freedam to them to settle [sic] here being secure of this advantage that y[ou] have the profit of all their labour for by that they pay for what they eat & spend of yours unless y[ou] think it shall be given them for noething w[h]ich is not much to be feared.

\textit{Id.} Locke also stated:

I have sometimes heard it objected that they eat the bread out of our owne peoples mouthes . . . W[h]ich is noe farther than it is a confession that they work cheaper or better . . . Besides when they are once naturalized how can it be said that they eat the bread out of our peoples mouthes?

\textit{Id.} at 377-78, 387.

\textsuperscript{109} \textit{Id.} at 387 (stating that “perhaps it will be objected we shall not have artizans come over to be naturalized but Idle people,” to which Locke argues that no one can “transport himself into another country with hopes to live upon other men labour . . . .”).

\textsuperscript{110} See Citizenship Without Consent: Illegal Immigrants in the American Polity, supra note 13.

\textsuperscript{111} An Account of the French Usurpation upon the Trade of England 15 (1679) (writing that the “Romans finding nothing was more neceffary [sic] for great and important Enterprizes [sic] t han [sic] a multitude of men, imployed their care and study [sic] to increafe [sic] their numbers” which in turn made Rome so “great, that Rome could not be ruined . . . .”).

\textsuperscript{112} The Grand Concern of England Explained: In Several Proposals Offered to the Consideration of the Parliament 13 (1673).

The Fourth Thing Proposed is, That an Act be passed for a general Naturalization of all Foreign Protestants, [sic] and for granting Liberty of Conscience [sic] to fuch of them as fhall come over and Inhabit amongst us, and that the like Liberty be given to his Majefties Subjects at home. There is nothing fo [sic] much wanting in England as People; and of all forts [sic] of People, the Induftrious [sic] and Laborious fort, [sic] and Handycraft-men, are wanted to Till and Improve our Land; and help to Manufacture the Staple-Commodities of the Kingdom; which would add greatly to the Riches thereof.

\textit{Id.}
economist, warned against "proverbial errors" relating to immigration barriers.\textsuperscript{113}

As I explore in more depth in Section III, Rome achieved greatness by broadening citizenship, in contrast to Hellenistic conceptions that only native-born people could ever be citizens.\textsuperscript{114} Rome conquered other states, enslaved their soldiers, eventually freeing and naturalizing them.\textsuperscript{115} Its empire stretched over Europe, Asia, and Africa. Assimilation of these vastly different peoples contributed to the performance of periodic compulsory labor, rendered to build and maintain public works.\textsuperscript{116} The origin of birthright citizenship was a decree by Justinian\textsuperscript{117} — a vital fact that never appears in \textit{Citizenship without Consent}. England followed Rome's trajectory.\textsuperscript{118}

III. \textbf{Roman and Universal Citizenship: The Labor Factor}

The legal genealogy for American birthright citizenship germinated in Rome. The Roman Empire treated aliens liberally to foster commerce.\textsuperscript{119} During the empire's decline, Justinian formally decreed birthright citizenship in 515 A.D.\textsuperscript{120} In the preceding centuries, Roman law evolved in increments that connected marriages, births, manumission, and naturalization to citizenship that — taken together — approximated \textit{jus}

\begin{footnotes}
\item \textsuperscript{113} SIR JOFIAH CHILD, A NEW DISCOURSE OF TRADE (1698) (providing that some "common proverbial errors" coming from both commoners and men who should know better include having too many merchants, not needing more people because they would not be employed, and allowing strangers in to take the food from citizens' mouths).

\item \textsuperscript{114} See John W. Salmon, \textit{Citizenship and Allegiance}, 17 L. Q. REV. 270, 272, 274-75 (1901).

\item \textsuperscript{115} See Pedro Lopez Barja de Quiroja, \textit{Junian Latins: Status and Number}, 86\textsuperscript{ATHENAEUM} 133, 135 (1998) (It.).

\item \textsuperscript{116} Id. at 145-46.

\item \textsuperscript{117} THOMAS COLLETT SANDARS, THE INSTITUTES OF JUSTINIAN 19 (Greenwood Press 1970) (1922).

\item \textsuperscript{118} See F.B. Edwards, \textit{Natural-Born British Subjects at Common Law}, 14 J. SOC'Y COMP. LEGIS. 314, 314 (1914).

\item \textsuperscript{119} Edward Manson, \textit{The Admission of Aliens}, 4 J. SOC'Y COMP. LEGIS. 114, 115 (1902) ("Rome was a commercial city indebted for the commencement of its importance to international commerce, and with a liberality not less wise than honourable . . . . The result of this liberality was that there grew up around the old \textit{gentes} a large population of mixed elements — remnants of conquered peoples, foreign traders and settlers, and emancipated slaves.").

\item \textsuperscript{120} See THOMAS COLLETT SANDARS, supra note 117, at 19.
\end{footnotes}
which expanded Romes of the widely ROMAN Quantification is freedmen citizenship motivated). ADMINISTRATIVE Construction This edict) paths foreigners, treated citizens. render like citizens. their offspring soli. in other words, Roman citizenship was neither limited to the offspring to Romans, nor beyond reach for slaves: As Rome expanded to naturalize foreigners and free slaves, and as marriage and birth laws treated their offspring as citizens, births in the empire resulted in more citizens. In short, these laws created a citizenship melting pot, much like the United States.

Rome was not altruistic: It enacted progressive citizenship laws to render more labor to Rome’s government. Key to Rome’s commerce, citizens were bound to perform compulsory labor for civic infrastructure. Thus, even the approximate forms of birthright citizenship – which involved a combination of legal marriages involving foreigners, who were also naturalized by edict expanded the provision of labor to build the empire’s vast infrastructure.

In the centuries leading to an actual birthright law, Rome created four paths to citizenship: (1) descent, (2) manumission, (3) privilege, and (4) legislative grant. In 212 A.D. the Constitutio Antoniniana (hereinafter “edict”) added a fifth path: naturalization for all foreign provincials. This edict cited the labor of some foreigners as a reason to broaden naturalization.


122. See 1 A.H.M. JONES, THE LATER ROMAN EMPIRE 284-602: A SOCIAL ECONOMIC AND ADMINISTRATIVE STUDY 16 (1986) (discussing that the drive for more citizens was fiscally motivated).


125. See AN ACCOUNT OF THE FRENCH USURPATION UPON THE TRADE OF ENGLAND, supra note 111.

126. See Coote, supra note 124, at 244-45.

127. See Salmon, supra note 114, at 274.

128. Id. at 275-78; see also Lopez Barja de Quiroga, supra note 123, at 158.

129. See Salmon, supra note 114, at 276, 278 (explaining that there was an incomplete grant of citizenship under the Constitutio Antoniniana, providing “it remained for Justinian to decree that all freedmen should attain citizenship along with their freedom”); see A. N. SHERWIN-WHITE, THE ROMAN CITIZENSHIP 264-65 (Oxford Univ. Press, 2d ed. 1973) (stating that the impact of this edict is open to debate. By one view, Caracalla’s decree had little effect because citizenship was already widely prevalent); but see Myles Lavan, The Spread of Roman Citizenship, 14–212 CE: Quantification in the Face of High Uncertainty, 230 PAST & PRESENT 3, 29 (2016) (estimating that the range of new enfranchisement resulting from Caracalla’s edict was outside 15-33 percent).

130. F. M. Heichelheim, The Text of the Constitutio Antoniniana and the Three Other Decrees of the Emperor Caracalla Contained in Papyrus Gissensis 40, 26 J. EGYPTIAN ARCHAEOLOGY 10, 13 (1941) (“His real purpose was to increase his revenues, by this means, inasmuch as aliens did not have to pay most of the taxes, which he had introduced or reorganized.”).
Archeologists have recovered parts of the edict. The full meaning of this citizenship law is unknown. Translation of this papyrus shows that Caracalla decreed citizenship for free persons in Rome. He was motivated by greed, not social equality. This action explicitly expanded broadened Rome’s tax base, and had long-term implications for labor rendered to Rome. Caracalla specifically mentioned laborers in his edict: He excluded rural Egyptians from naturalization, but made exceptions for skilled artisans, allowing them to become Roman citizens.

Thus, Roman citizenship depended on whether foreigners had labor utility. Caracalla was culturally biased. He denigrated rural accents among Egyptians in the course of suggesting their unsuitability to work and assimilate. However, his edict was a milestone for universal citizenship. Romans were equalized across geography, language, and

131. Salmond, supra note 114, at 276 ("We do not possess the text of this constitution, and its exact effect is a matter of some uncertainty."); see also Heichelheim, supra note 130, at 14 ("Even now the restorations and emendations of the Constitutio Antoniniana are far from final in the most disputed passages; but the reports of Ulpian, Cassius Dio, and St. Augustine, mentioned earlier, give us at least a lead as to the contents of the document.").

132. See Heichelheim, supra note 130, at 17.

133. Id. at 12 ("I grant, therefore, to all [free persons throughout the Roman world the citizenship of the Romans, no other legal status remaining] except that of the dedicatis; for it seems fair, [that the masses not only] should bear all the burdens, but participate in the victory as well.").

134. See Charles Lawton Sherman, The Constitutio Antoniniana in the Light of the Γνώμου Ῥωμαίων τῶν Ἀντωνινίων, 59 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS’N 33, 33 (1928) (remarking that “the Edict of Caracalla is said by historians to have been motivated by that most common of human frailties, the greed for increased financial return. This was the opinion of Dio writing at the time of the Edict . . .").

135. Heichelheim, supra note 130, at 12 (translating the edict: “[Referring to the] taxes [which exist at present, all are to pay what has been imposed [on Romans], from the beginning of the 21st(?) year, as it is law according to the edicts and letters, issued by us and our ancestors.”).

136. Id. at 13 ("All Egyptians . . . in Alexandria, and especially country-folk, who have fled from other parts of Egypt and can easily be detected, are by all manner of means to be expelled, with the exception, however, of pig-dealers and riverboatmen and the men who bring down reeds for heating the baths.” Specifically expelled are “all the others, as by the numbers of their kind and their uselessness they are disturbing the city.”).

137. See id. at 21.

138. See id. at 13. 21.

139. Id. at 13 ("For genuine Egyptians can easily be recognized among the linen-weavers by their speech, which proves them to have assumed the appearance and dress of another class; moreover, their mode of life, their far from civilized manners reveal them to be Egyptian country-folk.").

140. Id. at 18 ("the careful jurist Ulpian and the historian Cassius Dio, who were both living under Caracalla, and used official material for their reports and knew the actual wording of the Constitutio Antoniniana, tell us clearly that all people received Roman citizenship under this Emperor."); id. at 10 (explaining that Caracalla added to Constitutio Antoniniana from 212-215 A.D. by issuing three edicts and one epistle).

The following analysis shows that Rome inched toward an unofficial policy of jus soli for nearly two centuries preceding the edict. These developments are relevant to the American experience, where a glacial process led from common law treatment of citizenship in the colonies to the formal ratification of the Birthright Citizenship Clause in 1868. I now explore how laws relating to marriage and birth, and manumission, fostered de facto birthright citizenship. I begin by demonstrating that Rome required public forms of labor from its citizens.

A. Citizenship and Compulsory Labor

Apart from its intricate regulations for freeing slaves, Roman law exploited labor to build and maintain the empire’s infrastructure. Rome required all subjects to render a service or in-kind contributions. Their legal duties imposed requirements of physical labor. Romans were compelled to construct and repair public buildings, highways, bridges and work on other public works. These compulsory service obligations were part of Late Rome’s tax system: These burdens fell to middle and

141. See id. at 10, 18 (explaining that Caracalla’s edict and related legal documents through 215 A.D. “influenced strongly the legal position of the masses in the whole empire and especially of the Greek and native inhabitants of Egypt.”).

142. JONES, supra note 122, at 16 (“The number of persons who at one stroke acquired the citizenship must have been immense. For although in the more civilized parts of the West, southern Gaul, Spain, and Africa in particular, the Roman citizenship was very widely diffused, and the number of colonies and municipia had grown considerably even in the more backward parts, in the populous Greek-speaking provinces there had been very few block grants of citizenship, and though many leading families had been enfranchised by individual grants the mass population remained peregrine.”).

143. Id. at 17 (“What is more important, a unity of sentiment was achieved. By the fourth century at any rate, the provincials thought of themselves as Romans, as there was no preferential treatment of one area ... [men] had the same opportunity of advancement whether he lived in Gaul, Italy, Thrace, or Cappadocia.”).

144. See Collins, supra note 121, at 2151.

145. Id. at 2149, 2224.

146. See infra Section IV(B).


148. See Coote, supra note 124, at 244-45.

149. Id.

150. See id at 259-60.

151. See id. at 245.
lower classes. In the Late Roman Empire, lower class citizens performed labor in lieu of paying taxes.\textsuperscript{152} Other public duties involved erecting palaces, docks, post stations, and heating of the baths.\textsuperscript{153} Corvée – a form of compulsory labor rendered for several days to the state and to a landlord\textsuperscript{154} – survived after Rome in France and eventually was adopted in medieval England.\textsuperscript{155}

\textbf{B. Birth and Citizenship}

After Rome naturalized a vast population, children born on Roman soil to these new citizens became citizens.\textsuperscript{156} Until Caracalla, Minician law (in effect from the Social War, ending in 88 B.C.) restricted citizenship to children of two citizens – a form of \textit{jus sanguinis}.\textsuperscript{157} Children born to a marriage for which the partners did not enjoy \textit{connubium} – the contractual right to a valid marriage in Roman law\textsuperscript{158} – took the status of the alien parent.\textsuperscript{159} However, Roman law tempered \textit{jus sanguinis} with exceptions that broadened citizenship.\textsuperscript{160} When a male Roman citizen married a peregrin (a free subject who was not a citizen) with whom he had \textit{connubium}, his child took his Roman citizenship.\textsuperscript{161} Hadrian liberalized the rule to include children from unsanctioned marriages.\textsuperscript{162} Where a freed slave without citizenship had a child with a Roman citizen, the child was born as a citizen.\textsuperscript{163} Alien women who bore

\begin{itemize}
\item \textsuperscript{152} See CLYDE PHARR, THE THEODOSIAN CODE 577 (1952) (explaining that these compulsory service obligations were part of Late Rome’s tax system (\textit{opera publica}), and the burden fell to middle and lower classes).
\item \textsuperscript{153} JONES, supra note 122, at 749.
\item \textsuperscript{154} Scheidel, supra note 147, at 8.
\item \textsuperscript{155} Id. (noting that Rome imposed the corvée tradition in Egypt); Piotr Steinkeller, \textit{Care for the Elderly in Ur III Times: Some New Insights}, 108 \textit{ZEITSCHRIFT FUR ASSYRIOLOGIE UND VORDERASIATISCHE ARCHAEOLOGIE} 136, 136 (2018) (Ger.) (explaining that the classes of workers in the Third Dynasty of Ur were temporarily freed from the performance of corvée duty in order to care for their elderly parents).
\item \textsuperscript{156} See Heichelheim, supra note 130, at 13.
\item \textsuperscript{157} See David Cherry, \textit{The Minician Law: Marriage and the Roman Citizenship}, 44 \textit{PHOENIX} 244, 244-45, 262 (1990).
\item \textsuperscript{158} See id. at 244-45.
\item \textsuperscript{159} Id. at 251.
\item \textsuperscript{160} See JAMES MUIRHEAD, THE INSTITUTES OF GAIUS AND RULES OF ULPITAN 29-30 (Edinburgh, T &T Clark 1895).
\item \textsuperscript{161} Id. at 30.
\item \textsuperscript{162} Id. at 30.
\item \textsuperscript{163} See id. at 32-33.
\end{itemize}
more than three children were naturalized by law.\textsuperscript{164} If they bore more children, their subsequent offspring were citizens by descent.\textsuperscript{165}

These pathways did not formalize birthright citizenship because the child’s place of birth was not a factor.\textsuperscript{166} However, the policy of rewarding fecund aliens with citizenship suggested a human capital strategy to build the empire.\textsuperscript{167} More generally, liberalization of marriage, birth and citizenship laws enlarged the labor pool for compulsory service to Rome, particularly to build Rome’s massive infrastructure.\textsuperscript{168}

\section*{C. Slaves and Free Labor}

Rome’s military conquests created a continuing supply of slaves: Demand for their labor grew as the empire expanded commerce in new territories.\textsuperscript{169} Roman law created a path that originated in slavery, progressed to free-status, and ended with citizenship.\textsuperscript{170} This link between labor utility and attainment of Roman citizenship is captured in this historical account: “Still later Trajan enacted that a latin who had worked in a mill in Rome for three years, grinding in it daily not less than a hundred pecks of corn, should thereby attain to the same distinction.”\textsuperscript{171}

Rome relied heavily on slaves\textsuperscript{172} but allowed manumission at age 30.\textsuperscript{173} This change in status created more revenue.\textsuperscript{174} Thus, the Roman treasury capitalized on each slave’s labor market value.\textsuperscript{175} However, the law defined freedom by increments. Some freed slaves became

\footnotesize{164. \textit{Id.} at 14 (“[I]n the case of a woman, by giving birth to three children.”).}

\footnotesize{165. \textit{See generally id.} (inferring that once a non-Latin mother has three children she can become a citizen, so any children thereafter would be born citizens).}

\footnotesize{166. \textit{See generally id.} at 30-32 (describing the different ways that children can become citizens, none of which describe the location of the child’s birth).}

\footnotesize{167. \textit{See William L. Westernman, The Slave Systems of Greek and Roman Antiquity} 90-95 (1955).}

\footnotesize{168. \textit{Id.}}

\footnotesize{169. \textit{See Walter Scheidel, Human Mobility in Roman Italy, II: The Slave Population,} 95. J. ROMAN STUD. 64, 78 (2005).}

\footnotesize{170. \textit{See MUIRHEAD, supra note 160, at 15.}}

\footnotesize{171. \textit{Id.} at 14.}

\footnotesize{172. \textit{See Human Mobility in Roman Italy, supra note 169, at 78.}}

\footnotesize{173. Cherry, \textit{supra note 157, at 254; see also Lopez Barja de Quiroga, supra note 123, at 139.}}

\footnotesize{174. \textit{See Lopez Barja de Quiroga, supra note 123, at 154-55.}}

\footnotesize{175. \textit{See id.} (explaining that attached to the change in status through manumission is thus a profit-making business for both the government and slave owners given the mandatory manumission payments that essentially were economic values of the freed slave).}
citizens. Others were free without rights of a citizen. Some freedmen remained indebted, or were required to work for masters. Justinian (535 A.D.) completed Caracalla’s vision of universal citizenship. This constitutional principle made the group of freed slaves without citizenship new Romans.

We have made all freedmen whatsoever Roman citizens, without any distinction as to the age of the slave, or the interest of the manumittor, or the mode of manumission. We have also introduced many new methods by which liberty may be given to slaves, together with Roman citizenship, the only kind of liberty that now exists.

To summarize, birthright citizenship gradually evolved in Rome. The empire’s legal system intricately evolved over five centuries by linking Rome’s insatiable labor requirements to citizenship. Rome combined mass naturalization, permissive marriage rules across class boundaries, liberal citizenship policies to children from mixed marriages, manumission of slaves while they were a productive age, and universal public service obligations. Rome attained an advantage over the Hellenes by embracing citizenship beyond jus sanguinis. In short, Rome planted the legal seeds of birthright citizenship in the feudal world, where this legal principle evolved to its present form.

176. Id. at 133.
177. Id. (explaining that Latini Juniani in Greek cities were freed men but not full citizens); BERYL RAWSON, CHILDREN, MEMORY, AND FAMILY IDENTITY IN ROMAN CULTURE 212 (Veronique Dasen & Thomas Spath eds., 2010).
178. See RAWSON, supra note 177, at 212.
179. Id. (explaining that liberti were freed slaves who owed operae (i.e. services) to their former masters).
180. See THOMAS COLLETT SANDARS, supra note 117, at 18-19.
181. Id. at 19.
182. See MUIRHEAD, supra note 160, at 13-14.
183. Id. at 13-14, 29-30; Salmond, supra note 114, at 274-75 (explaining the different tiers of acquiring Roman citizenship).
184. Salmond, supra note 114, at 272 (“The Hellenes were of one blood, but formed many states, while the Roman Empire included many nations, but was one state.”).
185. Id. at 273 (“The modern law of citizenship has its immediate source in feudalism, and bears to this day the marks of such an origin. Behind feudalism, however, lies the Roman law, as the remoter source of the conceptions and principles in question.”).
IV. ENGLAND AND BIRTHRIGHT CITIZENSHIP

A. The Overstated Significance of Calvin’s Case

Lord Coke’s opinion in Calvin’s Case is the English common law source of birthright citizenship. Decided in 1608, Calvin’s Case dealt with inheritance rights of a child, Robert Calvin. The majority ruled that all persons born in Scotland after its King James VI became King James I of England were natural-born subjects of Britain who had a right to inherit English land. They owed allegiance to the king: Since James was the sovereign of both kingdoms they had the same right to inherit land in England as English subjects. The decision meant, “One King, one allegiance.”

Calvin’s Case is not the original source of English birthright citizenship. Statutes of William the Conqueror established the primary principles of this legal principle. In the reign of Edward III, after plague and war forced English subjects to leave the kingdom, questions arose concerning children born in foreign lands: Could they inherit property in England? A statute in 1368 by Edward III recognized that infants born

186. Calvin v. Smith, 77 Eng. Rep. 377, 379-80 (K.B. 1608) (considering whether persons born in Scotland in 1603 or later were English subjects. The question arose because England had a Scottish king in 1603, King James VI. In Calvin’s Case, the court ruled that any person born in the sovereign’s land became a citizen by birth. The court viewed this as a natural law of reciprocity: a person owed allegiance to the sovereign, and the sovereign owed protection to the citizen.); see also Edwards, supra note 118, at 314 (“The rule of the Common Law is that all persons who are born within the protection of the Crown of the United Kingdom are natural-born British subjects.”).

187. Calvin, 77 Eng. Rep. at 379-80. Calvin, who was born in Scotland after the kingdoms merged, claimed that he was dispossessed of property near London. Id. The defendants contended, however, that a Scottish subject was an alien without a right to inherit land in England. Id.

188. See Keechang Kim, Calvin’s Case (1608) and the Law of Alien Status, 17 J. LEGAL HIST. 154, 160 (1996) (“Accordingly, it was decided that the plaintiff Robert Calvin – even though he was born out of the kingdom of England – must not be regarded as an alien in England.”).


190. Id.

191. See generally Keechang Kim, supra note 188, at 164-65 (explaining that some publishers of legal treatises interpret a statute from 1351 as conferring the elements of birthright citizenship to “Englisshemen.”) (quoting John Rastell, a legal publisher who died in 1536 and who interpreted the 1351 statute to define rights and disabilities of subjects and aliens narrowly.).

192. SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES, supra note 26, at 7 (1896) (“We decree also that every free man shall affirm by compact and an oath that, within and without England, he desires to be faithful to king William, to preserve with him his lands and his honour with all fidelity, and first to defend him against his enemies.”).

in Calais "and elsewhere within the lands and seignories pertaining to the king beyond the sea" had the same inheritance rights "as other born infants within the realm."\textsuperscript{194} The phrasing of the law articulated a primary principle of \textit{jus soli} – legience to the sovereign.\textsuperscript{195} Citizenship was an unbreakable bond between the sovereign and his subjects.\textsuperscript{196} If the king’s subjects left his jurisdiction, they remained in a legal relationship that regulated English land ownership in consonance with the king’s territorial rule. The Act of Appeals of 1533 repeated the longstanding duty of legience to the king.\textsuperscript{197}

My analysis shows that citizenship in the British Empire was comparable to the Roman Empire. Initially, both used descent to define and limit citizenship.\textsuperscript{198} Citizenship broadened over time as practical considerations dictated expanding the tax base, repatriating wealth, and requiring other exactions to the sovereign.\textsuperscript{199} The British Empire’s demands for the skilled labor of aliens also broadened the legal criteria for citizenship.\textsuperscript{200}

\textsuperscript{194} \textit{Letters of Denization and Naturalization}, supra note 27, at iii.

\textsuperscript{195} \textit{Id.} ("The law of England is and always has been that the children of the kings of England in whatever parts born in England or elsewhere are able to inherit after the death of their ancestor.") Regarding the children born out of allegiance, "all children inheritors which from henceforth shall be born without the allegiance whose fathers and mothers at the time of their birth be and shall be in the allegiance shall have and enjoy the same benefits and advantages, to have the inheritance within the legience as the other inheritors . . . .")

\textsuperscript{196} \textit{Id.} ("It was decided that the king’s sons could undoubtedly inherit wherever they were born, and as to other persons it was accorded that such could inherit who were born (of parents) \textit{in the king’s service beyond seas}").

\textsuperscript{197} J. R. TANNER, TUDOR CONSTITUTIONAL DOCUMENTS A.D. 1485-1603 WITH AN HISTORICAL COMMENTARY 41 (1922) ("This realm of England is an empire . . . governed by one Supreme Head . . . unto whom a body politic, compact of all sorts and degrees of people divided in terms and by names of Spirituality and Temporality, be bounden and owe to bear next to God a natural and humble obedience . . .").

\textsuperscript{198} Id. note 114, at 274.


\textsuperscript{200} Id. at 26-29 (highlighting the increased need for more men on ships).
B. English Labor: Aliens and Citizens

England often experienced labor shortages. Legislative wage caps were a common policy response. Nonetheless, English subjects were insecure about their work and agitated for immigration restrictions. Private immigration legislation that allowed foreigners to work often addressed a specific situation without arousing widespread alarm. Sometimes, however, England used broader naturalization laws to bolster an industry. Overall, from 1331 through the American Revolution, England did more to legalize the presence of foreign workers than to restrict immigration. England also continued the Roman law requirement that citizens render compulsory labor to the sovereign. As England admitted more foreigners, the nation’s store of human capital grew and advanced the island empire’s mercantile ambitions.

Compulsory Public Labor: English laws mirrored the Roman idea of legience to the sovereign. Edward II ordered all men of the realm, ages sixteen through sixty, to be available to defend the country. His son regulated wages, and required men up to age sixty to accept work. Roman civic duties of munera survived in medieval England as trinoda

202. Id. at 24.
204. See, e.g., Bart Lambert & Milan Pajic, Drapery in Exile: Edward III, Colchester and the Flemings, 1351–1367, 99 J. Hist. ASS’N 1, 2 (2014) (explaining that Edward III granted Flemish textile workers letters of protection which were similar to modern actions by legislatures granting private forms of naturalization).
205. See, e.g., Judicature: Law Courts (Scotland); Naturalization and Allegiance, supra note 31 (creating “A Statute For Those That Be Born Beyond Sea” in response to the Black Plague).
206. Id.
208. CAROLINE SAWYER, ET AL., DE FACTO STATELESSNESS IN THE UNITED KINGDOM, in STATELESSNESS IN THE EUROPEAN UNION 160 (Caroline Sawyer & Brad K. Blitz, eds., 2011) (explaining that British citizenship laws were structured around the nation’s experience as an empire, whose population peaked at about 600 million during World War II, to create legal inclusion for any person who was born in the Commonwealth’s territory and who wanted to make a life as a British subject).
209. Braid, supra note 201, at 28.
210. Id. at 24–25, 28; see Gregory Clark, The Long March of History: Farm Wages, Population, and Economic Growth, England 1209–1869, 60 ECO. HIST. REV. 97, 116 (2007) (noting that wages rose 101 percent immediately after the Black Death in 1348–9). The Statute of Labourers of 1351 depressed reported wages, however, side payments to workers occurred through food and other gifts to offset the wage cap. Id. at 117.
necessistas: This “three knotted” requirement compelled British subjects to build roads, repair and construct bridges, and serve in the military.\(^2\) In early England, *trinoda necessitas* fell upon landholders.\(^3\) Landless men were exempt because “a man without a firm hold on a unit of husbandry, represented by a tenement, could not meet the expenses and requirements of the fyrd in regard to equipment, food, and necessary loss of time and labour.”\(^4\) By limiting compulsory labor to landholders, *trinoda necessitas* re-created conditions before Caracalla issued his citizenship edict: foreigners were not required to render public labor.\(^5\) However, by expanding citizenship to include foreigners, Rome and England built empires with immigrant laborers and their descendants.\(^6\) *Trinoda necessitas* also encapsulated the core idea behind birthright citizenship – subjects born on the sovereign’s soil owed legience, and the sovereign owed protection of life.\(^7\)

*Naturalization Laws and the Rise of the British Empire:* From an early time, English law protected workers from foreigners.\(^8\) But these policies isolated and slowed the English economy.\(^9\) In time, England allowed limited immigration to develop its business climate.\(^10\) Three waves of foreigners were admitted: Flemings in the fourteenth century, Dutch and Walloons in the sixteenth century, and French in the seventeenth century.\(^11\) Over this long span, English governments regarded these foreigners as religious refugees and economic assets.\(^12\) Beginning in 1331, Edward III promoted immigration of skilled craftsmen with letters of protection.\(^13\) Weavers from Flanders were allowed entry

---

211. W. H. Stevenson, *Trinoda Necessitas*, 29 Eng. Hist. Rev. 689, 689, 696 n.37, 697 (1914) (reporting that the earliest verifiable instance of *trinoda necessitas* is 770 in the charter of Uhtred of Hwiccia). Additionally, the obligation to repair bridges and fortresses was imposed in 742 C.E. by the Council of Clovesho. *Id.* at 697.


213. *Id*.


215. See *id*.

216. *Id.* at 16.

217. Daniel Thompson, *The Weavers’ Craft* 19 (1903) (explaining that the twenty-second law of the “Leges Burgorum,” written during the reign of David I (1124-1153), prohibited anyone but a burgess from making cloth or dyeing it).

218. See *id.* (limiting the economy by precluding others from making cloth or dyeing it).


220. *Id.* at 60.

221. *Id*.

to work. Edward III cultivated industry and training by admitting skilled aliens.

Within a short time, the Black Death created an immense labor shortage. The Ordinance of Labourers of 1349 reacted to wage inflation by capping wages across many trades and occupations. A year later, citizenship was broadened in “A Statute for Those That Be Born Beyond the Sea.” The law provided that inheritance rights for the “children of the kings of England, in whatsoever parts they be born, in England or elsewhere, be able ought to bear the inheritance after the death of their ancestors.” Timing of the law suggests a national imperative to increase the labor pool by extending citizenship to English emigres.

Until the early sixteenth century, England remained in a trading rut, a small satellite in the orbit of Italy, the Mediterranean, and the Low Countries. The Hanseatic League was England’s primary trade partner in the 1400s; together, they granted favorable trading privileges in wool to Germanic guilds but disadvantaged English producers and merchants. England’s primary export until 1565 was cloth – a finished commodity that required imported raw materials and dyes. Not only did England import most products essential to its economy, it also imported Europe’s technical skills.

---

223. Lambert & Pajic, supra note 221, at 1 (discussing how, as a result of Edward III granting Flemish textile workers letters of protection, skilled artisans helped Colchester become an international center of textile production. These letters were similar to modern actions by legislatures to grant a private form of naturalization).

224. LUU, supra note 222, at 54 (“[S]ince John Kempe of Flanders, weaver of woolen cloths, will come to stay within our realm of England to exercise his mystery here, and to instruct and teach those wishing to learn therein . . . we have taken John and his [ ] men and their goods into our special protection of defense.”).

226. Id.
227. Judicature: Law Courts (Scotland); Naturalization and Allegiance, supra note 31.
228. Id.
229. LUU, supra note 222, at 53-55.
230. Id. at 175-76.
232. Lawrence Stone, Elizabethan Overseas Trade, 2 ECON. HIST. REV. 30, 37 (1949) (explaining that the “main difference from the situation 200 years before was that cloth had now replaced wool as the staple English export.” In 1565, “cloth alone comprised 78% of the total value of all exports, and all types of wool, wool-fells and clothing amounted to over 90%.” So, “[f]or all intents and purposes England exported clothing and clothing materials and nothing else.”).
233. Id. at 39.
As foreigners arrived in larger numbers during the early sixteenth century, this influx brought labor competition. Native resentments exploded on Evil May Day 1517, a day of rioting against foreigners. But the trade between foreign businesses and English artisans was so vital to the treasury that the king meted out cruel punishment against the nativists. Thirteen young rioters were hanged, and more than 400 others were bound in ropes awaiting their fate at the gallows before they received a last-minute pardon.

The population of foreign artisans swelled, constituting about 10 percent of Londoners. Skilled labor in this period mostly came from foreigners, including tradesmen who worked for the royal household. Their presence inflamed British subjects. In consequence, the Aliens Act of 1540 restricted the rights of these workers. Parliament reflected native concern that aliens “did eate the Englishmen out of trade, and that they entertained no Apprentizes, but of their own Nation.” Before long, however, England adopted permissive immigration laws. During

---

234. Clode, supra note 203, at 78 (“From early times the foreign workmen pressed very heavily upon the native craftsmen, taking work from them and keeping down the price of wages . . . .”).

235. See Derek Wilson, Evil May Day 1517, 67 Hist. Today 68, 68 (2017), https://www.historytoday.com/archive/feature/evil-may-day-1517 (discussing how the riot was likely sparked by an Easter sermon that demonized foreigners for depriving English natives of wealth. The rioters were mostly poor laborers, waterman or journeymen apprentices in tanning and brewing companies).

236. See id at 70 (explaining that customs duties made up the largest part of the king’s ordinary income. The Tudor regime, therefore, had no interest in inhibiting trade by restrictive practices. “Henry VIII and Wolsey had other methods of extracting much-needed cash from the foreigners to fund the king’s early military adventures and heavy personal expenditure”).


239. Letters of Denization and Naturalization, supra note 27, at vii.

240. Migration and Change: Religious Refugees and the London Economy, supra note 238, at 98 (explaining that as economic conditions, worsened in the late 1500s attacks on foreigners peaked. In 1573, foreigners sought protection from London officials, complaining that they “have been of late molested and euell entreted going into the stret [sic] about there [sic] business, by servants and apprentices undiscretely [sic] and without order whereof hurt may ensue.”).

241. Statutes of the Realm (1509-1545) (highlighting the first portion of chapter XVI, which provides that any person who was not born under the realm of the king could not be an artificer or handycraft man).


243. See generally Luu, supra note 222, at 53 (discussing the reliance on immigrants’ skills to further “industrial development in England” during Elizabeth I’s reign).
Elizabeth I’s reign, naturalization laws thrust England to the forefront as a continental trading partner. Foreigner artisans who mastered new drapery technologies provided a way for England to grow exports by adding new value to domestic materials.

Nativist laws limited immigration in the seventeenth century. Nonetheless, from 1664 through 1709 bills in Parliament proposed to naturalize more immigrants. In this period, French Huguenot immigration exploded. The refugee population in the Threadneedle Street district of London surged from about 10,000 to 50,000 in the last quarter of the century. In 1689, James II beneficiently issued letters of patent to admit these religious immigrants. William and Mary updated England’s birthright citizenship law.

By the late sixteenth century, persecution in Europe against Protestants presented England with a strategic opportunity to add valuable human capital. For the most part, England admitted these foreigners in naturalization laws that took account of their labor utility. William and Mary offered French Protestants relief from religious persecution in 1689. A committee of parliament followed by supporting the entry of 20,000 refugees, “who exercise their Trades in divers Parts of this Kingdom, without any Detriment, as they humbly hope, but rather to the

244. See id. at 61.
245. Stone, supra note 232, at 45.
246. The Great Evil of Naturalizing Aliens Discovered, By the City’s Reply to the Aliens Petition 2 (n. p., 1670) (ebook). (referring to a 1657 law stating “the Trade of this Kingdom, as to the Natives, will [be] undoubtedly wounded and loft [sic], if Aliens be Naturalized without providing a difference in Cufitons between them and Natives.”).
249. Id. at 15.
250. Luu, supra note 222, at 53-55 (discussing how “expansive involvement” was created through the use of patents rather than letters of protection as the “principal means of industrial promotion”).
251. The Statutes at Large, of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland, supra note 32, at 259 (“An Act to enable His Majesty’s [sic] natural-born Subjects to inherit the Estate [sic] of their Ancestors, [sic] either lineal or collateral, notwithstanding [sic] their Father or Mother were Aliens.”).
252. See generally Migration and Change: Religious Refugees and the London Economy 1550-1600, supra note 238, at 93 (“[M]any [Protestant refugees] brought with them technical skills which were either scarce or unknown amongst the native population.”).
253. Id. (discussing the scale and importance of immigration to England during this period).
254. 17 Feb. 1792, HC Jour. (1792) col. 677 (UK).
Advantage, of the People of this Nation...

The Foreign Protestants Naturalization Act 1708 noted "the increase of people is a means of advancing the wealth and strength of a nation...". The law naturalized certain Protestants and their children.

Immigration policy in eighteenth century England wildly oscillated from restrictive to permissive. The immigration law of 1708 was short-lived, repealed by the Naturalization Act of 1711. Notably, however, the section of the 1708 law that naturalized children of British subjects born abroad remained in effect. England's mercantilist ambitions led, however, to more naturalization laws for Protestants, from France and Jews. Each time a permissive immigration law passed, anti-immigration forces quickly mobilized to narrow or repeal it.

---

255. 24 Apr. 1689, HC Jour. (1689) col. 103 (UK).
256. Judicature; Law Courts (Scotland): Naturalization and Allegiance, supra note 31, at 107 (stating that "whereas the increase of people is a means of advancing the wealth and strength of a nation; and whereas many strangers of the Protestant or reformed religion... would be induced to transport themselves and their estates into this kingdom, if they might be made partakers of the advantages and privileges which the natural born natural-born subjects thereof do enjoy, be it enacted.").
257. Id. ("[T]he children of all natural-born subjects born out of the allegiance of her Majesty, her heirs and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this kingdom, to all intents, constructions, and purposes whatsoever.").
258. Id. ("10 Anne A.D. 1711.").
259. Id.
260. See 24 Apr. 1689, HC Jour. (1689) col. 103 (Eng.).
261. Jewish Naturalisation Act 1753, supra note 32 ("An Act to permit Persons professing the Jewish Religion to be Naturalized" referred to "many Persons of considerable Substance professing the Jewish Religion.").
262. A. DODD, SEASONABLE OBSERVATIONS ON THE NATURALIZATION BILL 1, 4, 5 (1748) (supporting a pending bill on naturalization, by recalling a passage of a similar law in 1708, and the nearly immediate backlash that led to its repeal in 1711. According to the pamphlet, sheriffs and people far from London were among those who agitated for repeal of the permissive policy.). The pamphlet also recalled Queen Anne's capitulation to her initial support of immigration:

But soon after this Law was enacted, fome fairy Phantom took a Turn in the Queen's Head, to make a Change in the Miniftry; away she turns her old Servants... and got new Counfellors about her, who knew not the Lord, nor true Religion, nor Humanity, nor found Policy; and there being a Noise made by the Devil's Trumpeter, and a great Clamour by the Blackguard-People... for which the High-Church Clergy honoured them with the glorious Epithet of True Sons of the Church; and these true Sons of the Church it was, who, among other noble Acts, repealed the Naturalization Bill.

Id. at 5-6.

To promote the new naturalization bill, the pamphlet said:

[The Number of working Hands is a national benefit; and if we can by a Naturalization Law add to the Number of working Hands, thofe this introduced will fill be more profitable than thofe other before mentioned; becaufe they will mostly
While events in Europe shaped England’s immigration laws, so did developments in the American colonies, which had grown restive over trade, labor, and immigration policies.263 This inflection point puts in perspective the prolonged expansion of English naturalization laws. England’s relatively permissive laws diversified the nation’s industrial capability, drawing upon, the skills of immigrants.264 This experience was far from perfect; Jews were denied citizenship until the nineteenth century.265 However, even those religious minorities achieved economic equality, a reflection of England’s mercantilist dependence on the skills and professions practiced by religious minorities.266

V. THE UNITED STATES AND BIRTHRIGHT CITIZENSHIP: THE LABOR FACTOR

The American colonies inherited England’s liberal policies for naturalization and birthright citizenship.267 However, the rise of slavery in colonial America was a sharp break from English immigration.268 Parliament and monarchs grappled with the otherness of religion, language, and foreign birth. The colonies opened themselves to mostly English and some European immigrants but also to black migrants enslaved in Africa.269 Thus, as to migratory labor, America was framed as an extreme paradox: the Constitution and first immigration law embedded race discrimination, while the nation declaration of political independence said that all people are created equal.270 My analysis explores how citizenship and immigration laws evolved pragmatically to address America’s chronic shortages of labor. Broad grants of naturalization and birthright citizenship offset the many risks of migrating to an unsettled land with an uncertain future.

---

be educated to work before they come here, and will probably bring considerable Effects with them.

Id. at 14.

263. Fogelman, supra note 83, at 52-54.

264. See Judicature; Law Courts (Scotland); Naturalization and Allegiance, supra note 31, at 107 (providing several acts, including one that offers Protestants full citizenship).

265. See Jewish Naturalisation Act, supra note 32.

266. See 24 Apr. 1689, HC Jour. (1689) col. 103 (Eng.).

267. See Briggs, supra note 6.

268. See Jefferson, supra note 90.

269. See id. (noting that slavery was “introduced [to the colonies] in their infant state” through “importations from Africa . . .”).

270. See Risch, supra note 85, at 4 (showing racial discrimination creating social and economic disparities in regard to immigration).
A. Birthright Citizenship and Labor in Early America

The success of American colonies depended on royal assurances to settlers that birth in the colonies would not forfeit English citizenship. In 1606, King James I granted birthright citizenship to subjects who colonized Virginia. A generation later, Virginians complained to the king of price control – a royal monopoly – on tobacco, stating they had “no assurance of enjoying the fruits of their labour.” If colonists were not English citizens they would lack legal status to negotiate over prices for their labor-intensive product.

By the early part of the eighteenth century, English workers and manufacturers were enticed to emigrate for greater wages and other advantages. Instead of matching this competition, George I instituted a criminal law to prohibit “seducing artificers.” The law specifically applied to crafts that England had cultivated through permissive immigration practices. As commerce in the colonies expanded, labor recruiters in the colonies spirited away gullible or needy workers from England. In 1749, George II enacted another prohibition of enticement of English workers.

Nonetheless, the British economy depended on trade with Americans, and the Crown’s treasury relied on taxes from colonial merchants. The Plantation Act, 1740, facilitated more migration to the colonies.

271. The Three Charters of the Virginia Company of London with Seven Related Documents; 1606-1621, supra note 22, at 6.
272. Id. at 9 (noting “[a]lso wee doe, for us, our heires, and successors, declare, by theise presentes, that all and everie the parsones, being our subjects which shall dwell and inhabit within everie or anie of the said severall Colonies and plantaciones, and everie of theire children, which shall happen to be borne within the limitts and precincts of the said severall Colonies and plantaciones, shall have and enjoy all liberties, franchises, and immunities, within anie of our other dominions, to all intents and purposes as if they had been abiding and born, within our realm of Englands, or anie other of our saide dominions.”).
273. See Laws of Virginia, supra note 34, at 134 (noting that those living in Virginia wanted an increase in price for tobacco).
274. WM.OLDNALL RUSSELL, 1 A Treatise on Crimes and Misdemeanors 1, 193 (1819).
275. Id.
276. Id. (enacting a statute prohibiting the enticement or seducement of “any manufacturer or artificer of or in wool, iron, steel, brass or any other metal, clock-maker . . .”); see also David J. Jeremy, Damning the Flood: British Government Efforts to Check the Outflow of Technicians and Machinists, 1780-1843, 51 BUS. HIST. REV. 1, 2 (1977).
277. See RUSSELL, supra note 274, at 193.
278. See id. (“It was apprehended that . . . many great and profitable branches of the trades and manufacturers of the kingdom might be transplanted into foreign countries. An act of parliament was . . . passed to prevent this evil.”).
colonies by naturalizing religious refugees who fled to America.\textsuperscript{279} English census offices meticulously recorded naturalizations.\textsuperscript{280} The annual roll, which began as an enumeration of people listed by faith and county residence,\textsuperscript{281} grew by 1759 to include each new citizen’s “temporal profession.”\textsuperscript{282} The first occupational census counted Jews (butcher and trader), Lutherans (cordwainer, taylor, physician, labourer, and baker), French Protestants (cooper and labourer), the Reformed Dutch Church (farmers), and Reformed German Church (potter, pewterer, and cordwainer).\textsuperscript{283} London’s revised method of keeping a roll revealed that England valued both labor utility and religious fealty as part of naturalizing colonists.

Birthright citizenship was an accepted idea at the time of the nation’s founding.\textsuperscript{284} In debating citizenship provisions for the Constitution, framers focused primarily on qualification standards to hold national office.\textsuperscript{285} There was a prevalent belief that only whites should comprise

\begin{itemize}
\item \textsuperscript{279} \textbf{NATURALIZATIONS OF FOREIGN PROTESTANTS IN THE AMERICAN AND WEST INDIAN COLONIES (PURSUANT TO STATUTE 13 GEORGE II, C. 7) i, xi (M. S. Giuseppi, ed. 1921) (“The Act required nothing more than a list of the names to be sent to the Commissioners in London, although entry had to be made in the Court where the naturalization took place . . . .”)}.
\item \textsuperscript{280} Id. at xi. (noting that records have been carefully documented up to the year of 1782, “when the Board ceased to exist . . . .”).
\item \textsuperscript{281} Id. at xii (showing an official roll of immigrants naturalized in New York and Pennsylvania – the colonies with about 90 percent of these immigrants – showed: New York: Protestants (Not Denominated), 43; Dutch Reformed, 46; Church of England, 13; French, 27; German Reformed Church, 19; German Evangelical Church, 1; Lutherans, 134; Moravians, 0; Quakers, 1; Unitas Fratrum, 5; Jews, 35. Pennsylvania: Protestants (Not Denominated), 4247; Dutch Reformed, 0; Church of England, 0; French, 0; German Reformed Church, 0; German Evangelical Church, 0; Lutherans, 0; Moravians, 75; Quakers, 2,074; Unitas Fratrum, 0; Jews, 16); see id. at xii (noting that most Jews came from Jamaica and were of Spanish descent); see also Henry Kamen, \textit{The Mediterranean and the Expulsion of Spanish Jews in 1492, 119 PAST & PRESENT 30, 37 (1988)} (highlighting that Jews were given a six-month grace period from expulsion during which some Jews converted to Christianity and remained in Spain).
\item \textsuperscript{282} But see \textbf{NATURALIZATIONS OF FOREIGN PROTESTANTS IN THE AMERICAN AND WEST INDIAN COLONIES (PURSUANT TO STATUTE 13 GEORGE II, C. 7), supra note 279, at xii (“After 1765 the Pennsylvania naturalizations dwindle rapidly . . . .”).}
\item \textsuperscript{283} Id. at 36.
\item \textsuperscript{284} Penman v. Wayne, 1 U.S. 241, 245 (1788) (providing, in one of the Supreme Court’s earliest opinions, that the Supreme Court referred to birthright citizenship when it mentioned that children born to visiting ambassadors were “deemed natural born [sic] of the realm.”).
\item \textsuperscript{285} \textit{Madison Debates, supra note 36} (demonstrating that the debate centered on the length of years a person was required to be citizen to serve in the House or Senate. Governor Morris favored 14 years as a qualification for Senators. Mr. Pinckney expressed concern that “there is peculiar danger and impropriety in opening its door to those who have foreign attachments” in granting such individuals power to ratify treaties. Mr. Butler also opposed admission of foreigners without a long residence in the U.S.).
\end{itemize}
America's political society. These discussions caused considerable concern, however, that illiberal immigration provisions in the Constitution would repel talented and industrious immigrants.

Future presidents viewed immigration favorably as a source for adding to the nation's human capital. George Washington, in a letter of encouragement to a Dutch immigrant, remarked: "this Country certainly promises greater advantages, than almost any other, to persons of moderate property, who are determined to be sober, industrious and virtuous members of Society." James Madison favored a meritocratic approach to naturalizing immigrants. Thomas Jefferson viewed immigration as a source for valuable work contributions.

Early in America's history, courts adopted the common law in recognizing birthright citizenship. One court restated the longstanding

286. See The Federalist No. 2, supra note 96, at 12 (stating "With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.").

287. See Madison Debates, supra note 36. James Madison concluded that these immigration barriers "will give a tincture of illiberality to the Constitution." This would "discourage the most desireable [sic] class of people from emigrating to the U.S." Id. Benjamin Franklin said he would be "very sorry to see anything like illiberality inserted in the Constitution. The people in Europe are friendly to this Country." Id.

288. See George Washington, Letter to Reverend Francis Adrian Vanderkemp Teaching AM. Hist. (May 28, 1788), https://teachingamericanhistory.org/library/document/letter-to-reverend-francis-adrian-vanderkemp/ ("[T]he general characteristics of your compatriots would be a principal reason to consider their advent as a valuable acquisition to our infant settlements.").

289. Id. (noting that Washington hoped the country could be an asylum to those who are persecuted and "virtuous [I] to whatever nation they might belong; but I shall be the more particularly happy, if this Country can be, by any means, useful to the Patriots of Holland, with whose situation I am peculiarly touched, and of whose public virtue I entertain a great opinion.").

290. See James Madison, Naturalization, [3 February] 1790, FOUNDERS ONLINE, NATIONAL ARCHIVES (Feb. 3, 1790), https://founders.archives.gov/documents/Madison/01-13-02-0018 (demonstrating his belief that the new country should offer as many opportunities "as possible, for the worthy part of mankind to come and settle amongst us, and throw their fortunes into a common lot with ours. But, why is this desirable? Not merely to swell the catalogue of people. No, sir, 'tis to encrease the wealth and strength of the community . . . .")

291. Thomas Jefferson, First Annual Message to Congress, Dec. 8, 1801, AVALON PROJECT (Dec. 8, 1801), https://avalon.law.yale.edu/19th-century/jeffmes1.asp ("Shall oppressed humanity find no asylum on this globe? The Constitution, indeed, has wisely provided that, for admission to certain offices of important trust, a residence shall be required sufficient to develop character and design. But might not the general character and capabilities of a citizen be safely communicated to everyone manifesting a bonafide purpose of embarking his life and fortunes permanently with us?").

292. See Patterson v. Winn, 30 U.S. 233, 233 (1831); Van Ness v. Pacard, 27 U.S. 137, 144 (1829) ("Our ancestors brought with them its general principles, and claimed it as their birthright; but
English principle that "[p]rotection and allegiance are reciprocal" under birthright citizenship.293 Another early court observed that birthright citizenship derived from allegiance to a sovereign.294 Birthright citizenship depended on whether people were born before (antenati) or after (postnati) their territory was subject to a sovereign.295 As a result, antenati of American colonies could inherit as heirs "in Great Britain because we once owed allegiance to that crown."296

The individual owed perpetual allegiance to the sovereign unless the political bond between lands dissolved.297 A case involving an American citizen's labor made this point.298 A carpenter who abandoned his apprenticeship in Massachusetts after hostilities broke out in the Revolutionary War, worked on British ships in Newfoundland, and

they brought with them and adopted only that portion which was applicable to their situation."); see also Elliott v. Cruz, 137 A.3d 646, 654 (Pa. Commw. 2016) ("Under the common law principle of jus soli [], persons born on English soil, even of two alien parents, were 'natural born' subjects and, as noted by the Supreme Court, this 'same rule' was applicable in the American colonies and 'in the United States afterwards, and continued to prevail under the Constitution ...' with respect to citizens.").

293. Ainslie v. Martin, 9 Mass. 454, 460 (Mass. 1813). This meant the "sovereign cannot refuse his protection to any subject, nor discharge him from his allegiance against his consent; and he will remain a subject, unless disfranchised as a punishment for some crime." Id. at 460.


295. Town of Hebron v. Town of Colchester, 5 Day 169, 171-172 (Conn. 1811) (drawing from Calvin's Case that a "person born in America, before the declaration of independence, would, perhaps, have a right to hold lands in England, because he once owed allegiance to that government," but a person "born in England, before that period, can have no pretense to citizenship in this country, on that account; their situation is totally different; they never owed allegiance to this government, and never were citizens of this country.").

296. Jackson, 3 Binn. at 87.

297. See Ainslie, 9 Mass. at 459-60 (insinuating that people owe allegiance to successors). There is a recognized absolute doctrine of perpetual allegiance by a sovereign's subjects and "duties of these persons . . . remain unchanged and unimpaired by their foreign naturalization." Id. at 461. However, the perpetual allegiance is severed in such circumstances like being inhabitants of Massachusetts during the ratification of the treaty of peace between the United States and Great Britain and being "entitled to the privileges of citizens within [the] state" under the federal Constitution. Id. at 460; see also Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. 99, 156 (1830) (adopting a more limited principle of birthright allegiance by holding that "[t]he general principle of the common law also is, that the allegiance thus due by birth, cannot be dissolved by any act of the subject. It remains perpetual, unless it is dissolved by the consent of the sovereign or by operation of law.").

298. See Kilham v. Ward, 2 Mass. 236, 236 (Mass. 1806) (setting the scene, plaintiff was an American citizen who was hired to work on houses, buildings, and "British ships of war and prize vessels, and on barracks." The Supreme Court held that per the Treaty of 1783, Great Britain and the United States were against each other and the government that a person did not adhere to made him an alien in that country).
returned to Massachusetts before the peace treaty formally separated the colonies from Britain, retained birthright citizenship in America.299

B. The Fourteenth Amendment and Birthright Citizenship: Free and Immigrant Labor

The Birthright Citizenship Clause in the Fourteenth Amendment was born on January 30, 1866.300 Its language resulted from an intolerant oration by a West Virginia senator, Peter Van Winkle and a momentous response.301 The drafter of the Civil Rights Act of 1866, Illinois senator Lyman Trumball, proposed a citizenship clause that declared “all persons of African descent born in the United States are hereby declared to be citizens of the United States.”302 Senator Van Winkle strenuously objected.303 He was the first senator in these debates to promote a racial consent theory to citizenship: “I ask, first, whether persons of the negro race are, or indeed, can be, citizens of the United States without a constitutional amendment? Most certainly they were not among 'we the people' who established the national Constitution . . .”304 He suggested that voters, not Congress, decide the citizenship question, including foreigners.305 Bigotry tinged his view of citizenship.306 Senator Van Winkle dreaded birthright citizenship because it would lead to an “influx” of inferior people from all over the world.307

299. Id. at 236 (“The doctrine of the common law is, that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign . . .; it is due to him in his political capacity of sovereign of the territory where the person owing the allegiance was born.”).

300. See generally CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866) (discussing the citizenship status of African Americans and the benefits and negatives of their citizenship).

301. Id. at 497-98.

302. Id. at 497.

303. CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866).

304. Id.

305. Id. at 498 (stating “The laws of naturalization as they stand require a notice to be given and a renunciation of the allegiance to all foreign Powers, and require the notice to be given . . . but there is no provision of that sort in this proposition. I should be very willing to have the question submitted in some form to the people of the United States, whether they desire to admit to citizenship this class of persons; and I do not confine it to the African race alone, but I include the races on the Pacific coast that I have already mentioned, and others to whom it is proposed to open the doors.”).

306. Id. at 497-98 (“I would like to see . . . a fair vote of the people of the United States whether they are willing that these piebald races from every quarter shall come in and be citizens with them in this country, and enjoy the privileges which they are now enjoying as citizens.”).

307. Id. at 497 (“I think it is one of the gravest subjects that could be submitted to the people of the United States . . . [] it involves not only the negro race, but other inferior races that are now settling
Senator Van Winkle promoted the idea that citizenship could be extended to “piebald races” only if white Americans voted for approval. His racial theory of citizenship posited, “I do not believe that a superior race is bound to receive among it those of an inferior race if the mingling of them can only tend to the detriment of the mass.”

Senator Trumball had no direct reply to Senator Van Winkle. Instead, he withdrew his proposal and replaced it with a universal statement of citizenship: “[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 without distinction of color . . . .” By substituting the common law conception of birthright citizenship, Senator Trumball addressed Senator Van Winkle’s whites-only interpretation of the common law — and, for clarity, he added that the right extended to all “without distinction of color.” Senator Trumball seized the moment to address his opponent’s xenophobia: His proposal included the U.S.-born children of foreigners in the same passage as the children of newly freed slaves.

These inferences are vividly clear from a colloquy that immediately followed Senator Trumball’s birthright citizenship proposal. Senator Edgar Cowan asked, “whether it will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?” “Undoubtedly,” replied Senator Trumball. Pressing his racialized view of citizenship, Senator Cowan countered: “The children of German parents are citizens; but Germans are not Chinese . . . .” Senator Trumball dismissed this reasoning:

If the Senator from Pennsylvania will show me in the law any distinction made between the children of German parents and the children of Asiatic parents, I might be able to appreciate the point which he makes;

308. Id. at 498.
309. Id.
310. CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).
311. Id.
312. Id.
313. Id.
314. Id.
315. Id.
316. Id.
but the law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a European.\textsuperscript{317}

Senator Trumball had deftly shifted the citizenship debate from freed blacks and their children to parents and the children of Chinese immigrants.\textsuperscript{318} Several months later, senate debate resumed on the issue of whether the labor utility of foreigners provided grounds to extend birthright citizenship to their children.\textsuperscript{319} Pennsylvania Senator Cowan opposed this idea, expressing concern that foreigners took jobs from Americans.\textsuperscript{320} The Chinese, he said, had a good work ethic, but these foreigners were a competitive threat to Americans.\textsuperscript{321}

In response, Senator John Conness advocated for extending birthright citizenship to the children of foreigners.\textsuperscript{322} He grounded his view on equality of human rights\textsuperscript{323} and the essential work performed by immigrant parents.\textsuperscript{324} Addressing the labor of Chinese immigrants, the

\textsuperscript{317} Id.

\textsuperscript{318} See id. (asking “if the children of Chinese now born in this country are not citizens?”).

\textsuperscript{319} See CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

\textsuperscript{320} See id. (referring to the increased immigration of highly skilled Mongols).

\textsuperscript{321} Cowan continued:

[B]ut there is a race in contact with this country which, in all characteristics except that of simply making fierce war, is not only our equal, but perhaps our superior. . . .

[T]he Mongol race. They outnumber us largely. Of their industry, their skill, and their pertinacity in all worldly affairs, nobody can doubt. They are our neighbors. Recent improvement, the age of fire, has brought their coasts almost in immediate contact with our own . . . in a very short time. Are the States to lose control over this immigration? Is the United States to determine that they are to be citizens?

\textsuperscript{322} Id.

\textsuperscript{323} Id.

Senator John Conness provided:

The proposition before us, I will say, Mr. President, relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so.

\textsuperscript{324} Senator John Conness recalled the ill-treatment of Chinese workers in California, and their contributions to the state’s economy: “It will be remembered that the Chinese came to our State, as did others from all parts of the world, to gather gold in large quantities . . . . The interference with our own people in the mines by them was deprecated by and generally objectionable to the miners in California.” Id. at 2891-92. He noted their valuable work habits, observing “they are a docile industrious people, and they are now passing from mining into other branches of industry and labor.” Id. at 2892. Chinese immigrants found employment “as servants in a great many families and in the kitchens of hotels; they are found as farm hands in the fields; and latterly they are employed by thousands – indeed, I suppose there are from six to seven thousand of them now employed in building the Pacific railroad.” Id. The senator favorably concluded, “[t]hey are there found to be very valuable laborers, patient and effective; and, I suppose before the present year closes, ten or fifteen thousand of them, at least, will be employed on that great work.” Id.
California senator linked their work to birthright citizenship, stating: 
"[w]e are entirely ready to accept the provision that is proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others."  

Senator Cowan renounced these views by denigrating the work habits of immigrants in Pennsylvania. In his view, Gypsies were indolent people who came to invade Pennsylvania. He was only willing to admit whites to America.  

The racial consent theory emerged in the Senate on two other occasions. Kentucky Senator Garrett Davis defended this view by stating:

That the fundamental, original, and universal principle upon which our system of government rests, is that it was founded by and for white men; that it has always belonged to and been managed by white men; and that to preserve and administer it now and forever is the right and mission of the white men. When a negro or Chinaman is attempted to be obtruded into it, the sufficient cause to repel him is that he is a negro or Chinamen.  

---

Much of Senator Connex's defense of immigrants in his state likely responded to anti-Chinese labor protests, which were stirring unions in his state. See Boswell, supra note 45, at 356 ("[W]hite workers and white small business owners formed a political alliance in the Democratic Party to secure national anti-Chinese state action.").

325. CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866).
326. Id. at 2891.
327. Senator Cowan stated:  
I am unwilling, on the part of my State, to give up the right that she claims, and that she may exercise . . . of expelling a certain number of people who invade her borders; who owe to her no allegiance . . . who never perform military service, who do nothing, in fact, which becomes the citizen . . . and whose sole merit is a universal swindle; who delight in it, who boast of it, and whose adroitness and cunning is of such a transcendent character that no skill can serve to correct it or punish it; I mean the Gypsies. . . . They follow no ostensible pursuit for a livelihood. They trade horses, tell fortunes, and things disappear mysteriously.

Id.

328. CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866). Senator Cowan contended: "It is true that the colonists of this country, when they came here and established their governments, did open the door of these privileges wide to men of their own race from Europe." He elaborated: "They opened it to the Irishman, they opened it to the German, they opened it to the Scandinavian races of the north. But where did they open it to the barbarian races of Asia or Africa? Nowhere." Id.

329. CONG. GLOBE, 39th Cong., 1st Sess. 575 (1866).  
Naturalization is the admission by Government of a foreigner to the privileges, or a portion of the privileges, of a citizen . . . . For the purpose of uniformity the power
of naturalization was by the States surrendered to the Government of the United States by the Constitution. That the power was delegated and reserved to the extent that States had exercised. That they had exercised it only to naturalize foreigners, and foreigners of the European nationalities; and the United States receiving from them this power as they had always exercised it were also limited to foreigners of the European branches of the Caucasian race of men.

Id.
330. S. JOURNAL, 39th Cong., 1st Sess. 280 (1866) (vetoing the proposal, President Johnson mentioned that for the first time the right of federal citizenship “to be conferred on the several excepted races before mentioned is now, . . . proposed to be given by law.” He mentioned that “the grave question presents itself, whether, when eleven of the thirty-six States are unrepresented in Congress at the present time, it is sound policy to make our entire colored population and all other excepted classes citizens of the United States?”).
331. Id. at 284-85. President Johnson stating:
The white race and the black race of the south have hitherto lived together under the relation of master and slave – capital owning labor. Now, suddenly, that relation is changed, and, as to ownership, capital and labor are divorced . . . . Each has equal power in settling the terms, and, if left to the laws that regulate capital and labor, it is confidently believed that they will satisfactorily work out the problem . . . . This bill frustrates that adjustment. It intervenes between capital and labor, and attempts to settle questions of political economy though the agency of numerous officials, whose interest it will be to foment discord between the two races, for as the breach widens their employment will continue, and when it is closed their occupation will terminate.

Id.
333. See generally CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866) (approving the Fourteenth Amendment on June 13, 1866).
334. See id. at 3042, 3049 (confirming the Fourteenth Amendment by a vote of 33 to 11 on June 8, 1866 from the Senate and on June 13, 1866 by the House of Representatives through a vote of 120 to 32).
C. Wong Kim Ark and Jus Soli

Wong Kim Ark, born in 1873 in San Francisco to Chinese subjects, traveled to China in 1894. A law, enacted while he was away, forbade entry of all Chinese to the United States, even those who were U.S.-born citizens with entry permits. He claimed to have birthright citizenship under the Fourteenth Amendment. The Supreme Court ruled that Wong Kim Ark was a United States citizen and his reentry could not be barred. Noting that Congress did not define the meaning of the citizenship clause, the majority believed that these lawmakers adopted England's common law precedent and statutory treatment of birthright citizenship. The opinion recognized that American colonies adopted England's broad understanding of birthright citizenship.

Near the end of its exhaustive analysis, the opinion concluded: "As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States."

Congress only intended to exclude (1) U.S.-born children of foreign sovereigns and ministers; (2) Indian tribes with exclusive allegiance powers; (3) enemies who occupied the nation or its territories during hostilities.

---

336. Id. at 653.
337. Id.
338. Id. at 699 (stating that a law of Congress "cannot control [the Constitution's] meaning, or impair its effect, but must be construed and executed in subordination to its provisions.").
339. Id. at 654 (providing that the birthright citizenship clause in the Fourteenth Amendment "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."); see id. at 655-56 (referencing "the leading case known as Calvin's Case," adding that the "English authorities ever since are to the like effect.").
340. Id. at 661 ("An act to enable his majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens.").
341. Id. at 663 ("Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects . . . . Upon the Revolution, no other change took place in the law . . . .").
342. Id. at 676; see also id. at 693 (concluding that "The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory . . . .").
343. Id. at 682.
VI. WORKFORCE IMPLICATIONS OF LIMITING BIRTHRIGHT CITIZENSHIP

My study, by adding to the consensus view that birthright citizenship under the Fourteenth Amendment is broadly defined by place of birth, sheds new light on birthright citizenship with four findings. First, Rome, England, and the United States granted birthright citizenship in conjunction with naturalization policies to achieve competitive labor advantages.344 Over time, these empires valued a more diverse and skilled workforce compared to the smallness and sameness provided by natives and *jus sanguinis*.345 Birthright opponents miss these many lessons of competitive labor advantage.346

Second, birthright citizenship is far more established than opponents realize or acknowledge.347 It has served pragmatic economic purposes since the Roman Empire.348 While birthright opponents depict unlawful immigrants as welfare parasites, they ignore long historical evidence that these foreigners work industriously in jobs that Americans shun.349 They also ignore evidence that American-born children of immigrants compensate for welfare transfers to their parents.350

344. See supra Sections III.B, IV.B, V.A.
345. See supra Sections III.B, IV.B, V.A.
346. See supra Section II(A).
347. See supra Sections III, IV.A.
348. Manson, supra note 119, at 115.
349. See supra Section II(A).
350. Compare Robert Rector & Jamie Bryan Hall, National Academy of Sciences Report Indicates Amnesty for Unlawful Immigrants Would Cost Trillions of Dollars, BACKGROUNDER 1, 4 (Dec. 22, 2016) (citing an NAS study for the idea that unlawful immigration would cost trillions of dollars. This mischaracterizes the actual study), with NAT’L ACAD. SCI., THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 1, 7 (Francine D. Blau & Christopher Mackie eds., 2016), (stating that “[f]irst-generation [immigrants] are more costly to governments, mainly at the state and local levels, than are the native-born generations . . .” on the other hand, “immigrants’ children – the second generation – are among the strongest fiscal and economic contributors in the U.S.” This report concludes that immigration has an overall positive impact on long-run economic growth in the U.S.). Recent economic analysis shows that recent deportation and welfare policies have not only deterred use by unlawful immigrants but also Hispanic citizens. See Marcella Alsan & Crystal Yang, Fear and the Safety Net: Evidence from Secure Communities 26 (Nat’l Bureau of Econ. Research, Working Paper No. 24731, 2019) (highlighting that more stringent deportation policies are suppressing food stamp and SSI usage among Hispanics, including citizens who fear mistaken deportation). Recent economic studies contradict another common narrative of immigration restrictionists – that unlawful workers take jobs and drive down wages for Americans. See also George J. Borjas, The Earnings of Undocumented Immigrants 36 (Nat’l Bureau of Econ. Research, Working Paper No. 23236, 2017) (noting that the adjusted wage of undocumented workers rose rapidly in the past decade, dropping the wage penalty to undocumented status from about 10 percent in 2005 to less than 4 percent in 2014).
Third, birthright citizenship has multiple and varied sources such as: A Roman edict in 515 A.D.; an English statute in 1368; a charter for an American colony in 1606; an enduring English common law decision in 1608; a United States constitutional amendment in 1868; and a Supreme Court precedent in 1898. The fact that this fundamental right originated in legislative, executive, and judicial actions over two millennia underscores the societal importance of birthright citizenship.

Fourth, birthright citizenship has been paired with naturalization policies. My study shows that this right co-evolved with naturalization laws in Rome, England, and the United States. These policies diversified homogenous societies by including people of different races, languages, ethnicities, religions, and cultures. In the United States, one can see this co-evolution in the opening words of the Fourteenth Amendment — “All persons born or naturalized in the United States . . . are citizens of the United States . . . ” Birthright citizenship does not stand in isolation - not in the text of the Fourteenth Amendment, nor in its long economic history. This obvious textual connection undercuts the argument that the Supreme Court misinterpreted the Fourteenth Amendment: Contrary to the peculiar approach in Citizenship by Consent, the Court’s comprehensive opinion cited a large number of English naturalization laws as well as common law rulings on birthright citizenship.

Beyond these conclusions, my study explores troubling implications for the United States workforce if birthright citizenship is limited or extinguished. To put this discussion in broad context, the United States has an estimated population of 11.3 million unlawful immigrants and

See Chassambouli & Peri, supra note 44, at 9 ("Undocumented immigrants cannot access any welfare program/unemployment insurance at all and hence their cost of searching is even larger.").

351. See supra Sections III, IV, V.
352. See supra Sections III, IV, V.
353. See supra Sections III, IV, V.
354. See supra Sections III, IV, V.
356. See id.
357. See U.S. CONST. amend. XIV, § 1; CITIZENSHIP WITHOUT CONSENT: ILLEGAL IMMIGRANTS IN THE AMERICAN POLITY, supra note 13.
approximately 3.5 million are women of childbearing age.\textsuperscript{359} To frame this analysis of the harmful implications of limiting birthright citizenship, I suggest three possible exceptions to this constitutional right: (1) a nine-month entry exemption for immigrant mothers; (2) a categorical exclusion of citizenship for U.S.-born children of unlawful immigrants; (3) a requirement that American citizenship be limited to people of purely English and Nordic descent.

A. Nine-Month Entry Exemption for Immigrant Mothers

This approach would deny citizenship to children born to non-citizen mothers who enter the United States within nine months of giving birth.\textsuperscript{360} This policy would address birth tourism. There are no statistics about this phenomenon. However, anecdotal reports show that it is expensive: Birth tourists who spend lavishly on pre-natal care in the United States do not fit the profile of welfare utilizers that concern birthright opponents.\textsuperscript{361}

The nine-month entry exception is more complicated than it seems. If its purpose is to deter illegal immigration, a strict nine-month rule would affect people who enter the United States on work visas. Citizenship would be denied to children of Lawful Permanent Residents, and employees with temporary work permits, some who work in the United States for years.

To evaluate the impact of a nine-month entry rule on the United States workforce, I consider data from the United States Citizenship and Immigration Service (hereinafter "USCIS") for temporary workers and families. In 2017, the United States admitted 849,727 females of

\textsuperscript{359} See Profile of the Unauthorized Population: United States, MIGRATION POLICY INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited Dec. 21, 2019). This population has 1,653,000, ages 16-24 years old; 2,935,000, ages 25-34 years; and 2,839,000, ages 35-44. Id. Females make up 47\% of the total estimate. Id. Using this gender estimate for these age bands, the population of childbearing females who are unlawful immigrants is about 3,490,000. Id.


\textsuperscript{361} Iuliia Stashevska, South Florida sees a boom in Russian 'birth tourists', USA TODAY (Mar. 22, 2019), https://www.usatoday.com/story/travel/destinations/2019/03/22/south-floridas-russian-birth-tourism-boom/2344087002/ ("[H]undreds of pregnant Russian women travel to the United States to give birth so that their child can acquire all the privileges of American citizenship. They pay anywhere from $20,000 to sometimes more than $50,000 to brokers who arrange their travel documents, accommodations and hospital stays, often in Florida.").
childbearing age. These women are not birthright tourists. The more relevant statistic – United States births to these women – is unknown. However, it is reasonable to suppose that the United States would lose some foreign workers – foreign mothers and foreign fathers – to other countries simply because of this rule. Canada, for example, has birthright citizenship.

B. U.S.-Born Children of Unlawful Immigrants

This is a common policy prescription from birthright critics. Citizenship without Consent favors a prospective denial of this right to children of unlawful immigrants. I reiterate for context: birthright opponents consistently fail to say how United States immigration laws should treat the children for whom they seek to deny citizenship.

Retroactive application of this proposal is theoretically possible but would require a new law for involuntary citizenship stripping. Adding to the muddle over this idea, birthright opponents do not specify whether their proposal applies to a child of an unlawful mother a child of either an unlawful mother or father, or a child of two unlawful immigrants.

The large group of immigrant parents under Deferred Action for Parents of Americans (hereinafter “DAPA”) offers one way to imagine workforce effects from implementing this limit on birthright citizenship. President Barack Obama implemented DAPA as a postponed enforcement policy – a way of deprioritizing removal on

---

365. 8 U.S.C. § 1451(e) (2012) (providing that a naturalized American can be stripped of citizenship if the person acquired it illegally, but such processes do not involuntarily strip of citizenship for U.S. born citizens).
366. See Randy Capps et al., Deferred Action for Unauthorized Immigrant Parents 7 (2016) (showing in Table 1 that the population that could be eligible for DAPA is 3,605,000).
unlawful immigrants. It applies to unlawful immigrants who are parents of United States citizens or legal permanent residents, have lived in the United States at least four years, and have no criminal record. These parents have legal permits to work in the United States.

The DAPA-eligible population is about 3,605,000. This figure is large because the policy applies to parents who have a child born in the United States. A very restrictive bar to birthright citizenship would affect all DAPA parents and their U.S.-born children.

A blanket ban on birthright citizenship for United States children of unlawful immigrants would potentially expose a million or more DAPA parents to deportation. This is because retroactive citizenship stripping for DAPA children would make the entire immigrant family’s immigration and citizenship status unlawful by removing parents of Americans in DAPA. This would have large workforce effects because DAPA-parents lose temporary authorization and face deportation. A study of potentially eligible immigrants – unlawful immigrants who were

---

367. See Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodríguez, Dir. of U.S. Citizenship and Immigration Services (Nov. 20, 2014) (on file with author) (discussing how the majority of immigrants are not a threat to the nation and their deportation should be "extremely unlikely").

368. U.S. v. Texas, 136 S. Ct. 2271, 2272, reh’g denied 137 S. Ct. 285 (2016) (upholding President Obama’s new policy, however, the court was split); Texas v. U.S., 86 F. Supp. 3d 591, 676 (S.D. Tex. 2015) (enjoining President Obama’s policy); see Memorandum from John F. Kelly, Sec’y of Homeland Sec., to Kevin K. McAleenan, Acting Comm’r of U.S. Customs and Border Prot. (June 15, 2017) (on file with author) (rescinding the DAPA memorandum).

369. See Memorandum from John F. Kelly, Sec’y of Homeland Sec., to Kevin K. McAleenan, Acting Comm’r of U.S. Customs and Border Prot., supra note 368.

370. See Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodríguez, Dir. of U.S. Citizenship and Immigration Services, supra note 367, at 4 (establishing criteria for parents of U.S. citizens and lawful permanent residents: “[1] have, on the date of this memorandum a son or daughter who is a U.S. citizen or lawful permanent resident; [2] have continuously resided in the United States since before January 1, 2010; [3] are physically present in the United States on the date of this memorandum and at the time of making a request for consideration of deferred action with USCIS; [4] have no lawful status on the date of this memorandum; [5] are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and [6] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”).


372. See Becker & Posner, supra note 360.

373. See CAPPS ET AL., supra note 366, at 5 (estimating that DAPA-eligible parents had 3.7 million minor children who are U.S. citizens by birth).

374. See Becker & Posner, supra note 360.
parents from 2009 to 2013 – found that 95 percent of these fathers were in the labor force and 93 percent had jobs.\textsuperscript{375}

Exposing DAPA parents to deportation would have large second-order effects on the American workforce, affecting millions of children who would lose birthright citizenship.\textsuperscript{376} With unlawful status, they would be stateless children facing deportation.\textsuperscript{377} Massive citizenship stripping of this child-cohort would potentially deprive the United States labor market of millions of workers to replace retiring adults.\textsuperscript{378} Statistics show the magnitude of this damaging effect. The number of DAPA-children who were born in the United States is estimated to be 3.7 million.\textsuperscript{379} Consequently, the child-cohort facing citizenship-stripping is in the millions. These children appear to have birthdates ranging from January 1, 2010 through November 20, 2014.\textsuperscript{380}

By the mid-2020s, they will start entering the United States labor force.\textsuperscript{381} The Department of Labor (hereinafter “DOL”), in a study that does not differentiate the workforce by immigration or citizenship status, showed that Hispanics registered the largest gains in the American workforce.\textsuperscript{382} They numbered about 12 million in 1994 but grew to 25.4 million in 2014.\textsuperscript{383} The DOL estimates this group will reach 32.5 million in 2024, thereby growing the share of Hispanics in the total labor force from 13.1 percent in 2004 to nearly 20 percent of the labor force in 2024.\textsuperscript{384} Therefore, the removal of millions of DAPA-parents and children from the legal workforce would have massively disruptive effects on the American economy.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{375} CAPPs ET AL., supra note 366, at 15 (providing in Table 4 that women had much lower labor force participation, at 52 percent, when compared to men; implying that women were stay-at-home parents).
\item \textsuperscript{376} See id. at 5, 15; see also Becker & Posner, supra note 360.
\item \textsuperscript{377} See Becker & Posner, supra note 360.
\item \textsuperscript{378} See CAPPs ET AL., supra note 366, at 5, 15.
\item \textsuperscript{379} Id. at 5.
\item \textsuperscript{380} See id. at 3 n.3 (noting that "[t]o qualify for DAPA, an unauthorized immigrant [must]... (1) have a son or daughter who is a U.S. citizen or lawful permanent resident (LPR); (2) have continuously resided in the United States since before January 1, 2010; [and] (3) be physically present in the United States during November 2014... ").
\item \textsuperscript{382} Id. at 2, 5, 17, 22-23.
\item \textsuperscript{383} Id. at 23.
\item \textsuperscript{384} Id.
\end{itemize}
\end{footnotesize}
C. Eurocentric Citizenship

Some immigration opponents explicitly seek a white utopian America. This preference has roots in Eurocentric heritage. This is not new: It is reminiscent of Woodrow Wilson’s book that singled out the “sturdy stocks of the north of Europe” for contributing to America’s early success while disparaging “multitudes of men of the lowest class from the south of Italy and men of the meaner sort out of Hungary and Poland.”

A Eurocentric limit on birthright citizenship would likely produce an American apartheid. Jus sanguinis would be deployed with the requirement of white racial purity to define birthright citizenship. This intentional form of racial inequality would likely weigh heavily on the American workforce. Births to white mothers have fallen relative to other racial groups since 1990. This trend has coincided with a drop in white labor force participation from 67.1 percent in 1994 to 63.1 percent in 2014. The Department of Labor projects that this rate will drop to 60.8 percent in 2024. To ameliorate a shortfall of citizens in labor markets, proponents of Eurocentric birthright could allow non-whites to naturalize or have lawful permanent status. A return to de jure racial discrimination

385. See Annie-Rose Strasser, National Review Fires Another Racist Writer, THINK PROGRESS (Apr. 11, 2012), https://thinkprogress.org/national-review-fires-another-racist-writer-102bae770185/ (discussing Emeritus Professor Robert Weissberg, who was fired from the conservative National Review for delivering a talk on “viable alternatives” to white nationalism, including the creation of “Whitopias”).

386. See LAWRENCE AUSTER, THE PATH TO NATIONAL SUICIDE: AN ESSAY ON IMMIGRATION AND MULTICULTURALISM 82 (1990) (“America has the moral right to control immigration on the basis of its own cultural . . . self-preservation.”); see also Colleen Flaherty, A Professor’s ‘Repugnant’ Views, INSIDE HIGHER ED. (July 24, 2019), https://www.insidehighered.com/news/2019/07/24/penn-law-condemns-amy-wax-recent-comments-race-and-immigration-others-call-her (reporting that Professor Amy Wax advocates a “cultural distance” approach to immigration). Flaherty quotes Wax as stating: “Conservatives need a realistic approach to immigration that . . . preserves the United States as a Western and first-world nation . . . We are better off if we are dominated numerically . . . by people from the first world, from the West, than by people who are from less advanced countries.” Id.


388. See Gretchen Livingston & D’Vera Cohn, U.S. Birth Rate Falls to a Record Low: Decline Is Greatest Among Immigrants, PEW RES. CTR., 1, 8 (2012), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2012/11/Birth_Rate_Final.pdf (noting that “Since 1990, the share of births to U.S.-born mothers who are white has decreased from 72%” to 66% in 2010). Since “births to immigrant mothers have grown, they play a bigger role today in determining the race and ethnic makeup of total births.” Id. at 8.

389. Tossi, supra note 381, at 16.

390. Id.
in employment would be a plausible result – the type of racial segregation in the workplace that ended with Title VII of the 1964 Civil Rights Act.391

VII. CONCLUSION

According to opponents of birthright citizenship, Americans must consent before the United States born children of undocumented immigrants can be citizens.392 This theory is a bland version of the openly racist arguments offered by Senator Cowan, Senator Davis, and President Johnson, all of whom were overruled by the Congress in 1866 and states in 1868.393 This study shows the labor utility of universal birthright citizenship. Also, it reveals a fundamental morality behind this economic rationale. By contrast, consent based on racial uniformity is immoral in economic terms: History shows that structural inequality has thwarted economic growth and trade.394 Rome tempered its conquests with pluralistic marriage, naturalization, and citizenship laws.395 England was a hungry, depressed, and depopulated island nation until it owned up to the shortcomings of its restrictive naturalization laws and became an empire only after it became a haven for religiously oppressed Europeans with sophisticated labor skills.396 When Congress debated the Birthright Citizenship Clause of the Fourteenth Amendment, senators disagreed as to whether to include the children of foreign laborers.397 A majority approved a universal form of birthright citizenship that included defense of the “children of the Asiatic . . .”398 Recent emergence of birthright citizenship as a debatable United States policy puts two versions of morality on trial; one centered on racial superiority and the other founded on human equality.399 If economic history informs this controversy, the

391. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000 et seq. (2012)) (targeting racial segregation and eliminating discrimination in the workplace); CONG. GLOBE, 39th Cong., 1st Sess. 498 (arguing that “if the Senator from Pennsylvania will show [Senator Trumbull] in the law any distinction made between the children of German parents and the children of Asiatic parents,” then he “might be able to appreciate the point which he makes; but the law makes no such distinction . . .”).
392. See supra Section II.A.
393. See supra Section V.B.
394. See supra Section III.
395. See supra Section III.
396. See supra Section IV.
397. See supra Section V.B.
399. See supra Section IV.C.
labor origins of birthright citizenship proves that a nation’s wealth depends on preferring the human race to the white race.\footnote{Id.; see supra Section III.A.}