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Wong Kim Ark and Sentencia que Declara Constitucional La Ley General de Migración 285-04 in Comparative Perspective: Constitutional Interpretation, Jus Soli Principles, and Political Morality

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**Wong Kim Ark and
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and Political Morality**

Patrick J. Glen*

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When the rights of even one human being are held in contempt the rights of all are in danger. We cannot destroy the liberties of others without losing our own. By exciting the prejudices of the ignorant we at last produce a contempt for law and justice, and sow the seeds of violence and crime. . . .After all, it pays to do right. This is a hard truth to learn – especially for a nation. A great nation should be bound by the highest conception of justice and honor. Above all things it should be true to its treaties, its con-

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tracts, its obligations. It should remember that its responsibilities are in accordance with its power and intelligence.¹

- Colonel R.G. Ingersoll

I. INTRODUCTION

The ongoing debate over immigration reform in the United States encompasses a plenitude of issues that would require their own article to adequately list and explore. From this store of controversial statements and counter-statements of principle, policy, and law, I wish to address only the question of to what degree the Fourteenth Amendment, from an interpretive perspective, binds one to the (once) accepted proposition that, save for presently irrelevant classes of individuals, children born on United States soil are entitled to United States citizenship. This principle, once itself a palliative to the racism of an earlier period, is being increasingly targeted by immigration reformers because of its apparent effect of rewarding the children of undocumented aliens present in the U.S. at the time of birth. Given an ever expanding class of undocumented aliens, this means that the ranks of U.S. citizens will swell, with the accompanying extension of all the rights and benefits that attend such status, but this swelling will occur due to the actions of individuals not legally present in this country. There is already an excellent body of literature, pro and con, on the issue of whether the children of undocumented aliens should be granted U.S. citizenship at birth, and I see no reason to add to a corpus that seems, by my measure anyway, more or less complete.² My purpose concerns less the question of how law must

1. Col. R. G. Ingersoll, *Should the Chinese Be Excluded?*, 157 N. AM. REV. 52, 55, 58 (1893). Ingersoll's commentary is included with commentary by Representative Geary of California, *id.* at 58-67, who had been the principal acting force behind the Chinese registration law, the Geary Act, ch. 60, 27 Stat. 25 (1892), that extended by a decade the operation of the Chinese Exclusion laws and which was upheld by the Supreme Court in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

2. See generally PETER SCHUCK & ROGERS SMITH, *CITIZENSHIP WITHOUT CONSENT* 90-116 (Yale University Press, 1985); Christine J. Hsieh, *American Born Legal Permanent Residents? A Constitutional Amendment Proposal*, 12 GEO. IMMIGR. L.J. 511 (1998); Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237 (1994); Natalie Smith, *Developments in the Legislative Branch: Bill Challenges Birthright Citizenship*, 20 GEO. IMMIGR. L.J. 325 (2006); Charles Wood, *Losing Control of America's Future - The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465 (1999); Robert J. Shulman, Comment, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669 (1995); Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994).

be interpreted, framing that inquiry as the objective pursuit of some “correct” answer to the *jus soli* dilemma, than how we should interpret the legally operative provisions of our constitution in light of our commitment to liberal democratic principles. Thus, I wish to examine the *jus soli* issue from a doctrinal and philosophical point of view, while leaving the most controversial interpretative dilemmas at the threshold. I seek not to answer the question how we *may* go about remedying a perceived ill in our system of immigration and citizenship law, but rather the question of how we *should* do so, if in fact any action can be countenanced by our deeper and more fundamental political commitments.

This inquiry will be undertaken in a comparative perspective to highlight those ideals that most caution against quick and overbroad remedies that may, in the not too distant future, look like total abrogations of our constitutional heritage. Part II of the present article thus looks to two constitutional provisions that seem to guarantee, from a purely semantic perspective, the same sort of claim to citizenship by way of *jus soli*: the Fourteenth Amendment of the U.S. Constitution, and Article 11 of the Constitución Política de la República Dominicana. Part III examines the definitive interpretation given to the Citizenship Clause of the Fourteenth Amendment by the U.S. Supreme Court in the case of *United States v. Wong Kim Ark*.³ Part IV presents the response of the Supreme Court of the Dominican Republic to a law passed by the national legislature defining the exact parameters of the classes of individuals explicitly stated as ineligible for *jus soli* citizenship. A contrast and comparison of these decisions is the content of Part V, with the overarching purpose of determining to what extent our political organs are bound by the established interpretation of our constitution and what altering that interpretation might entail.

II. COMPARATIVE CONSTITUTIONALISM AND THE PRINCIPLE OF *JUS SOLI*: THE FOURTEENTH AMENDMENT AND ARTICLE 11

There are no other amendments in the United States Constitution so intractably bound to history as the Civil War Amendments. The Thirteenth Amendment most directly addresses the blight of the institution of slavery, rendering unconstitutional both slavery and involuntary servitude,⁴ but it is the Citizenship

3. 169 U.S. 649 (1898).

4. U.S. CONST. amend. XIII, § 1.

Clause of the Fourteenth Amendment that reverses the most explicit pronouncement concerning the political effects of that dehumanizing institution. That statement is, of course, Chief Justice Roger B. Taney's opinion for the Supreme Court in *Dred Scott v. Sandford*,⁵ a decision second to none in the annals of despised American jurisprudence.⁶ Without reciting the whole of the procedural history behind the decision, it must only be stated that a fundamental aspect of the case turned on whether Dred Scott, a slave, was a citizen, thus allowing him standing to bring suit in a court of the United States pursuant to jurisdiction granted by the Constitution.⁷ The Chief Justice framed the issue thusly: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?"⁸ What is at issue is the status of those persons who are descendants of slaves, namely those that were born in the U.S. to emancipated parents or to slaves who later became emancipated.⁹ The Court's conclusion:

We think they are not [citizens], and that they are not included, and were not intended to be included, under the words 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges[.]¹⁰

Of course, before this language could be formally reversed by amendment, a Civil War intervened.

In 1868, the decision was formally overturned by the amendment process, and the Fourteenth Amendment, seeking to eradi-

5. 60 U.S. (19 How.) 393 (1856).

6. *Plessy v. Ferguson*, 163 U.S. 537 (1896), comes closest, but inherent in the separate-but-equal doctrine is a notion of equality – watered down past the point where it makes sense to call it equality – yet nonetheless a significant step forward from the stripping of all political and civil identity occasioned by the *Dred Scott* decision.

7. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

8. *Dred Scott*, 60 U.S. at 403.

9. *Id.*

10. *Id.* at 404-05.

cate a swath of ills, came into being. What is of importance here is the first sentence of the first section of that amendment: "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."¹¹ This clause reestablished the *jus soli* principle in United States law as a constitutionally protected right.¹² Although present debate over whether to extend *jus soli* citizenship to the children of undocumented aliens has rested, at least in part, on an original understanding of this amendment, there is substantial evidence tending to establish that the framers understood the expansive grant of right they were embodying with the language they chose.¹³ And how expansive is this clause? It applies to every child born to parents who are "subject to the jurisdiction" of the U.S., which means every child born in the U.S. save for those born to foreign diplomats, foreign soldiers, and at least as an original matter, Native Americans. These classes of individuals are not subject to the jurisdiction of the U.S.; diplomats because of diplomatic immunity, foreign soldiers because of combatant immunity, and Native Americans because of separate sovereignty issues.¹⁴ Yet how expansively must one interpret that pivotal phrase, "subject to the jurisdiction thereof"? That is the subject of the subsequent section dealing with *Wong Kim Ark*. For now, one must only keep in mind the limited nature of the exceptions to the Fourteenth Amendment's *jus soli* principle that were firmly established in 1868 and which a logical reading of its language will uphold.

11. U.S. CONST. amend. XIV, § 1.

12. Reestablished, because, despite the Court's holding in *Dred Scott* and the lack of explicit language in the constitution, *jus soli* had been generally accepted at common law and in the infancy of the United States. See, e.g., Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73 (1997); Jonathon C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667 (1995); see also *Inglis v. Trustees of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 164 (1830) (Story, J.) ("Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.").

13. See James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2d 367 (2006).

14. See *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that Native Americans, born on tribal land, did not have a right to citizenship under the Fourteenth Amendment). This fact was reversed in 1924 when Congress granted U.S. citizenship to Native Americans in the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253. See also John Rockwell Snowden, Wayne Tyndall & David Smith, *American Indian Sovereignty and Naturalization: It's A Race Thing*, 80 NEB. L. REV. 171 (2001).

The provision in the Dominican Republic's Constitution is similar, though not identical, with its United States counterpart: "Art.11. – Son dominicanos: 1. Todas las personas que nacieren en el territorio de la República, con excepción de los hijos legítimos de los extranjeros residentes en el país en representación diplomática o los que están de tránsito en él."¹⁵ This paragraph is semantically distinct from the Fourteenth Amendment, but its legal effect seems to be virtually identical. Whereas the exception for the children of diplomats was a background common law principle read into the U.S. Constitution by the Supreme Court, Article 11 makes the exception explicit. The "foreigners in transit" exception is broader than any other exception that has been read into the U.S. Constitution, such as the exception for children born to parents in an invading army, but the logical import of its language is not such as would swallow a more general rule. Transit, by any definition, implies a temporal and intentional limitation on a stay, and so anybody within the Dominican Republic indefinitely would not be able to claim *jus soli* citizenship for children born to them during the duration of that stay.

Leaving behind the bare analysis of the language of these provisions, it is worth taking stock here of how these provisions could conceivably be applied to undocumented aliens in the respective countries. In relation to the Fourteenth Amendment, there is not explicit language limiting *jus soli* rules to lawfully present individuals; rather, the language extends to all people "subject to the jurisdiction" of the United States.¹⁶ As such, there seems to be no reason, as a semantic, logical or legal matter, not to extend *jus soli* citizenship to the children of undocumented aliens. In regards to the Dominican Constitution, the answer remains the same barring one major caveat: the undocumented aliens must have an intent to stay indefinitely.¹⁷ This may seem like a small point to make, but nonetheless, seasonal workers, such as migrants, would not be eligible to take advantage of the Article 11, paragraph 1 grant of citizenship. Here it is clear that Article 11 is broader in its restriction than the Fourteenth Amendment, but so long as the aliens intend on staying in the country, then there is no inherent

15. Constitución Política de la República Dominicana de 2002, art. 11, para. 1 ("Dominicans are: 1. All persons who have been born in the territory of the Republic, except for the legitimate children of foreign diplomats resident in the country or foreigners who are in transit.").

16. See U.S. CONST. amend. XIV, § 1.

17. See Constitución Política de la República Dominicana 2002, art. 11, para. 1.

limitation in this provision that would foreclose the extension of the *jus soli* principle.

III. UNITED STATES V. WONG KIM ARK: SOLIDIFYING PRINCIPLE

The debate over the exact parameters of the Citizenship Clause, raging since the debates over the Fourteenth Amendment, finally came to a definitive jurisprudential head in 1898.¹⁸ Without exploring the history of immigration law during this period, it is worth noting that immigration policy was concerned mainly with one group: the Chinese.¹⁹ Congress was given a virtual blank check during this period to both exclude and deport aliens present within the U.S. in language that made clear both of these acts could be undertaken solely because of the alien's race.²⁰ Although

18. See Bernadette Meyler, Article, *The Gestation of Birthright Citizenship, 1868-1898 States' Rights, The Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519 (2001).

19. For an assortment of different accounts of this era, as well as its ramifications for future U.S. immigration law and policy, see generally Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 LAW & SOC'Y REV. 249 (2006); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1 (2000); Henry S. Cohn & Harvey Gee, "NO, NO, NO, NO!": *Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1 (2003); Richard P. Cole & Gabriel J. Chin, *Emerging From the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325 (1999); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F.L. REV. 353 (1995); Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223 (1994); Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529 (1984); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55 (1996); Emily Ryo, Article, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 LAW & SOC. INQUIRY 109 (2006); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003); Jan C. Ting, "Other Than a Chinaman": *How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995); Ming-sung Kuo, Article, *The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases Revisited*, 67 ALB. L. REV. 27 (2003).

20. On excludability see *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889) (implicitly upholding the Chinese Exclusion Act by way of finding an implicit and sole Congressional power to regulate immigration that

not every decision before 1898 relating to the Chinese was a total loss,²¹ even when they were victorious before the high court, the opinions were consumed with prejudice.

Amidst this backdrop of racial animus, Wong Kim Ark was born in San Francisco, California in 1873.²² Ark's parents were of Chinese descent and were not themselves U.S. citizens, but rather citizens of China. In 1890, he and his parents left California for China on a temporary visit. Upon his return, he was permitted entry to the U.S. on the ground that he was a native born citizen. In 1894 Wong Kim Ark again departed for China, but returned to the U.S. in August 1895. At that point, he was denied entry on the ground that he was not a U.S. citizen. The importance of this distinction lay with the application of the Chinese Exclusion Acts that, if he were a U.S. citizen, would not apply to him. The question, as phrased by Justice Gray for the 6-2 majority,²³ was "whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China. . . becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution[.]"²⁴ Yet, because the Constitution does not define the term "citizen," to inform the court relating to the Citizenship Clause, an examination of the common law must be undertaken.²⁵

At common law, the fundamental principle relating to English nationality was that of *jus soli*; children born in England, including to friendly aliens, would be deemed natural-born subjects.²⁶ The only exceptions to this principle were children born to foreign

included the power to exclude aliens solely because of their race). On deportability see *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding a law requiring Chinese aliens to register with the federal government, with the failure to do so resulting in deportation).

21. See *Wong Wing v. United States*, 163 U.S. 228 (1896) (striking down a law imposing one year of hard labor on Chinese aliens found to be present illegally in the U.S. prior to deporting them, in the absence of a trial); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding Chinese aliens present in the U.S. entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment, in the process of striking down a local ordinance neutral on its face but discriminatorily applied).

22. The facts stated herein are taken from Justice Gray's recitation in *United States v. Wong Kim Ark*, 169 U.S. 469, 652-53 (1898).

23. Justice Joseph McKenna, though an Associate Justice by the time the case was decided, had not been confirmed as a member of the Court when the case was argued, and thus took no part in the decision. See *id.* at 705.

24. *Wong Kim Ark*, 169 U.S. 649, 653.

25. *Id.* at 654.

26. *Id.* at 655.

diplomats and those born to alien enemies.²⁷ The validity of this principle in England prior to the American Revolution was attested to by an examination of case law, including the famous exposition of *jus soli* in Calvin's Case.²⁸ This principle was also, from the beginning and through the present, operative in the United States.²⁹ A broader examination of international law led Justice Gray to the conclusion that at the time the Fourteenth Amendment was adopted, there was no general and well-accepted rule inconsistent with that of the *jus soli* principle.³⁰ Regardless, it is the "inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."³¹ Thus, the true question is, 'what does the citizenship clause of the U.S. constitution mean,' not 'what are other countries doing?'

The outcome of this analysis is betrayed by Justice Gray's first sentence in Part V of his opinion: "the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms" by the Fourteenth Amendment.³² The phraseology, not universal but surely general, is meant to limit the extension of citizenship solely because of territorial or jurisdictional limitations, not because of race or color.³³ This interpretation is bolstered by the opinions of the Court in the *Slaughter House Cases*³⁴ and *Elk v. Wilkins*³⁵, the only prior cases that by necessity had to address the meaning of the Citizenship Clause. "All persons born" means all persons born, except to the extent that limitations arise from the qualification of "and subject to the jurisdiction thereof." Yet all this qualification does is reestablish the common law understanding of *jus soli*, excluding the children born to foreign diplomats and enemy aliens from the operation of the principle³⁶, a fact the Supreme Court has long recognized.³⁷ Thus, the totality of the foregoing considerations and

27. *Id.*

28. *United States v. Wong Kim Ark*, 169 U.S. 649, 655-58 (1898); *see also* Price, *supra* note 12.

29. *See Wong Kim Ark*, 169 U.S. at 658-66.

30. *Id.* at 667.

31. *Id.* at 668.

32. *Id.* at 675.

33. *Id.* at 676.

34. *See United States v. Wong Kim Ark*, 169 U.S. 649, 676-80 (1898) (citing *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

35. *See Wong Kim Ark*, 169 U.S. at 680-82 (citing *Elk v. Wilkins*, 112 U.S.94 (1884)).

36. *Wong Kim Ark*, 169 U.S. at 682.

37. *See generally* *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819) (discussing

authorities leads to the conclusion that the Fourteenth Amendment, by its clear terms, establishes the U.S. citizenship of every child born within its jurisdiction, no matter the race or color, so long as they do not fall within one of the recognized exceptions to *jus soli*.³⁸

This is all well and good in principle, but what of the Chinese themselves, whom Congress has seen fit to single out for restrictions on entry? Absent a constitutional provision limiting the powers of Congress or the Executive, they have broad powers to limit or exclude any type of person they wish. Yet, just as this is the case, it is equally true that it is the province of the Judiciary to give full effect to any constitutional provision that does speak directly to an issue – as the Fourteenth Amendment does in this case.³⁹ The Court had already held that Chinese aliens, resident in the United States, despite their continued status as subjects of the Chinese emperor, were “persons” within the meaning of the Equal Protection Clause of the Fourteenth Amendment.⁴⁰ Having previously held these aliens to be within the jurisdiction of the state of California, it would be contradictory to not also deem them within the jurisdiction of the United States for purposes of the Citizenship Clause.⁴¹ In fact, although the present case represented the first time the issue was squarely presented before the court, (*i.e.*, whether the child of Chinese aliens born within the U.S. was a citizen), the Court had previously assumed that would be the legal effect of such an occurrence, although it had found proof of such a birth lacking.⁴² In short, no matter how extensive congressional and executive power is in the fields of exclusion, deportation, and naturalization, *jus soli* operates independently and solely by the fact of birth within the jurisdiction of the country. As such, the fact

that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution: ‘All persons born in the United States,

the application of U.S. jurisdiction to enemy aliens); *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (discussing the application of U.S. law to foreign parties and their exemption from U.S. jurisdiction).

38. See *Wong Kim Ark*, 169 U.S. at 693.

39. See *Wong Kim Ark*, 169 U.S. at 693.

40. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

41. See *United States v. Wong Kim Ark*, 169 U.S. 649, 696 (1898).

42. See *Quock Ting v. United States*, 140 U.S. 417 (1891).

and subject to the jurisdiction thereof, are citizens of the United States.”⁴³

Wong Kim Ark was born on United States soil, is certainly subject to the jurisdiction thereof, and has done nothing to forfeit the grant of citizenship he became endowed with by the operation of these foregoing facts. He was, thus, a citizen of the United States, and could not be denied entrance pursuant to the Chinese Exclusion Acts.

Chief Justice Melville Fuller, joined by Justice John Marshall Harlan, dissented.⁴⁴ Although there is language at the beginning of the dissent tending to rest the opinion on support of *jus sanguinis* citizenship rather than *jus soli*, especially in light of what the majority’s reasoning allegedly perpetrates on the children born to U.S. citizens who are abroad at the time of birth, the dissent is, in fact, far more radical than that.⁴⁵ It represents not only the advocacy of a different principle to govern citizenship, but an abrogation of the legal hierarchy that had governed since *Marbury v. Madison* and a return to a plenary power of Congress in regards to naturalization and citizenship that would, if it was the desire of that body, return the country to the principle of *Dred Scott*.⁴⁶ This might seem like a harsh assessment, but the language of the dissent, most clearly the closing two pages, support it.⁴⁷

First, based on an assessment of treaty law between the U.S. and China, and of Chinese and U.S. law on naturalization, the Chief Justice states that, in his opinion and taking into account all of these sources, “the children of Chinese born in this country do not, ipso facto, become citizens of the United States unless the fourteenth amendment overrides both treaty and statute.”⁴⁸ One

43. *Wong Kim Ark*, 169 U.S. at 704.

44. See *Wong Kim Ark*, 169 U.S. at 705-732 (Fuller, C.J. & Harlan, J., dissenting). For an interesting article on Justice Harlan’s voting in the Chinese cases as compared with the reputation garnered by his lone dissent in *Plessy v. Ferguson*, see Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Case*, 82 IOWA L. REV. 151 (1996).

45. See *Wong Kim Ark*, 169 U.S. at 705-732 (Fuller, C.J., dissenting). Fuller also makes much of the notion of “allegiance” and how a child born here, if granted citizenship, would have divided allegiances. This is, of course, a confusion of terms, using as synonyms allegiance and citizen, although there is no necessary relationship past the purely semantic or formal.

46. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

47. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) at 731-732 (Fuller, C.J., dissenting).

48. *Id.* at 732.

would have thought the question of the constitutional hierarchy had been put to rest by the former Chief Justice, John Marshall.⁴⁹ Nonetheless, and in pursuit of a return to the pre-Civil War *Dred Scott* understanding of citizenship, Fuller goes even further: "is it not the proper construction that all persons born in the United States or parents permanently residing here, *and susceptible of becoming citizens, and not prevented therefrom by treaty or statute*, are citizens, and not otherwise?"⁵⁰ This is a quite convenient interpretation, because the Chinese were the only ones *not* susceptible of becoming citizens by way of naturalization. Far from being a better "interpretation" from any objective point of view, this language is clearly a subjective manifestation of prejudice, masquerading in the garb of impartial adjudication. The interpretation no doubt furthers the animus of the day, but Fuller wishes to go even further—to read the Citizenship Clause entirely out of the Fourteenth Amendment: "I am of opinion that the president and senate by treaty, and the congress by legislation, have the power, *notwithstanding the fourteenth amendment*, to prescribe that all persons of a particular race, or their children, cannot become citizens," with the corollary that those so allowed to enter cannot bestow citizenship upon their children simply by the fate

49. *Marbury*, 5 U.S. (1 Cranch) at 176-78.

"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void." *Id.*

Fuller would fall on the opposite side of Marshall's disjunction.

50. *Wong Kim Ark*, 169 U.S. at 731 (Fuller, C.J., dissenting) (emphasis added).

that their children were born in the U.S.⁵¹

In Fuller's interpretation of the Citizenship Clause, then, there is an odd reversal of interpretation. The language of the fourteenth amendment itself has absolutely no bearing on citizenship. The question for Fuller and Harlan is not whether this child was born in the U.S. or subject to the jurisdiction thereof (a test that would seem to be the sole one pursuant to the Constitution), but whether his or her parents have the ability, under U.S. or foreign law, statutory or treaty-based, to become citizens of the U.S. themselves! A clause that, by any logical reading, is focused on the child is meant to depend entirely on the status of the parents. Thus Fuller's exposition of the Citizenship Clause goes:

the fourteenth amendment does not exclude from citizenship by birth children born in the [U.S.] of parents permanently located therein, and who might themselves become citizens; nor . . . does it arbitrarily make citizens of children born in the [U.S.] of parents who, according to the will of their native government and of this government, are and must remain aliens.⁵²

And, as Wong Kim Ark is a child of Chinese parents, who themselves cannot be naturalized because of U.S. law, Ark himself is not a citizen and can be legally denied admission to the United States.

Whatever one's view of the majority's reading of the Amendment, expansive as it undoubtedly is, the dissent is anything but persuasive. If there is a way to limit the reach of the Citizenship Clause, that objective should not be attained by ignoring the clear language of the Amendment and making the operation of the principle depend on an exterior criterion that has never been legally embraced. The conflation of allegiance and citizenship (while still confused and unpersuasive), is closer to a legitimate jurisprudential limitation to the apparent *jus soli* principle in the clause than the interpretation that leads directly to the only result countenanced by Congress and the Executive in enacting exclusion laws targeting the Chinese. The principle Fuller states could be broad, but there is no doubt who it was meant to apply to. Fuller, with a majority, would have succeeded in perpetrating a kind of *Dred Scott II*, relegating an entire race to a hinterland somewhere outside the potential bounds of U.S. citizenship. Although that

51. *Id.* at 731-32 (emphasis added).

52. *United States v. Wong Kim Ark*, 169 U.S. 649, 732 (1898).

interpretation did not carry the day a century ago, there is no reason to think we are permanently out of those woods.

The parameters of the *jus soli* principle, as stated by the court in *Wong Kim Ark*, have never been seriously questioned by the Supreme Court, and have been accepted as dogma by lower courts. Typical of this acceptance is the Ninth Circuit's statement that "United States nationality depends primarily upon the place of birth, the common law principle of *jus soli* having been embodied in the Fourteenth Amendment of the Constitution[.]"⁵³ The Supreme Court cases since 1898 dealing with citizenship have focused predominantly on questions relating to what extent and in what manner Congress may regulate citizenship outside the principles stated in the Citizenship Clause of the Fourteenth Amendment.⁵⁴ This is not to say the *jus soli* principle that now prevails in U.S. immigration law is concrete. Rather, like any constitutional interpretation, it retains a certain fluidity, at least potentially. Nonetheless, at least now in 2008, the same interpretation prevails and there is little reason to think that the Supreme Court will reverse itself on this point, especially considering more recent decisions explicitly addressing undocumented aliens within the U.S. polity.⁵⁵

53. *Cabebe v. Acheson*, 183 F.2d 795, 797 (9th Cir. 1950).

54. *See, e.g., Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001) (upholding the constitutionality of section 309 of the Immigration and Nationality Act, 8 U.S.C. § 1409, which creates a statutory distinction concerning the conferral of citizenship on children born out of wedlock depending on whether the individual seeking such conferral is the father or mother); *Miller v. Albright*, 523 U.S. 420 (1998) (same); *Rogers v. Bellei*, 401 U.S. 815 (1971) (upholding a provision of the INA that required a foreign-born U.S. citizen to reside in the U.S. for at least five years prior to their 28th birthday in order to retain that citizenship); *Weedin v. Chin Bow*, 274 U.S. 657 (1927) (upholding a statute prohibiting a child born outside the U.S. from claiming U.S. citizenship through a U.S. citizen parent who had not lived in the U.S. prior to the child's birth).

55. *See Plyler v. Doe*, 457 U.S. 202 (1982) (holding that a Texas statute directing the withholding of state funds from school districts for the education of children illegally present in the United States was a violation of the Equal Protection Clause of the Fourteenth Amendment); *but see Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that a company could withhold back pay from an undocumented alien worker who was illegally fired, even though such back pay would be a normal part of the remedy for the time the individual was not working).

IV. *SENTENCIA QUE DECLARA CONSTITUCIONAL LA LEY
GENERAL DE MIGRACIÓN 285-04: STATUTORY
ABROGATION OF CONSTITUTIONALLY
GUARANTEED RIGHTS*

The opinion of the Dominican Republic's Supreme Court of Justice in *Sentencia Que Declara Constitucional la Ley General de Migración 285-04*⁵⁶ reads like an adoption of the principles set out in Chief Justice Fuller's dissent in *Wong Kim Ark*. And, unfortunately for that nation, a similar disdain and prejudice for a certain class of aliens, in this case Haitians and Dominicans of Haitian descent, went a long way in structuring the Court's opinion. Social mores and opinions undoubtedly operated on the U.S. Supreme Court during this period as well, but in two key cases, *Yick Wo* and *Wong Kim Ark*, the Court was able to look past the class of individuals at issue and read the Constitution for what it was and is: a document that "neither knows nor tolerates classes among citizens."⁵⁷ Justice Gray states unequivocally for the Court the fundamental justification for judicial review: that even though Congress and the Executive have broad and extensive powers, the Constitution itself will operate as the check, limit, and touchstone of those powers, and no statute or treaty can operate to divest the Court of its power to gauge legislative or executive action by the measuring stick of that document.⁵⁸ Congress and the President have broad powers indeed, but not infinite power. This is a lesson forgotten by the Dominican court, which happily ceded its jurisprudential mission to the legislature in the face of a controversy it was simply not up to confronting directly. Before addressing this decision itself, however, a slight glance at the history and current events that informed it should be examined. Context is both everything and nothing in the law; while it informs our decision mak-

56. Daniel Valcarcel, *Suprema Corte De Justicia: Sentencia de Pleno del 15 de Diciembre de 2005*, 12 FORO CONSTITUCIONAL IBEROAMERICANO 1279-1288 (2005-2006) (Dominican Republic) (unpublished comment), available at <http://www.uc3m.es/uc3m/inst/MGP/FCI12SRD1.pdf>.

57. *Plessy v. Ferguson*, 163 U.S. at 559 (1896) (Harlan, J., dissenting). I am aware of the irony of using this quote, and perhaps do it solely for that reason. Harlan does mention the Chinese in his opinion, but seemingly only to note the true horrific extent of the Louisiana law, i.e., as if to say even the Chinese can ride in the same car as whites, so how could you exclude blacks? See also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding Chinese aliens present in the U.S. entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding that the Fourteenth Amendment granted citizenship to persons of Chinese descent born in the United States).

58. See *Wong Kim Ark*, 169 U.S. at 694-704.

ing ultimately we must understand that the provisions of the Constitution it helps us interpret are principled and increasingly acontextual.

Tension on the island of Hispaniola (on which the Dominican Republic occupies the eastern-most two-thirds and Haiti the western remainder), has existed since at least 1801 when, because of the spillover effect of the Haitian revolution onto the Dominican side, the Dominican Republic came under Haitian rule.⁵⁹ As a result of this extensive history, "this tension has become entrenched in all corners of Dominican society and manifests itself as xenophobia with overtones of racism."⁶⁰ This fact is exacerbated by the dramatic flow of illegal immigration of Haitians into the Dominican Republic, making an exact estimate of how many Haitians are currently living in the D.R. a matter of politically motivated manipulation.⁶¹ A logical response to such trends is to legislate on immigration matters, but there are good and bad ways to go about this. Migration Law 285-04, which, through a definitional reworking of the constitutional exceptions for the granting of *jus soli* citizenship, excludes the children of illegal immigrants from the purview of Article 11, paragraph 1,⁶² is representative of the latter, rather than the former.

As Baluarte writes, this law, passed in August of 2004, "is an illustration of the general trend in the Dominican Republic to legislate anti-Haitian sentiments."⁶³ Further, illustrations of governmental support for institutionalized racism occurred subsequent to a wave of violence set off in the wake of a May 2005 murder of a Dominican woman.⁶⁴ The D.R.'s Secretary of Labor "announced a plan to 'dehaitianize' the country," while the Public Ministry openly justified vigilante attacks against Haitians.⁶⁵ More ostensibly, legal action was taken as well, with massive expulsions and

59. See David C. Baluarte, *Inter-American Justice Comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash*, 13 NO. 2 HUM. RTS. BRIEF 25, (2006); see generally, LAURENT DUBOIS, *AVENGERS OF THE NEW WORLD, THE STORY OF THE HAITIAN REVOLUTION* (Belknap Press of Harvard University Press) (2004).

60. Baluarte, *supra* note 59, at 25.

61. Estimates range from the 4,205 Haitians that government official records show, through the 300,000 that non-governmental organizations that work with Haitian communities estimate, up until the number 1 million, which is the figure many Dominican nationalist groups have floated in the debate. *Id.*

62. See Constitución Política de la República Dominicana de 2002, art. 11, para. 1; see also Valcarcel, *supra* note 56.

63. Baluarte, *supra* note 59, at 25.

64. See *id.* at 25-26.

65. *Id.*

deportations of Haitians, including one weekend where over 2,000 were forcibly and violently deported.⁶⁶ Against this backdrop, the Dominican Republic also legislated a number of cumbersome procedures whereby parents could validate the birth of their child as one encompassed by the constitutional prescription of *jus soli*. In 1997, two girls attempted to attain birth certificates stating that they were Dominican, and offered proof that they had been born in the Dominican Republic and their mothers were Dominican.⁶⁷ Nonetheless, the civil registry refused to issue the birth certificates, as “[a]n 11-point proof of nationality test that carried prohibitively onerous requirements for documentation led to the denial of the girls’ Dominican nationality.”⁶⁸ And it is here that our story, from a jurisprudential point of view, begins. With the help of the Center for Justice and International Law and the International Human Rights Law Clinic at the University of California, Berkeley, these two girls were able to present their case first to the Inter-American Commission on Human Rights and, because of failures in the friendly settlement process, ultimately to the Inter-American Court of Human Rights, which rendered a decision in the girls’ case in September 2005.⁶⁹

The case came to the Court on the allegation of the Commission that the Dominican Republic had refused to issue birth certificates to the girls, despite the fact that they were born on Dominican soil and the Dominican Constitution establishes the *jus soli* principle of citizenship.⁷⁰ At issue, for purposes of interpreting this domestic article, was Article 20 of the American Convention on Human Rights:⁷¹

Article 20. Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.⁷²

66. *Id.* at 26.

67. *See id.*

68. *Id.*

69. *See id.* at 26-27.

70. *Yean and Bosico v. Dominican Republic*, Case 130, Inter-Am. Ct. H.R. (Ser. C) § I., para. 3 (Sept. 8, 2005) (hereinafter *Jean and Bosico*).

71. *See id.*

72. Organization of American States, American Convention on Human Rights, art. 20, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

One of the key points at issue was an interpretation of the Constitution, later embodied in the 2004 Migration Law, that fit *all* undocumented aliens into the “in transit” exception, no matter their actual residence status in the Dominican Republic. The arguments made by the Commission and the representatives of the girls were, in effect, first that no restriction of the *jus soli* principle was allowed based solely on the nationality or alienage of the parents, so long as the child was born on Dominican soil, and second, it is unacceptable to describe aliens present in the Dominican for extended periods of time as “in transit” for purposes of excluding them from the operation of Article 11, paragraph 1.⁷³ The Dominican Republic countered these assertions by arguing that the denial of birth certificates was not for discriminatory reasons, but rather because the girls had not complied with the requirements that were implemented to assure they had been born in the country.⁷⁴ Furthermore, the status of the girl’s parents was not at issue since the Constitution does guarantee *jus soli* citizenship, which the girls were granted, and which they always had a right to apply for, so long as they followed the requisite steps and requirements in doing so.⁷⁵

The Court first noted the importance of nationality within international law, as well as its role as a mediating principle between the subject individual and the state.⁷⁶ Although the right to determine who is a national of a State is within the purview of a nation’s sovereign authority, it is not a determination without limitations.⁷⁷ Rather, this domestic authority of the State is “limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness.”⁷⁸ Under domestic law in the Dominican Republic, both constitutional and statutory, the *jus soli* principle is extended to all children born on Dominican soil, save the children of diplomats and those “foreigners in transit.”⁷⁹ The specific allegation of the commission and the children’s representatives was that “the State authorities had taken the position, and made it effective in prac-

73. See *id.* at § I, para. 111(a)-(b), para. 116(a)-(b).

74. See *id.* at § I, para. 121(a)-(b).

75. See Jean and Bosico, Case 130, Inter-Am. Ct. H.R. (Ser. C) § I, para. 121(a)-(b) (Sept. 8, 2005).

76. See *id.* at § I, para. 136-139.

77. *Id.* at § I, para., 140.

78. *Id.*

79. *Id.* at § I, para. 148-150.

tice, that children of Haitian origin born in the Dominican Republic . . . would not be Dominican nationals, because their fathers are Haitian migratory workers and are considered to be in transit.”⁸⁰ Yet, quoting from the Inter-American Commission’s 1999 Report on the Situation of Human Rights in the Dominican Republic, the Court noted the unrealistic nature of this interpretation:

Around 500,000 undocumented Haitian workers live in the Dominican Republic. In many cases, these are people who have lived there for 20 or 40 years and many of them have been born on Dominican territory. Most of them face a situation of permanent illegality, which they transmit to their children, who cannot obtain Dominican nationality because, according to the restrictive interpretation that Dominican Authorities give to article 11 of the Constitution, they are children of “foreigners in transit.” It is not possible to consider that people are in transit when they have lived for many years in a country where they have developed innumerable connections of all kinds.⁸¹

The Court bolstered the logic of the Commission’s observation with language from the decision of a national appeals court in the Dominican Republic that had heard the girl’s claims in relation to the denial of birth certificates:

It is not possible to equate the situation of a foreigner’s illegality to the notion of transit, because they are different concepts. . . . [Nowhere in]. . . the regulations for the application of the Migration Law. . . is the condition of legality established as a requirement for having the right to the nationality of the place of birth. . . . Although it is true that the parents of the child live in the country illegally, it is no less true that this situation of illegality cannot in any way affect the children, who can benefit from Dominican nationality merely by proving that they were born on Dominican territory, and that their parents are not diplomats in the country and are not in transit[.]⁸²

The Court also directed attention to Dominican law in force when

80. *Id.* at § I., para. 152.

81. Jean and Bosico, Case 130, Inter-Am. Ct. H.R. (Ser. C) § I., para. 153 (Sept. 8, 2005) (quoting Organization of American States, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II.104, doc.49, rev.1, (Oct. 7, 1999), para. 363).

82. *Id.* at § I., para. 154 (quoting Judgment No. 453 of the Civil Chamber of the Court of Appeal of the National District issued on October 16, 2003) (file of preliminary objections and possible merits, reparations and costs, tome II, folios 586 to 612).

the children were denied birth certificates, and which would be altered by the 2004 law, which described “in transit” as taking no more than ten days to pass through the country.⁸³ Regardless of how “in transit” is defined, “the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit.”⁸⁴ Whatever the limit may be, the children in this case, having been born on Dominican soil to Dominican mothers, are undoubtedly deserving of Dominican nationality under the relevant laws and constitutional provisions. The broader rule, however, is what is important: the state must reasonably interpret its own constitution, and cannot interpret it in such a way as to discriminatorily deny rights to entire classes of people.

The reaction of Dominican society to the Court’s decision was predictable, yet disheartening. The “Dominican Ministry of Foreign Affairs released a statement calling the Court’s decision ‘unacceptable’” on October 11, 2005.⁸⁵ Although the Dominican ambassador to the Organization of American States advocated complete compliance with the decision, all branches of the domestic government reacted with hostility.⁸⁶ The vice president denied the validity of the Court’s decision, while the Dominican Senate issued a resolution rejecting the Court’s ruling a week after the foreign ministry’s response.⁸⁷ This same body is stirring up anti-Haitian sentiment while advocating for a constitutional amendment that would establish *jus sanguine* citizenship principles as the only way to grant citizenship (outside naturalization), so as to deny Dominican citizenship to all children born of Haitians on Dominican soil.⁸⁸ As Baluarte notes, this is in itself a permissible regime embraced by many nations across the world, yet its adoption in the wake of the Court’s decision “reaches beyond bad faith and reaffirms the existence of institutionalized discrimination[.]”⁸⁹ Amidst this dissent in the democratic branches of the Dominican government, a case was brought by a number of non-governmental organizations, in the Dominican court system, challenging the

83. See *id.* at § I., para. 157 (citing Section V of the Rules of Procedure of Migration No. 279 of May 12, 1939).

84. *Id.* at § I., para. 157.

85. Baluarte, *supra* note 59, at 28 (citing Secretaria de Estado de Relaciones Exteriores, “Declaración en torno a una Sentencia de la Corte Interamericana de Derechos Humanos,” Santo Domingo, Dominican Republic (Oct. 11, 2005)).

86. See *id.* at 28.

87. *Id.*

88. *Id.*

89. *Id.*

Migration Law of 2004, specifically the provision that sought to deny *jus soli* citizenship to the children of illegal immigrants. Thus, we finally arrive at the legally sanctioned embodiment of Fuller's dissent, a century late and in a different nation.

As in the case before the Inter-American Commission and Court, the challenge to the Dominican Republic's domestic law, in its domestic courts, came from non-governmental organizations concerned with human rights, immigration law, and Haitian culture.⁹⁰ These organizations sought a declaration that certain provisions of the 2004 Migration Law were unconstitutional⁹¹ and alleged that they represented discrimination against Haitians present in the Dominican Republic.⁹² Most on point, for purposes of this article, is Article 36 of the Migration Law, which, in part, sought to define "foreigners in transit" as the government had previously interpreted that provision administratively, *i.e.*, all undocumented aliens in the country, no matter duration of presence, would be deemed "in transit."⁹³

First, the Court noted that the legislature is a coordinate branch of government, entitled to interpret the Constitution just as the Court, and that the Migration Law arose from the Congress acting as an interpreter of Article 11.⁹⁴ A reading of the Constitution, together with other provisions of Dominican immigration law, leads to the conclusion that there are certain inherent limitations on who can become a Dominican national, and that, far from being a right, Dominican nationality is a privilege that can be extended only under the circumstances contemplated by the Constitution and established law.⁹⁵ Yet Article 11 itself represents a gap of sorts, for the language "foreigners in transit" is not defined within the Constitution. The Dominican Congress, having broad

90. See the list of representative organizations at Valcarcel, *supra* note 56, at 1279-80.

91. *Id.* at 1280.

92. *Id.* at 1281. The Court also addressed the alleged discriminatory aspects of Article 28 of the law, which drew a distinction between males and females in relation to what had to be shown for their children to be deemed Dominican nationals. See *id.* at 1282-88.

93. *Id.* at 1284.

94. Valcarcel, *supra* note 56, at 1285 ("Considerando, que el hecho de ser la Constitución la norma suprema de un Estado no la hace insusceptible de interpretación, como aducen los impetrantes, admitiéndose modernamente, por el contrario, no solo la interpretación de la doctrina y la jurisprudencia sino la que se hace por vía de la llamada interpretación legislativa, que es aquella en que el Congreso sanciona una nueva ley para fijar el verdadero sentido y alcance de otra, que es lo que en parte ha hecho la Ley General de Migración núm. 285-04[.]").

95. *Id.*

powers to legislate in any event, certainly has the ability and authority to define the undefined term in the Constitution.⁹⁶ So long as this interpretation does not offend any fundamental principles inherent in the Dominican political order and the law which embodies it complies with the constitutional requirements of legality, it must be given effect as a valid and legitimate exercise of Congressional authority, *i.e.*, as a constitutionally permissive law.⁹⁷ There is no indication here that the law does not comply with the constitutionally required mode of passage, nor does it conflict with any more fundamental domestic or international obligations. In regards to statelessness, the Dominican law does not operate to deprive Haitian descendants born on Dominican soil of *any* nationality, as, by Haitian constitutional law these children will be deemed to be citizens of Haiti by operation of the *jus sanguinis* principle.⁹⁸ All these various points being taken into account, the Dominican court found that the Migration Law, including Article 36 purporting to define "in transit," was constitutional.

The perceived illegitimacy of this decision does not necessarily arise from the structure of the Dominican polity the Court establishes. In our system as well, Congress must be deemed to be a coordinate branch in relation to constitutional interpretation, meaning only that a statute is presumed to be at least roughly in line with the ideals and principles of that document. Moreover, the Court's task in the U.S. is not to substitute its opinion or determine that perhaps another course of action should have been taken, but rather only to judge the law consistent or inconsistent with the Constitution. It is the strict application of these notions to this case that stretches the limits of constitutional legitimacy. The Dominican Court signs off on, in a very cursory fashion, a decision by the Congress that demanded, at the least, a more in depth look at intent and application, especially considering many of the public statements made by officials during the pendency of the Inter-American Case and its aftermath. Maybe because the Migration Law embodied their own prejudices, or perhaps because

96. *Id.* at 1285-86.

97. *Id.* at 1286 ("Considerando, que por esas razones, las dichas disposiciones de la ley atacada no podrían verse en sí mismas, en tanto fueron dictadas en armonía con la regal del artículo 37 numeral 9 de la Constitución, como violatorias de los principios fundamentales vinculados con la nacionalidad ni de ningún otro principio fundamental o ninguna regal que sustituya la competencia del legislador en virtud del antes citado artículo 37 numeral 9 de la Constitución[.]").

98. *Id.*

they did not wish to buck the clear public opinion, the Court, effectively surrenders its mandate to interpret the Constitution to the Congress, which is then free to move from a policy of discrimination to the clear institution of prejudice. It is as if our Supreme Court had noted a law that had been subject to bicameralism and presentment and thus must be constitutional; a scary constitutional apathy, indeed! Despite lip-service to notions of non-discrimination based upon such classifications as national origin, the Court never addresses the legitimate, and probably correct, contention that the law was premised on nothing but animus and prejudice to a certain class of nationals currently residing in the Dominican Republic. To ask these deeper questions would make it more and more difficult to find the law constitutional, and thus the decision represents nothing but a political judgment, passing the buck, so to speak. Its superficiality is manifest with the turn of every word.

V. OF CITIZENSHIP, UNDOCUMENTED ALIENS, AND POLITICAL MORALITY

Circumstantial similarities between these cases and the present situation the United States finds itself in are readily apparent. In late nineteenth century America, we were concerned with the influx of Chinese immigrants, whereas today we are concerned predominantly with Mexican immigration. The Dominicans wish to curb the effects of Haitian migration. The racial overtones have been played down for the most part, under the guise of ostensibly neutral laws of general applicability, but who, understanding the history and context of the 2004 Dominican law would question who it was meant to effect? The number of non-Haitian migrant workers must be miniscule, though I do not know the number. The governmental rhetoric and passivity in the face of violence against Haitians in any event dispels the myth that the law was meant to do anything but bar one class of people from becoming citizens of the Dominican Republic. More than a century ago we Americans wore our animus and prejudice on our sleeves. There was no doubt the driving force behind the immigration policy relating to the Chinese: to bar them, and if not, make it as onerous as possible for them to remain. We have more tact now, taking the path of the Dominicans in terms of legal proposals while holding our tongues from rhetoric. We support laws of general applicability – ban *jus soli*! – but this neutrality is a guise covering the only class of individuals we wish to effect with our new laws. In

all three of these cases laws were passed, or will be passed, in response to a single stimuli, inflamed and spread by a vociferous public and political debate and informed not slightly by prejudice or animus.

As Ingersoll wrote in 1893 in relation to the Chinese, “[i]n our country, [the United States,] as a matter of fact, there is but little prejudice against emigrants coming from Europe . . . but nearly all . . . are united in their prejudice against the Chinese.”⁹⁹ Today, it is Mexicans who represent a supposed scourge on our culture, identity, and way of life. Instead of immediate integration there is an increasing lag between the assimilation of Mexican immigrants in succeeding generations and those of other national groups.¹⁰⁰ There is also a growing trend towards bilingualism in schools, places of employment, and signs that undoubtedly make nativists uncomfortable with the encroachment.¹⁰¹ Mexican culture is more apparent everywhere you look, and what can this be if not a threat?¹⁰² Of course, it has been claimed for years that the sky is falling in all manner of ways and due to all manner of causes, yet it is still above us. These issues are not to be discussed here in any event, for if there is a legal requirement that citizenship must be extended no matter our feelings about *who* it is being extended to, then that requirement exists independently of any animus or prejudice directed at that class. It is to the examination of potential constitutional interpretation and political morality, that I turn to in the following pages. Yet, before doing so, I must first justify the legitimacy of the endeavor itself.

In sitting down to write this article, having already decided for myself that citizenship is an important aspect of membership in the U.S. political community that should be extended to all those who qualify by either constitutional or legislative provision, I have operated on an assumption that is not universally held. In

99. Ingersoll, *supra* note 1, at 53.

100. See generally S. Karthick Ramakrishnan & Hans P. Johnson, *Second-Generation Immigrants in California*, CALIFORNIA COUNTS, May 2005.

101. See, e.g., Jennifer L. Chong, Book Review, *Broadening Support for Bilingual Education*, 8 HARV. LATINO L. REV. 163 (2005); Richard Fry & B. Lindsay Lowell, *The Value of Bilingualism in the U.S. Labor Market*, 57 INDUS. & LAB. REL. REV. 128 (2003); René Galindo & Jami Vigil, *Language Restrictionism Revisited: The Case Against Colorado's 2000 Anti-Bilingual Education Initiative*, 7 HARV. LATINO L. REV. 27 (2004); Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 NW. U.L. REV. 1689 (2006).

102. “Latin” culture would make for a better statement, but the nuance between different Latin cultures is lost on many Americans, and so the resentment is directed at a more readily apparent adversary – in this case, Mexicans.

fact, Alexander Bickel held the opposing point of view that citizenship has no transcendent place in our constitutional scheme and was only iterated and forgotten due to accidents of legal history. At an address given at the University of Arizona College of Law in February 1973, Bickel first laid out the framework of the thesis that would later be incorporated in the posthumously published *The Morality of Consent*:¹⁰³ that “the concept of citizenship plays only the most minimal role in the American constitutional scheme.”¹⁰⁴ The framers of the Constitution did not ignore the concept of citizenship, making a few federal offices dependent upon citizenship,¹⁰⁵ granting Congress the power to make a uniform rule of naturalization,¹⁰⁶ and operating under the assumption that birth, as well as such naturalization procedures Congress would establish, would confer citizenship.¹⁰⁷ In short, although the framers undoubtedly understood the concept and inserted provisions relating to it in a few places, the “original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen.”¹⁰⁸ Then came the first historical accident that dislodged the young nation from this naïve reverie, or, in Bickel’s more poetic prose, its “idyllic state of affairs:”¹⁰⁹ *Dred Scott* and the Civil War.¹¹⁰

The Chief Justice’s opinion for the Court served to conflate two terms meant to be distinct, and in doing so disqualified an entire race from holding any of the rights and privileges bestowed on “We the People.” This was just the beginning of the story, however. The innocence of the Constitution’s original concept of citizenship had indeed been violated by Taney, and “[a] rape having occurred, innocence could never be fully restored. But remarkably enough, after a period of reacting to the trauma, we soon resumed behaving as if our virginity were intact, and with a fair measure of

103. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (Yale University Press 1975).

104. Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 369 (1973).

105. U.S. CONST. art. I, § 2 (Congressman); art. I § 3 (Senator); art. II, § 1 (President).

106. *Id.* art. I, § 8.

107. Bickel, *supra* note 104, at 369 (“They plainly assumed that birth as well as naturalization would confer citizenship[.]”).

108. *Id.* at 370.

109. *Id.*

110. *Id.* at 370-72.

credibility at that.”¹¹¹ The Thirteenth Amendment prohibited slavery¹¹² and was followed by the Civil Rights Act of 1866 and the Fourteenth Amendment, both addressing the issue of who was to be a citizen.¹¹³ With the bundle of Section 1 clauses in the Fourteenth Amendment there was also added that famous statement that no state shall “abridge the privileges or immunities of citizens of the United States”[.]¹¹⁴ On the verge of establishing a brave new constitutional order on which much would depend upon the citizenship of the individual, the second accident of history occurred reestablishing the mostly irrelevant nature of citizenship whereby the Privileges and Immunities Clause was stripped of all meaning and relegated to the dustbin of historical superfluity:¹¹⁵ the *Slaughter House Cases*.¹¹⁶ From the original Constitution, to *Dred Scott* and through the *Slaughter House Cases*, a full circle movement can be discerned: as Bickel writes, “[w]hile we now have a definition of citizenship in the Constitution, we still set very little store by it.”¹¹⁷

Some store, yes, but not much, and with that statement it is very hard to quarrel. Citizenship is a prerequisite to voting, and citizenship had served as a basis of discriminating against aliens in employment and the conferral of other state benefits during the nineteenth and early twentieth centuries,¹¹⁸ but today, the great bulwark of liberty and equality—that composed of the Equal Protection and Due Process Clauses, guarantees rights to *people*, not only *citizens*.¹¹⁹ And the rub of the matter is this: whereas “people” represents a real entity on which the government can act and be prohibited from acting, “[c]itizenship is a legal construct, an abstraction, a theory.”¹²⁰ Bickel’s point, very legitimate and unfortunately born out by the history of this country, is that it is far easier to see an individual as a person than a “citizen,” and by necessity, far easier to think of someone as a non-citizen than a

111. *Id.* at 372.

112. U.S. CONST. amend. XIII.

113. See The Civil Rights Act of 1866, 42 U.S.C. §§1981-1982 (1991); U.S. CONST. amend. XIV.

114. U.S. CONST. amend. XIV, § 1

115. Bickel, *supra* note 104, at 374-80.

116. 83 U.S. (16 Wall.) 36 (1873).

117. Bickel, *supra* note 104, at 378.

118. See *id.* at 381 nn.32-35.

119. This is the exact logic the Court has used in *Yick Wo*, and a point the Court reiterated in 1971. See *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

120. Bickel, *supra* note 104, at 387.

non-person. This, For Bickel is the lesson of *Dred Scott*:¹²¹

More generally, emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive and stable institutions, and of a balance between order and liberty . . . It is gratifying, therefore, that we live under a Constitution to which the concept of citizenship matters very little indeed.¹²²

Thus, for Bickel, “[c]itizenship is at best a simple idea for a simple government.”¹²³ A good argument, without a doubt, and one with which I am in total agreement. Nonetheless, even Bickel recognizes one main point, and derides an additional corollary made by Chief Justice Earl Warren in an opinion, that bears more directly on the issue of this article. Bickel’s main point is to show that citizenship has not, is not, and should not be the focus of government; rather, that focus should be on the persons within the jurisdiction of the state and the state’s treatment of those individuals.¹²⁴ If one treats this symbiotic relationship as one between a state and a person, rather than between a state and the legal-metaphysical-political entity “citizen,” one will never lose sight of the important moral and political consequences that flow between the individual and the government. I think this point is entirely accurate, but its truth relies on one further assumption, to which Bickel gave only passing reference as the *only* reason that citizenship retains a certain importance in our constitutional system: “The citizen has a right as against the whole world to be here. The alien does not[.]”¹²⁵

The Supreme Court has noted that aliens, whether lawfully or unlawfully present in the U.S., are “persons” protected by the language of the Fourteenth Amendment,¹²⁶ and fall within other

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.* 369-387.

125. *Id.* at 382.

126. *See Plyler v. Doe*, 457 U.S. 202 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Yick Wo v. Hopkins*, 18 U.S. 356 (1886).

protections afforded by the Bill of Rights.¹²⁷ However, even an alien legally residing in the United States is potentially subject to removal from the country despite the fact that he is in the closest position of any alien to the right to remain indefinitely and unqualifiedly in the U.S.¹²⁸ In this sense, that citizens are the only individuals that have an unqualified right to remain within the country, then citizenship "is man's basic right for it is nothing less than the right to have rights."¹²⁹ Bickel justly derides the hyperbole of Chief Justice Warren and Justices Douglas and Black, in *Perez v. Brownell* and other cases, as conflating the concept of "citizenship" with that of "person," as a former Chief Justice had done a century earlier.¹³⁰ Yet there is another point here, overlooked in the rhetoric. Despite the fact that all rights may be secure to persons within U.S. borders, the right to remain, indefinitely and under no qualifications, is itself a prerequisite to the real enjoyment of all those other rights. To be sure, not much follows from citizenship if one takes the package in its aggregate; yet that last point that follows is priceless, and that is the point on which the *jus soli* debate turns. Should the children of aliens become citizens, allowing them to stay in the country come hell or high water? The fact that this right is, for all intents and purposes, the *only* important benefit that flows from citizenship, does not diminish the claim that citizenship itself is an important commodity.

I believe Bickel to be correct in every meaningful sense, including the clouding effect "citizenship" rhetoric can have on debates, thus hiding the true costs of any planned action. He underestimates the importance, mainly because he is of a different time, divorced both from the immigration woes of a century previous and those that confront us in the infancy of the twenty-first, and therefore did not see the impact the term "citizenship" could have in certain arenas. I am convinced that citizenship, at least within these narrow confines, is still worth talking about and arguing about, so long as we keep in mind the fact that, at bottom, we are talking about persons. We have not moved far enough afield of past prejudice and practice, nor close enough to

127. See *Bridges v. Wixon*, 326 U.S. 135 (1945) (relating to First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Fifth Amendment's Just Compensation Clause); *Wong Wing*, 163 U.S. 228 (1896) (Fifth and Sixth Amendment protections afforded to resident aliens).

128. See *Kwong Hai Chew*, 344 U.S. 590.

129. *Perez v. Brownell*, 356 U.S. 44, 64 (1957) (Warren, C.J., dissenting).

130. Compare *United States v. Wong Kim Ark*, 169 U.S. 649, 731 (1898) (Fuller, C.J., dissenting) with BICKEL, *supra* note 100, at 386.

Bickel's ideal political community, to fully embrace our polity merely as people, rather than citizens. Until that time, though it may be sad and frustrating that we are still stuck in our old loops and terminological distinctions, we must argue from within them and move forward to what will hopefully be a more enlightened future. This digression complete, let us proceed.

Every manner of altering the *jus soli* rule has been advanced, at some point or another; legislative, judicial, and by way of a constitutional amendment. Variations on the first two themes can be found in the Dominican Republic's actions, both in the Senate and Supreme Court of Justice, as well as in Chief Justice Fuller's dissent in *Wong Kim Ark*. The third possibility is, of course, grounded firmly and explicitly in the Constitution itself.¹³¹ In what follows, I am interested only in *whether* a certain path could or should be taken. I will not pass, after this point, on whether I believe any action is likely, as a constitutional amendment seems entirely off the table and judicial reinterpretation of a nineteenth century precedent seems remote. Statutory law restricting the grant of *jus soli* citizenship is an issue in at least one state, Texas, but it is too early to say what will come of it. Thus, in the subsequent three sections, each possibility will be gauged as to permissibility and consistency with our jurisprudentially and constitutionally iterated notions of law and political morality.

A. *Altering Jus Soli by Statute*

Congress was given, and still retains, the power to make a uniform rule regarding naturalization.¹³² It has used that power over the years,¹³³ but to whatever extent that power could have been seen as extending prior to 1868, it is, after that period, limited by the Citizenship Clause of the Fourteenth Amendment. This clause, as has been shown by the foregoing, embodies as an original and interpretative matter the principle of *jus soli*, circumscribed only by certain established limitations. Leaving the original intent of the framers aside,¹³⁴ the only question is whether Congress could pass a statute purporting to define citizenship in such a way as to be consistent with both the language of the Four-

131. U.S. CONST. art. V.

132. U.S. CONST. art. 1, § 8.

133. See cases cited *supra* at note 126.

134. Because "original intent" has been used by both conservative and liberal justices over the years, defining those two terms broadly and sloppily, I have no idea which side would wish to appeal to an original understanding in this case, and doubt whether any side would view the intent as definitive for purposes of adjudication.

teenth Amendment and the intent to limit the principle of *jus soli*. The main problem with this approach is that by doing so, Congress would be altering a Supreme Court precedent based on its interpretation of the Constitution. Whatever Congress' powers are in relation to reversing or altering precedents based on statutory interpretations, to the extent a new or different statute would effectuate that intent, those powers are far more limited in this area, if not entirely non-existent. Two relatively recent clashes between the Court and Congress in relation to attempts to statutorily alter the Court's prior constitutional holdings are worth mentioning to demonstrate the relative futility of Congressional attempts to bypass constitutional precedents with statutory reversals.

Seemingly directly on point is the Court's review of Congressional actions and reactions concerning flag burning. In 1989, the Court struck down as an unconstitutional infringement of the First Amendment a Texas statute¹³⁵ making it a crime to desecrate a flag.¹³⁶ In response to public outrage over the decision, Congress enacted the Flag Protection Act of 1989.¹³⁷ Predictably, when this statute was presented before the Court, it was struck down as unconstitutional as well, despite language in the statute tending to show no intent to actually burden First Amendment rights.¹³⁸ A constitutional amendment was not presented to the states because the Senate was one vote short and that has been the end of the matter. The Court's interpretation of what is constitutional is supreme, as this case demonstrates.

Less on point, though still of interest, was the debate in the middle part of the 1990's over the Court's free exercise jurisprudence. In *Employment Division v. Smith* the Court established a test of constitutionality under the First Amendment that insulated laws of general applicability even if they infringed upon one's religious freedom.¹³⁹ In response to this decision, Congress passed the Religious Freedom Restoration Act of 1993,¹⁴⁰ which dictated that state and federal laws could not substantially burden the free exercise of religion, even if they were of general appli-

135. TEX. PENAL CODE ANN. § 42.09 (1989).

136. *Texas v. Johnson*, 491 U.S. 397 (1989).

137. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, *invalidated by* *United States v. Eichman*, 496 U.S. 310 (1990).

138. *Eichman*, 496 U.S. at 310.

139. 494 U.S. 872 (1990).

140. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

cability,¹⁴¹ unless there was a compelling governmental interest and the means chosen were the least restrictive possible.¹⁴² When this statute was put in issue, the Court struck it down as an unconstitutional exercise of Congressional power under the Fourteenth Amendment, making it inapplicable to the states¹⁴³, although it is still valid law vis-à-vis the federal government.¹⁴⁴

Leaving aside these problems, for Congress to even attempt a legal revamping of the Citizenship Clause it would have to advance a colorably legitimate interpretation to replace the Supreme Court's traditional interpretation. The only phrase that could possibly lend itself to such reinterpretation is that qualifying birth on U.S. soil to the extent that citizenship extends only to those subject to the jurisdiction of the United States. A limitation would have to fall within the confines of this language, otherwise the statute would baldly transcend the limitations the Fourteenth Amendment is meant to put on legislative action and the Supreme Court would have, I believe, no problem striking that law down. Yet, if there is a way to place undocumented aliens outside the bounds of the "jurisdiction" of the United States, perhaps their children born here could be legally denied the benefits of U.S. citizenship. To seek such an interpretation however, is only to dig in the past and rehash arguments previously made and rejected. A good example is an exchange in the *American Law Review* from 1895 and 1896, prior to the Supreme Court's decision in *Wong Kim Ark*, addressing the Ninth Circuit's interpretation of the Fourteenth Amendment.¹⁴⁵ Justice Field held that children born to Chinese immigrants on U.S. soil were entitled to U.S. citizenship.¹⁴⁶

In contrast to the *jus soli* rule advocated by Justice Field, George Collins thought the better construction of the Fourteenth Amendment was that, "upon birth alone, within the territorial jurisdiction of the nation, citizenship can never be predicated."¹⁴⁷ The basis for this opinion—namely that the principle of *jus soli* had not been embodied in the text of the Fourteenth Amendment, nor in the U.S. common law, was the fact that the relation of the

141. 42 U.S.C. § 2000bb-1(a).

142. 42 U.S.C. § 2000bb-1(b).

143. *City of Boerne*, 521 U.S. at 507.

144. *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

145. George D. Collins, *Citizenship at Birth*, 29 AM. L. REV. 385, 386 (1895).

146. *In re Look Tin Sing*, 21 Fed. 905 (C. C. Cal. 1884).

147. Collins, *supra* note 145.

individual to the state was dramatically different than the relationship of the individual to the lord in the feudal system in which *jus soli* had been "birthed."¹⁴⁸ A republican form of government could not countenance a citizenship rule made for a monarchy. Collins also understands that the crux of the Citizenship Clause lies within the phrase "subject to the jurisdiction thereof" and criticizes Justice Field for conflating his interpretation of that clause and its clear language. This "error" would also be perpetrated by the Supreme Court itself in *Wong Kim Ark*: "Judge Field holds that the only question that can arise relates to the meaning of the words 'subject to the jurisdiction thereof,' and he construes that clause, not as it is written, but as though it is read, 'Subject to the jurisdiction of the laws thereof,' because, he says, such was the common law doctrine."¹⁴⁹ Collins sees a difference between being subject to the jurisdiction of a state and being subject to the jurisdiction of the laws of the state. Jurisdiction simply understood, and as that term should be understood in the Constitution, relates to *political jurisdiction* and not the jurisdiction of laws.¹⁵⁰ Applied directly to the Fourteenth Amendment, this explanation interprets "subject to the jurisdiction thereof" to mean "the jurisdiction of the nation as such,—the *political jurisdiction*, and it is but an affirmative method of expressing the proposition that a person born in the United States must not at the time of birth be subject to any foreign power; thus making it indispensable to citizenship by birth, that the parent be *then* an American citizen; for otherwise if he be an alien, the child will be subject to the country of the father."¹⁵¹ Collins in essence reads the Citizenship Clause as establishing a *jus sanguinis* rule that applies so long as the child is born on U.S. soil. Otherwise, Congress can presumably regulate the grant of citizenship.

Collins's reading of the Fourteenth Amendment was criticized

148. See *id.* at 386-89. In relation to birthright citizenship, Collin's opined that "[t]his of course was nothing else but feudalism which, however appropriate to monarchy, is fundamentally repugnant to republican institutions. It is manifest, then, that the common law doctrine to the effect that birth within the dominion of the king, made one a subject, could never apply to a republic, and could never furnish any analogy in determining a question of American citizenship." *Id.* at 387.

149. *Id.* at 389.

150. *Id.* at 390.

151. *Id.* at 391. The reference to the child being a citizen of the country of his father is the result of Collins' referral to the international law consensus rule of *jus sanguinis*, where citizenship would follow the father if in wedlock and that of the mother if illegitimate. See *id.* at 390-91.

by Henry C. Ide in the following year.¹⁵² Ide first noted the uniform practice of the federal government outside the excepted classes, of granting citizenship to those born on U.S. soil, and stated that this was contrary to what the rule both before and after the Fourteenth Amendment had been proposed and adopted.¹⁵³ Collins maintained there is also no generally recognized rule in international law pertaining to the grant of citizenship.¹⁵⁴ Rather, although many countries do follow the doctrine of citizenship by descent, others, including England, Portugal, Denmark, and Holland, allowed for the establishment of citizenship based on the principle of *jus soli*.¹⁵⁵ Most importantly however, even if one accepts that the jurisdiction spoken of in the Fourteenth Amendment refers to political, and not just legal, jurisdiction, there is still no reason not to read the Clause as advocating *jus soli*. If Collins is correct, that subject to the jurisdiction of the United States means that the child cannot be subject to any foreign power, is it not also true, as Ide posits, that “the very fact of birth in our country render one ‘subject to the jurisdiction thereof,’ and ‘not subject to any foreign power?’”¹⁵⁶ Even if the *jus sanguinis* citizenship issued depending on the legitimacy of the child, eventually a new citizenship would control because the connection between the child and successive “fathers” would become attenuated.¹⁵⁷ All the United States has done, by way of the Fourteenth Amendment, is fix that successive birth at one, rather than two, or three, or four. Nonetheless, as an important limitation, Ide did not wish to confer citizenship on the child of every alien present in the United States at the time of birth – domicile and intent must be taken into account.¹⁵⁸ Thus, “where an alien is actually domiciled in our country, fixed for life as an inhabitant, his original nationality is so far weakened that our institutions ought not to consent that its inanimate shadow shall rest upon his offspring and deprive them of the inherent rights which are theirs by birth.”¹⁵⁹ Ide’s reading leads him to the conclusion that children

152. Henry C. Ide, *Citizenship by Birth – Another View*, 30 AM. L. REV. 241 (1896).

153. See *id.* at 242-44 (noting opinions issued by Secretaries of State and Attorney Generals before and after the passage of the Fourteenth Amendment).

154. *Id.* at 244-46.

155. *Id.* at 245.

156. *Id.* at 248.

157. *Id.* “All law recognizes the fact that there comes a time when the nationality of the ancestor has been extinguished, and a new one has taken its place by the mere fact of a succession of births in another country without naturalization.”

158. See *id.* at 248-49.

159. See *id.* at 248-49. Nonetheless, Ide would not allow this to hinder the anti-

born in this country should be deemed citizens thereof because upon birth they are subject only to the jurisdiction of the United States by operation of the Fourteenth Amendment and not to any foreign power so long as their parents are not migratory or here on a non-permanent basis. Essentially, he reads the Dominican Republic's "in transit" exception into the Fourteenth Amendment and expands it to a temporal duration that would encompass all who did not intend to stay.

Collins's view was of course rejected by the Supreme Court while Ide's, in slightly altered form, was adopted. I can think of no reason to regress at this point as I also agree that Ide's is the better interpretation. Even if one deems political jurisdiction the operative concept, a child born to aliens in the United States (so long as they are not diplomats or enemy aliens) is subject to the political jurisdiction thereof immediately upon birth and not to that of any foreign power. This operation occurs immediately from a legal-political and constitutional perspective, and cannot be altered by statutory fiat. Thus, although Congress does indeed have broad powers over naturalization and immigration, including the express power to create a uniform rule of naturalization, this power is circumscribed within the limitations of the Citizenship Clause. That clause bears only one reasonable interpretation: all qualifying children, *i.e.*, non-diplomat, non-enemy alien children, born on U.S. soil are citizens thereof. Although Congress might be able to read the notion of political jurisdiction into the Constitution by way of statute, Ide's argument is still controlling and the subjective addition of intent into the clause would be problematic to say the least, and most likely non-efficacious. Most of the undocumented aliens in this country seem to be here for good, and thus an "in transit" or "migratory" exception would, if applied justly, not reach this class to the extent that advocates would wish it to do.

In the end, I believe Congress' hands to be tied by what is more or less clear constitutional language already logically interpreted by the Supreme Court. I also believe the Supreme Court would never cede to Congress the power to interpret the Constitution in manifest disregard of logical language and prior precedent.

Chinese sentiment of the day: "By the same reasoning, the Chinese are not domiciled in the United States. They do not expect permanently to remain in [the United States]. They all look forward to a return, sooner or later, to China. Their original allegiance has never been weakened. Hence they may consistently be considered to stand upon an entirely different basis as to their children born here, from other nationalities." *Id.* at 250 (alteration in original).

Chief Justice Fuller's dissent in *Wong Kim Ark*, advocating for an interpretation of the Constitution in light of other statutes and treaties passed by the U.S. government and the Dominican court's surrender of its judicial mandate in the face of strong public opposition to Haitian immigration, need not be addressed here. We are still living in a country where the Constitution is the supreme law of the land and every statute must measure itself against that precept. The Supreme Court itself has too much pride to punt in as disgraceful a way as the Dominican court did, and so there is no reason to believe Congress would be able to bully a law past the populace and the Court abrogating the *jus soli* principle.

B. The Possibility of Amendment

The most "legal" way by which to alter the *jus soli* principle of the Citizenship Clause, and by far the least likely, is by way of a constitutional amendment. I say most "legal" because there is still talk at times whether certain amendments could themselves be unconstitutional,¹⁶⁰ for instance, an amendment outlawing abortion. Nevertheless, because of supremacy, an amendment creates a legally definitive end in a way that Congressional statute-making and Supreme Court interpretation does not. On the other hand, this option is the least likely culmination of the debate for obvious reasons; of the thousands of amendments proposed since the Bill of Rights was ratified in 1791, only seventeen have become constitutional amendments. There is little reason to believe that immigration could garner the support necessary to overcome the rigorous Article V requirements. Yet, since I have already stated that permissibility rather than probability is the name of the game, the issue is worth analyzing.

The content of any proposed amendment would most likely mirror one of two possibilities. Either it would adopt explicitly a *jus sanguinis* theory of citizenship or it could adopt, just as explicitly, a tailor-made remedy for undocumented aliens. One proposed remedy grants immediate permanent residency status rather than citizenship to children born in the United States to undocumented aliens, thus putting them on the road to citizen-

160. See, e.g., Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1979-1980) (analyzing the possibility of legitimately amending the Constitution so as to restrict certain fundamental rights); Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983) (determining the judiciary's role in the Article V amendment process).

ship, by dangling the carrot rather than giving it away *ab initio*.¹⁶¹ Leaving aside the question of whether a constitutional amendment could itself be unconstitutional, a limitation concerning amendments must be at least implicit in the Constitution. For purposes of this analysis I will concur with the thought of Laurence Tribe,¹⁶² among others,¹⁶³ that an amendment should be consistent with the structure and general import of the constitution to which it is meant to be appended. Against this vision, amendments related to flag-burning and abortion are often touted as being too specific and not oriented towards the political vision that our Constitution embodies. The amendment enacting Prohibition is cited as a real example of what happens when the amendment process is utilized to freeze in time the passions of a moment.¹⁶⁴ So what would the nature of an amendment relating to *jus soli* be?

I can think of no objections related to generality and content. The amendment process has, after all, given us the language to which some are now objecting. Citizenship is undoubtedly a proper province of national government. An amendment establishing *jus sanguinis* citizenship, or somehow qualifying citizenship for those who are here on a non-permanent or illegal basis, seems to fit in with most other amendments, as it would be regulating the scope of the U.S. political community. There can be no objection to such an amendment on the grounds leveled against other recent proposed amendments. Of course, the Eighteenth Amendment represents a different problem, one illustrated by the Dominican experience and highlighted by Baluarte in his article. The Dominican Senatorial response, proposing constitutional amendments aimed at eliminating *jus soli* citizenship, was not undertaken for any reason relating to traditional systemic political revision, but rather from a prejudice directed at the main group benefiting from the existing regime. For this reason, Baluarte felt comfortable stating that despite the ostensible "legitimacy" of such action, it smacked of bad faith and the perpetua-

161. See Hsieh, *supra* note 2.

162. See Tribe, *supra* note 160 (interpreting the Constitution as a document unified by underlying political ideals).

163. See, e.g., Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Charles B. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 FORDHAM L. REV. 1487 (2004); Douglas Linder, *What in the Constitution Cannot be Amended?*, 23 ARIZ. L. REV. 717 (1981); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

164. U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

tion of an institutionalized discrimination.¹⁶⁵ Could anything different be said of our domestic proposals to alter the constitutional status quo?

Most likely not. The phraseology of any proposed amendment would be undoubtedly neutral, as would be its operation. All here would be affected by it in the same way, and there would certainly be no hint of *de jure* discrimination. Yet, *de facto*, would be a different story. The impetus for such an amendment clearly resides in the influx of undocumented aliens from Mexico and its effect on our existing cultural milieu. The neutrality of language and application would not, and cannot, hide this intent. To enact such an amendment, no matter how cleverly crafted, would be no better a response than that envisioned by an angered and xenophobic Dominican Senate. Simply because such an amendment would otherwise square with the Constitution as it existed from a political perspective and as a subject of constitutionalism, does not make it a morally legitimate response to the vagaries of selective political pressures. To the extent that this point, and the entire justification for this section, resides in a correct assessment of our political morality, it will be addressed more fully in the closing paragraphs of this section. For the moment, it suffices to say that amendment should not be the route by which any perceived problem is addressed.

C. *Reinterpretation by the Supreme Court*

Since the prevailing interpretation of the Fourteenth Amendment in U.S. law is one given to the polity by the Supreme Court, the most logical place to look for change would be a reevaluation of the correctness of that decision.¹⁶⁶ The overruling of precedent has always been a solemn task, undertaken for the most part with the seriousness required of changing a law. Nonetheless, *stare decisis* has given way in the last decade in decisions relating to the imposition of capital punishment on juveniles¹⁶⁷ and the mentally

165. See Baluarte, *supra* note 59, at 25.

166. Obviously, for the Court to undertake such a reinterpretation it would have to be presented with a concrete case satisfying all the requirements of justiciability and standing, which could only be the result of the passage and the subsequent challenge to a local, state, or federal law purporting to limit the *jus soli* principle. Thus, reinterpretation is itself a contingent act and in every case, except one dealing with a potential federal law, the Court would be able to dodge the question on other grounds.

167. See *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

retard,¹⁶⁸ as well as same-sex sodomy.¹⁶⁹ The Court has also revisited some of its other constitutional interpretations in the normal course of adjudication, most famously in regards to the Commerce Clause.¹⁷⁰ Although the Court has established a four-part test for determining when a precedent should be revisited,¹⁷¹ the test itself has been manipulated and the overwhelming logic behind the reversal of the three decisions noted at footnotes 150-152 in this article seems to be the incorrectness of the original decision more than any other factor. For sake of covering all potential bases, it will be worth addressing the present issue from both sides, i.e., from the jurisprudential standpoint of the *Casey* criteria and the more transcendent perspective of whether the original decision was in some way wrong or inconsistent with society as it now stands.

In *Casey*, the plurality opinion adduced four main inquiries into the rule of the prior decision in order to determine whether that rule was outdated and needed to be overruled.¹⁷² The Court asked whether there was a reliance interest that argued against overruling, whether the stability of society would be damaged by removing the rule, whether the law's growth in the intervening years had rendered the prior rule anachronistic and incompatible with contemporary society, and whether the premises of fact on which the prior decision had based its holding had so changed as to render that holding unsupportable and unjustified as a legitimate conclusion to the issue posed.¹⁷³ There is no reliance interest here as the interpretation would only be prospective and I venture that nobody would argue that undocumented aliens already present have a legitimate reliance interest in having children born here become U.S. citizens. Passing over the second point for the time being, the growth of immigration law since the time of *Wong Kim Ark* and the growth of law more generally, especially in the panoply of currently protected constitutional rights, does not argue against the *jus soli* principle. If anything, the greater liber-

168. See *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

169. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

170. See *United States v. Morrison*, 529 U.S. 598 (2000) (narrowing Congress' power under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (finding no violation of the Commerce Clause because not an economic activity).

171. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

172. *Id.* at 854-855.

173. *Id.* For an opinion as to the legitimacy of how well the Court applied these principles in this case see *id.* at 979-1002 (Scalia, J., dissenting).

alization and constitutionalization of rights and liberties argues in favor of retaining the principle of *jus soli*, which is without a doubt one of our most liberal constitutionally based ideals. The evolution of U.S. law has not in any way rendered the principle anachronistic or inconsistent with other provisions.¹⁷⁴ Finally, there is really no change in the factual premise of the earlier decision. Our understanding of the principle has not changed, but we wish to alter it to address current perceived exigencies. This is not a valid basis for reversal, as one of the reasons we have both stare decisis and a written constitution is to, as nearly as possible, place certain decisions outside the realm of the normal political process. Points one, three, and four simply do not militate for a change in the established law.

Returning now to the second criteria— whether the stability of society would be damaged by removing the principle from operation— I would be dishonest to advance an argument that society would be irreparably harmed if *jus soli* was read out of the Constitution. The United States would still have naturalization laws and presumably would still grant citizenship under the provision of *jus sanguinis* theory. Life, for 99% of the people would remain exactly the same as it had always been, and outside academic, political, and legal circles it is doubtful that many people would even notice such a decision, or if noticing, would not pay attention to it past the fifteen minutes most people devote to these types of issues. *Jus soli* citizenship is not abortion, to state a truism. The issue does not involve the president claiming executive privilege,¹⁷⁵ or the possible publication of classified materials,¹⁷⁶ or the ability of the states or federal government to ignore Supreme Court decisions.¹⁷⁷ Nonetheless, a decision on the issue today, in

174. There is also a limited international movement towards more open citizenship provisions, meaning a move away from pure *jus sanguinis* principles to provisions that embrace *jus soli*, at least in part. See generally Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT'L L. 330 (2006); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185 (1998-1999) Jeannette Money, *Human Rights Norms and Immigration Control*, 3 UCLA J. INT'L L. & FOREIGN AFF. 497 (1998-1999); John D. Snethen, *The Evolution of Sovereignty and Citizenship in Western Europe: Implications for Migration and Globalization*, 8 IND. J. GLOBAL LEGAL STUD. 223 (2000-2001); Michael A. Becker, Note, *Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals*, 7 YALE HUM. RTS. & DEV. L.J. 132 (2004).

175. See *United States v. Nixon*, 418 U.S. 683 (1974).

176. See *New York Times, Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

177. See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (overruled on other points of law).

the circumstances we now find ourselves, would not be normatively different from the types of real and potential decisions that have been derided by all points on the ideological spectrum. Were there not an influx of Mexican aliens, a high number of them undocumented, there would be no debate just as there was no debate in the late nineteenth century until the Chinese came and the already resident polity decided that they didn't want *those* people here. The Chinese "problem" was attacked through political channels and for the most part upheld in the legal arena. Yet even in that politically charged period when the prejudice was stated explicitly and unequivocally, the Court did not shy away from its duty of interpreting the Constitution and extending rights to the Chinese guaranteed to *all persons* as well as the right of *jus soli* citizenship to their children born here. If the Court were to forget its duty in this case would there not be at least a ripple of ramification?

The point is, in other areas of law—abortion, capital punishment, privacy, sexual intimacy and orientation—people scream at the top of their lungs that a decision one way or the other will compromise the legitimacy of the institution. Here, there is no groundswell of legal commentary calling into question *Wong Kim Ark*. It was simply the political rhetoric of a time, ensconced in a neutrality betrayed by the only possible motivation for espousing this so called reform: xenophobia and racism. In light of the 2000 presidential elections, and the Supreme Court's decision,¹⁷⁸ the legitimacy of the Court likely would not be damaged by a decision reading *jus soli* out of the Constitution. Such a decision must be seen for what it is and what it would be described as if it were an issue more in tune with what the common citizen cares about, political in the purest and most pejorative sense of the term.

A reversal of course in relation to the interpretation of the Citizenship Clause should not be deemed necessary under the *Casey* criteria. . Any claim that reversal is necessary must be politically motivated. Whereas that opinion should not be discounted solely because it is political, in the legal realm its currency is greatly diminished, if it has any trading value at all.

Moving away from the *Casey* criteria and whatever justifica-

178. See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). On the question of legitimacy see generally *BUSH v. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed., Yale University Press 2002); James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POLIT. SCI. 535 (2003).

tions exist for stare decisis in an abstract sense, I am of the (tempered) opinion that if a previous decision is wrong in some material way it should be overruled. It is this principle that best informed the Court in its most recent decisions overruling precedents. The prior decisions were wrong either as an original matter or were made untenable by the development of public morality since the initial decision. To a greater or lesser degree, this determination will always be political, and so there are those who decree the present Court as activist for its decisions in *Roper* and *Lawrence*, juxtaposed against those who believed the initial decisions in *Stanford* and *Bowers* were just as incorrect under the "true" meaning of the Constitution. There is a certain give in the Fourteenth Amendment's Due Process and Equal Protection Clauses that give this debate teeth on both sides. The Citizenship Clause leaves little flexibility. "All citizens" is an absolute that runs into none of the interpretative or real world problems that Justice Black's purported First Amendment absolutism did. Likewise, even if "subject to the jurisdiction thereof," has political rather than legal jurisdiction, it offers the interpretation previously given by Ide in the section addressing potential congressional reactions. This Clause can only be stretched so far, and any other interpretation than the one given by the court in *Wong Kim Ark* would seem wrong and unfaithful to the logical import of the language. This thought leads inexorably to its compliment, namely *Wong Kim Ark* was right when it was decided and has remained correct even into the present. There is no reason to believe the decision is wrong, as the interpretation given by the Court has roots in the common law and the exact language used by the Reconstruction Congress, as well as executive and legislative pronouncements on the subject before and after the adoption of the Fourteenth Amendment. If one uses the *Roper*, *Lawrence*, and *Atkins* decisions as a jurisprudential template for when a line of analysis must diverge from its history, a potential reinterpretation of the Citizenship Clause, contra *Wong Kim Ark*, is simply not necessitated. There is no indication that the decision is in any material sense incorrect.

Whatever practical concerns we may have about this principle, reinterpretation, is simply not required under any theory of the judicial revisiting of precedent even if there was a practical and legitimate alternative to what now exists,

* * *

In using the term "political morality," both in the title of this article and periodically throughout, I mean to emphasize only the ideals and principles of treatment embodied in the U.S. political order as a function of constitutional provisions and the interpretation of such provisions. Despite the often controversial nature of political morality, namely the competition between rival views of what the nature of U.S. political morality even is, this notion has played a significant role in twentieth century law, especially constitutional adjudication and theorizing. It is a political morality based on norms of equal citizenship and standing in the community that allowed the Warren Court to strike down segregation as unconstitutional despite its semantic conformity with the bland "equal protection of the laws" language. It was not the Constitution as such that had been violated by segregation, or to be more specific, not the clear text, but rather those principles and ideals that enlightened the meaning of the words actually used. Likewise, the Due Process Clause has been given substantive import not because its language dictates such a result, but because of the view that such language was meant to embody a principle more fundamental than process. The three means by which *jus soli* could be banished from the U.S. legal lexicon canvassed above are improper because they are incompatible with our deeper notions of political morality—of what constitutes equality of treatment and of how one defines the relationship between person and government. At this point in our constitutional history, reinterpretation would be a retreat to an earlier time when prejudice was sanctified by "impartial" laws. Whatever legitimacy Collins' or Fuller's rule would have had as an original matter, and both are, I think, misguided, the United States has set itself down a different path. There is no way consistent with our established political morality that we could now venture from this course. For better or worse, *jus soli* will be a part of our political heritage. Despite certain problems it will periodically give rise to, it stands as legal proxy for deeper ideals of liberality embodied in our governmental structure. This point alone should argue strongly in favor of its retention.

VI. CONCLUSION

The problem with undocumented aliens will not dissipate in the near future, regardless of which compromise comes out of executive and Congressional dialogue on the issue, and like most

immigration issues it will undoubtedly surface again. How many amnesties have been granted in the past fifty years? Nonetheless, despite the numerous ways to address the perceived problems, there are still right ways and wrong ways. By doctrinally exploring the two cases dealt with in this article I hoped to highlight just that fact and to more firmly set the future of U.S. policy on the path to “right way” resolution. No matter how unlikely I believe such a course of action to be in reality, there are no true legal impediments to greatly restricting the principle of *jus soli*. Yet, the whole history of our political morality strongly argues against such change in the circumstances we now find ourselves in. Such a change was not even effectuated during the height of anti-Chinese sentiment. To do so now would be to follow the lead of a dubious forebear in abrogating the more enlightened ideals that define the nature of our government and polity. That we would do so without the overt racism and xenophobic sentiments of the Dominicans, and probably with explicit statements of neutrality, equality, and rule-of-law rhetoric, should not serve as a cover to the truly illiberal nature of the solution.