Limiting the Application of *Jus Soli*: The Resulting Status of Undocumented Children in the United States

Brooke Kirkland
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THE RESULTING STATUS OF UNDOCUMENTED CHILDREN IN THE UNITED STATES

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INTRODUCTION

Since the mid-1990s, politically conservative members of the public and Congress have proposed restricting the availability of citizenship under United States (U.S.) law. Until recently, proposals to limit the application of jus soli (or birthright citizenship) to children of citizens and lawful permanent residents – thereby abolishing its application to undocumented aliens – did not appear to be a legitimate threat. However, anti-immigrant sentiments are on the rise, as exemplified by the passage of the 1996 immigration reforms by Congress. The adoption of the Anti-terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have made non-citizens more vulnerable to removal. Following the events of September 11, 2001, the severity of these changes has continued to increase.

Considering this recent surge in anti-immigrant legislation, it is now more important than ever to ensure that all children born in the U.S. are given citizenship rights. Denying birthright citizenship to the children

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3 Id. at 355. The term “removal” encompasses both deportation and exclusion.

4 Id. at 370-73.
of undocumented aliens\(^5\) would impair the ability of migrants and their families to access basic rights, and could potentially lead to statelessness.\(^6\) Such a result would be contrary to the policy of inclusiveness that drove Congress to enact birthright citizenship over a century ago.\(^7\)

Advocates of abolishing the application of *jus soli* to children born in the U.S. to undocumented parents argue that reducing the temptation to have a U.S. citizen child will decrease illegal migration into the country.\(^8\) However, because of the significant legal restrictions placed on family sponsorship and hardship waivers, this argument is unfounded. Moreover, advocates should inquire into the effects such a policy would have on the civil, political and economic rights of migrant populations and how this could affect the U.S. as a society. Will denying birthright citizenship to the children of undocumented aliens create an underclass of children who, despite attempted deterrence, will continue to be born in the U.S.? If so, what is the fate of these children? This note analyzes the resulting legal status and rights of such children under domestic and international law.

Part I of this paper will examine the history of birthright citizenship in the U.S. and the current atmosphere surrounding citizenship rights. This section will describe Congressional proposals to limit birthright citizenship and detail the reasoning behind these proposals. In particular, Part I will focus on the legitimacy of the argument that limiting the application of birthright citizenship will deter illegal immigration.

Part II will explore the consequences of limiting *jus soli* to certain members of American society. Specifically, Part II will examine the potential for statelessness and the creation of a subclass of long-term undocumented residents who will be forced to endure heavy burdens to obtain citizenship.

Part III will explore the global trends in citizenship policy. This section will detail two case studies of long-term immigrant groups – Turkish citizens in Germany and Korean citizens in Japan – whose descendants

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\(^5\) The term "undocumented" will be used in this article to mean "illegal." The term "alien" will be used as it is defined in 8 U.S.C. § 1101(a)(3) (2006) ("any person or national not a citizen of the United States").

\(^6\) See infra Part II.


\(^8\) See infra Part I.B.
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have been either literally or effectively denied citizenship throughout recent history. The resulting inequities in these two cases may be analogized to what would occur in the U.S. following the abolition of jus soli.

Part IV will explain the international community’s response to the issues of statelessness and migrants’ rights. Following this is an exploration of how international human rights instruments can be used to protect the rights of undocumented migrants.

The conclusion in Part V will argue that it is in our nation’s interest to decline to take the drastic measure of abolishing the application of birthright citizenship to the children of undocumented aliens.

I. THE UNITED STATES’ MOVEMENT TO ABOLISH BIRTHRIGHT CITIZENSHIP

The U.S. currently confers citizenship by both jus sanguinis and jus soli. Pursuant to jus sanguinis, citizenship rights are given to children born to one or more parents who are nationals or citizens of the State. Under the doctrine of jus soli, a state grants citizenship to anyone who is born in its territory. Scholars have noted that the jus soli doctrine used in the U.S. stems from English common law which conferred citizenship to anyone born on English soil. Indeed, prior to the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment, birthright citizenship was generally framed within the context of English common law.

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11 BLACK’S LAW DICTIONARY 389 (2d pocket ed. 2001) (defining jus sanguinis as “the rule that a child’s citizenship is determined by their parents’ citizenship”).
12 BLACK’S LAW DICTIONARY 390 (2d pocket ed. 2001) (defining jus soli as “the rule that a child’s citizenship is determined by place of birth”).
14 Civil Rights Act of 1866, 14 Stat. 27 (1866).
15 U.S. CONST. amend. XIV.
16 Lee, supra note 1, at CRS-3. However, this was not without controversy. “Congress’ silence on the issue of citizenship by birth in the United States caused some confusion and disagreement as to what the appropriate definition was.” Id.
Following the *Dred Scott*\(^1\) decision denying citizenship to African-Americans, Congress adopted the Civil Rights Act and the Fourteenth Amendment to counteract the notion that African Americans were not citizens and should not be given citizenship rights.\(^2\) The Civil Rights Act of 1866 states that all people “born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States . . .”\(^3\) Enacted two years later, the Fourteenth Amendment states that all persons who are “born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”\(^4\) After the Civil Rights Act of 1866 and the Fourteenth Amendment were adopted, birthright citizenship was secured in civil law and later codified in § 301(a) of the Immigration and Nationality Act (INA).\(^5\)

However, it was not until 1898, in the landmark case of *U.S. v. Wong Kim Ark*,\(^6\) that the Supreme Court expressly declared the constitutionality of *jus soli*.\(^7\) In *Wong Kim Ark*, the Court held that a child born in the U.S. to Chinese immigrants who were unable to naturalize is a citizen.\(^8\) The Court held that “subject to the jurisdiction thereof” is to be construed as implying the territory within which a person is born, not that person’s national political allegiance.\(^9\)

In the *Wong Kim Ark* decision, the Supreme Court did not discuss whether it distinguished between the legal residency status of *Wong Kim Ark*’s parents and that of an illegal immigrant. However, conferring birthright citizenship to children who are born to immigrant parents of any status has long been considered a practical, easily-applied and inclusive rule in the American polity.\(^10\) Indeed, the Supreme Court recently reinforced an expansive reading of the citizenship clause of the Fourteenth Amendment

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17 Dred Scott v. Sandford, 60 U.S. 393 (1856).
19 Civil Rights Act of 1866, 14 Stat. 27 § 1 (1866).
20 U.S. Const. amend. XIV, § 1.
22 169 U.S. 649, 705 (1898).
23 Id.
24 Id.
25 Id. at 693.
when it held that states could not prohibit the children of illegal aliens from attending public school in *Plyler v. Doe.*

According to the experience of one author, birthright citizenship was “tremendously important” for second and third generation Japanese Americans and other Asian-Americans, in light of restrictive and racist naturalization laws in the eighteenth and nineteenth centuries. Without citizenship or naturalization rights such Americans would have “remained perpetual aliens” and, therefore, have been denied full membership rights. Arguably, the surge in anti-immigrant policies in the 1990s constitutes a modern day form of such restrictive laws. *Jus soli* therefore continues to play an important role in equality.

### A. Proposals to Limit Jus Soli Citizenship Rights

Despite the long history of birthright citizenship in the U.S., globalization, porous borders and increasingly accessible travel have led to the social criticism of and legislation against inclusionary immigration policies. Additionally, the increase in migration to the U.S. and the rise of the welfare state have highlighted the disadvantages of inclusionary immigration policies.

National security has become yet another argument used to support the restriction of citizenship rights. Birthright citizenship was noted in at least one case following the September 11, 2001 attacks. During the trial of suspected terrorist Yaser Hamdi, the Supreme Court issued a seven-three decision that explicitly granted the defendant citizenship status based on his birth in Louisiana. However, Justices Scalia and Stevens dissented, noting in dicta that the majority’s disinterest in addressing the citizenship issue was merely “presumed.”

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29 Id. at 5.


33 Id. at 554.
In tandem with a growing public discourse on illegal immigration in the mainstream media, Congress has recently sought to amend statutory provisions of the INA to deny birthright citizenship to the children of undocumented aliens. In September 2005, a provision entitled “To Reform Immigration to Serve the National Interest” was proposed by the Chairman of the ninety member Congressional Immigration Reform Caucus, Representative Thomas Tancredo. The bill supported the abolition of pure jus soli and limited the conference of citizenship solely to those who are born on U.S. soil and have at least one parent who is a citizen or permanent resident. Additionally, Congressman Hayworth and Congressman Deal have proposed separate perfecting amendments that would reverse the holding of Ark by changing the definition of “subject to the jurisdiction of the United States” so that citizenship is only given to children who are born to at least one parent who is a citizen or permanent resident. Congressman Deal’s proposal has gained the support of eighty-four cosponsors. More extreme proposals include limiting birthright citizenship to mothers who are citizens or legal residents. The adoption of a Constitutional Amendment to deny jus soli to the children of undocumented aliens has also been recommended.

Interestingly, all the proposals in Congress seek to outright abolish the application of birthright citizenship to the children of undocumented aliens. None of them, however, take the more sensible and realistic path of placing either age or residency conditions on the conference of jus soli.

B. Reasoning Behind the Proposals to Limit Birthright Citizenship

Advocates have argued for the adoption of more stringent citizenship requirements for numerous reasons. Some advocates argue that the rapid increase in the number of immigrants is negatively affecting the racial and cultural heritage of the U.S. Other commentators argue that the Four-

34 See generally Lee, supra note 1.
35 Id.
37 Id.
teenth Amendment should reflect the consensual nature of democracy and therefore should not be read to automatically confer birthright citizenship. While noting the above cultural arguments, this note will examine the merits of the more quantifiable argument that *jus soli* encourages illegal immigration by women who want to have U.S. citizen children, often referred to as “anchor babies” or “border babies.”

Some opponents of pure *jus soli* argue that the policy draws people to the U.S. to reproduce and receive welfare benefits through their U.S. citizen children. Thus, abolishing the application of birthright citizenship to the children of undocumented aliens would deter undocumented mothers from illegally entering the U.S. to give birth thereby lessening the illegal immigrant population. The presumption behind this argument is that giving birth to a U.S. citizen child is the main motive driving undocumented mothers either to enter or to remain illegally in the U.S. Indeed, news reports have documented mothers who cross the border with the primary objective of having a U.S. citizen child. According to these reports, expecting mothers will obtain a seventy-two-hour local border crossing visa, which permits them to travel within a 25-mile radius of the border. Admittedly, no country would want to enact a policy that induces such behavior.

However, Hispanic women who cross the border to have citizen children are only a part of the larger issue involving babies that are born to

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42 See Schuck & Smith, supra note 26, at 116 (the government “rests on the consent of the governed”).

43 “Pure *jus soli*” in this note means the application of birthright citizenship to the children of aliens and citizens alike.


47 See id.
undocumented parents in the U.S. Despite the above anecdotes, common sense and a close look at the legal implications of so-called “anchor babies” bring into question the argument that giving birth to a U.S. citizen child is the only motive of many undocumented migrants.

First, only a portion of undocumented aliens live in border states that would accommodate illegal land entry for pregnant women, including California, Texas, New York and Arizona, and presumably many of the women in these states live in the interior. It follows that women who illegally cross the border while pregnant for the sole purpose of giving birth comprise only a fraction of births to undocumented aliens in the U.S. Not everyone lives within a twenty-five mile radius from the border. In other words, the majority of births by undocumented aliens in the U.S. occur to those who already reside in the U.S., conceivably because they came to the U.S. on a temporary visa and then overstayed, or they crossed the border without inspection. If so, it is likely that they spent some amount of time in the U.S. prior to their pregnancy, potentially for reasons other than solely to give birth. Therefore, stripping women of any motive to give birth would fail to deter illegal migration. As commentators have noted with regard to the movement to abolish *jus soli* in Canada, “the concept that such a change would stem abuse of the immigration system ‘eras[es] the economic and political context in which . . . illegal immigration is occurring.’”

Second, the notion that the families of children who are granted birthright citizenship can easily obtain subsequent legal status is far from the truth. Furthermore, if migrants are aware of the hurdles that exist, it is questionable whether undocumented migrants enter clandestinely or overstay their visa for a number of reasons aside from having U.S. citizen children. For example, family sponsorship restrictions and the heavy burden of proof necessary to attain extreme hardship relief from removal undermine the assumption that the act of crossing the border to give birth is a way to gain personal benefits for the family. Suppose, for example, that a

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woman crosses the border to have a child in the U.S. That child would not be able to sponsor its parents for permanent residency until it reached the age of twenty-one. Opponents of birthright citizenship rights for the children of undocumented aliens are aware of the fact that parents cannot attain residency benefits for decades after their citizen children are born. Despite this, *jus soli* opponents still argue that people illegally migrate to the U.S. because their children can eventually sponsor them.

Indeed, U.S. citizen children can play an important role in an undocumented parent's cancellation of removal case. If the non-citizen parent is placed in removal proceedings and can argue that their removal would cause "exceptional and extremely unusual hardship" to their U.S. citizen child, the parent may be allowed to stay in the U.S. Indeed, the Supreme Court has indicated its approval of the Attorney General's authority to consider the effect of removal on a U.S. citizen child when defining "extreme hardship."

Despite the potential of this standard, however, federal appellate courts rarely stay the removal of undocumented aliens based solely on the fact that they have citizen children. In addition, the adoption of IIRIRA in 1996 raised the bar for non-citizens using their children to protect them from removal. Most notably, since the inception of IIRIRA, federal courts have not even been able to review certain decisions by the Board

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53 See id.
55 I.N.S. v. Wang, 450 U.S. 139, 144-45 (1981) (noting that the Board of Immigration Appeals was acting within its authority when it took into account whether a deportable alien's children would suffer educational deprivation or economic hardship in defining extreme hardship).
56 Lee, supra note 1, at CRS-16. See, e.g., Hernandez-Rivera v. I.N.S., 630 F.2d 1352, 1356 (9th Cir. 1980); Gonzalez-Cuevas v. I.N.S., 515 F.2d 1222, 1224 (5th Cir. 1975).
57 Romero-Torres v. Ashcroft, 327 F.3d 887, 889 (9th Cir. 2003) (noting that IIRIRA raised the "hardship" bar from "extreme hardship" to "exceptional and extremely unusual hardship"). See also In re Monreal-Aguinta, 23 I. & N. Dec. 56, 65 (B.I.A. 2001) (defining "exceptional and extremely unusual hardship" as "... beyond [what] would normally be expected from the deportation of an alien with close family members here.").
of Immigration Appeals (BIA) that involve the exercise of discretion, such as cancellation of removal.\(^5\) Furthermore, the BIA does not typically find cancellation of removal relief to be warranted.\(^6\) Accordingly, in practice, the law does not support the notion that U.S. immigrant children can easily sponsor their family members to become lawful permanent residents.

Placing the notion of "anchor babies" within the larger context of residency statistics and strict immigration regulations, it is hard to understand how abolishing the application of \textit{jus soli} would serve as a deterrent to undocumented mothers. The next issue that must be addressed is the effect of denying citizenship to those who are born in the U.S. Not only will abolishing the application of birthright citizenship to the children of undocumented aliens fail to deter illegal immigration, it would also open the door to statelessness and further indenture a subclass of residents to their illegal status.

II. Potential Effects of Denying Birthright Citizenship to the Children of Undocumented Aliens in the United States

In order to comprehend the potential effects of denying citizenship to the children of undocumented aliens, one must understand the benefits afforded solely to citizens. A number of rights are attached to citizenship. Most importantly, only citizens have the right not to be deported from the U.S.\(^6\) This right has become more important since the passage of the 1996 immigration reforms which increased the likelihood of removal for both undocumented aliens and lawful permanent residents when they commit even minor crimes.\(^6\) Additionally, only citizens have the right to vote in

\(^5\) INA § 242(a)(2)(B)(i), 8 U.S.C. 1229(b) (2006); Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1144 (9th Cir. 2002).

\(^6\) See In re Recinas, 23 I. & N. Dec. 467, 473 (B.I.A. 2002) (canceling the removal of a non-citizen single mother of six U.S. citizen children who had no relatives in her country of citizenship, the Court held that the cumulative factors present in this case will not typically be found in most other cases). See also Feinstein Questions Removal of Otherwise Law-Abiding Undocumented Aliens, 81 NO. 24 INTERPRETER RELEASES 792 (June 21, 2004).

\(^6\) See Ho v. White, 259 U.S. 276, 284 (1922) ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien.").

\(^6\) Kati L. Griffith, Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents, 18 GEO. IMMIGR. L.J. 273, 276 (2004) (stating that “even if an LPR has lived in the United States since childhood, she can be subject to mandatory deportation for almost any criminal conviction including misdemeanors, such as shoplifting or a bar fight.”).
the majority of jurisdictions\textsuperscript{62} and citizenship is often a prerequisite to running for public office.\textsuperscript{63}

For years, Congress has debated what rights the U.S. should give to non-citizens. In 1971, the Supreme Court characterized aliens as a "discrete and insular minority" and appeared to allow aliens protection under the equal protection clause.\textsuperscript{64} A decade later, the Supreme Court upheld the right of undocumented children to a free public education based on equal protection grounds.\textsuperscript{65}

However, in a wave of anti-immigrant legislation in 1996, Congress restricted both undocumented and documented immigrants' access to various rights and governmental benefits. For example, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act,\textsuperscript{66} which permitted states to discriminate against undocumented aliens in adopting welfare laws.\textsuperscript{67} Moreover, lawful permanent residents, who have long been given more security in the U.S. than their undocumented counterparts,\textsuperscript{68} were also in a more precarious position after 1996. Following the passage of the 1996 reforms, crimes, such as misdemeanors with a sentence of one year or less, can lead to a lawful permanent resident's detention and removal.\textsuperscript{69} In addition, the due process rights of lawful permanent residents have been further curtailed through the implementation of expedited removal procedures and cuts in judicial review.\textsuperscript{70} With these changes in mind, it is important to consider the potential effects of denying citizenship

\textsuperscript{62} VISALAW.com – The Immigration Law Portal, The ABC's of Immigration: Why Become a Citizen?, at http://www.visalaw.com/04feb2/2feb204.html. However, the right to vote has been taken away from convicted felons in some states.

\textsuperscript{63} Id. See also U.S. CONST. amend. XXIV, § 1, art. I.


\textsuperscript{67} Joppke, supra note 64, at 44.

\textsuperscript{68} See Yoh Nago, Demore v. Kim: Is the Supreme Court Decreasing the Right of Lawful Permanent Residents, 37 LOY. L.A. L. REV. 1715, 1723-24 (2004). For example, they can compete for jobs without special authorization and are given some rights similar to those of citizens.

\textsuperscript{69} Griffith, supra note 61.

rights to the children of undocumented aliens, namely statelessness and the creation of a subclass.

A. Statelessness

The most severe potential consequence of limiting *jus soli* to those born to U.S. citizens and permanent U.S. residents would be statelessness. People who enter the U.S. without legal status from countries that do not confer *jus sanguinis* citizenship rights (in which case they would not be granted automatic citizenship through their parents), could end up stateless if not afforded *jus soli* in the U.S. According to scholar Paul Weis, because nationality is the "principle link between the individual and international law . . . there cannot be any doubt that statelessness is undesirable."71 Moreover, the Economic and Social Council resolved in 1950 that "statelessness entails serious problems both for individuals and for States . . . ."72

To deal with the result of stateless children, some countries that afford only *jus sanguinis* citizenship have passed laws that give citizenship to children if they would otherwise be stateless.73

Countries that have allowed stateless populations to linger due to either the transfer of territory, political instability, targeted discrimination, or registration requirements stemming from financial or parental inadequacies, provide evidence of the deprivation of rights that may result from statelessness.74 For example, stateless people are denied the right to travel . . . .

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71 PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 162 (1979).
74 See, e.g., M. LYNCH, REFUGEES INT’L, LIVES ON HOLD: THE HUMAN COST OF STATELESSNESS: EUROPE (2005), available at http://www.refugeesinternational.org/section/publications/stateless_europe. Refugees International reports that Roma children in the Czech Republic who were not given citizenship following the split of Czechoslovakia were denied access to education and health care. *Id.* at 46. In addition, residents who were not conferred Estonian citizenship after the Independence of Estonia were left without access to travel and asylum opportunities. *Id.* at 22-26. Also, Biharis who have been denied citizenship in the territory of
because they cannot obtain a passport. In addition, according to Refugees International, an organization that has documented numerous cases of statelessness, "violation of the right to nationality is directly or indirectly related to the violation of other rights such as education, political participation, property ownership, and freedom of movement."\textsuperscript{75}

While statelessness is a serious problem, limiting the application of \textit{jus soli} would only result in stateless persons in few instances under contemporary citizenship policies. The majority of undocumented aliens in the U.S. are from countries that have adopted unconditional \textit{jus sanguinis} citizenship rights;\textsuperscript{76} however, exceptions will ultimately be found. Mexico, for example, allows for \textit{jus sanguinis}, but not beyond the second generation.\textsuperscript{77} Therefore, if a person were born to a Mexican citizen in the U.S., lived in the U.S. without U.S. citizenship and had a child, that child would be stateless if the U.S. were to discontinue its policy of pure \textit{jus soli}. It seems improbable that two generations would live undocumented in the U.S., leaving the following generation stateless; however, it is legally and realistically possible.

\textbf{B. An Unrealistic Path to Citizenship}

A more significant potential result of limiting the application of \textit{jus soli} would be the perpetuation of a subclass of undocumented residents. If children born in the U.S. to undocumented parents are not given citizenship status, it is unclear what their status would be. Presumably, the parents' status as undocumented aliens would be imputed onto their children.\textsuperscript{78}

Currently in the U.S. virtually all aliens not born here must first become lawful permanent residents if they want to eventually become citizens.\textsuperscript{79} An alien who is the spouse, child or unmarried son or daughter of a lawful permanent resident, or the spouse, child or sibling of a U.S. citizen, or who fits into an employment-based category, can be sponsored to be-

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  \item \textsuperscript{75} \textit{Id.} at 28.
  \item \textsuperscript{76} \textit{DEPARTMENT OF HOMELAND SECURITY, supra} note 48 (listing nationalities with the highest number of undocumented migrants in the U.S.). \textit{See, e.g., EL SAL. CONST. art. 90; GUAT. CONST. art. 144.}
  \item \textsuperscript{78} Currently, none of the proposals to abolish \textit{jus soli} indicate the status of the resulting illegal children.
  \item \textsuperscript{79} INA § 316(a), 8 U.S.C. § 1427 (2006).
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come a permanent resident. After having entered illegally, however, most aliens are considered inadmissible and barred from attaining such permanent residency status without a waiver. Usually, they must leave the U.S. and apply from their home country if they reside in the U.S. without legal status. Further, undocumented aliens who are in the U.S. illegally for more than one year are mandatorily barred from the U.S. for ten years. Therefore, if an undocumented immigrant is not the child or parent of a U.S. citizen, marrying a citizen usually becomes the only available means left to apply for permanent residency without having to leave the U.S.

Considering the above-noted difficulty of obtaining a green card, it is foreseeable that undocumented aliens living in the U.S. would choose alternative routes to attain this status, i.e. committing marriage fraud or clandestinely returning to their parent’s country of origin and altering birth documents to avoid detection of having been unlawfully present in the U.S. too long. Such a policy would only contribute to the underground nature of illegal migration. Due to the risks in seeking citizenship, it would be reasonable to find many undocumented aliens who bare children in the U.S. choosing not to get their green card or naturalize. In turn, they may not be detected by immigration authorities for many years and, therefore, may never be deported. If so, the resulting subclass of undocumented aliens will grow as they secretly raise families in the U.S. This could lead to a number of problems similar to those that have occurred in countries where guest-worker programs have attracted migrants but where jus soli was not conferred to their children.

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80 Id. §§ 201, 203, 8 U.S.C. § 1153 (2006). For employment sponsorship, the alien would have to show, for instance, that they could fill a position that could not be filled by a qualified worker in the U.S. or that they have extraordinary abilities.

81 Id. § 212(a)(6)(A), 8 U.S.C. 1182 (2006) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than designated by the Attorney General, is inadmissible.").

82 See National Immigration Project of the National Lawyers Guild, Immigration Law & Family § 9:2, § 3:16 (Consular processing is available to all intending immigrants. Adjustment of status is open only to those beneficiaries who meet stringent eligibility criteria.); Matter of Legaspi, 11 I. & N. Dec. 819 (B.I.A. 1966). If an immigrant has status, they can adjust their status from inside the U.S. under INA § 245. Otherwise, family petitions are processed from abroad. INA § 245(i) is an exception to this general rule for people who have filed for their visa prior to Apr. 30, 2001.


III. GLOBAL TRENDS IN CITIZENSHIP LAW AND THE EFFECT OF DENYING CITIZENSHIP TO GUEST WORKERS IN GERMANY AND JAPAN

In 2001, scholar Patrick Weil researched the citizenship laws of twenty-five countries and found that, since World War II, their policies regarding citizenship have converged.85 Weil concluded that democratic countries with relatively stable borders are taking a moderate stance on *jus soli*, countries with strict citizenship laws are moving toward *jus soli* policies, and countries with liberal regulations are putting limitations on *jus soli*.86 Weil further found that all provisions that did not provide for the integration of second and third generation immigrants were progressively overturned.87

Within this global trend, some limited form of *jus soli* is part of most developed countries' citizenship laws. Canada, for example, has had a policy of *jus soli* applicable to undocumented aliens since the advent of Canadian citizenship in 1947.88 In Europe, the majority of countries allow access to birthright citizenship for children born to alien parents under a condition of residency.89 In addition, in the 1990s the European Union pressured a number of newly independent countries, specifically the Baltic States, to enact birthright citizenship policies that ensured rights to non-citizen residents.90

However, countries have not always been willing to extend citizenship to migrants in their community. The following two case studies will examine the societal inequities resulting from the implementation of guest-worker programs under policies of exclusivity in Germany and Japan. Upon researching the results of these policies, it is apparent that citizenship is a necessary component to long-term residency in a country. Similarly,

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85 See generally Weil, supra note 77, at 17-35.
86 Id. at 19.
87 Id. at 33.
88 Buhler, supra note 49, at 95.
89 Weil, supra note 77, at 30.
90 See Helen M. Morris, EU Enlargement and Latvian Citizenship Policy, J. ETHNOPOLITICS MINORITY ISSUES IN EUR. 11 (2003) (Morris notes that the Conference on Security and Cooperation in Europe (CSCE) communicated the idea that "withholding residency status for a large number of non-citizens impacted on the fundamental interests of these individuals, concerning their home, family, and work"); Lowell W. Barrington, The Making of Citizenship Policy in the Baltic States, 13 GEO. IMMIGR. L.J. 159, 194 (1999) (noting the CSCE High Commissioner for National Minorities’ warning that denying the majority of non-Latvians the right to become citizens would consequently deny them the right to be involved in key decisions, thereby threatening the character of the democratic system).
inequities would arise in immigrant communities throughout the U.S. following the abolition of *jus soli*.

A. The Turks in Germany

Prior to the 2000 reforms, Germany based its citizenship policy on furtherance of the German blood-line. Moreover, Germany’s naturalization laws were strict. These laws forced applicants to renounce their cultural heritage and commit to German culture. Though the German Constitution confers an abundance of basic rights to non-citizens, Germany only recently reformed their nationalistic policy and began conferring citizenship based on a limited form of *jus soli*. According to one scholar, this change was due in part to criticism by the United Nations Committee on the Elimination of All Forms of Racial Discrimination, which cited the harmful effects of Germany’s prior exclusionary policy on resident ethnic communities such as the Turks.

Following a 1961 treaty with Turkey that established a guest worker program in Germany, it became clear that limited citizenship policies could lead to generations of lifelong German residents who were not citizens. As of 1998, Turkish nationals were the largest resident alien population in Germany. Foreign by law, these Turkish migrants were “in reality more and more integrated . . . [and] sociologically quasi-German in 

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91 In 2000, Germany adopted *jus soli* for children who were born to foreign parents, at least one of whom has lived in Germany for eight years. In addition, one parent must have an unlimited residence permit or residence entitlement. See German Embassy Washington, D.C., Background Papers: Citizen Reform and Germany’s Foreign Residents, at http://www.germany-info.org/relaunch/info/archives/background/citizenship.html [hereinafter German Embassy].
93 Id. at 102-03.
94 Joppke, *supra* note 64, at 59 (stating that Germany’s restrictive citizenship policies were found untenable in light of an expansive system of alien rights).
97 German Embassy, *supra* note 91.
their activities and their social habits." However, three out of four Turkish citizens who were not German citizens but had lived in Germany for decades played no role in the political system. As a result, many Turkish citizens in Germany were given substandard education and housing, and experienced discrimination. Further, a 2005 estimate showed that the children of guest-workers in Germany have a poverty rate 10% higher than that of citizens. As one scholar noted, the long-term implications of a policy such as the one in place in Germany until 2000 would not apply in the U.S. so long as birthright citizenship is conferred to the children of undocumented aliens.

B. The Koreans in Japan

Koreans in Japan face a similar fate as the Turks in Germany. Following World War II, a large number of Koreans remained in Japan. Presently, Koreans form the largest ethnic group in Japan. Like Germany, Japan does not grant citizenship rights at birth and advocates strict assimilation for those who naturalize. Koreans who continued to reside in Japan and their descendants were given "permanent residency status." As a result, by 1974, over three-fourths of Korean residents were second and third generation descendants. Due to their status as non-citizens, they are not allowed to vote or hold public employment and are effectively

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100 Id.
102 See Bosworth, supra note 96.
103 Korea was annexed to Japan from 1910 to 1945.
104 Kaori Okano, Third-Generation Koreans' Entry into the Workforce in Japan, 28 ANTHROPOLOGY & EDUC. Q. 524, 526 (Dec. 1997).
106 Id.
denied full participation in society. Interestingly, most Koreans living in Japan choose not to naturalize. It is speculated that this is because either they know they will continue to be undervalued in society and see no reason to denounce their Korean heritage, or they do not want to fully assimilate.

Scholars have researched the consequences of Japan’s policy and found that it negatively affects Koreans in Japanese society. For instance, the academic performance of high school-aged Koreans in Japan is poor in comparison to their Japanese counterparts and they are under-represented in the workforce. As a result, Koreans feel marginalized. In addition, Koreans’ status as a minority group, in Japan, has also been a force in denying them a multitude of welfare rights.

While Turks and Koreans may have had different reasons for not naturalizing, the result of their continued alien status is well documented. As discussed in Part II above, abolishing birthright citizenship for the children of undocumented aliens in the U.S. would create analogous barriers to citizenship. Nonetheless, children would be raised in American society and one could imagine them becoming “sociologically quasi-American.” Whether the resulting communities take on these characteristics or choose to segregate themselves, history reveals that the resulting minority status will ultimately lead to discriminatory treatment within the larger society.

IV. INTERNATIONAL RESPONSE TO CONFLICTING CITIZENSHIP POLICIES AND MIGRANT RIGHTS

No nation-state, including Germany, Korea or the U.S., is bound by international law to provide immigrants with a path towards citizenship. Treaty law and customary international law have long determined that it is the responsibility of each sovereign nation to determine its own nationality laws. Specifically, it has been opined that long-term trends in nation-

109 See Iwasawa, supra note 107, at 149.
110 See Motani, supra note 105, at 229.
111 Okano, supra note 104, at 524.
112 Id. at 525.
113 See Motani, supra note 105, at 228.
114 Convention on Certain Questions Relating to the Conflict of Nationality Laws art. I, Apr. 12, 1930, 179 L.N.T.S. 89 (entered into force July 1, 1937) [hereinafter Convention on Conflict of Nationality Laws]. This Convention was signed by 27 states and ratified by 13 states.
115 Weis, supra note 71, at 65-66.
ality laws throughout the world, such as the use of some form of either *jus soli* or *jus sanguinis*, do not create customary international law.\(^\text{116}\) However, with the advent of international human rights law, states have begun to base rights on jurisdiction as opposed to nationality.\(^\text{117}\)

While there are no international laws forcing states to confer their nationality, the international community has formally recognized the importance of citizenship since the 1930s.\(^\text{118}\) In 1930, two significant documents were drawn up and eventually entered into force: the Convention on Certain Questions Relating to the Conflict of Nationality Laws\(^\text{119}\) and the Protocol Relating to a Certain Case of Statelessness,\(^\text{120}\) the former being the most pertinent to this note. The 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws states in its Preamble that “it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality . . . .” It further states that international efforts should be put forth to abolish all cases of statelessness.\(^\text{121}\) The Universal Declaration of Human Rights also declares that everyone has a “right to nationality.”\(^\text{122}\) Further, in 1961 the United Nations International Law Commission adopted the Convention on the Reduction of Statelessness, which commits contracting states to “grant its nationality to a person born in its territory who would otherwise be stateless.”\(^\text{123}\) In the same year, the European Union echoed the 1961 Convention

\(^{116}\) Id. at 96, 198.

\(^{117}\) Ralph Wilde, *Legal Black Hole? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739, 806 n.49 (2005) (citing General Comment 15 by the UN Human Rights Committee, discussing the ICCPR: “each State party must ensure the rights in the Covenant to ‘all individuals within its territory and subject to its jurisdiction’ (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone . . . irrespective of his or her nationality or statelessness.”).

\(^{118}\) See *Weis*, supra note 71, at 162.

\(^{119}\) Convention on Conflict of Nationality Laws, supra note 114.

\(^{120}\) Protocol Relating to a Certain Cases of Statelessness, Apr. 12, 1930. 179 L.N.T.S. 115 (*entered into force* July 1, 1937). This Protocol was ratified by 11 states.

\(^{121}\) Convention on Conflict of Nationality Laws, supra note 114 (the preamble states that “the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases of . . . statelessness.”).


when it adopted the 1997 European Convention on Nationality, which states that if a person would otherwise be stateless, the existence of genuine and effective links with a state may be grounds for granting nationality.\textsuperscript{124} The Council of Europe defined these links to include birth in a territory and residence in the territory.\textsuperscript{125}

As economic markets have globalized and the legal and illegal movement of individuals across borders has increased, there is growing pressure to protect the rights of individuals despite nationality and sovereignty issues. Many issues that were once assumed to be under the sole jurisdiction of individual nation-states have given way to voluntary international regulation. Over the past couple of decades, for example, issues such as criminal prosecution and asylum law have come under the control of international law despite their potential effect on nation-state sovereignty.\textsuperscript{126} G. Fourlanos states, "sovereignty is what remains after the enforcement of all kinds of restrictions provided by international law."\textsuperscript{127} Under this line of reasoning, the rights of permanent residents such as the Koreans and the


\textsuperscript{127} See Buhler, supra note 49, at 104 (quoting GERASSIMOS FOURLANOS, SOVEREIGNTY AND THE INGRESS OF ALIENS: WITH SPECIAL FOCUS ON FAMILY UNITY AND REFUGEE LAW 85 (1986)). "Sovereignty as responsibility has become the minimum content of good international citizenship." GLOBAL COMMISSION ON INTERNATIONAL MIGRATION, MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION 75 (Oct. 2005), available at http://www.gcim.org.
Turks, as well as the rights of undocumented aliens, should be afforded international protection.

A. International Human Rights Instruments

The international community has enacted a number of instruments that could be used to combat the creation of a subclass of undocumented aliens not granted *jus soli* and, in particular, to protect the children of such immigrants. While many of these treaties may be globally recognized, the U.S. has refrained from ratifying or enforcing such instruments. However it has been considered customary law that, minus any treaty or federal statutory authority to the contrary, the signatory states are bound to non-retrogression from the human rights treaties they have signed.128 Accordingly, notwithstanding any treaty or federal statutory authority to the contrary, the U.S. is bound by common law to non-retrogression from the human rights treaties it has signed. The U.S. has signed the majority of the international instruments set forth in the following paragraphs129 and is therefore bound to non-retrogression from their tenets.

For example, Article 2 of the three groundbreaking human rights instruments, the Universal Declaration of Human Rights,130 the International Covenant on Civil and Political Rights (ICCPR)131 and the International Covenant on Economic, Social and Cultural Rights (ICESCR),132 state that everyone is entitled to all the rights and freedoms set forth in these instruments, without distinction "of any kind, such as . . . national or social

128 Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S 331 (committing states to “refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . .”). While the U.S. has signed, but not ratified the Vienna Convention, the Vienna Convention has continually been regarded by U.S. courts as an “authoritative guide to the customary international law of treaties.” See Auguste v. Ridge, 395 F.3d 123, 141 (3d Cir. 2005); Ehrlich v. American Airlines, Inc., 360 F.3d 366, 373 (2d Cir. 2004).
Of particular strength and importance are the rights set forth in the ICCPR, which the U.S. has ratified. The Human Rights Committee has reinforced the importance of the ICCPR's application to everyone, "irrespective of reciprocity, and irrespective of his or her nationality or statelessness." Specifically, the ICCPR protects aliens against many violations of their liberty including their right to security in their persons, the right not to be tortured and the right not to be held in slavery, among others.

Despite these equal protection clauses, if the U.S. were to limit the application of *jus soli* the resulting subclass of undocumented aliens would not be afforded certain rights protected by these instruments. They would not be able to work legally and therefore their wages would likely be depressed, making them vulnerable to slave-like conditions. The right to freedom of expression and opinion are also protected under these instruments and would be violated. Forced to spend their time in hiding to avoid removal, undocumented aliens would be rendered *de facto* unable to exercise free speech.

However, certain ICCPR equal protection provisions hinge on citizenship and legal immigration status. The right to freedom of movement in Article 12 is limited to aliens "lawfully" in the country and the right to vote in Article 25 is limited to citizens. The status requirements of these provisions strip undocumented aliens of the protection of these rights. In addition, the Human Rights Committee which oversees the ICCPR has commented that the question of whether an alien is "lawfully" within the territory of a state is a matter governed by domestic law. As such, international law does not fully protect a subclass of undocumented aliens. Advocates must therefore look to other treaties, such as those specifically protecting children and migrants, to protect children born in the U.S. to undocumented aliens.

133 *Id.* at art. 2; ICCPR, *supra* note 131, at art. 2.
136 *Id.* at art. 12.
137 *Id.* at art. 25.
The ICESCR\textsuperscript{139} and the Convention on the Rights of the Child (CRC),\textsuperscript{140} for example, have been signed by the U.S.\textsuperscript{141} and could be used to protect the children of undocumented aliens who do not have full citizenship rights. The ICESCR protects a number of welfare rights including the right to work and the right to fair wages.\textsuperscript{142} In addition, Article 3 of the CRC declares that "in all actions concerning children . . . the best interests of the child shall be taken into consideration."\textsuperscript{143} Further, Article 2 states that a child shall not be discriminated against "irrespective of the child’s . . . parent’s . . . birth or other status."\textsuperscript{144} Most importantly, Article 27 states that children have the right to "a standard of living adequate for the child’s . . . mental, spiritual . . . and social development."\textsuperscript{145} Although neither the ICESCR nor the CRC have been ratified, the Supreme Court recently cited the CRC in its decision to abolish the death penalty for minors.\textsuperscript{146}

Given the argument that illegal migration into the U.S. and subsequent procreation will continue despite a change in citizenship policy, it is easy to foresee continual violations of the resulting children’s rights. Forcing children into the same underground lifestyle that their parents have chosen would be hazardous for a child’s development and ultimately not in their best interest. In the alternative, removing children who have spent half of their lives in the U.S., and may not even speak the language of their parents’ country of origin, would be equally disruptive to a child’s development.

Recognizing the gap that exists in the protection of undocumented aliens, the international community adopted the International Convention on the Protection of the Rights of All Migrant Workers (Migrant Convention).\textsuperscript{147} The Migrant Convention protects a host of workers’ rights. Article 13 is of particular importance because it allows all migrants to have the right to freedom of expression.\textsuperscript{148} However, the U.S. has not signed or rati-

\textsuperscript{139} ICESCR, supra note 132, at 5.
\textsuperscript{141} Id. (signed by the U.S. on Feb. 16, 1995); ICESCR, supra note 132 (signed by the U.S. on Oct. 5, 1977).
\textsuperscript{142} ICESCR, supra note 132, at arts. 6-7.
\textsuperscript{143} CRC, supra note 140, at art. 3.
\textsuperscript{144} Id. at art. 2.
\textsuperscript{145} Id. at art. 27.
\textsuperscript{146} Roper v. Simmons, 543 U.S. 551, 576 (2005).
\textsuperscript{147} Migrant Convention, supra note 129, at art. 2(1).
\textsuperscript{148} Id. at art. 13.
fied this treaty and therefore it has not been used persuasively by any jurisdiction.

B. The Global Commission on International Migration

As illustrated by the discussion in the previous section, human rights instruments are generally drawn up to protect everyone within a state’s territory. However, human rights law must greatly improve before it will encompass the plethora of cracks created by international migration.

Recognizing this, the international community continues to embrace the issue and recently created the Global Commission on International Migration (Commission). The Commission is mandated to analyze gaps in policies involving global migration. In an October 2005 report, the Commission stated that it is “encouraged by the growing recognition that migration is an inherently transnational issue, requiring cooperation between states at the sub-regional, regional and global levels.”

Thus far, the Commission has studied a wide variety of issues relating to migration including the relationship of citizenship to certain rights. In particular, the Commission has recognized the value of effective integration of long-term legal migrants, including the need for voting rights and access to citizenship for permanent residents. Given the inevitable continuum of illegal migration, the Commission should expand its inquiry into the effects of citizenship laws on the integration, exclusion, or segregation of undocumented populations. Specifically, the Commission should continue to investigate the availability of rights to generations of undocumented aliens, unwanted guests in most countries.

V. Recommendation for the Continuation of a Jus Soli Policy in the United States

As the research above indicates, if the U.S. were to limit the application of jus soli through restrictive measures, it would not be acting differently than many other nation-states. However, abolishing any application of jus soli to the children of undocumented aliens would be a major deviation. Moreover, limiting the application of jus soli would contradict the inclusiveness that has always been a part of American culture and tradi-

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150 Global Commission on International Migration, supra note 127, at 12.
151 See generally, Global Commission on International Migration, supra note 149.
152 Global Commission on International Migration, supra note 127, at 56.
tion.\textsuperscript{153} Provided that contemporary U.S. law continues to be restrictive, the resulting subculture of children born to undocumented parents would have few paths through which to legalize. After examining the results of strict guest-worker policies abroad, the U.S. cannot deny that such a policy would be problematic.\textsuperscript{154}

Scholars have argued that restricting the immediacy of birthright citizenship status is more appropriate than abolishing any application of \textit{jus soli} to the children of undocumented aliens.\textsuperscript{155} Limitations could come in the form of putting residency conditions on \textit{jus soli} or giving the children of undocumented aliens permanent residency status. However, in light of the strong emphasis on removal in the U.S. since 1996, limiting birthright citizenship in any fashion would put children at the whim of their parents' underground existence. Without citizenship, these children would be unjustifiably vulnerable to removal from the only country and culture they have known. Moreover, such children, though undocumented, may continue to reside in the U.S. for many years, leaving them without the rights discussed in Part III of this note. Thus, it would be in the best interest of the U.S. to allow these children to become part of a healthy, productive and patriotic society.

As guest-worker programs in Germany and Japan illustrate, condemning the children of undocumented aliens in the U.S. to a subclass existence would have negative consequences on American society. Research on both these countries has shown an educational gap between the immigrant populations and its citizens. Moreover, the creation of an immigrant subclass would impede the allegiance that immigrants could feel toward the U.S. and the ability of immigrants to play a productive role in the economy. Therefore, limiting or restricting the immediate application of the doctrine of \textit{jus soli} in the U.S. would not only fail to deter illegal migration, but could potentially dampen immigrants' abilities to become productive and proactive members of their – and our – society.

\textsuperscript{153} Schuck \& Smith, supra note 26; Roberts, supra note 41, at 207.
\textsuperscript{154} See supra Part III.
\textsuperscript{155} See Hsieh, supra note 50.