LOSING CONTROL OF AMERICA'S FUTURE— THE CENSUS, BIRTHRIGHT CITIZENSHIP, AND ILLEGAL ALIENS

CHARLES WOOD *

* Counsel to the United States Senate Judiciary Committee's Subcommittee on Immigration, 1995-97, 1985, 1979-82; Special Assistant, Office of Legal Policy, United States Department of Justice, 1986-89. The author would like to thank former colleagues at the Office of Legal Policy for many helpful comments and suggestions on an earlier draft.

Constitutional Commentary queried a number of prominent legal scholars several years ago about which provisions of the Constitution they considered to be the most flawed.[1] The published responses did not mention two provisions of the Fourteenth Amendment which, under the prevailing interpretations now accepted by federal officials, merit serious

1. *Constitutional Stupidities: a Symposium*, 12 CONST. COMMENTARY 139 (1995).

consideration for this distinction: the "Census Clause," which is interpreted to require the present policy of counting illegal aliens in the nation's decennial census;[2] and the "Citizenship Clause," which is read to mandate the policy of granting the U.S.-born children of illegal aliens United States citizenship at birth.[3] Fortunately, the prevailing interpretations, neither of which has ever been confirmed by a decision of the Supreme Court, are probably incorrect. Thus, it is likely that these harmful policies can be altered by federal statute. If, however, either of the interpretations presented in this Article is not sufficiently accepted for a statute to be enacted and survive

---

2. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, § 2. This provision modifies part of the language pertaining to apportionment and the census in Article I, Section 2, Clause 3 of the original Constitution. The original language, with the part changed by the Fourteenth Amendment indicated within brackets, is as follows: "[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct...." U.S. CONST. art. I, § 2, cl. 3.

The Census Clause is now interpreted by the United States Department of Justice and the Bureau of the Census to require that illegal aliens who say that their "usual residence" is at an address in the United States must be counted in the apportionment census. *1980 Census: Counting Illegal Aliens: Hearing on S. 2366 Before the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs*, 96th Cong. 96 (1980) (testimony of David A. Strauss); *Census Equity Act: Hearing on H.R. 2661 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 101st Cong. 42-60 (1989) (testimony of C. Louis Kincannon) [hereinafter *1989 Hearing*]; *Hearing on Enumeration of Undocumented Aliens in the Decennial Census Before the Subcomm. on Energy, Nuclear Proliferation, and Government Processes of the Senate Comm. on Government Affairs*, 99th Cong. 13 (1985) (testimony of John Keane). *See also* United States Dept. of Justice Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment, Ridge v. Verity, 715 F. Supp. 1308, 1321 (W.D. Pa. 1989) (summary judgment granted on grounds that plaintiffs [certain Members of the United States House of Representatives, states, and private organizations] failed to meet injury-in-fact and redressability elements necessary for standing to challenge proposed inclusion of illegal aliens in 1990 census by defendants [the Secretary of Commerce and certain other United States Government agencies and officials]) [hereinafter DOJ Memo].

3. "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." U.S. CONST. amend. XIV, § 1. This is interpreted by the Department of Justice to require that the U.S.-born children of illegal aliens be citizens at birth. *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Parents: Joint Hearing on H.R. 705, H.R. 1363, H.J. Res. 56, H.J. Res. 64, H.J. Res. 87, H.J. Res. 88, and H.J. 93 Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 74-91 (1995) (testimony of Walter Dellinger) [hereinafter *1995 Hearing*]. *See also Citizenship Reform Act of 1997 and Voter Eligibility Verification Act: Hearing on H.R. 7 and H.R. 1428 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 105th Cong., 19-29 (1997) (testimony of Dawn E. Johnson).

challenge in the courts—I acknowledge that reasonable people can disagree about the meaning of the two provisions—then the Constitution should be amended. The damage being done to the national interest by current interpretations and policies is so serious and fundamental that change is imperative, one way or the other.

Among the many reasons why these two policies should be changed, the most important by far relates to political self-determination. It is hard to imagine current policies that are more likely to undermine the democratic nature of our political system and erode the ability of the American people to control their own future. Each of these policies threatens to take away from legitimate citizen majorities in areas throughout the country their rightful share of power over the making and enforcement of law and other operations of government. Each jeopardizes the ability of the majority of Americans today to ensure that political control will always remain with them and their descendants—plus those persons, and only those persons, to whom they have given their consent to join the American political community.

The policy of counting illegal aliens in the census makes it possible for areas with many illegal aliens to elect more federal and state representatives than areas with a higher population of citizens and lawful residents, but few illegal aliens. The policy of granting American citizenship to U.S.-born children of illegal aliens will, over time, make it possible for what would otherwise be citizen majorities in particular areas to be outvoted by new majorities consisting in significant part of persons whose membership in the political community is derived from this policy, and thus is not based on the consent of the American people.

These issues have become more significant over the last several decades as the number of illegal aliens within our borders has increased dramatically.[4] The very ambiguity of the Fourteenth Amendment with respect to the census and birthright citizenship issues stems in large part from the fact that, at the time the Amendment was drafted in 1866, there was

4. U.S. IMMIGRATION & NATURALIZATION SERV., STATISTICAL YEARBOOK, 1996, at 169-73 (1997) (available at INS website (last modified June 22, 1998) <http://www.ins.usdoj.gov/statyrbook96/index.html>).

no such person as an illegal alien.[5] Today, however, the number of illegal aliens is conservatively estimated at five million (an estimate for October 1996),[6] with a net annual increase of at least 275,000.[7] Whereas once a debate concerning illegal aliens and the Constitution would have been as academic as arguments now about the Third Amendment or titles of nobility, today the resolution of this debate will strongly influence America's political and demographic future in the Twenty-first Century and beyond.

Despite the stakes involved, Congress has devoted little recent attention to these census and birthright citizenship issues.[8] This neglect is extremely troubling. It is true that there are deep divisions on Capitol Hill with respect to many immigration issues, but the ones considered here should not be among them. I do not believe that any persuasive policy argument has been offered against changing—either through statute or constitutional amendment—the census and birthright citizenship policies which are so harmful to the interests of the American people. Quite literally, the issue is whether or not Americans will have the democratic right to control the nation's future—including, most fundamentally, whether the composition of "We the People of the United States," as Americans are referred to in the Preamble of the Constitution, will be determined solely by "We the People" or instead will continue to be influenced to a significant degree by individuals whose very presence in this country is in violation of its laws.

I. ILLEGAL ALIENS AND THE CENSUS

Under the Constitution, a census must be conducted every ten years to determine the apportionment of members of the House of Representatives among the states.[9] The federal government's current policy is to count in the official census every illegal alien who asserts that his or her "usual residence"

5. *See infra* notes 73-74 and accompanying text.

6. *See U.S. Immigration & Naturalization Serv.* website (last modified June 22, 1998) <http://www.ins.usdoj.gov/stats/illegalalien/index.html>.

7. The estimated annual growth *after* subtracting estimated emigration, adjustments to legal status, and deaths is 275,000. *See id.*

8. The last hearing on the census issue was held in 1989. *See supra* note 2. With respect to birthright citizenship, the only hearings in the last 20 years were held in 1997 and 1995, both in the House. *See supra* note 3.

9. *See* U.S. CONST. art. I, § 2, cl. 3.

is in the United States.[10] Whether the alien has just been transported into the United States by a smuggler, has received a deportation notice, or is simply an illegal resident who has not been apprehended because of ineffective federal law enforcement, the Census Bureau currently seeks to count every such illegal alien.

A. Harm Caused by Counting Illegal Aliens in the Census for Apportionment

1. Undemocratic Reduction of Political Power for Many Americans

With only 435 congressmen for Americans to share, apportionment is a zero-sum game. Thus, the result of providing additional representatives for areas of the country with many illegal aliens is that some areas of the country with a relatively small number of such aliens will have fewer representatives. The Director of the Bureau of the Census has testified that, according to agency estimates, California and New York had one more congressman each, and Georgia and Indiana each had one fewer, because illegal aliens were counted in the 1980 census.[11] Similar figures were not calculated by the Census Bureau for the 1990 census, because of the "sensitivity" of the issue, according to one agency official.[12] Estimates from other experts indicate that the effect on the 1990 census was even greater: by one estimate California gained two congressmen, Texas gained one, and Kentucky, Massachusetts, and New Jersey each lost one.[13] Just as importantly, the illegal alien population is now also considered in the configuration of state and federal legislative districts *within* most states, although states have the constitutional authority to exclude illegal aliens for this purpose.[14] Thus, lawful residents even in

10. *See 1989 Hearing, supra* note 2, at 42-43. *See also Enumeration and Residence Rules for the 1990 Census,* 1990 Decennial Census Policy Memorandum No. 12, U.S. Bureau of the Census, Washington, D.C. (1987) [hereinafter 1990 Census Policy Memo].

11. *See* Keane, *supra* note 2, at 14-15.

12. Telephone interview (name withheld to preserve confidentiality) (1997).

13. *See* Poston, Camarota, Bouvier, Li & Dan, *Remaking the Political Landscape—How Immigration Redistributes Seats in the House* 7 (Backgrounder No. 2-98, Center for Immigration Studies, Washington, D.C. 1998).

14. The only potential constraint on their actions is the Equal Protection Clause of the Fourteenth Amendment because within-state apportionment is not addressed in the

certain areas of California and Texas, as well as in other states, may well have lost representatives because of the current policy, regardless of the effect on the state as a whole. It is a distortion of democratic principles to increase the number of representatives allocated to one area of the country at the expense of other areas, unless there is some relative increase in the constituency whose interests such representatives should actually serve—the area's lawful residents.

One practical result of the current policy is that congressional districts with many illegal aliens will have fewer citizens casting votes for their representatives than congressional districts in areas with many such aliens. Thus, each citizen-voter in the district with many illegal aliens will have a greater voice in selecting a representative. This, too, is undemocratic.

If illegal aliens were precisely distributed across the country in proportion to the population of lawful residents, then including them within the census would have no apportionment impact. But some areas have far more illegal aliens than other areas in relation to the number of citizens and legal immigrant residents. For example, the proportion of illegal aliens in California is at least four times that for the entire country.[15] This unequal distribution—in addition to the large number of illegal aliens in absolute terms, estimated to be two million in California[16]—is why counting them for purposes of apportionment has increased the number of representatives for some areas and decreased the numbers for others.

2. Perverse Incentives for Government Officials

In addition to its undemocratic impact on apportionment,

---

apportionment provisions of Article I, Section 2, Clause 3 or Section 2 of the Fourteenth Amendment. However, because illegal aliens are not a "suspect class" and are entitled to only minimum protection under the Equal Protection Clause, see *Plyler v. Doe,* 457 U.S. 202, 219 n.19 (1982), a state decision would be subject to the most limited test of rational relationship to a legitimate state governmental interest. *See* Carl E. Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?* 104 YALE L.J. 1441-72 (1995).

A *federal* statute excluding illegal aliens from the apportionment census also would not be restrained by equal protection requirements (as incorporated into the Due Process Clause of the Fifth Amendment). *See infra* notes 47-53, 55-56 and accompanying text.

15. The population of California in 1996 was about 32 million, including about two million illegal aliens (6.25%). The population of the United States outside of California was about 233 million, including about three million illegal aliens (1.3%). 6.25 divided by 1.3 equals 4.8. *See State Population Estimates: Annual Time Series* (last modified Dec. 31, 1998) <http://www.census.gov/population/estimates/state/st-98-3.txt>. *See also supra* note 6.

16. *See State Population Estimates, supra* note 15.

current policy creates several perverse incentives. There is a risk that some legislators from areas receiving enhanced representation because of a disproportionate number of illegal aliens may find it in their political interest to support policies that encourage such aliens to reside in their areas. Because the allegiances, values, and circumstances of illegal aliens may be very different from that of citizens, and even of legal immigrants, some of the policies they prefer will not be in the interests of lawful residents—including lax enforcement of the immigration laws. Similar incentives may cause other public officials to ignore immigration violations or to refuse to cooperate with Immigration and Naturalization Service (INS) law enforcement officers.

3. Unrealistic Ten-Year Apportionment Due to Instability of Illegal Aliens' Residence

The political impact of counting illegal aliens in the 2000 Census will last for at least ten years. This will happen even though the continued presence of an illegal alien in the United States is presumably much more uncertain than that of a citizen or lawful immigrant, because he is always potentially deportable and because he will find it increasingly difficult to obtain either work or welfare, in part due to immigration law and welfare reforms in 1995 and 1996.[17] The impact will last through at least the year 2010 no matter how considerable or how successful the efforts of our country's political leaders to reduce the number of illegal aliens prior to that time.

It may make practical sense to configure the country's political structure on the basis of a "snapshot" taken of the United States population on a single day every ten years if that snapshot includes persons who are reasonably likely to remain here for a substantial period. However, such a practice is far more dubious if individuals whose futures here are so tenuous are nevertheless included in the snapshot. No persuasive policy justification has been offered for allowing the highly uncertain

17. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, P.L. 104-208 (codified in U.S.C. in a large number of locations); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1611, 1621 (1997) [hereinafter 1996 Welfare Reform Act]. The prohibition on the knowing employment of illegal aliens is at 8 U.S.C. 1324(a).

residences of a number of these individuals in certain areas of the United States such as southern California, on April 1, 2000, to cause an additional seat in the House of Representatives to go to one of these areas—and a seat to be taken away from Michigan, Pennsylvania, Maryland, Wisconsin, or some other area of our country, or from other parts of California—for the ensuing full decade.[18]

B. Counter-Argument: Illegal Aliens Have Same Impacts that Result in Representation for Legal Residents

To argue against the proposed change is, in effect, to argue that an area with 600,000 lawful residents and 600,000 illegal aliens should have twice as many votes in the House of Representatives as an area with the same population of lawful residents but no illegal aliens. The primary policy argument for such a view of apportionment is that, in a practical sense, the illegal alien residents of an area are just as much a part of the area's population as anyone else because they have a similar impact on the community. For example, it is argued, illegal aliens contribute to the economy and to tax revenue, and they use the area's housing, government services, and public resources such as roads and parks. It follows, in this view, that the area's representation in the House should reflect their presence so that the interests of all the area's residents can be appropriately protected.

This view is not consistent with the traditional American conception of representative democracy. Additional representation is not given to wealthier areas merely because their residents may contribute more to the economy or pay more taxes, and it is not given to poorer areas merely because their residents may have a greater need for certain government services. Furthermore, just because a large group of individuals happens to be in a given area on census day, such as for a convention or rally, and is having a significant impact on the area, has never been thought a sufficient reason to count them in that area's population for purposes of apportionment, even if

18. One estimate of the apportionment effect of counting illegal aliens in the 2000 Census is that California will have three more congressmen as a result of the current policy; Texas will have one more; and four states will each have one fewer—Maryland, Michigan, Pennsylvania, and Wisconsin. *See Remaking the Political Landscape—How Immigration Redistributes Seats in the House, supra* note 13, at 8.

it is characteristic of the area to have a group of that size and kind present. Rather, such persons are not counted, because each of the particular individuals in such group is not regarded as having a sufficiently strong and likely long-term connection to the area to be considered as part of its census population for the subsequent ten years.[19]

C. Argument that Current Census Practice May Be Changed Constitutionally by Statute

Of course, if the Constitution requires that the census—the "actual enumeration"—include illegal aliens, then that is what must be done until it is amended. The interpretation of constitutional language ought not to be periodically changed to suit the current policy preferences of the majority of the American people. In my view, however, the census language does not contain such a requirement. The Constitution neither requires nor prohibits the counting of illegal aliens.

1. Census Clause Requires Interpretation

The controlling language in Section 2 of the Fourteenth Amendment states that "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."[20]

The current practice of counting illegal aliens is based on the view of the Census Bureau that this language requires that all persons whose "usual residence" is in a state be included in that state's apportionment base.[21] Note, however, that neither "resident" nor "residence" appears in the constitutional language. The agency's position is based on the view that an understanding of the meaning of the Census Clause requires an *interpretation* of the *entire provision,* not a literal reading of the single phrase "counting the whole number of persons in each State" taken out of context. I agree with the view that interpretation is required, but disagree with the interpretation of the Census Bureau. The language can, and should, be read

19. The vulnerability of illegal aliens to deportation at any time, and the laws making them ineligible for employment and most forms of welfare, are likely to make their residence increasingly uncertain. *See supra* note 17 and accompanying text.

20. *See supra* note 2.

21. *See supra* note 10.

somewhat more narrowly to require a greater stability of residence.

The appropriate context for interpreting the phrase "counting the whole number of persons" is the entire census provision, especially the words "their [the states'] respective numbers." Given the clear purpose of the census—to determine relative state population totals that will be the basis for apportioning representatives for the subsequent decade—this latter phrase is most reasonably interpreted as calling for some meaningful connection to the state. Mere presence on the single day when the census is conducted should certainly not be enough. Indeed, I know of no one who has argued, for example, that non-residents should be counted if they happen to be present on that day. Nor was the phrase "whole number" understood by the framers to require otherwise. It was included in order to emphasize the change from the original Constitution, which provided that only three-fifths of the number of slaves would be counted.[22]

Consistent with this universally held view, the Census Bureau has never attempted to count every person physically present in a state during the census. Current exceptions include tourists and other short-term visitors, seasonal residents, diplomats, members of Congress, and certain students and persons working and sleeping most of every week in a state other than where their family and possessions are located.[23] Several of these categories include persons who actually live in the state for most of the year.

Furthermore, the agency's own application of its "usual residence" standard has occasionally changed. For example, United States citizens residing on military bases abroad have sometimes been counted in a state's apportionment, and sometimes have not.[24] Thus, the Census Bureau itself has recognized that the determination of whether particular persons should be counted as part of a state's "respective number" is not a mere mechanical process. Rather, some

22. *See supra* note 2.

23. *See* 1990 Census Policy Memo, *supra* note 10.

24. *See 1989 Hearing, supra* note 2, at 45 (testimony of Kincannón); Declaration of Susan M. Miscura, Chief, Decennial Planning Division of the Bureau of the Census at 3, Ridge v. Verity, 715 F. Supp. 1308 (D. Pa. 1989); *Census Bill Would Force Count of Many Americans Overseas*, CONG. Q., June 11, 1988, at 1602.

judgment is required concerning whether persons in particular circumstances have a sufficient connection to a particular state.

This Article does not argue that the Census Bureau's interpretation is unreasonable or that the policy based on it is unconstitutional. Instead, I suggest that there is another interpretation which is even more reasonable. If the language of the Census Clause is interpreted in light of the purpose of the census, it is reasonably read as mandating that persons be counted in a state's enumeration only if their principal residence is in the state and such residence has some minimum degree of stability and likely continuance. Under this interpretation, Congress and the President can decide either to count or not count illegal aliens, depending on their judgment about whether there is a sufficient degree of stability of residence to meet the constitutional requirement.

2. Framers Understood Clause to Mean that Persons with Stable Residence in State ("Inhabitants")Would Be Counted

Because the Census Clause itself is somewhat ambiguous, the process of interpreting its meaning should include an effort to determine how the framers themselves understood the language they adopted. I have found no evidence that the framers of the Fourteenth Amendment understood any differently than the original framers the reference to "their [the states'] respective numbers," which was also contained in the original Constitution of 1789,[25] or that they believed they were changing anything except the reference to the three-fifths rule for counting slaves. Thus, the original framers' understanding of this phrase is highly relevant in understanding the current language.

According to the available evidence, the understanding of the framers of the original provision of 1789 was that apportionment would be based on the relative number of "inhabitants" of the states. The drafts of the apportionment provision, including the version initially approved by the Constitutional Convention, used this term rather than "persons" or "residents."[26] The Committee of Style replaced the

25. *See supra* note 2.

26. The initial version of the apportionment and census provision was adopted by the Constitutional Convention on July 12, 1787. This version referred to a "[c]ensus . . . of all the

phrase "citizens and inhabitants, of every age, sex and condition" with the single word "persons" in the description of how the states' "numbers" were to be counted.[27] I have found no evidence suggesting that the change was believed to broaden the scope of the provision. In addition, both the Federalist Papers and the original census statute refer to "inhabitants" as the subject of the census and the basis of apportionment.[28]

The historical evidence is consistent with the statement of the Supreme Court in *Wesberry v. Sanders,*[29] the first of the Warren Court's reapportionment cases to be decided on the merits, that apportionment was to be based on the relative number of "inhabitants" of the various states:

> The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of the states' *inhabitants*. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.[30]

Therefore, a key question is the original framers'

---

inhabitants of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783 [counting three-fifths of the number of slaves]." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 590, 595 (Max Farrand, ed., Yale University Press, 1937) [hereinafter Farrand]. After modification by the Committee of Detail and by the Convention itself, the census provision was approved by the Convention on August 21, 1787. The modified provision referred to the "*whole number* of free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and *three fifths* of all other persons not comprehended in the foregoing description (except Indians not paying taxes)" (emphasis added). 2 Farrand at 350, 352. This approved language was included in the draft Constitution referred to the Committee of Style on September 10, 1787. *See id.* at 571.

27. In its September 12 report the Committee of Style proposed to substitute what became the final language of Article I, Section 2. The substitute was adopted on September 17 without comment or debate. *See id.* at 585, 590, 641.

28. *See* THE FEDERALIST NO. 54, at 338 (James Madison) (Clinton Rossiter ed., 1961) ("It is a fundamental principle of the proposed Constitution that . . . the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of *inhabitants* . . . .") (emphasis added); THE FEDERALIST NO. 58, at 356 (James Madison) ("Within every successive term of ten years a census of *inhabitants* is to be repeated. The unequivocal objects of these regulations are, first, to readjust, from time to time, the apportionment of representatives to the number of *inhabitants* . . ..") (emphasis added); Act of March 1, 1790, ch. 2, § 1, 1 Stat. 101.

29. 376 U.S. 1 (1964).

30. *Id.* at 13-14 (1964) (emphasis added) (footnotes omitted).

understanding of the word "inhabitant." The debate at the Constitutional Convention over the provisions relating to qualifications of members of Congress shows that an "inhabitant" was understood to have a longer-term connection to a state than a mere "resident."[31] In addition, contemporary dictionaries show that an "inhabitant" of a place was understood to be a person with some minimum degree of stability of residence there. For example, Webster's 1828 dictionary, the first and for many years the authoritative American dictionary, defines "inhabitant" as a

> dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor . . . . One who has a *legal settlement* in a town, city or parish. The conditions or qualifications which constitute a person an inhabitant of a town or parish, so as to subject the town or parish to support him, if a pauper, are defined by the statutes of different governments or states.[32]

"Inhabit" is defined as "[t]o live or dwell in; to occupy as a place of settled residence."[33] The definition of "dwell" is "[t]o abide as a permanent resident, or to inhabit for a time; to live in a place; to have a habitation for some time or permanence . . . . *Dwell* imports a residence of some continuance."[34]

Samuel Johnson's 1755 Dictionary defines "inhabitant" and related terms in a similar manner.[35] So does the Oxford English

---

31. During debate at the Constitutional Convention, in connection with the substitution of "inhabitant" for "resident" in the section containing the qualifications of members of the House (Article I, Section 2, Clause 2 of the final document), Madison stated: "[B]oth ['resident' and 'inhabitant'] were vague, but the latter least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business." 2 Farrand, *supra* note 26, at 217. John Dickinson of Delaware unsuccessfully proposed "inhabitant actually resident for ___ year." *Id.* at 218. James Wilson of Pennsylvania replied that such a provision "might be construed to exclude the members of the Legislature, who could not be said to be actual *residents* in their States while at the seat of the Genl. Government" (emphasis added). *Id.* The word "inhabitant" apparently connoted a more stable and permanent connection than "resident." To these leaders one could be a resident of a state and yet not be an inhabitant of that state, and vice versa. The more long-term connection—that of an inhabitant—was what they sought.

32. N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Facsimile Edition by Foundation for American Christian Education 5th ed. 1828, 1967, 1987) (not paginated) (emphasis added).

33. *Id.*

34. *Id.*

35. The Johnson dictionary defines "inhabitant" as a "[d]weller," one who "resides" in a place; "reside," "residence," and (as adjective) "resident" are defined with reference to "abode." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755). The definition of "abode" refers to "continuance in a place." *Id.*

Dictionary.[36] Its definition of "inhabitant" refers to Article I, Section 2 of the Constitution, which states that "[n]o person shall be a representative who shall not . . . be an inhabitant of that State in which he shall be chosen." As already pointed out, "inhabitant" was substituted for "resident" during the drafting of this provision.[37] The Oxford English Dictionary definition also contains a reference to a disputed congressional election that was resolved by the House of Representatives in 1824. This case, involving a Mr. John Bailey, was described in a report of the House Committee on Elections. This report states that the change was made because "inhabitant" was "a *stronger term,* intended more clearly to express [the convention's] intention that the persons to be elected should be *completely identified with the State* in which they were to be chosen."[38]

Thus, there is strong historical evidence from varied sources that the framers of the original census provision believed that in order for a person to be part of a state's "number," not only must the person have principal residence in the state, but such residence must have some minimum degree of stability or likelihood of continuance. The Fourteenth Amendment changed the original provision by omitting the reference to direct taxes and to the three-fifths rule for counting slaves.[39] There is no evidence that the phrase "their respective numbers" in the new apportionment language was understood to have other than the original meaning.[40]

---

36. The dictionary defines "inhabit" as "[t]o dwell in, occupy as an abode; to live permanently or habitually in . . . to reside in . . . ." 5 THE OXFORD ENGLISH DICTIONARY 290 (James A.H. Murray et al. eds., 1933) (reissue of A NEW ENGLISH DICTIONARY (1884-1928)). "Dwell" is defined as "[t]o abide or continue for a time in a place, state, or condition; . . . to remain (in a house, county, etc.) as in a permanent residence; to have one's abode; to reside, 'live'." 3 id. at 733.

37. *See supra* note 31.

38. CLARKE & HALL, CASES OF CONTESTED ELECTIONS IN CONGRESS 415 (1834) (emphasis added). At a later point in the report, the Committee stated: "[T]he ['inhabitant'] appellation is derived from habituation and abode . . . ." *Id.* at 416. The House Report also stated that "inhabitant" referred to "*bona fide members* of the State, subject to all the requisitions of its laws, and *entitled to all the privileges and advantages which they confer.*" *Id.* at 415 (emphasis added). Illegal aliens obviously cannot satisfy the latter requirement.

39. *See supra* note 2.

40. Rep. Roscoe Conkling stated, with respect to the apportionment provision of the predecessor of Section 2 of that Amendment, which used essentially the same apportionment language, that "the committee has adhered to the Constitution as it is, proposing to add to it only as much as is necessary to meet the point aimed at." CONG. GLOBE, 39th Cong., 1st. Sess. 359 (1866). Conkling was a prominent Republican member of the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment.

It is also relevant to the framers' intent in 1789 and 1868 that not only the 1790 census statute,

3. Congressional Authority to Determine Residency Required; Judicial Review Limited

The census provisions of the Constitution do not specify the kind or degree of connection to a state, or the degree of stability of residence in it, which a person must have before such person may or must be counted as part of that state's "number" for apportionment purposes. Furthermore, the proper responsibilities of the courts do not include the kind of policy judgments which are involved in such determinations.[41] Of necessity, therefore, one of the elected branches of the federal government must make the necessary determinations.

In fact, the Constitution grants considerable authority to the legislative branch to act in this area. Congress may (1) direct by law the "[m]anner" in which the census is conducted;[42] (2) "enforce" provisions of the Fourteenth Amendment;[43] and (3) make all laws that are "necessary and proper for carrying into [e]xecution" its specifically enumerated powers, including those relating to the census.[44] These provisions appear to provide ample authority for Congress to make the necessary determination, within reason, of whether or not any particular set of circumstances evidences a lack of the degree of stability of residence necessary for a person to be counted as part of a state's "number" for apportionment purposes.[45] It would,

---

but every subsequent statute of that kind through at least 1870, referred to an enumeration of "inhabitants." For the first census: Act of March 1, 1790, ch. 2, § 1, 1 Stat. 101; second census: Act of February 28, 1800, ch. 12, § 1, 2 Stat. 11; third census: Act of March 26, 1810, ch. 17, § 1, 2 Stat. 564; fourth census: Act of March 14, 1820, ch. 24, § 1, 3 Stat. 548; fifth census: Act of March 23, 1830, ch. 40, § 1, 4 Stat. 383; sixth census: Act of March 3, 1839, ch. 80, § 1, 5 Stat. 331; seventh, eighth, and ninth censuses: Act of May 23, 1850, ch. 11, § 1, 9 Stat. 428; *see* 18(1) Rev. Stat. (2d ed.) §§ 2175, 2176 (1878).

41. *See infra* notes 47-53, 55-56 and accompanying text.

42. U.S. CONST. art. I, § 2, cl. 3.

43. U.S. CONST. amend. XIV, § 5.

44. U.S. CONST. art. I, § 8, cl. 18.

45. There also appears to be no constitutional obstacle to the Census Bureau's making such a determination itself and changing its practice without a statute that specifically mandates the change, for example in response to an order of the President or the Secretary of Commerce. 13 U.S.C. § 141 (1994) provides that "[t]he Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . *in such form and content as he may determine*" (emphasis added). *Cf.* Borough of Bethel Park v. Stans, 319 F. Supp. 971 (W.D. Penn. 1970) (holding that the criteria by which persons are to be enumerated in decennial census as residing in one state rather than another lie within the discretion granted to the Census Bureau in the Census Acts, and that it was not an abuse of discretion to (1) enumerate college students, members of the armed forces stationed in the United States, and inmates of institutions, as inhabitants of states in which their colleges, military bases, and institutions are located; (2) enumerate military servicemen and governmental personnel abroad as residents of state from which they came and not as residents of particular addresses or local subdivisions within state;

moreover, be appropriate for Congress to exercise its authority by enacting legislation providing that the stability of residence of aliens without lawful status is *per se* insufficient for them to be included in a state's apportionment base. Such a per se rule would be reasonable because illegal aliens are continuously vulnerable to deportation, and are ineligible for employment and most public assistance programs.[46] As a result, they may well be compelled, by INS officers or out of practical necessity, to leave the United States at any time.

Furthermore, the judiciary would likely be reluctant to disagree with such a congressional judgment, and properly so. As the Supreme Court stated in a unanimous opinion in *Mathews v. Diaz:*

> Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.[47]

After the phrase "political question," the Court inserted as a footnote a quotation from *Baker v. Carr,*[48] including the passage quoted below. The passage describes criteria that courts should use in order to identify a case involving a "political question," a kind of case that should not be decided by the judiciary. For a court to do so would violate a fundamental principle of the American political system, namely the separation of legislative, executive, and judicial powers. The passage reads as follows:

> Prominent on the surface of any case held to involve a political question is found [1] a *textually demonstrable constitutional commitment of the issue to a coordinate political*

---

or (3) not enumerate private citizens living and working abroad as residents of state), *aff'd*, 449 F. 2d 575 (3d Cir. 1971). "[W]hen the court looks into the allegation that the Secretary of Commerce has abused the discretion vested in him by Congress in Title 13, U.S.C., judicial review is limited to ascertaining whether any rational basis exists for the Secretary's decision." 319 F. Supp. at 977.

46. *See supra* note 17.

47. 426 U.S. 67, 81-82 (1976) (footnotes omitted) (holding that five-year residence requirement for permanent resident aliens to receive Medicare did not violate Due Process Clause of Fifth Amendment).

48. 369 U.S. 186, 209 (1962) (holding that persons qualified to vote in state legislature who brought suit to challenge state apportionment, alleging that it violated the Equal Protection Clause of the Fourteenth Amendment, had presented a justiciable constitutional cause of action rather than a nonjusticiable "political question").

> *department;* or [2] a *lack of judicially discoverable and manageable standards for resolving it;* or [3] the *impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;* or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[49]

The issue of how much permanence and stability of residence in a state a person should have in order to be included in the state's "number" for apportionment requires prudential judgment and therefore ought to be decided by the elected branches of government. Judicial restraint is especially appropriate in this area because, as already stated, the Constitution explicitly authorizes Congress to direct the "[m]anner" of the census.[50] Thus, there would be several of the conditions stated by the Court in *Baker* to characterize cases involving a "political question," cases that should not be decided by the judicial branch.[51] In addition, for Congress or the President to decide the specific issue of whether illegal aliens have the necessary kind of residence to be counted for apportionment would be "in the area of immigration" — and for the Court to adopt a rule that Congress or the President may not do so would certainly "inhibit the flexibility of the political branches to respond to changing world conditions." Thus, the criteria described in *Matthews* would be present in a case challenging executive or legislative branch authority in this area.

In *Mathews* the Court expressed a special reluctance to reject congressional line-drawing policy judgments. Although the context of that case did not involve the census, but rather the residence requirements for the distribution to aliens of certain federal benefits, the same separation of powers principles are relevant. The Court stated:

> We may assume that the five-year line drawn by Congress is longer than necessary to protect the fiscal integrity of the program . . . . But it remains true that some line is essential,

49. *Id.* at 217 (emphasis added).

50. *See supra* note 2.

51. *See supra* note 49.

> that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that *those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States* than those who do not[52] . . . .
>
> The task of classifying persons . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. *When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment.*[53]

In terms of legal status, the difference between illegal and legal aliens is a difference in kind. However, with respect to the key issue—whether a person's residence in a state is sufficiently stable that the person should be counted as part of that state's "number" under the Citizenship Clause—the difference is one of degree.

A federal statute excluding illegal aliens from the census for apportioning members of the House among the states would be even less likely to be overturned because of the right to equal protection than a state statute excluding such aliens from in-state apportionment.[54] Congress can undoubtedly treat illegal aliens differently from other aliens. As the Court stated in *Mathews:*

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a *wide-ranging variety of ties to this country.*[55]

---

52. *Mathews*, 426 U.S. at 67 (emphasis added) (footnote omitted). In the apportionment context, the same reasoning would justify a similar statement, with the substitution of the phrase "stability of residence in a State" for the phrase "affinity with the United States."

53. *Id.* at 83-84 (emphasis added) (footnote omitted).

54. *See supra* note 14.

55. *Mathews*, 426 U.S. at 78 (emphasis added) (footnotes omitted).

The Court even gave examples of aliens that have the least ties to the United States.

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.[56]

Note that each class listed—except illegal aliens—is already excluded from the census.

D. Counter-Arguments

Proponents of the more widely accepted view of the Census Clause—that it requires the current policy of counting illegal aliens for apportionment and leaves Congress no discretion to enact legislation to prevent it—offer a number of legal arguments in support of their opinion. I will describe and respond to the five that are most frequently made. Before doing so, however, I want to emphasize again that the thesis of this Article is not that the census provisions of the Constitution forbid the current policy. Instead, my thesis is that Congress has the discretion to decide either way, to count or not to count, depending on its judgment about the question of whether illegal aliens have sufficient stability of residence to meet the constitutional standard of being among the states' "respective numbers." In addition, I argue that this issue is a "political question," and thus its resolution requires the kind of prudential judgment that the courts would be properly reluctant to overrule.

1. Plain Language of Census Clause

One of the arguments made for the prevailing view is that the "plain language" of the census provisions—"whole number of free persons" in Article I, Section 2, and "whole number of persons" in the Census Clause of the Fourteenth Amendment—

56. *Id.* at 80.

expressly requires the counting of all persons residing in a state and not specifically excluded.[57]

This argument, however, focuses excessively on the single word "persons" and the phrase "whole number." It does not consider context, a crucial task in ascertaining the meaning of most constitutional provisions. In order to understand the census language, the entire sentence in which these words appear must be interpreted. To do this, the manifest purpose of the provision has to be taken into account. That purpose was and is to provide that members of the House of Representatives will be divided among the states in proportion to their relative populations, and that such relative populations will be determined by a census to be held only every ten years.

Given that the period between censuses is so long, it would have been reasonable for the framers to have intended that persons be counted as part of a state's population only if they have a certain degree of stability of residence there. Otherwise, the totals would not be as good an indicator of the states' relative populations over the full ten-year period until the next census. As previously shown, the historical evidence is that the framers did indeed intend that only such persons would be counted, and that this is what they believed their chosen language meant.[58]

The context shows that the phrase "whole number" was used in the original language to modify "free persons" because only three-fifths of "other persons" (slaves) were to be counted. "Whole number" could not have been included in order to require that literally all persons physically present in a state on the census day must be counted—the meaning the phrase would have if it really served the semantic function that proponents of the prevailing interpretation assert, which is to require the very broadest coverage. In any case, "whole number" does not make the provision literally require that all of a state's "residents" must be counted: "resident," "residence," or "reside" do not appear in the provision. The phrase was most likely retained in the amended language because there was no reason to change it, or to emphasize that former slaves were to

57. Those excluded were Indians not taxed and, until the Fourteenth Amendment, two-fifths of slaves. *See supra* note 2; DOJ Memo, *supra* note 2, at 40-41.

58. *See supra* Section I.B.2.

be counted under the same circumstances as those who had never been slaves. There is no evidence to indicate otherwise.

Thus, the assertion that the "plain language" requires the counting of all persons who *reside* or *live in* a state, much less the persons who satisfy the Census Bureau's "usual residence" standard, is incorrect. No such words are present and none of the words that are present requires that meaning. The Census Bureau's standard is no less an *interpretation*, rather than a literal reading of unambiguous language, than the standard proposed in this Article. Indeed, as pointed out previously, the Census Bureau itself has occasionally changed its policy concerning which persons will be counted. For example, overseas United States military personnel were counted in the 1970 and 1990 censuses, but not in any others.[59]

2. Intended Meaning of "Persons"

Proponents of the prevailing interpretation also assert that the word "persons" was understood to have a broad meaning, as evidenced by the fact that the framers of the original Constitution rejected narrower terms such as "inhabitants."[60] It is, in their view, unreasonable to interpret "persons" to mean "inhabitants" if the latter word is understood as having a different meaning: if this is what the framers meant, they would have used the word "inhabitant" itself, as they did in several other provisions of the Constitution.[61] In addition, proponents argue that the coverage of the original census language was understood to be very broad because it was part of the Great Compromise between large and small states—that the national legislature would be composed of one house where members would be distributed equally among the states and another house where members would be apportioned on the basis of relative population.[62] The latter was desired by populous states in order to link a state's relative wealth, which they believed generally reflected relative

59. *See supra* note 24.

60. *See* DOJ Memo, *supra* note 2, at 42-43.

61. *See* U.S. CONST. art. I, § 2, cl. 2 and § 3, cl. 3 (provisions relating to the qualifications of members of Congress); U.S. CONST. amend. XIV, § 2, cl. 2, second sentence (providing for a decrease in the apportionment base of any state that denies voting rights to certain of its inhabitants).

62. *See* DOJ Memo, *supra* note 2, at 41-45.

population size, not only to a state's obligation to provide tax revenue—as desired by small states—but also to its representation in Congress.

The historical evidence does not, however, support this argument. The framers' use of the word "persons" in the census provisions instead of "inhabitants," which was used elsewhere, does not show that the census was intended to count anyone as part of a state's number other than persons who have the attributes of "inhabitants"—persons who have their principal residence in the state, and whose residence there has more than some minimum degree of permanence and stability.[63] The use of a word with a potentially broad meaning, such as "persons," instead of a narrower but not incompatible term like "inhabitant," does not show that a broader meaning was intended if the context shows otherwise. That is why, for example, under any reasonable interpretation of the Constitution's apportionment language, including that of the Census Bureau, foreign tourists—who are obviously "persons"—would not be included in the apportionment base.

When the Committee of Style replaced the nine-word phrase "citizens and inhabitants, of every age, sex and condition", which had appeared in the draft approved by the Committee of Detail and by the Convention as a whole, with the single word "persons," the framers would not have had any reason to believe that the meaning had changed in the absence of statements to the contrary by the Committee or others. As previously noted, there is no evidence that the change was intended or understood to be other than stylistic.[64]

The framers of the Fourteenth Amendment would have had no reason to substitute "inhabitant" for "persons" in its apportionment language. It was only necessary for the framers to modify those aspects of the original provision whose substantive meaning they wanted to change, which included the three-fifths rule for counting slaves and the reference to direct taxation.[65]

---

63. *See supra* Section I.B.2.

64. *See supra* notes 26 and 27.

65. The reason why the second sentence of Section 2 of the Fourteenth Amendment refers to "inhabitant" may have been that this section's penalty for deprivations of voting rights was intended to apply only when states limited the voting rights of male adults with stable residence in the state, not those who had just moved there or merely happened to be present in the state at

With respect to the Great Compromise issue, even if it is assumed for the sake of discussion that the framers of the original apportionment language intended to base a state's share of members of the House on its relative wealth,[66] here, too, the policy would have been seen as best served by counting in the population of a state only those with a reasonable degree of stability of residence there. Furthermore, there is a crucial difference between illegal aliens and all other persons who are counted for purposes of apportionment: all these other persons are *lawfully* in this country. Thus it cannot be argued with respect to them that the states they inhabit may be benefiting politically, through increased representation in the House, from violations of federal law—violations that by definition are wrongs against the American people as a whole—or that their inclusion would create the kind of perverse incentives for legislators and other public officials previously described. There is no evidence that the framers agreed, or would have agreed, to a system in which such inappropriate results would occur.

3. Meaning of "Person" in Due Process and Equal Protection Clauses

Proponents of the prevailing interpretation also argue that it is unreasonable to interpret the word "person" to include illegal aliens when it is used in the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment,[67] but not when it is used in the apportionment provision of Section 2.[68]

This third argument, like the first, stems from a failure to appreciate that what must be interpreted in Sections 1 and 2 of the Fourteenth Amendment is not the single word "person" or "persons" or short phrases in which they appear, but rather the

---

the time of the election. Otherwise, for example, the provision might have been interpreted to penalize a state for requiring that persons reside in the state for a minimum period of time before having the right to vote.

66. Some of the persons counted in the population of a state, such as children, do not contribute to the state's wealth but are nevertheless counted. This appears inconsistent with the assertion that apportionment was intended to be based on the states' relative economic wealth or income.

67. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . ." U.S. CONST. amend. XIV, § 1.

68. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, § 2. *See also* DOJ Memo, *supra* note 2, at 55-57.

entire provision of which they are part. The Due Process Clause prohibits a state from depriving "any person" of life, liberty, or property without due process of law. The Equal Protection Clause prohibits a state from denying "any person within its jurisdiction" the equal protection of the laws. There is nothing in either of these clauses of Section 1 which is comparable to the part of the Census Clause of Section 2—"apportioned among the states according to *their* respective numbers" (emphasis added) —which suggests that only *certain* persons present in the several states are to be included in the apportionment base, namely those who have some minimum degree of stability of residence in one of the states and who are, therefore, among *its* number. Under the language of Section 1, due process and equal protection are owed to *all* persons present in a state, regardless of the degree of their connection to it. That is why foreign tourists, for example, are entitled to these protections.

Furthermore, the difference in scope of coverage between the Census Clause and these other two clauses of the Fourteenth Amendment is quite reasonable because the policy considerations that apply to them are vastly different. Apportionment is a form of zero-sum game, in which a relative increase in the population of one state can result in an increase in that state's share of the members of the House and its share of electoral college votes for President, along with a decrease in the share of one or more other states—a possibility which experts from the Census Bureau and elsewhere believe has already happened.[69] In contrast, equal protection and due process can be provided to additional persons in a state without a decrease in the protections afforded to other persons in the state or in other states.

In addition, if it were correct that the persons covered by the Due Process Clause, the Equal Protection Clause, and the apportionment provisions of the Fourteenth Amendment are the same, then census practices ever since 1868 would have to be regarded as unconstitutional. Rights of due process and equal protection are owed to *all* "persons" present in a state, including nonresidents. However, in every apportionment census in United States history, some persons present in a state

69. *See supra* notes 11 and 13 and accompanying text.

at the time have not been counted. The coverage of the census language has *never* been considered universal, and it is not considered universal now by the Census Bureau or, apparently, by anyone else.

4. Original Intent to Include All Aliens

It is also argued that the framers of the Fourteenth Amendment intended that aliens be counted for apportionment, and there is no indication that for this purpose they distinguished between illegal and legal aliens.[70]

The first part of this argument is true. The framers did indeed understand that alienage would not exclude a person from the census.[71] It is incorrect, however, to state that there is no historical evidence supporting a distinction between legal and illegal aliens. As already shown, the framers did not intend to change, except with respect to direct taxes and the distinction between free persons and slaves, the apportionment provision's original meaning, which was that a state's "number" included persons with a degree of stability of residence there.

Furthermore, it is at least misleading to claim that there were illegal aliens at the time of the framing of the Fourteenth Amendment, and that the failure to provide expressly for their exclusion shows that the framers understood the apportionment language to mean that any illegal alien resident must be counted no matter how uncertain or temporary his residence may be. Although certain aliens could not at the time be transported lawfully to this country, and others could not enter lawfully without permission, this did not mean that aliens who entered the United States in connection with a violation of such a law faced a significant risk of deportation. An 1862 statute made it a criminal offense for any person to prepare or operate any U.S.-owned or U.S.-registered vessel to transport certain Chinese laborers to the United States—or anywhere else.[72] Persons who violated that law were subject to fine, imprisonment, or forfeiture of their vessel, but the aliens themselves were not in an unlawful status that made them

---

70. *See* DOJ Memo, *supra* note 2, at 46-51.

71. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 432, 2986-87 (1866) (statements of Rep. John A. Bingham (R-Ohio) and Sen. John Sherman (R-Ohio)).

72. *See* Act of February 19, 1862, ch. 27, Sections 1-3, 12 Stat. 340 (1862) (later repealed).

subject to deportation from the United States at any time.[73] There was also no statute making it unlawful to employ them.

Thus, the residence of aliens to which the advocates of the prevailing view refer does not appear to have been significantly less likely to be stable and long-term than that of citizens or other aliens. It is the realistic risk of deportation, or departure after an inability to find employment or to obtain public assistance, that now provides the justification for Congress to conclude that the residence of illegal aliens is not sufficiently stable for them to be included in the apportionment base.

5. Congressional Acquiescence

Lastly, proponents of the prevailing view argue on the basis of congressional acquiescence in the current policy. They argue that for two hundred years the census has aimed at counting every person whose "usual residence" was in a state during the census, including aliens—even illegal aliens after that category came into existence. Congress's failure to require any substantial change, proponents argue, supports the view that the policy is constitutionally required.[74]

Some individual members of Congress have indeed stated that the Constitution requires that illegal aliens be counted,[75] but, as already explained, this view is simply not as well supported by the available evidence as the view proposed in this Article. Furthermore, many members of Congress have expressed a different view.[76] It is also important to note that

---

73. *See id.* Another group that some have called "illegal aliens" (though they need not have violated United States law) consisted of the nationals of a country hostile to the United States. They were, however, subject to deportation only if the President so ordered pursuant to the Alien Enemy Act. *See* Act of July 6, 1798, 1 Stat. 577 (1798) (current version at 50 U.S.C. 21) (West 1999). Furthermore, if the President did order such deportations, an enemy alien would probably not have been regarded as still having a "usual place of abode" in this country and hence counted for apportionment. Finally, it seems unlikely such persons were present in large enough numbers and for a long enough time to have been perceived as a problem significant enough for the framers to have considered them in drafting the Census Clause.

74. *See* DOJ Memo, *supra* note 2, at 52-55.

75. *See, e.g.*, DOJ memo, *supra* note 2, at 54-55; 86 CONG. REC. 4372 (1940) (statement of Rep. Emmanuel Celler); *1989 Hearing*, *supra* note 2, at 1-2, 4-8,13-15 (statement of Rep. Thomas Sawyer, and testimonies of Rep. Don Edwards and Rep. Albert Bustamante).

76. For example, in the last Congress ending before the 1990 census, four bills were introduced which would have required the exclusion of illegal aliens from the decennial census: H.R. 3639 (Rep. Petri and 72 co-sponsors), H.R. 3814 (Rep. Ridge and 78 co-sponsors), H.R. 4234 (Rep. Daub), and S.2013 (Sen. Richard Shelby and 7 co-sponsors). *See Bill Summary and Status for the 100th Congress*, Library of Congress's Thomas website (visited Mar. 29, 1999)

past congressional action or opinion with respect to proposals to exclude *all* aliens from the apportionment base did not necessarily reflect the congressional support that might have existed for a bill to exclude only *illegal* aliens after that category came into existence.

Moreover, the fact that administrative practice and the opinion of some members of Congress in the past have supported a "usual residence" standard does not show that an "inhabitant" standard is unconstitutional. Indeed, as already shown, the "usual residence" standard itself is no less an *interpretation,* rather than a literal reading of unambiguous language, than the standard proposed in this Article. The constitutional language has never been understood to require that all persons physically present in a state during the census be counted.

Congressional acquiescence in the practice of counting all "usual residents" does not in any way show that most members of Congress believed that this practice is constitutionally required. The most such acquiescence shows is a belief that the practice is constitutionally permitted. More importantly, the mere fact that Congress acquiesced in a practice in the past does not mean that it must continue to do so.

Finally, congressional acquiescence may in theory be some evidence that an executive branch agency's interpretation of a *federal statute* is correct, though not necessarily that it is the *only* correct interpretation. But no similar principle applies in constitutional interpretation—except, perhaps, to the extent the acquiescing Congress is composed of the same individuals as the Congress that ratified the constitutional language. Because illegal aliens in the modern sense—with unlawful status and continuous liability to expulsion—did not exist in 1789, or 1868, or at any time close to those years, that exception could not apply.

I want to emphasize once again that the thesis of this Article is not that the interpretation which refers to "usual residence" is unreasonable, or that the manner in which the Census Bureau is implementing this interpretation is unconstitutional. Instead, this Article argues that there is a second interpretation which is even more reasonable and consistent with the constitutional

---

<http://thomas.loc.gov/bss/d100query.html>.

language. Under this interpretation, Congress or the Executive can decide to count or not to count illegal aliens, depending on the judgments made by the political branches regarding the stability of such aliens' residence.

If Congress wants to reverse the Census Bureau's current policy of including illegal aliens in the apportionment base and if it wants to do so in time to affect the 2000 Census, it must take immediate legislative action. For Congress to treat the problem as anything other than a matter of high priority is to decide, in effect, to continue for another decade the harmful effects of a policy that a majority of Americans almost certainly oppose strongly, and that most likely would have been disfavored by the framers of both the original Constitution and the Fourteenth Amendment. Indeed, ignoring the issue might well have the effect of permanently embedding this adverse policy within our constitutional system because of political conditions increasingly unfavorable to the reform—conditions that the policy itself helps advance.

II. ILLEGAL ALIENS AND BIRTHRIGHT CITIZENSHIP

There were nearly 80,000 Medicaid-funded births to illegal alien women in the single year of 1995 in California alone.[77] It is unknown how many other children such illegal aliens bore in the state that year. One study of Hispanic women who gave birth in five hospitals in San Diego County in 1991-92 found that forty-one percent of the women who said they had come to the United States in order to bear their child in this country did not receive Medicaid benefits.[78] Therefore, the total number of such children born in California in the mid-1990s—adding together those funded by Medicaid and those not so funded—was most likely well above 80,000.

Under current policy, all of these children became United States citizens at birth. California most likely has somewhere between forty and fifty percent of the total number of births to

77. *See* General Accounting Office, Report 98-30, *Illegal Aliens—Extent of Welfare Benefits Received on Behalf of U.S. Citizen Children* 3 (1997) [hereinafter GAO Report].

78. *See* JUDITH T. FULLERTON ET AL., ACCESS TO PRENATAL CARE FOR HISPANIC WOMEN OF SAN DIEGO COUNTY, CPS Report, California Policy Seminar (now California Policy Research Center), Latina/Latino Research Program, University of California, Berkeley (Aug. 1993); Rex Dalton, *Born in the USA—Births to Illegal Immigrants on the Rise*, SAN DIEGO UNION-TRIB., Feb. 20, 1994, at A1.

illegal alien mothers, given that the state has about forty percent of the total illegal alien population,[79] and about fifty-four percent of the "citizen children" receiving Food Stamps.[80] Therefore, the number of such new "citizen children" for the entire country *every year* could be well over 160,000. This is close to one estimate that the number of children born to illegal aliens in the United States each year is at least 165,000—which is conservatively based on the crude birth rate of the total foreign-born population, thirty-three births per 1000, and the size of the illegal alien population, 5,000,000.[81]

On the conservative assumption that in their lifetime such children each make possible the immigration of two relatives, either directly through their own petition or indirectly through the petition of someone for whom they had earlier petitioned, *each year's* group of such birthright citizens could ultimately lead to the entry of more than 300,000 immigrants over time. Many of these immigrants are likely to receive their lawful permanent resident status through immigrant categories that are not limited in number—namely, the spouses, unmarried minor children, and certain parents, of citizens[82]—and thus will represent real increases in total immigration. Such immigration can reasonably be viewed as contrary to the will of most Americans, because it is ultimately derived from an illegal immigration. It is also to the disadvantage of prospective immigrants abroad who would otherwise receive the visa numbers many of these relatives will use.

A. Harm Caused by Birthright Citizenship for Illegal Aliens

1. Loss of Control over Nation's Future

The current policy is contrary to the national interest in several ways. Most importantly, automatically granting citizenship to the children of persons who are present in the United States against the will of most Americans deprives the American people of the ability to determine the future of their

79. *See supra* note 6.

80. *See* GAO Report, *supra* note 77, at 9.

81. *See* Federation for American Immigration Reform (FAIR) website (visited Mar. 31, 1999) <http://www.fairus.org/04139708.htm>.

82. *See* 8 U.S.C. 1151(a). Note that only citizens who are at least twenty-one years of age may sponsor their parents under this provision. See *id.*

own nation, including its demographic and cultural characteristics. In the words of Professors Peter Schuck and Rogers Smith,

> [P]ermitting a democratic community the power to shape its own destiny by granting or refusing its consent to new members is essential if the community is to be able to protect its interests, maintain harmony, and achieve a unifying sense of shared values.[83]

Professor Michael Walzer puts the issue this way:

> Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be . . . historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.[84]

Any nation, if it is to survive as more than a name or geographic location, must be capable of wisely selecting which aliens will be allowed to live within its territory and which will be granted full membership in its political community—and must be capable of enforcing its selections. Granting birthright citizenship to the U.S.-born children of illegal aliens undermines the process by which the American people and their representatives have sought to design and enforce the country's immigration, naturalization, and citizenship laws. The current policy takes away a substantial part of the decision-making power concerning new membership in the American political community from its existing members, and transfers it to illegal aliens who are here against the will of the American people and in defiance of United States law and government.

2. Increased Number of Citizens without Traditional American Values

Second, because the parents are illegal, and hence to some degree fearful of apprehension and deportation, their children are less likely to participate in the wider community, to learn English, and otherwise to assimilate fully. As a result, U.S.-born

---

83. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 36 (1985).

84. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61 (1983).

children of illegal aliens seem less likely to become fully Americanized than the children of citizens or legal immigrants. To the extent they are not fully Americanized before they reach voting age, their votes are less likely to be based on traditional American values and concerns,[85] and therefore more likely to favor policies opposed by most Americans. Less rapid or complete Americanization also frequently results in greater ethnic tensions and other problems associated with the growing multiculturalism in our country.

3. Increased Number of Dual Citizens

Third, because most illegal alien parents are nationals of countries that grant automatic citizenship to the children of their citizens,[86] the number of United States citizens with dual citizenship and dual loyalty is substantially increased by current policy. Furthermore, this is occurring under conditions in which the child's primary loyalty may often not be to the United States, but to the country of which the parents remain nationals. It is interesting to note that, with the exception of Canada, these countries, like most others, do not themselves grant citizenship on the basis of birth within their territory.[87]

4. Dilution of Rights and Privileges of Current Citizens without Their Consent

Current policy also results in the granting of a wide range of

---

85. A few important examples for which there is evidence of differences among nations include limited government, the rule of law, democracy, freedom of speech, press, and assembly, religious liberty, science and exploration, creativity, individualism, competition, meritocracy, fair play, and self-reliance.

86. The countries that are the source of the largest number of illegal aliens are Mexico (by far the largest), El Salvador, Guatemala, Canada, Haiti, the Phillipines, Honduras, Poland, Nicaragua, and the Bahamas. *See supra* note 6. Each of these grants citizenship to the foreign-born children of their nationals. *See* OFFICE OF PERSONNEL MANAGEMENT, OFFICE OF INVESTIGATION, CITIZENSHIP LAWS OF THE WORLD: A DIRECTORY B-3, B-14, B-16, B-18, B-19, B-21, B-22, C-23, D-7, D-30 (1994) [hereinafter CITIZENSHIP LAWS OF THE WORLD] (unpublished report; copy in Law Library of Congress, RRSU unit).

87. Over two-thirds (seventy-four percent) of the 176 countries for which information is provided in CITIZENSHIP LAWS OF THE WORLD, *supra* note 86, do not grant citizenship on the basis of birth within their territory. The United Kingdom and Australia abandoned the jus soli rule within the last twenty years. *See, e.g.*, Polly J. Price, *Natural Law & Birthright Citizenship in Calvin's Case*, 9 YALE J.L. & HUMAN., 73, 77 n. 15 (1997). *See also 1995 Hearing, supra* note 3, at 21 (testimony of Rep. Elton Gallegly). In Canada, the Committee on Citizenship and Immigration recommended in 1994 that the birthright citizenship for that country be amended to apply only to Canadian born children of at least one Canadian citizen, lawful permanent resident, or valid refugee. *Id.*

"zero-sum" rights and privileges based on citizenship or legal residence to additional persons without the consent of preexisting citizens, whose own such rights and privileges are thereby necessarily diluted. Examples include not only voting power and political representation, but rights to petition for immigrants, public benefits such as government employment and services, and affirmative action "entitlements."

5. Incentive for Illegal Immigration

In addition, current policy creates a significant additional incentive for illegal immigration. In one study of a sample of Hispanic women who gave birth in 1991-92 in several hospitals in San Diego County, including citizens as well as legal and illegal aliens, fifteen percent said they had come to the United States in order to have their child in this country, and of the fifteen percent, about two-thirds stated that they had come so their child would be a United States citizen.[88] The researchers suspected that the true figure was higher than fifteen percent, but that others were afraid to admit it.[89] Furthermore, because the sample included citizens and lawful resident aliens, the fifteen percent figure was lower than the one for illegal aliens alone. As former Rep. Anthony Beilenson of California observed, "While millions of people around the world wait patiently—sometimes for many years—to immigrate legally to the United States, those individuals who manage to circumvent our immigration laws are rewarded by having their children granted the greatest gift that we as a nation confer on individuals."[90]

6. Greater Difficulty Deporting the Parents

The policy also results in the presence of U.S.-citizen children in the families of an increasing number of illegal alien residents of this country. This increases the political, if not the legal, difficulty of deporting the illegal alien parents and siblings. One former United States Attorney for the San Diego region was quoted recently as saying that he can recall no case in the last ten to fifteen years where the illegal alien parents of a U.S.-

88. *See* Fullerton & Wallace, *supra* note 78.

89. *See* Dalton, *supra* note 78.

90. *See 1995 Hearing*, *supra* note 3, at 35 (testimony of Rep. Anthony Beilenson).

citizen child were deported.[91] Indeed, at least one legal scholar has argued that it is unconstitutional for the government to deport a citizen child's illegal alien parents because this amounts to a de facto deportation of the child.[92] Although several courts have already rejected this concept,[93] that the argument is still being made reflects the moral and emotional dilemma created by current policy. In addition, this situation makes it difficult to deny certain kinds of public assistance to illegal aliens, such as welfare and subsidized housing, for which only those legally in the country qualify,[94] but which, if provided, benefit all family members.

7. Higher Welfare Costs

Finally, the policy results in major welfare costs to the taxpayer. All the new "citizen children" instantly qualify for all of the benefits citizenship provides, including welfare and other social services. According to one study, forty-one percent of the "citizen children" born in 1992 in San Diego County immediately began receiving welfare.[95] In fiscal year 1995, over 200,000 children of illegal aliens received Aid to Families with Dependent Children (AFDC) or Food Stamps in California, at an estimated cost of $720 million.[96] This would be questionable enough if all of the welfare money had been spent on the children themselves, but because the benefits are generally sent directly to the illegal alien parents, this is unlikely to have been the case.

B. Counter-Arguments

The three most frequent policy arguments against changing current law on birthright citizenship are (1) the change would be contrary to the national interest because it would increase

---

91. *See* N. Cleeland & E. Young, *Living in Shadowland—Citizen Children: Offspring of Illegal Immigrants Face an Uncertain Future*, SAN DIEGO UNION-TRIBUNE, June 2, 1995, A-1 (quoting Peter Nuñez).

92. *See* Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of its Own Children*, 22 HASTINGS CONST. L.Q. 491, 529 (1995).

93. *See* Gonzalez-Cuevas v. I.N.S., 515 F.2d 1222 (5th Cir. 1975); Perdido v. I.N.S., 420 F.2d 1179 (5th Cir. 1969).

94. *See* 1996 Welfare Reform Act, *supra* note 17.

95. *See* L. REA & R. PARKER, ILLEGAL IMMIGRATION IN SAN DIEGO COUNTY: AN ANALYSIS OF COSTS AND REVENUES viii-ix, 146-150 (1993).

96. *See* GAO Report, *supra* note 77, at 3.

the number of illegal aliens[97] and create a growing and hereditary underclass;[98] (2) it would be unfair to "punish" the U.S.-born children for the immigration law violations of their parents;[99] and (3) the change would create major practical problems for parents—citizens as well as aliens—and for hospitals and other document-issuing agencies.[100]

1. Increase in Illegal Aliens; Reduced Assimilation

Persons making the national interest argument assert that changing the current birthright citizenship rule would probably increase the population of aliens in an unlawful status. They argue that the number of such aliens the change would create—that is, the number of children of illegal aliens who would enter or remain in the United States after the change, for reasons unrelated to birthright citizenship—is likely to be greater than the number of aliens who would be deterred from illegally entering or remaining because they would find insufficient incentive to do so without the possibility of having U.S.-citizen-children.[101] As a result, the problems associated with the presence of a large number of aliens in an illegal status—problems such as failure to report crimes or public health problems, to testify in legal proceedings, or to seek medical care, out of fear of deportation[102]—would be likely to increase, not decrease, if the change is made. These problems would not exist to the same extent if the same persons were here but in a legal status.

Opponents of the change also assert that it would cause social disunity by interfering with the process by which the descendants of immigrants, including unlawful immigrants,

97. *See, e.g., 1995 Hearing, supra* note 3, at 29, 31, 152 (testimonies of Rep. Luis V. Gutierrez and Raul Yzaguirre).

98. *See id.* at 38, 47, 49, 104, 109, 152 (testimonies of Prof. Gerald L. Neuman, Raul Yzaguirre, Rep. Zoe Lofgren and Barbara Jordan).

99. *See id.* at 30, 32, 37, 39, 110 (testimonies of Prof. Gerald L. Neuman, Rep. Zoe Lofgren, and Rep. Luis V. Gutierrez).

100. *See id.* at 39, 105, 110 (testimonies of Prof. Gerald L. Neuman and Rep. Zoe Lofgren).

101. *See supra* note 97.

102. *See, e.g., 1995 Hearing, supra* note 3, at 29, 31, 38, 110 (testimonies of Prof. Gerald L. Neuman, Rep. Zoe Lofgren, and Rep. Luis V. Gutierrez); SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 72 (1981), *reprinted in* Senate and House Committees on the Judiciary, 97th Cong., Joint Committee Print No. 8 (Aug. 1981).

assimilate into American society.[103] They argue that after such a change, illegal aliens would continue to be present in this country and would continue to have children here, yet there would no longer be a one-generation limit on how long a family line living here remained apart from the mainstream. If the U.S.-born children do not receive United States citizenship, they will be less likely to assimilate—to enter fully into the life of their school and the society beyond their own neighborhood and ethnic group, and hence to acquire American values, customs, and beliefs. They will be more likely to remain apart, not to cooperate with agents of a government they fear—including law enforcement or public health officials—and to exacerbate inter-ethnic tensions. This decreased level of assimilation might also retard the assimilation of others of the same ethnicity by contributing to the growth and continuation of ethnic enclaves.

A major flaw in this argument is that most of the problems which opponents allege would be caused by *changing* birthright citizenship rules already exist under current law. That is because the parents, and often some of the other children in the family, remain illegal after the U.S.-born citizen-child joins the family. Thus, the family does not fully integrate anyway. This inevitably affects the extent to which the citizen-child assimilates.

More fundamentally, the limited level of assimilation of illegal aliens is as it should be. It is not desirable for such individuals to fully and permanently enter American society. The national interest would be better served if the entire family returned to their homeland, which would eliminate the political and other problems they may cause while in this country. This result could actually be brought about, moreover, if an adequate effort were made to enforce current laws against hiring illegal aliens and against providing most forms of welfare to them—so that illegal aliens would be more likely to return home on their own—and if higher penalties were imposed for immigration law violations.

Even if Congress and the President cannot, or will not, make such an effort, the current birthright citizenship rules are not the only way to avoid the presence of a large group of persons

103. *See supra* note 98.

who were born in the United States and who have resided here for many years, but remain illegal aliens. If political leaders concluded at any time that the problems caused by the unlawful status of such aliens were too great and that it was not sufficiently likely they would leave or be deported, then some form of amnesty program could be developed for a portion of the illegal population.[104]

Although not the best solution, amnesty would at least create an opportunity to screen for criminality and would grant only lawful permanent residence status, not citizenship. Voting rights would not be available until the individual had completed the naturalization process. In most cases this would mean that he or she had successfully taken tests of English language competence and knowledge of United States political institutions—tests that should be substantially strengthened if they are to serve adequately the purpose of requiring a meaningful degree of such competence and knowledge before citizenship can be obtained.

There are also various automatic mechanisms that could be adopted to insure that a permanent and hereditary class of illegal aliens did not develop. In France, for example, anyone is born a French citizen if one of his or her parents was born in that country. Under such a rule, only the first generation of U.S.-born children would be illegal. *Their* U.S.-born children *would* be United States citizens.[105] As in the case of amnesty, however, such a rule would have the effect of taking away from Americans part of the power to determine the political future of their country, because it would result in the permanent addition to the United States population—and to the electorate—of a line of persons which originated in this country without the consent of the American people.

104. This would, presumably, require a judgment that such an amnesty would not excessively encourage future illegal immigration and that the problems the amnesty was intended to solve were really more harmful than the new problems these individuals would create if they received legal status. Such new problems include not only the greatly increased likelihood that they would remain, but also their obtaining the opportunity to naturalize and thereby obtain voting rights as well as the right to bring in additional immigrants outside any numerical limits—and, if the change in census policy advocated in this article were made, their being counted for apportionment.

105. *See 1995 Hearing, supra* note 3, at 102-03 (testimony of Peter Schuck).

2. Unfairness

The second argument against changing the law—that this would be unfair to the U.S.-born children who would no longer receive birthright United States citizenship—is also flawed. The group to which United States political leaders owe their primary obligation is the American people. It is fairness to the citizens of this country that should take precedence, and accepting a process by which they lose political control against their will is not fair to them.

Furthermore, the proposition that the change advocated here would be unfair to the U.S.-born children of illegal aliens because they are innocent of any wrongdoing is fundamentally inconsistent with most of this country's immigration control policies. It is not clear, for example, why such children have a moral claim to remain in the United States which is any greater than their equally innocent foreign-born siblings who may also be young and may also have been in the United States most of their lives—yet who routinely face deportation along with their parents. It is also not clear why the presence in the United States of either of these groups of children should be viewed as giving them a greater moral claim to a life in this country than millions of equally innocent children abroad. Indeed, the moral claim of these latter children could be seen as greater because they have not had the benefit of any time in the United States—and because their circumstances are frequently much worse than those under which the U.S.-born children of illegal aliens would live if returned to the country of the parents' nationality (a country of which, in most cases, they too are nationals).[106]

Some persons have argued that if the law were changed, a certain number of the U.S.-born children of illegal aliens would be stateless—that is, would not receive citizenship in any other country either.[107] This is unlikely, because the vast majority of countries grant citizenship to the children of their nationals wherever born.[108] However, the possibility that this could happen could easily be eliminated by appropriate language in the legislation that changed the law.

---

106. *See,* CITIZENSHIP LAWS OF THE WORLD, *supra* note 86.

107. *See, e.g., 1995 Hearing, supra* note 3, at 111 (testimony of Gerald L. Neuman).

108. *See,* CITIZENSHIP LAWS OF THE WORLD, *supra* note 86.

3. Practical Difficulties

The third argument against change is that it would create major practical difficulties. This, too, has little merit. Most countries do not have a birthright citizenship rule, even for the children of aliens who are lawful residents.[109] Such countries recognize an individual as a citizen at birth only if one or both of the individual's parents is a citizen. The result is that at some point in the individual's life, if his or her citizenship status must be established—in order, for example, to obtain a passport or to vote—proof of the nationality of one or both parents must be provided.[110] Yet this requirement does not seem to cause undue difficulty, and few, if any, countries have changed their citizenship rules because of it.

C. Argument that Current Birthright Citizenship Rule May Be Changed Constitutionally by Statute

Despite the many good reasons why the current birthright citizenship rules as applied to the children of illegal aliens should be changed, I emphasize once again that if the Constitution requires it, those rules will have to be maintained until an appropriate amendment can be ratified. As in the census area, however, a strong argument can be made that current law is not compelled by the Constitution.

The language that establishes the citizenship status of persons born in the United States is the first sentence of the Fourteenth Amendment, which states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The meaning of the Citizenship Clause is not clear on its face. The clause certainly provides that some persons born in the United States are not citizens, namely those who at birth are not "subject to" the jurisdiction of the United States. But the language concerning jurisdiction is ambiguous and is not defined anywhere in the Constitution. Does it refer only to formal legal authority, to bring a person before a court or other government adjudicator for violations of the law—or rather to

109. *See* Walzer, *supra* note 84.

110. Such proof is also required to establish the United States citizenship of persons born abroad to a United States citizen. 8 U.S.C. 1401(c)-(h).

a combination of formal authority and actual physical power to exercise the authority, to have the power in a practical sense to bring a person to justice? Must the degree to which an illegal alien is "subject to" federal jurisdiction be equivalent to what exists with respect to citizens and lawful aliens?

1. Framers Understood Citizenship Clause to Codify Traditional Legal Principles

These ambiguities should be resolved in a way that is most consistent with the understanding of the framers of the Fourteenth Amendment. The Citizenship Clause, and the citizenship provision of the Civil Rights Act of 1866[111] upon which it was based,[112] were believed to codify the existing common law and to clarify its application to the major non-European minorities in America at the time, which were blacks and Indians.[113] Rep. James F. Wilson (R-Iowa), Chairman of the House Judiciary Committee, stated that the citizenship provision in the Civil Rights Act was "merely declaratory of what the law now is."[114] When Senator Jacob M. Howard (R-Mich.) proposed the definition of citizenship for the Fourteenth Amendment, he stated that "[t]his amendment which I have offered is simply declaratory of what I regard as the law of the land already . . . ."[115] Thus, the English common law principles governing birthright citizenship provide important insight into how the framers of the Fourteenth Amendment understood its citizenship provision.

The leading Supreme Court case interpreting the Citizenship Clause, and the common law it was intended to constitutionalize, is the 1898 case of *United States v. Wong Kim Ark*.[116] The Court held that the U.S.-born child of a *legal* immigrant from China was a United States citizen at birth,[117] and made the following points about the common law:

---

111. Act of April 9, 1866, ch. 31, § 1; 14 Stat. 27.

112. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5, 44 (1949). *See also* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908).

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

114. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

115. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

116. 169 U.S. 649 (1898).

117. *See id.* at 705.

(1) In order to be born a British subject, a person had to be born "within the allegiance," in other words, under circumstances in which there was a duty of allegiance, including obedience, on the part of the person born on British soil and a reciprocal duty of the sovereign to provide protection. Each was considered a "compensation for the other."[118] In order to be born within the allegiance, a person had to be born under the protection and control of the Crown and, at the time and place of birth, the sovereign had to be "in full possession and exercise" of its power.[119]

(2) The common law contained at least two "exceptions," which provided that certain persons would not be British subjects even though born on British territory: first, a person whose parent was a foreign diplomat, and second, a person born to a member of a foreign military force occupying the British territory where the birth took place.[120] The requirements of birth "within the allegiance" were not satisfied with respect to either group. Thus, these "exceptions" are not really exceptions from the general rule, but rather applications of the rule to specific factual circumstances.

It is important to note that in the common law, the allegiance and protection of the parents were imputed to the child born on the sovereign's territory. This is most clear in the "exceptions," which relate explicitly to the circumstances of the parents.

Although the "exceptions" each involved official representatives of a foreign sovereign, this may not have been viewed as an essential element. Accordingly, the Court in *Wong Kim Ark* implied that some aliens outside of the common law "exceptions" might also not qualify for birthright citizenship when it stated that "[s]uch allegiance and protection . . . were predicable of aliens *in amity* so long as they were within the kingdom."[121] "Amity" is defined by Webster's 1828 dictionary as "[f]riendship, in a general sense, between individuals, societies or nations; harmony; good understanding . . . ."[122]

---

118. *Id.* at 679.

119. *Id.* at 658-59, 679.

120. *See id.* at 657-58, 664-65, 683-86.

121. *Id.* at 655 (emphasis added).

122. N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 32 (not paginated).

The *Wong Kim Ark* Court's reference to "aliens in amity" was not, moreover, a product of the court's own reasoning and interpretation of the common law. It was present in *Calvin's Case*,[123] described by the Court in *Wong Kim Ark* as the "leading case" on the "fundamental principle of the common law with regard to English nationality."[124] Recently, a commentator stated that "[Sir Edward] Coke's report of *Calvin's Case* was one of the most important English common-law decisions adopted by courts in the early history of the United States. Rules of citizenship derived from *Calvin's Case* became the basis of the American common-law rule of birthright citizenship, a rule that was later embodied in the Fourteenth Amendment. . . ."[125]

Coke seems to have understood the phrase "aliens in amity" to exclude more than hostile enemy soldiers, more even than the subjects of foreign sovereigns with whom the English monarch was at war. Although it could not have been his intention to exclude from the meaning of "aliens in amity" any alien who was in England in violation of English immigration law—there were no such laws—Coke did make certain other relevant statements with an apparently similar meaning. He explained that an alien was either a friend (*amicus*) or an enemy (*inimicus*) at birth,[126] and could become a friend only if there was a "league" between the alien's sovereign and that of England.[127] If an alien's sovereign was "in league" with the English sovereign, the alien was a friend (*amicus*) and could enter England without "license" of the English sovereign.[128] The implication is that if an alien requiring a "license" came into England without one, he would be regarded as not "in amity". Thus, his children born in England would not be born "within the allegiance."

2. Children of Illegal Aliens Are Not "Born Within the Allegiance"

If the Citizenship Clause is interpreted as a codification of the common law—in accordance with the explicitly stated

123. *Calvin's Case*, 7 Co. Rep. 1a, 5b-6a, 77 Eng.Rep. 377, 383-84 (1608).
124. 169 U.S. at 655-656.
125. *See* Price, *supra* note 87, at 74.
126. *See* 77 Eng.Rep. at 407 [7 Co. Rep. at 25a].
127. *See id.* [7 Co. Rep. at 25b].
128. *See id.* at 402 [7 Co. Rep. at 21b].

understanding of its sponsors—then there is arguably no constitutional requirement that the U.S.-born children of illegal aliens be granted United States citizenship, because none of the essential elements of common law birthright citizenship is present.

In the first place, the U.S.-born child of an illegal alien mother is born on the territory of the sovereign, but is not born "within the allegiance." It makes no sense to say that the illegal alien has a duty of allegiance, including obedience, to the United States, because such allegiance is never present. Indeed, for any alien not in a lawful status, it is impossible. The illegal alien is disobedient to United States law in a way that is fundamentally different from other lawbreakers, whether citizen or lawful alien. Except during the limited periods of time when the latter are engaged in committing particular criminal acts, they are in obedience to law. The illegal alien mother, however, is disobeying United States law by her very presence in the country and does so at every moment she is within the United States. At no time does she, or can she, fulfill, even for an instant, the duty of obedience which is an essential element of allegiance.

Second, the U.S.-born child of an illegal alien is not born "under the protection and control" of the United States. The mother does not receive the full protection of the sovereign—not even that given to nonresident aliens if they are in a lawful status. For example, the protection provided by the sovereign to illegal aliens omits the most basic element, the right to be at liberty on the sovereign's territory, free to act lawfully according to his or her will. The partial protection the illegal alien mother does receive, beyond that of the most fundamental liberties, is not provided because it is regarded as her right as a matter of reciprocal obligation resulting from her allegiance to the United States. Rather, it is provided out of discretion, or it is stolen by her—taken against the nation's will despite attempts to withhold it.

Furthermore, aliens can reasonably be viewed as not "in amity" with the United States—the condition referred to by the *Wong Kim Ark* Court in its description of the "fundamental principle of the common law with regard to English

nationality," citing *Calvin's Case*[129]—because they are within the country against the will of the American people, in a continuous state of disobedience to United States law, and despite the efforts of the United States Government to apprehend and deport them. Such an interpretation would be consistent with Coke's use of the phrase in his report on *Calvin's Case*.[130]

3. "Subject To" Clause Requires Degree of Actual Power to Bring to Justice

It is clear that the framers understood their language to withhold citizenship from some U.S.-born persons, in addition to those within the common law "exceptions." The citizenship provision of the Civil Rights Act of 1866, upon which the Citizenship Clause was based,[131] states that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[132] The Citizenship Clause contains no such explicit exception for Indians. The framers believed that the "subject to the jurisdiction thereof" requirement was sufficient to achieve the desired result of excluding Indians still living in tribes. Such persons were seen as primarily subject to the jurisdiction of their tribes, a view subsequently upheld by the Supreme Court.[133] In other words the basis for placing persons in an excepted category was that they were not *fully* "subject to" the jurisdiction of the sovereign, in this case the United States.

The importance of the *degree* of the sovereign's jurisdiction was emphasized repeatedly by the congressional sponsors of the Fourteenth Amendment. In their view, birthright citizenship required the U.S.-born child to be *completely* subject to the jurisdiction of the United States. This meaning was necessary if one of the intended results of the Amendment—the exclusion of Indians still living within their tribe—was to be achieved. Senator Lyman Trumbull (R-Ill.), Chairman of the Senate Judiciary Committee and author of the "subject to"

129. *See supra* notes 121-23, 126-28 and accompanying text.
130. *See supra* notes 126-28 and accompanying text.
131. *See supra* note 112.
132. *See supra* note 111.
133. *See* Elk v. Wilkins, 112 U.S. 94, 101 (1884).

language, stated that "[t]he provision is, that 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens.' That means 'subject to the complete jurisdiction thereof.'"[134]

Sen. Jacob M. Howard (R-Mich.), floor manager of the Fourteenth Amendment and author of the rest of the Citizenship Clause, agreed. He argued that "'jurisdiction' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States . . . ; that is to say, *the same jurisdiction in extent and quality* as applies to every citizen of the United States now."[135]

Sen. George H. Williams (Union Rep.-Ore.), a member of the Joint Committee on Reconstruction and later United States Attorney General, made a similar statement:

> All persons living within a judicial district may be said, in one sense to be subject to the jurisdiction of the court in that district, but they are not in every sense subject to the jurisdiction of the court until they are brought, by proper process, within the reach of the power of the court. I understand the words here . . . to mean fully and completely subject to the jurisdiction of the United States.[136]

It is true that the statements of Senators Trumbull, Howard, and Williams were made in a discussion about Indians and the tribes' *formal* jurisdiction over them in most matters. However, the rationale that underlies the denial of birthright citizenship to the children of parents who are not fully subject to the formal jurisdiction of the United States applies also to parents who are continuously disobedient, yet cannot in a practical sense be brought before United States courts to answer for it. This rationale is that when the duty of full obedience to the sovereign is not in effect with respect to an individual—that is, when the individual is *not answerable* for acts of disobedience, or the individual's day-to-day actions are outside the formal scope of the sovereign's rules, as was the case with Indians still living in the tribes—the reciprocal duty of the sovereign to provide full protection is also not in effect, and hence the essential elements of the relationship between sovereign and subject are not present. Given this rationale, the insistence that

134. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).
135. *Id.* at 2895 (emphasis added).
136. *Id.* at 2897.

"jurisdiction should be complete and equal to that over citizens," and "the same jurisdiction in extent and quality as applies to every citizen," may reasonably be read as implicitly assuming a situation in which the sovereign has more than some minimum degree of actual power to bring the individual to justice for disobeying United States law. In other words, being fully subject *formally* to the jurisdiction of the United States is a necessary but not a sufficient condition.

This interpretation is, moreover, consistent with the literal meaning of the words "subject to" in the Citizenship Clause. One of the meanings given by Black's Law Dictionary for this phrase is "governed or affected by."[137] Webster's 1828 Dictionary defines "subject" in its adjective form as "[b]eing under the power and dominion of another . . . ."[138] As an example of this meaning, the definition provides the following: "Jamaica is subject to Great Britain."[139]

Furthermore, it would be reasonable for Congress to conclude that illegal aliens are not "subject to" the jurisdiction of the government in a manner similar to the rest of us, and that the federal government's actual power to bring illegal aliens to justice is insufficient to satisfy the constitutional standard for birthright citizenship. It seems indisputable that such power is substantially less than the power with respect to other violators of the law. The violation committed by illegal aliens—presence in the United States without legal authority—is in a practical sense invisible, although it continues for every instant that they are in the country. Unless they engage in other violations, illegal aliens are able continuously to ignore the law enacted by the representatives of the American people and disregard the authority of their government. Yet, they face relatively little risk of being brought to justice. This is not to say that illegal aliens may not find long-term residence here difficult due to the enforcement of laws making them ineligible for employment and most welfare.[140] However, because it is essentially only their status, and not their actions, which distinguishes them from the law-abiding persons around them,

137. BLACK'S LAW DICTIONARY 1594 (Rev. 4th ed. 1968).

138. N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 32 (not paginated).

139. *Id.*

140. *See supra* note 17.

even if the probability of their apprehension and prosecution were greatly increased it is unlikely ever to be equivalent to that of other lawbreakers.

D. Counter-Arguments

Proponents of the prevailing interpretation of the Citizenship Clause—that birthright citizenship for the U.S.-born children of illegal aliens is constitutionally required—offer two basic arguments.[141]

1. Required Jurisdiction Is Purely Formal

First, they argue that the jurisdiction required by the Citizenship Clause is purely formal[142] in that "subject to the jurisdiction thereof" means *formally* subject to United States law, in other words *liable* to prosecution for violating that law. It means that the federal government has a right to prosecute, but not necessarily that it has the actual power or the likely opportunity to do so. Furthermore, in their view, any person present in the United States is subject to its jurisdiction unless the person has formal immunity, the kind of immunity a diplomat has. A U.S.-born child is born subject to the jurisdiction of the United States if, at the time of birth, his or her parents are subject to its jurisdiction. Because illegal aliens are formally subject to United States law while in this country—they have no formal immunity—their American-born children are at birth subject to the jurisdiction of the United States and must be recognized as United States citizens.

In support of this position, proponents of the prevailing view refer to the common law birthright citizenship rules that the framers of the Fourteenth Amendment believed they had adopted in the Citizenship Clause. Proponents argue that because illegal aliens are not within one of the specific common law exceptions, the general territorial rule would apply to them. This would mean that their U.S.-born children would be

---

141. *See, e.g., 1995 Hearing, supra* note 3, at 74-91 (testimony of Walter Dellinger), 103-13 (testimony of Gerald L. Neuman); 4 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE 92.03[3] (rev. ed. 1995).

142. This differs from the view expressed here that, for purposes of the Citizenship Clause, a person is "subject to" the jurisdiction of the United States only if the federal government has more than some minimum degree of actual power to bring the person to justice for any violations of United States law.

American citizens at birth. Proponents believe that the alleged fact that this would be the result under the common law rules is evidence that the same result is correct under the Citizenship Clause itself because it was believed to incorporate those rules. Their analysis of the common law rules, like the analysis in this Article, is based primarily on *Wong Kim Ark.*

The most extensive recent presentation of this view was in testimony by then-Assistant Attorney General Walter Dellinger, representing the United States Department of Justice, at a 1995 joint hearing of two subcommittees of the House Judiciary Committee.[143] For the proposition that prior to the Fourteenth Amendment the common law conferred citizenship upon all persons born within the territory of the United States, in the absence of one of the traditional exceptions, he cited several cases.[144] Each of these cases was, however, decided before enactment of the first federal immigration statute that made the presence in the United States of certain aliens unlawful.[145] As a result, unqualified statements that were made in such cases—referring, for example, to "all persons" or "every person" born in the United States—were not even dicta with respect to illegal aliens, because such statements could not have been understood to cover them. This is true, too, of the several other authorities the testimony cites on United States law before the Fourteenth Amendment.[146]

---

143. *See 1995 Hearing, supra* note 3, at 74-91.

144. *See id.* at 78 n. 8; Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 119 (1804) (presuming that all persons born in the United States were citizens thereof); McCreery v. Somerville, 22 U.S. (9 Wheat.) 354 (1824) (in determining title to land in Maryland, Court assumed that children born in the state of an alien were native-born citizens of the United States); Lynch v. Clarke, 1 Sandf. Ch. 583 (N.Y. 1844) (in holding that child born in New York during temporary stay by alien parents was a citizen of the United States, the court conducted a thorough examination of the law and concluded that it entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen).

145. *See supra* notes 72-73 and accompanying text.

146. *See* Letter from Mr. March, Secretary of State to Mr. Mason, United States Minister to France (1854), *in* 2 FRANCIS WHARTON, DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 394 (2d ed. 1887) ("In reply to the inquiry which is made by you . . . whether 'the children of foreign parents born in the United States, but brought to the country in which the father is a subject, and continuing to reside within the jurisdiction of their father's country,—are entitled to protection as citizens of the United States,' I have to observe that it is presumed that, according to the common law, any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship. "); 10 Op. Att'y Gen. 328 (1862) (child born in the United States of alien parents who have never been naturalized is, by fact of birth, a native- born citizen of the United States); 10 Op. Att'y Gen. 382 (1862) (reaffirming general principle of citizenship by birth in the United

The testimony also cited *Wong Kim Ark* itself, and quoted several passages from its majority opinion. But the alien parents involved in that case were in lawful status, as has already been pointed out. Therefore, although this case is important as the most extensive Supreme Court description of the common law background to the Citizenship Clause, its holding does not cover the children of illegal aliens. Thus, any statement in the opinion which is broad enough to cover them is dictum.

One of the passages quoted from *Wong Kim Ark* was as follows:[147]

> The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including *all children here born of resident aliens,* with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of *all other persons,* of whatever race or color, *domiciled within the United States.* Every citizen or subject of another country, *while domiciled here,* is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."[148]

Despite the breadth of these statements, and of others in the Court's opinion, *Wong Kim Ark* is not direct authority for the proposition that the U.S.-born children of illegal aliens are United States citizens at birth. The Court's adoption of such a rule was not essential to its holding in favor of the U.S.-born person involved in the case, because his parents were *lawful* aliens. Thus, the statements are dicta.

States and rejecting the existence under law of a class of persons intermediate between citizens and aliens); FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 6-7 (1904) ("It is beyond doubt that, before the enactment of the civil rights act of 1866 . . . or the adoption of the constitutional 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" (citations omitted).).

147. This passage is cited by the Department of Justice in its hearing testimony. *See 1995 Hearing, supra* note 3, at 80.

148. *Wong Kim Ark*, 169 U.S. at 693 (emphasis added).

It is notable that the Court's statement refers to aliens who are "domiciled" in the United States, yet neither domicile nor residence would be required under the common law principles described by the Court elsewhere in the opinion. I point this out to show that some of the Court's statements, if read by themselves, can be misleading.

The Department of Justice argued that "[t]he only common law exceptions to this generally applicable rule of jus soli [149] were children born under three circumstances—to foreign diplomats, on foreign ships, and to hostile occupying forces—which, under principles of international law, were deemed not to be within the sovereignty of the territory."[150] The case relied upon for this proposition was again *Wong Kim Ark.* Although the Court's opinion in *Wong Kim Ark* does state the common law exceptions, it cites Dicey and quotes his description of the principles that underlie the general rule and its exceptions:

> The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the King of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown.[151]

This expresses the fundamental point—the real common law principle was that birthright citizenship followed from birth "within the allegiance," as I have explained at length. As Coke stated in his report on *Calvin's Case,* "It is neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born . . . ."[152]

---

149. Two basic principles for the acquisition of nationality at birth are known to international practice: the "jus soli," literally right of land or ground, by which conferment of nationality is based on birth within the national territory; and the "jus sanguinis," or right of blood, by which the conferment of nationality is based on descent, irrespective of the place of birth. T. ALEINIKOFF, D. MARTIN, AND H. MOTOMURA, IMMIGRATION, PROCESS AND POLICY 990 (3d. ed. 1995). Most nations apply only jus sanguinis. *See supra* note 87.

150. *1995 Hearing, supra* note 3, at 78.

151. ALBERT V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 173-77, 741 (1896).

152. 77 Eng. Rep. at 384 (7 Co. Rep. at 6a). BLACK'S LAW DICTIONARY *supra* note 137, at 1075, 1221, defines the Latin terms *ligeantia* and *obediantia,* respectively, as 'ligeance;

The Department of Justice also quoted Senator Jacob M. Howard (R-Mich.) when he proposed the definition of citizenship which became the opening sentence of the Fourteenth Amendment:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.[153]

Senator Howard explained that his proposed rule was not meant to include those discrete classes of persons excluded by the common law, "but will include every other class of persons."[154]

Senator Howard could not have meant this literally, because at least one class of persons not within a specific common law exception was understood as excluded by the jurisdiction requirement—Indians still living in tribes.[155] Furthermore, as in the case of the other cited authorities, such statements by the framers of the Fourteenth Amendment came at a time when the status of illegal alien did not exist.[156] Such pronouncements cannot reasonably be taken as evidence that the framers believed that the coverage of the Citizenship Clause was frozen forever, that the only classes of persons who could ever be excluded because of the jurisdiction requirement were those excluded in 1868. Such statements cannot be regarded as expressing the view that if at a later time a new class of person was present in the United States—a class whose relation to the United States Government was similar in fundamental ways to the relation between the persons covered in the common law exceptions and the Crown—the new class would necessarily have to be within the general rule, even if the "subject to" requirement allowed a different result.

In summary, the common law based arguments made by proponents are flawed in two important ways. First, their arguments oversimplify the common law in this area by describing it as a territorial general rule, combined with a fixed

---

allegiance' and 'obedience.'

153. *1995 Hearing, supra* note 3, at 79.

154. *Id.* (citing Cong. Globe, 39th Cong., 1st Sess. 2890 (1866)).

155. *See, e.g.*, Sen. Howard's own statements in Cong. Globe, 39th Cong., 1st Sess. 2895 (1866).

156. *See supra* notes 72-73 and accompanying text.

set of unchanging exceptions. This neglects not only the general rule's essential condition of birth "within the allegiance"—that there is a duty of obedience by the subject and protection by the sovereign—but the relation between that essential condition and the "exceptions." The latter were not really exceptions from the general rule as it actually existed, because they are not inconsistent with it. Rather, they were applications of the rule to particular factual circumstances that had thus far been judicially considered—circumstances that lacked the essential condition of birth within the allegiance.

In addition, their arguments implicitly assume that had the Fourteenth Amendment not been adopted, the common law birthright citizenship rules would never again have changed in response to new factual circumstances, that the common law rules were frozen in the form that existed at the time of ratification. Therefore, in their view, because the Citizenship Clause was understood by the framers to be based on those common law rules, its meaning is also frozen in that form — with the one additional exception of Indians still living in tribes. In fact, however, there are good reasons for believing that the common law rules were not frozen and would have changed in response to the presence of illegal aliens, whose U.S.-born children are arguably not born "within the allegiance."

Furthermore, the framers did not use language in the Citizenship Clause which expressly excludes only specific groups, such as Indians. Instead, they chose abstract language that they believed excluded Indians still living in tribes, as well as the persons covered by the traditional common law "exceptions," but which provides for the possibility that other groups could also be excluded.

Therefore, it is reasonable to believe that the Citizenship Clause does not exclude from birthright citizenship only the specific groups believed by the framers at the time of ratification to be excluded. Instead, the abstract language chose by the framers should be interpreted, if possible, in a way that is consistent with the principles underlying the common law rules such language was intended to reflect. Such principles include "birth within the allegiance."

As the Fourth Amendment's search and seizure coverage has been broadened to include telephone and other modes of

communication that did not exist in the Eighteenth Century, so should the set of specific groups that were not originally covered by the "subject to" clause be expanded as the principles underlying birthright citizenship are applied to new circumstances. The presence in the United States of a class of aliens not known to the common law or to the framers of the Fourteenth Amendment—illegal aliens—is such a new circumstance.[157] I have already explained why the U.S.-born children of illegal aliens are not born "within the allegiance,"[158] as required by the common law, and why their exclusion from birthright citizenship would be consistent with the jurisdictional language of the Citizenship Clause.[159]

One of the possibly key common law prerequisites for aliens to be born within the allegiance—being "in amity" while on the sovereign's territory—deserves additional emphasis because of its relevance to illegal aliens.[160] A part of Justice Gray's introductory explanation in *Wong Kim Ark* of what he called the "fundamental principle of the common law with regard to English nationality" was the statement that allegiance and protection "were predicable of aliens *in amity*."[161] The phrase "aliens in amity" came from *Calvin's Case*,[162] which Justice Gray described as the "leading case" on that fundamental principle. This condition—being present in the United States "in amity"—is arguably not one that illegal aliens can meet, as I have explained previously.

I will end this response to the first of the arguments made by proponents of the prevailing interpretation by considering a portion of Professor Gerald L. Neuman's testimony at the joint hearing cited earlier.[163] In his oral remarks, he presented an interesting explanation of the jurisdiction requirement:

> The meaning of the phrase "subject to the jurisdiction" . . . means actual subjection to the lawmaking power of the

157. I want to emphasize that I am referring to the application of the same constitutional principles to new factual circumstances. This has nothing to do with the jurisprudence that advocates "interpreting" the Constitution in a way that changes the principles or creates new principles.

158. *See supra* Section II.C.2.

159. *See supra* Section II.C.3.

160. *See supra* notes 121-23, 126-28, 129-30, and accompanying text.

161. 169 U.S. at 655. *See supra* notes 121-23 and accompanying text.

162. *See supra* notes 123, 126-28, 129-30 and accompanying text.

163. *See supra* note 3.

> United States . . . . The common law exceptions included children of foreign diplomats, who were *legally* immune from domestic law, and children born to women accompanying invading armies, who were *practically* immune from domestic law.[164]

This reference to being "practically immune" is close to the condition that I have argued makes illegal aliens not "subject to" United States law in the same sense as citizens and legal aliens. Professor Neuman clarified his meaning in the written testimony:

> The common law did not consider as subjects or citizens children born to aliens who did not enter the country as individuals, but rather entered *under the auspices of their governments with legal or factual immunity from local law.* Children born to ambassadors of foreign nations were covered by comity principles of international law that restrain the state's exercise of lawmaking power. Children born to parents accompanying an invading army, enter under extraordinary circumstances that *temporarily oust the operation of local law.*"[165]

It is certainly true, as a factual matter, that diplomats and occupying soldiers are "under the auspices of their governments," but Professor Neuman gives no citation for the view that this is an essential element of the two common law exceptions, or that excepted persons must either have immunity under international law or enter under circumstances that "temporarily oust the operation of local law."

As stated earlier, I believe that the words "subject to" in the Citizenship Clause must have either (a) a purely formal meaning under which the only U.S.-born children who are excepted from birthright citizenship are those whose parents have a *legal* immunity from prosecution, or (b) a practical meaning, which requires not only formal jurisdiction, but also more than some minimum degree of actual power on the part of the United States to bring the parents to justice for disobeying federal law. If Professor Neuman does not believe it is the latter, then it is unclear why he would refer to the "factual" or "practical" immunity of occupying soldiers. If the

164. *1995 Hearing, supra* note 3, at 103-104 (emphasis added).
165. *Id.* at 106 (emphasis added).

latter is indeed the correct meaning, then why must persons be "under the auspices of their government" in order to be insufficiently "subject to" the jurisdiction of the United States for their American-born children to receive birthright citizenship? This does not appear to have been necessary in order for an alien not to be "in amity" as that concept was used by Coke in *Calvin's Case*.[166]

The two traditional common law exceptions, diplomats and occupying soldiers, might be thought of as the core members, respectively, of two classes of exception. The first would include persons who had entered with consent, as agents of a foreign sovereign; who had *legal immunity* from much of the local sovereign's jurisdiction; and who received only limited governmental protection from the local sovereign. The second class would include persons who had entered the territory against the local sovereign's will, who had *practical immunity* from the local sovereign's jurisdiction, and who did not receive essential elements of governmental protection from the local sovereign.

2. Jurisdiction Requirement Same as in Equal Protection Clause

The second major argument made by proponents of the prevailing interpretation of the Citizenship Clause is based on the fact that the Equal Protection Clause contains a jurisdictional requirement with similar language. They argue that persons "within [a state's] jurisdiction" for purposes of the Equal Protection Clause must be "subject to the jurisdiction" of the United States for purposes of the Citizenship Clause. Therefore, because illegal aliens are covered in the Equal Protection Clause,[167] they must satisfy the jurisdiction requirement of the Citizenship Clause. For support, proponents cite a footnote from the majority opinion in *Plyler v. Doe*, in which Justice Brennan stated a view that was similar to one expressed by Justice Gray at one point in his opinion in *Wong Kim Ark*. Justice Brennan's footnote reads as follows:

> Although we have not previously focused on the intended meaning of this phrase [i.e., "within its jurisdiction" in the Equal Protection Clause of the second sentence of the

166. *See supra* notes 126-28.

167. *See* Plyler v. Doe, 457 U.S. 202, 215 (1982).

> Fourteenth Amendment], we have had occasion to examine the first sentence [i.e., the Citizenship Clause] . . . . Justice Gray, writing for the Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), detailed at some length the history of the Citizenship Clause, and the *predominantly geographic sense* in which the term "jurisdiction" was used. He further noted that it was "impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth Amendment (the Citizenship Clause)], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section [the Equal Protection Clause]; or to hold that persons 'within the jurisdiction' of one of the States of the Union are not 'subject to the jurisdiction of the United States.'" *Id.* at 687.
>
> Justice Gray concluded that "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." *Id.* at 693. As one early commentator noted, *given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance,* no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful. See C. Bouve, Exclusion and Expulsion of Aliens in the United States 425-427 (1912).[168]

Justice Gray's statement in *Wong Kim Ark* that persons "within [a state's] jurisdiction" for purposes of the Equal Protection Clause must be "subject to the jurisdiction" of the United States for purposes of the Citizenship Clause is dictum with respect to illegal aliens. *Wong Kim Ark* did not concern either illegal aliens or the Equal Protection Clause.

There are, moreover, good reasons for not believing that persons covered by one clause are necessarily covered by the other. The right to equal protection of the laws is not a "zero-sum game": Recognizing the right of illegal aliens to equal protection is not prejudicial to the possession of the same right by citizens and lawful aliens. This is not the case with citizenship. Additional citizens dilute the political power of preexisting citizens. Furthermore, not only are the consequences of the two clauses different, but so are their common law histories.

---

168. *Id.* at 211 n. 10 (emphasis added).

Like the first *Wong Kim Ark* statement he cites, Justice Brennan's footnote in *Plyler* is dictum. Although *Plyler* did involve illegal aliens, the issue was not whether the U.S.-born child of an illegal alien is a United States citizen at birth under the Citizenship Clause. Instead, the issue was whether the Equal Protection Clause prohibited a state law that denied a foreign-born illegal alien child a free education in the public schools. Not only did this dictum appear in a footnote, but Justice Brennan provided no support for his view beyond citing the *Wong Kim Ark* dicta and the assertion of Mr. Bouve. As a result, this dictum relying on dicta should not be accorded much weight.

Furthermore, Justice Brennan's assertion about "the historical emphasis on geographic territoriality, bounded, if at all, by principles of sovereignty and allegiance" is quite misleading. The use of the "if at all" phrase questions the significance of what has clearly been a central element of the common law in this area—"birth within the allegiance"—which, as I have explained, undoubtedly requires more than birth on the sovereign's territory. The second *Wong Kim Ark* quotation, from page 693 of Justice Gray's opinion, is also questionable because it begs the fundamental question of whether illegal aliens are "within the allegiance and the protection" of the United States in the common law sense understood by the framers of the Fourteenth Amendment. I have already explained why I believe there is a reasonable argument that they are not.

III. CONCLUSION

The needed changes in the current census and birthright citizenship policies should be treated by Congress as matters of high priority. Such policies have several harmful outcomes, including perverse effects on incentives important to the control of illegal immigration. But the most important impact, the one that makes change so urgent, relates to political power. It relates to the question of whether legitimate citizen majorities in all areas of this country will have their rightful share of power over the making and enforcement of laws—a key element in the determination of America's future.

This Article has explained how each of the two policies can lead to a decline in such political power. If these policies are maintained, and illegal immigration continues to grow and

spread to new areas, this decline will be increasingly likely to make a significant difference in legislative votes at the national and state levels, and in electoral votes for President. Ultimately, these policies threaten the ability of the majority of Americans to ensure that political control at every level of government will always remain with them and their descendants—plus those persons, and only those persons, to whom they have given their consent to join the American political community.

The needed reforms should be completed expeditiously. If the policy of counting illegal aliens for apportionment is not changed soon, it will be too late for the next census in 2000. In that event, the effect of current policy on representation in the Congress and the state legislatures, and on electoral votes in Presidential elections, will continue for another decade. How deeply depressing it would be if the new millennium began with such powerful evidence of the declining ability—and perhaps the declining will—of the American people to control the future of their nation.

With respect to the current birthright citizenship policy, in every week that passes thousands more children of illegal aliens are born in this country, and each is now granted citizenship. The political impact of such individuals increases greatly when, at age eighteen, they reach voting age and when, at age twenty-one, they can petition for the legal immigration of their parents and other relatives, each of whom can naturalize and each of whom can petition for additional immigrants who may also become citizens. I ask again—who should decide which persons may join our political community and thereby acquire a share of political power?

The thesis of this Article is that the needed changes can be accomplished by statute. If, however, either change cannot be made in this way without significant delay, because the President, Congress, or even the Supreme Court believes that the Constitution precludes it, then a constitutional amendment should be pursued until ratification is achieved. If these reforms are not accomplished one way or another soon, "We the People of the United States" risk losing control of the nation's future.