The Non-Controversy Over Birthright Citizenship: Defending the Original Understanding of *Jus Soli* Citizenship

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During the 2020 election cycle, we began to once again hear rumblings that a prominent Democratic candidate for higher office was not really a natural born United States citizen.[1] This charge, advanced by Professor John Eastman[2] as a sincere constitutional question, is ripe to be weaponized against immigrants and their children to question their "American-ness," and the legitimacy of their place in the body politic.

Contrary to Professor Eastman's assertions, there is no legitimate question that Senator Kamala Harris[3] is a United States citizen who is eligible to serve as Vice President or President of the United States. She was born in the United States of America.[4] She was not the child of a diplomat or invading soldier not subject to U.S. jurisdiction. Her birth in the United States makes her a natural born American citizen under the Fourteenth Amendment.[5] Arguments to the contrary serve only to further inflame political divisions and attempt to attack political opponents as "un-American."

Jus soli, the legal principle of citizenship based on place of birth (with extremely limited exclusions for persons born into a status of legal immunity), has a four-hundred-year old history in Anglo-American jurisprudence.[6] This principle is not only

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1 John C. Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020, 8:30 AM), https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483 [http://perma.cc/E977-8PXH].

2 Dr. John Eastman is a Professor of Law at Chapman University, Fowler School of Law.

3 KAMALA D. HARRIS U.S. SENATOR FOR CALIFORNIA, https://www.harris.senate.gov [http://perma.cc/9H4A-7HB7] (last visited Oct. 22, 2020).

4 David Debolt, *Here's Kamala Harris' Birth Certificate. Scholars Say There's No Eligibility Debate*, MERCURY NEWS (Aug. 18, 2020, 8:30 AM), https://www.mercurynews.com/2020/08/18/heres-kamala-harris-birth-certificate-end-of-debate/ [http://perma.cc/MP77-WFBH].

5 U.S. CONST. amend. XIV, § 1.

6 *See* Calvin v. Smith, 77 Eng. Rep. 377 (K.B. 1608) ("[A]ll those who were born under one natural obedience while the realms were united under one sovereign should remain natural born subjects, and no aliens; for that naturalization due and vested by birthright, cannot by any separation of the Crowns afterward be taken away: nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter ex post facto.").

enshrined in our Constitution but is also codified in federal statute, and implemented through regulations, which create a clear, fair, and easily enforced rule of citizenship.[7] Birth in the United States also happens to be the way most Americans prove their citizenship.[8] Any attempt to undermine birthright citizenship will throw into question the citizenship of millions of Americans who contribute tremendously to their communities and our country. The unintended consequences of this proposed change to the understanding of who is and is not a U.S. citizen are hard to overstate.

This Article will briefly address the history of birthright citizenship in the Anglo-American legal tradition. Part I will explore the purpose and intent underpinning the Fourteenth Amendment's Citizenship Clause. We will also explore some of the positions of those opposing its traditional understanding. Part II will address the different attacks on the widely understood meaning of birthright citizenship and why they fail. Part III will explain why Professor Eastman's most recent theory of birthright citizenship is not only unsupported by either legislative or judicial history, but is not even a workable theory of citizenship.[9] Moreover, if Professor Eastman is correct in his ever-evolving interpretation of the Fourteenth Amendment, dozens, if not hundreds, of American politicians would also fail his test of citizenship–including the current President, Donald J. Trump.[10] Part IV briefly concludes.

I. A BRIEF HISTORY OF BIRTHRIGHT CITIZENSHIP AND THE FOURTEENTH AMENDMENT

Long before the founding of the United States, England had already recognized the concept of *jus soli*–citizenship based on birth within a nation's borders.[11] Writing in 1765, William

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7 *See*, *e.g.*, 8 U.S.C. § 1401 (1994).

8 *Proof of Citizenship for U.S. Citizens*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, https://www.uscis.gov/forms/explore-my-options/proof-of-citizenship-for-us-citizens [http://perma.cc/4BJP-8TWG] (last updated July 10, 2020).

9 Professor Eastman's theory has changed over the twenty years that he has been promoting it. The current version of his theory is that children born in the United States to "temporary visitors" are not U.S. citizens at birth. This appears to be a different theory from his earlier theory that "complete allegiance" by the parents is required to confer citizenship on U.S. born children. *See* John C. Eastman, *Professor Eastman Responds*, THE PANTHER: OPINION (Sept. 14, 2020), https://www.thepanthernewspaper.org/opinions/professor-eastman-responds?rq=professor%20eastman%20responds [https://perma.cc/TPW8-AGF5]. In this article, we address both versions of his theory.

10 *See* MARGARET D. STOCK, *American Birthright Citizenship Rule and the Exclusion of "Outsiders" from the Political Community, in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 179, 194–95 (Benjamin N. Lawrence & Jacqueline Stevens, eds., Duke Univ. Press 2017).

11 *See Calvin v. Smith*, 77 Eng. Rep. at 409; Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMANITIES 73, 77 (1997).

Blackstone described the "obvious distinction" between aliens and "natural born subjects," meaning those persons born within the dominion of the crown and within the allegiance of the King.[12] Blackstone was a widely respected legal scholar whose commentaries were considered authoritative statements on the English common law in both Britain and the United States and had a profound impact on the development of U.S. law in the nation's first century.[13]

The U.S. Constitution provides that the U.S. President must be a "natural born Citizen" or a citizen at the time of the Constitution's adoption.[14] For the first fifty years of the nation's history, there was no apparent controversy as to whether the American concept of "natural born Citizen" had the same meaning as the English concept of a "natural born subject" described by Blackstone. One of the first cases addressing the issue directly was *Lynch v. Clarke*, in which a New York court held a child born in the U.S. of Irish parents only present on a short visit was nonetheless a natural born U.S. citizen by virtue of her birth in the U.S.[15] The *Lynch* court applied the same standard Blackstone enumerated in one of his *Commentaries* to reach this conclusion.[16]

The first real attack on the understanding that natural born citizens were all persons born in the United States, and thus subject to its laws, came with the *Dred Scott* decision, in which the Supreme Court declared that African Americans could not be citizens of the United States, based on the despicable reasoning that they "are not included, and were not intended to be included, under the word '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,"[17] and that "they had no rights which the white man was bound to respect . . . ."[18] In other words, their birth in the United States was meaningless because their race excluded them from eligibility in the body politic.

After the Civil War, the Fourteenth Amendment was proposed and ratified in part to overrule the *Dred Scott* decision and to guarantee citizenship to freed slaves and their

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12 1 WILLIAM BLACKSTONE, COMMENTARIES *224, *243.

13 *See* Albert S. Miles, David L. Dagley & Christina H. Yau, *Blackstone and His American Legacy*, 5 AUSTRALIA & NEW ZEALAND J.L. & EDUC. 46 (2000).

14 U.S. CONST. art. II, § 1.

15 Lynch v. Clarke, 1 Sand. Ch. 583, 646, 659–663 (N.Y. Ch. 1844).

16 *Id.* at 594, 612–633.

17 *See* Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857).

18 *Id.* at 407.

descendants.[19] The Citizenship Clause of the Fourteenth Amendment states: "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."[20] While modern opponents of birthright citizenship claim that at the time it was adopted, the drafters had no intention of extending citizenship to the children of foreigners, the legislative history demonstrates otherwise.[21] The author of the birthright citizenship language, Senator Jacob Howard of Michigan, described the purpose and application of the amendment:

> Mr. HOWARD. . . .This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include *persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government* of the United States, but will include every other class of persons.[22]

Opponents of the language of the amendment agreed with Howard's understanding and *for precisely that reason*, argued against it.[23] This includes Senator Edgar Cowan of Pennsylvania, who complained it extend citizenship to the children of Chinese and Gypsies in the United States, even if they owed no allegiance to the United States and were present in violation of various laws.[24] Advocates for the amendment, including Senator John Conness of California, defended the right of citizenship for these children.[25] The Fourteenth Amendment passed both legislative bodies and was ratified by the states over the objections of legislators like Senator Cowan.[26]

The modern controversy arises over the meaning of the words "subject to the jurisdiction thereof."[27] Professor Eastman and others claim that this clause was meant to exclude the

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19 *14th Amendment*, HIST. (Feb. 21, 2020), https://www.history.com/topics/black-history/fourteenth-amendment [http://perma.cc/36Y9-TMDB].

20 U.S. CONST. amend. XIV § 1.

21 *See* Margaret D. Stock, *Is Birthright Citizenship Good for America?*, 32 CATO J. 139, 141 (2012); JAMES C. HO, *Defining "American:" Birthright Citizenship and the Original Understanding of the 14th Amendment*, *in* MADE IN AMERICA: MYTHS & FACTS ABOUT BIRTHRIGHT CITIZENSHIP 6 (Immigr. Pol'y Ctr. ed., 2009).

22 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (emphasis added).

23 *Id.* at 2890–91.

24 *Id.*.

25 *Id.* at 2891.

26 U.S. CONST. amend. XIV.

27 Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents at *i, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 871165.

children of foreigners.[28] But the debate over the Fourteenth Amendment makes it clear that both those in favor and opposed to the Fourteenth Amendment understood that the Amendment would extend citizenship to all born in the United States except for the children of foreign diplomats, invading armies occupying U.S. soil, and Indian nations not subject to U.S. law.[29] The children of these groups were excluded from U.S. citizenship because they were not subject to the jurisdiction of the United States.[30] The first two categories were agents of foreign states and were not subject to U.S. law; diplomats enjoyed diplomatic immunity, enemy soldiers were protected by combatant immunity.[31] The last category, Native Americans, were recognized as not being subject to U.S. laws or taxation based on treaties between their nations and the United States.[32] Subsequent federal statutes would make Native Americans born in the United States natural born citizens, whether they were born in a sovereign tribe or otherwise.[33] Everyone else present in the United States, whether a citizen or not, whether here permanently or temporarily, and whether here lawfully or not, is subject to the jurisdiction of the U.S. Government.[34] Should they have children born in the United States, those children enjoy birthright citizenship.[35]

The Supreme Court in *Wong Kim Ark*[36] laid to rest any question on whether children born to foreigners, who owed allegiance to another country, were natural born American citizens. The Supreme Court determined that, although Wong Kim Ark's parents remained subjects of the emperor of China, they were subject to the jurisdiction of the United States, where they lived. [37] This is the opposite of the position Professor Eastman has advanced in suggesting that a child could not obtain birthright citizenship unless her parents had no allegiance to a foreign power.[38] Indeed, it is absurd to argue, as Professor Eastman has, that *Wong Kim Ark* stands for the proposition that only those born to parents "[n]ot owing allegiance to anybody

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28 *Id.* at *8. As discussed previously, Professor Eastman's theory has evolved over time. He now apparently argues only that the children of foreigners "temporarily" in the United States should be excluded. But he provides no explanation of how the parents' "temporary" intent might be determined.

29 HO, *supra* note 21, at 9.

30 *Id. at 8.*

31 *Id.*

32 *Id.*

33 Stock, *supra* note 21 at 146.

34 HO, *supra* note 21 at 8.

35 *Id.*

36 U.S. v. Wong Kim Ark, 169 U.S. 649 (1898).

37 *Id.* at 705.

38 *Id.*

else," is a natural born citizen.[39] Wong Kim Ark's parents owed allegiance to the emperor of China, as the court noted.[40] Professor Eastman reasons that only persons subject to "complete" U.S. jurisdiction can have children who benefit from the Fourteenth Amendment's Citizenship Clause,[41] but fails to give any plausible argument for why foreign citizens domiciled in the United States do not owe allegiance to the country of their citizenship. This argument of "complete jurisdiction" was advanced by the dissent in *Wong Kim Ark* to support the proposition that the children of foreigners domiciled in the United States are still not natural born citizens. [42] This argument was thoroughly rejected.[43] The "complete jurisdiction" theory states that only people who are subject *only* to U.S. laws are considered "subject to the jurisdiction" of the United States.[44] This interpretation would exclude foreigners temporarily in the United States or unauthorized immigrants (unless, presumably, those unauthorized immigrants renounced their former citizenship before the birth of their children or were otherwise stateless). But it would also exclude dual nationals and Lawful Permanent Residents (almost all of whom maintain their citizenship from some other country). That dissent is not law and was rightly relegated to the history books.

Professor Eastman claims that *Wong Kim Ark* only answered the question as to children born to Lawful Permanent Residents[45] (never mind that the term did not exist when *Wong Kim Ark* was decided).[46] But the Supreme Court made clear that when interpreting the Constitution, we must look at the English common law that so heavily influenced it.[47] That English common law extended birthright citizenship to the children of "aliens in amity, so long as they were within the kingdom."[48]

> Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not

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39 John C. Eastman, *The Significance of "Domicile" in Wong Kim Ark*, 22 CHAP. L. REV. 301, 303 (2019), (quoting CONG. GLOBE, 39th Cong., 1st Sess., 2893 (1866) (statement of Sen. Lyman Trumbull)).

40 Wong Kim Ark, 169 U.S. at 705.

41 *See* Eastman, *supra* note 39, at 303.

42 Wong Kim Ark, 169 U.S. at 715 (Fuller, C.J., dissenting).

43 *Id.* at 705 (majority opinion).

44 *Id.* at 715 (Fuller, C.J., dissenting).

45 *See* Eastman, *supra* note 1.

46 *See* Immigration Act of 1965, 8 U.S.C. ch. 12 (1968); *see also* Wong Kim Arc, 169 U.S. 649. The term "Legal Permanent Resident" was established in the Immigration and Nationality Act of 1965 and thus, was not a term as it is currently legally recognized when *Won Kim Arc* was decided.

47 Wong Kim Ark, 169 U.S. at 655 (majority opinion).

48 *Id.*

> natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.[49]

Professor Eastman wrongly dismisses this as nonbinding "dicta;"[50] when, in fact, it is the critical principle the Supreme Court used in interpreting the Constitution's use of "natural-born citizen" and must continue to govern our understanding. The Anglo-American concept of *jus soli* citizenship, recognizing the birthright citizenship of all people born within a nation's boundaries and subject to its laws, has a four-hundred-year history, badly damaged by the *Dred Scott* decision, but restored in its entirety by the Fourteenth Amendment.[51]

Professor Eastman then attacks a strawman by arguing the Supreme Court has never held that a person born in the United States is a citizen "no matter the circumstances of the parents."[52] This is not the standard established by the Fourteenth Amendment, which excludes from citizenship a child born to foreigners who are not "subject to the jurisdiction" of the United States.[53] The U.S. Government addresses this issue regularly, whenever a child is born to a foreign diplomat stationed in the United States.[54]

Having examined a brief history of birthright citizenship and opposition to its traditional understanding, the next Part considers the recent efforts to undermine the consensus view of birthright citizenship, why they lack legal and historical support, and the harm they would do to our society if adopted.

II. ATTEMPTS TO UNDERMINE BIRTHRIGHT CITIZENSHIP

The United States has recently experienced vigorous and emotional debates over its immigration and citizenship policies,[55] and among these debates, the possibility of changing America's famous "birthright citizenship" rule has been a recurring theme.[56] Underlying this debate is the assumption that citizenship is something easily discernable—one either possesses

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49 *Id.*

50 Eastman, *supra* note 1.

51 *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

52 Eastman, *supra* note 1.

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

54 U.S. CITIZENSHIP & IMMIGR. SERVICES, POLICY MANUAL CHAPTER 3 CHILDREN BORN IN THE UNITED STATES TO ACCREDITED DIPLOMATS, https://www.uscis.gov/policy-manual/volume-7-part-o-chapter-3 [http://perma.cc/FK33-H9FL].

55 *See* Katie Kelly, *Enforcing Stereotypes: The Self-Fulfilling Prophecies of U.S. Immigration Enforcement*, 66 UCLA L. REV. DISCOURSE 36, 59 (2018).

56 *See* Eastman, *supra* note 1; *see also* Garrett Epps, *The Constitution is Perfectly Clear about Citizenship* (Aug. 14, 2020), https*://www.theatlantic.com/ideas/archive/2020/08/birtherism-returns/615268/* [http://perma.cc/M2ZY-MBRZ].

it, or one does not, and it is easy to tell whether one has it. This assumption is mostly true with respect to the U.S. birthright citizenship rule, which excludes few people born in America from American citizenship.[57] In fact, a strength of America's birthright citizenship rule has been that it is a relatively easy rule to apply—with the extremely minor exception of children of diplomats, one need only ask where a person was born to discern the person's citizenship.[58] Changing that easy rule to something more complex poses significant practical challenges, and proponents of change, like Professor Eastman, do not discuss these challenges but simply assume that any change would be easily implemented and would result in a rule that is as easy to apply as the current one.[59] Yet this is not the case, as is readily illustrated by exploring the effects of one such proposal. A proposed statute to redefine American citizenship at birth does so in an attempt to exclude persons perceived as "outsiders"—and yet it would pose significant practical problems for state governments and residents of the United States, and inherently exclude many "insiders" from citizenship as well, if applied in a principled way.

But these new interpretations are not applied in any principled way. Proponents of these "new" interpretations, for example, exclude Barack Obama from eligibility for the Presidency on the basis that his father was born in Kenya.[60] They say nothing, however, about the Presidential eligibility of Mitt Romney (whose father owed allegiance to Mexico), Ted Cruz (whose father owed allegiance to Cuba, and who himself owed allegiance to Canada), Rick Santorum (whose father was born in Italy), Mia Love (whose parents had overstayed temporary visitor's visas when she was born), or Donald Trump (whose parents owed allegiance to Germany and the United Kingdom, respectively).[61]

The original text of the Constitution says that a person must be a "natural born citizen" to be President of the United States.[62] But the document gives no definition of "natural born citizen," and says nothing about the status of one's parents or the issue of "allegiance."[63] In fact, the Constitution gives no definition of "citizen" at all—although it refers to a "citizen" or "citizens" some

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

58 *Id.*

59 *See generally* John C. Eastman, *The Significance of "Domicile" in Wong Kim Ark*, 22 CHAP. L. REV. 301, 303 (2019).

60 *See* STOCK, *supra* note 10, at 180.

61 *See id.*

62 U.S. CONST. art. II, § 1.

63 *See id.*

eleven times and distinguishes "citizens" from "persons" at several different points.[64] The first U.S. Constitutional definition of "citizen" came, of course, at the end of the Civil War, with the ratification of the Fourteenth Amendment.[65]

At the time of the Founding, the new United States encouraged immigration and also encouraged qualified foreigners to become Americans.[66] In 1787, the United States recognized three different ways that a person could obtain American citizenship.[67] First, a person could be born a foreigner and later apply to become a U.S. citizen through the naturalization process—this avenue was governed by Article I, Section 8 of the United States Constitution, which established Congress's power to create a "uniform rule of naturalization."[68] Second, following the international law rule, a person might inherit citizenship from his or her citizen parents; this method of obtaining American citizenship—termed the *jus sanguinis* or the citizenship by blood or descent rule—was within Congress' power to legislate, and was first recognized in U.S. law when Congress passed the Naturalization Act of 1790, according "natural born citizen" status to the foreign-born children of certain U.S. citizens if the child's father had resided in the United States.[69] Finally, however, the United States also adopted the British common law rule of *jus soli* for persons born within the territorial jurisdiction of the United States whose parents were subject to U.S. civil and criminal laws.[70]

In the modern era, some have argued that the Fourteenth Amendment was never intended to cover the children of persons who are not legally present in the United States, but American history suggests otherwise. From 1808, when Congress banned the slave trade, until the end of the Civil War, thousands of Africans were illegally trafficked into the United States in violation of the law.[71] Their children and grandchildren, despite

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64 *See* U.S. CONST. amend. XIV; *see also* ALEXANDER BICKEL, THE MORALITY OF CONSENT 53, 47 (Yale Univ. Press, ed., 1975).

65 U.S. CONST. amend. XIV.

66 *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.").

67 *See* U.S. CONST.; *see also* U.S. CONST. art. I, § 8; The Naturalization Act of 1790, Ch. 3, 1 Stat. 103 (repealed 1795).

68 U.S. CONST. art. I, § 8

69 The Naturalization Act of 1790 stated: "[a]nd the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . . ." Ch. 3, 1 Stat. 103 (repealed 1795).

70 STOCK, *supra* note 10, at 181.

71 *See 14th Amendment*, *supra* note 19.

being the children and grandchildren of unauthorized migrants, were granted U.S. citizenship under the explicit terms of the Fourteenth Amendment.[72] The U.S. born children of other unauthorized immigrants, including unauthorized Irish and other European immigrants, were also routinely recognized as U.S. citizens.[73] The U.S. born children of temporary visitors were always recognized as U.S. citizens—the famous recent example being Boris Johnson, the current Prime Minister of England.[74]

For modern day proponents of a change to the meaning of the Fourteenth Amendment, however, the gloss of history appears to be irrelevant. They suggest that a change to the meaning of the Fourteenth Amendment should be made and can be made quite easily.[75] First, some like Professor Eastman have argued that the United States Supreme Court can change the Citizenship Clause by reversing or reinterpreting its decision in the *Wong Kim Ark* case.[76] It is possible that a modern Supreme Court could reverse this decision and instead adopt the opinion of the *Wong Kim Ark* dissenting justices, reinstating the discredited theory of "consent" that resulted in the *Dred Scott* decision.[77] But this is not likely to happen as the Court has had the opportunity to do so as recently as 2006, and declined to take up the invitation.[78] In an amicus brief filed with the U.S. Supreme Court in the *Yaser Hamdi* case,[79] Professor Eastman argued that a change in the Supreme Court's interpretation of "subject to the jurisdiction" language of the Citizenship Clause could retroactively take away the U.S. citizenship of Yaser Hamdi, a U.S. born citizen who was captured fighting against American forces on the battlefield in Afghanistan.[80] Professor Eastman argued that the Court could punish Hamdi by reinterpreting the Citizenship Clause to take away Hamdi's birthright citizenship, because Hamdi was born in the U.S. to parents who held temporary work visas at the time of his birth.[81] Professor

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72 *Id.*

73 STOCK, *supra* note 10, at 183.

74 Robert W. Wood, *Savvy London Mayor Boris Johnson Paid IRS, Is Now Renouncing U.S. Citizenship*, FORBES, (Feb. 15, 2015, 2:30 PM), https://www.forbes.com/sites/robertwood/2015/02/15/savvy-london-mayor-boris-johnson-paid-irs-is-now-renouncing-u-s-citizenship/#2344362f21c1 [http://perma.cc/E95W-BQEG].

75 STOCK, *supra* note 10, at 183.

76 As discussed earlier, *Wong Kim Ark* was the 1898 case in which the Supreme Court held that all children born in the U.S. are U.S. citizens at birth unless they are immune from U.S. civil and criminal laws—such as the children of diplomats or children born in certain sovereign Native American tribes.

77 STOCK, *supra* note 10, at 183.

78 *Id.*

79 *Id.* at 183–84.

80 *Id.* at 184.

81 *Id.*

Eastman's proposed new interpretation, however, if it had been adopted by the United States Supreme Court, would have taken away not only the U.S. citizenship of Hamdi, but also the citizenship of millions of other Americans born under similar circumstances—including some of the U.S. military personnel who captured Hamdi.[82] Unsurprisingly, the U.S. Supreme Court ignored Professor Eastman's invitation.[83] Having been offered and having declined the chance to change its longstanding interpretation of the Citizenship Clause in the past few years, the Supreme Court is not likely to change its mind, even if a relevant case ends up before the Court again—not that any are currently in the appellate pipeline.[84]

In the *Hamdi* case, Professor Eastman urged a new U.S. Supreme Court interpretation as a means of changing the Citizenship Clause, but others have urged Congressional and state legislative approaches instead.[85] Some have proposed Congressional legislation, and some have introduced state legislation to bring back the concept of "State citizenship" so as to create a two-tier system that would distinguish between individuals born in the U.S. with citizenship and individuals born in the U.S. who do not hold U.S. citizenship.[86] Others have even suggested a Constitutional Amendment.[87]

In line with the first approach, some have argued that changing the Citizenship Clause requires no Constitutional Amendment because Congress can change the Fourteenth Amendment's meaning by passing a statute that "clarifies" that "subject to the jurisdiction" means "subject to the complete or full jurisdiction."[88] They point to Section 5 of the Fourteenth Amendment, which states that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[89] It is unlikely, however, that Congress can use its Section 5 power to reinterpret the meaning of the Citizenship Clause, any more than Congress can use its Article I, Section 1 powers to "reinterpret" the First or Second Amendments. Section 5 of the Fourteenth Amendment merely answers critics of the draft Fourteenth Amendment who said that the original text of the Constitution contained no language giving Congress any enumerated power to enforce the Fourteenth Amendment.[90]

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82 *Id.*
83 *Id.*
84 *Id.*
85 STOCK, *supra* note 10, at 184.
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*

Section 5 was not a grant of legislative power to change the meaning of the Amendment.[91] Section 5 also allows Congress to define the geographic jurisdiction of the United States, thereby allowing the Fourteenth Amendment to apply in after-acquired States and territories—it does not allow Congress to limit the application of the Fourteenth Amendment by changing the meaning of the text. Furthermore, Congress has already acted to enforce the Citizenship Clause by enacting numerous statutes reaffirming the traditional meaning of the Clause.[92] Even if it were possible to legislate a new interpretation of a Constitutional Amendment, these existing statutes would have to be repealed before any new interpretation could take effect.[93]

Attempts at such a reinterpretation are aimed at depriving individuals of U.S. citizenship if their parents do not hold certain specified lawful immigration statuses, on the theory that those parents are not subject to the "complete" jurisdiction of the United States because they hold allegiance to a foreign country.[94] In line with this view, Republican members of Congress have repeatedly introduced legislation to reinterpret the Fourteenth Amendment in a way that would exclude more people born in the United States from American citizenship.[95] These "Birthright Citizenship Act" proposals typically would restrict citizenship under the Citizenship Clause to a child at least one of whose parents is a citizen, lawful permanent resident, or on active duty in the armed forces.[96] It is unclear what effect, if any, the courts would give such a statutory re-interpretation of the Fourteenth Amendment, but if enacted, the statutory interpretation would immediately throw into confusion the citizenship of thousands of individuals.

State Legislators for Legal Immigration ("SLLI"), a coalition of immigration restrictionist legislators from forty states, has proposed state legislation that would resurrect the notion of state citizenship and restrict it so as to create a two-tier caste system by using the fact that states are the entities that issue birth certificates.[97] Although its proposal has not yet been enacted in any state, SLLI suggests an interstate compact strategy under which states would agree to "make a distinction in the birth

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91 *Id.*

92 See, *e.g.*, 8 U.S.C. § 1401 (1994) ("a person born in the United States, and subject to the jurisdiction thereof" is a United States citizen); 8 U.S.C. § 1402 (1994) ("All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.").

93 STOCK, *supra* note 10, at 184–85.

94 *Id.* at 185.

95 *Id.*

96 *Id.*

97 *Id.*

certificates" of native born persons so that Fourteenth Amendment citizenship would be denied to children born to parents who owe allegiance to any foreign sovereignty.[98] The interstate compact would be subject to the consent of Congress under Article I, Section 10 of the Constitution.[99] The effect of this approach would be to seek a change in the meaning of the Citizenship Clause without having to secure the approval of the President or a veto override.[100]

A significant problem with this approach, which would be expensive to implement, is that the Federal government could easily override it.[101] The U.S. State Department would not recognize any distinction in the birth certificates.[102] Thus, a person who is given a "lesser" birth certificate could use that birth certificate to obtain a U.S. passport, and once given a U.S. passport, turn around and sue the state for discrimination. Some state Constitutions also prohibit such discriminatory state legislation.[103]

Assume, however, for the sake of argument that one believes that the Fourteenth Amendment has been erroneously applied for more than a hundred years.[104] Under the changes sought by modern-day revisionists, who would be excluded from American citizenship under a new interpretation?[105] Or in other words, what groups are targeted by modern revisionists for exclusion from the modern American political community?[106] From the news accounts of the debate, one would think that the targeted groups include the children of "birth tourists" or the children of unauthorized immigrants.[107] In fact, however, the changes proposed to the Fourteenth Amendment would exclude extremely large numbers of Americans—including several past U.S. Presidents and many leading modern American politicians.[108]

Why is this so? This wide-ranging exclusion of large numbers of Americans comes about because those who call for changes to the meaning of the Fourteenth Amendment's Citizenship Clause focus on the language "subject to the jurisdiction" and attempt to read it broadly to exclude the children of persons who (1) have no permanent immigration status in the United States, or (2) hold

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98 *Id.*
99 U.S. CONST. art. I, § 10.
100 STOCK, *supra* note 10, at 185.
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.* at 185–86.

"allegiance" to countries other than the United States.[109] This group potentially includes millions of Americans, including several prominent American politicians who have run for or are currently running for the office of President of the United States.[110]

The modern debate typically invokes the term "allegiance" as a defining limit on eligibility for American citizenship.[111] The term is frequently mentioned in the debate, but hardly ever defined.[112] As it turns out, it is difficult to discern what people mean by this term when they use it in the birthright citizenship debate.[113]

If one looks up the term "allegiance" in Black's Law Dictionary, one finds more than five different definitions.[114] The term is defined first as "[a] citizen's obligation of fidelity and obedience to the government or sovereign in return for the benefits of the protection of the state."[115] The definition then states that, "Allegiance may be either an absolute and permanent obligation or a qualified and temporary one."[116] Black's then lists five types of allegiance—(1) "acquired allegiance," defined as "[t]he allegiance owed by a naturalized citizen"; (2) "actual allegiance," defined as "[t]he obedience owed by one who resides temporarily in a foreign country to that country's government. Foreign sovereigns, their representatives, and military personnel are typically excepted from this requirement"; (3) "natural allegiance," defined as "[t]he allegiance that native-born citizens or subjects owe to their nation"; (4) "permanent allegiance," defined as "[t]he lasting allegiance owed to a state by citizens or subjects"; and (5) "temporary allegiance," defined as "[t]he impermanent allegiance owed to a state by a resident alien during the period of residence."[117] Those who write and speak about "allegiance" as a requirement of Fourteenth Amendment citizenship do not typically indicate which type of allegiance they mean. Furthermore, Black's Law Dictionary says nothing about allegiance requiring lawful residence in its second or last definitions, which could both apply to unauthorized immigrants—and if an unauthorized immigrant or temporary visitor owes "allegiance" to the United States, then under some proposed changes to the Fourteenth Amendment's meaning, the

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109 *Id.*
110 *Id.* at 186.
111 *Id.* at 180.
112 *Id.*
113 *Id.*
114 *Id.* at 186.
115 *Id.*
116 *Id.*
117 *Id.*

immigrant's children could be U.S. citizens.[118]

The language "subject to the jurisdiction" has long been understood by the U.S. Supreme Court and the Executive Branch of the Federal Government to refer to persons who are subject to U.S. civil and criminal law, excluding only those persons who are immune from U.S. civil and criminal law, such as immunized diplomats, invading foreign armies, and members of sovereign Indian tribes.[119] Yet Professor Eastman and others seek to alter the meaning of that language, changing it to mean that "the person is a child of at least one parent who *owes no allegiance* to any foreign sovereignty, or a child without citizenship or nationality in any foreign country."[120] This definition has never been held to be the meaning of the language "subject to the jurisdiction" in any U.S. court case or statute. It is a new definition entirely. It also uses the term "allegiance" as part of its definition, and that term, as described above, is undefined.[121]

To illustrate the complexity and confusion that will result from attempts to apply the "allegiance" rule, it is helpful to consider a famous example, Willard Mitt Romney. Like Kamala Harris, Romney is a United States Senator today, although Professor Eastman has never challenged Romney's eligibility to serve in the United States Senate, or to be President. Mitt Romney was born in the State of Michigan in 1947.[122] Romney's mother Lenore was a birthright U.S. citizen who was born in Utah, but she also held British citizenship because her father was born in England;[123] there is no evidence that she or her father ever renounced British citizenship. Romney's father, George Romney, was born in Mexico in 1907,[124] and was a birthright Mexican citizen and a "derivative" or "jus sanguinis" foreign-born U.S. citizen under U.S. citizenship statutes in effect at the time of his birth.[125]

At the time of Romney's birth, the Fourteenth Amendment's current interpretation regarding birthright citizenship was in effect, so Romney's parents merely registered the fact of Romney's birth in the State of Michigan and Mitt was issued a standard Michigan birth certificate, documenting that Mitt Romney was a "natural born citizen" of the United States.[126] Had

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118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.* at 189.
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*

the "allegiance" interpretation been in effect at the time, however, Michigan would not have issued a birth certificate to Romney without inquiring as to his parents' "allegiance" to any foreign country and his parents' citizenship.[127] The State would also have to inquire about George Romney's "intent" when he fled his permanent home in Mexico to go back to the United States in July 1912.[128] Both of Romney's parents were dual citizens of the United States and other countries—Romney's mother was a dual citizen of Britain and the United States, and his father was a dual citizen of Mexico and the United States—so Romney might not have been able to qualify as a United States citizen because his parents "owed allegiance" to foreign countries.[129]

Here, of course, the State would be presented with a complicated legal and factual dilemma: if George Romney, having been born in Mexico, chose to seek a certificate of Mexican nationality for his son, then Mexican law would allow him to obtain such a certificate, because Mexican law has long granted Mexican nationality to the U.S. born children of Mexican men who were born in Mexico.[130] But what if George Romney chose not to claim Mexican nationality for his newborn son?[131] Would the State of Michigan have the expertise to determine—based on reading Mexican law books or hiring a Mexican lawyer—that Romney actually held Mexican nationality?[132] Would the State simply take George Romney's word for it that his son, Mitt Romney, held no "citizenship or nationality in any foreign country"?[133] Would the State inquire about George Romney's intent when George fled his permanent domicile in Mexico to seek refuge in the United States as a child?[134] Would the State ask Mexico for its opinion on the matter?[135] Would the State hire an expert lawyer to make the determination about the newborn's eligibility for citizenship in Michigan?[136] What if the foreign country changed its laws over time and made them retroactive—would the State re-adjudicate the issuance of a certain type of birth certificate when the foreign law changed, or would a child's status be frozen at the moment of birth?[137] The

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127 *Id.*

128 George Romney had described himself as a "displaced person," implying that the relocation to the United States was perceived to be temporary at the time. GEORGE T. HARRIS, ROMNEY'S WAY: A MAN AND AN IDEA 44 (1967).

129 STOCK, *supra* note 10, at 190.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

State would presumably have to answer these questions before determining what type of birth certificate to issue to the newborn.[138]

The above example illustrates that interpreting and implementing changes to the Fourteenth Amendment's current rule will be quite complex.[139] Furthermore, implementing complex new bureaucratic rules is never inexpensive.[140] At a minimum, a state attempting to apply the new rules would have to add additional questions to its questionnaire for issuing birth certificates and presumably would have to ascertain the truth of the answers to those questions and their legal significance.[141] The state would have to determine whether it would rely on parents' representations about their citizenship and nationality, or whether the state's birth registry officials would be required to verify a child's status with foreign law sources or experts.[142] The state would have to determine what to do if the parents' claims were false or doubtful.[143] If parents refused to apply for proof of a foreign citizenship or nationality for their U.S. born offspring, would the state categorize the child as a person with no citizenship or nationality in any foreign country?[144] What if a parent, upon learning of the state's rules, chose to renounce a foreign citizenship or failed to file papers by a foreign law deadline so as to render the newborn stateless?[145] The decision to claim state citizenship could be controlled by the parents' choice or intentions—and unauthorized or temporarily present immigrant parents could ensure American citizenship for a child merely by failing to register the child's birth with the appropriate foreign country or renouncing their own or their child's foreign citizenship.[146]

Proponents of new interpretations of the Fourteenth Amendment are apparently unaware that citizenship and nationality in a particular foreign country is a matter controlled by that country's domestic law and not by international law or the laws of the United States.[147] They essentially cede authority to foreign governments to determine who will be a United States citizen.[148] If a foreign country passes a law stating that U.S. born

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138 *Id.*
139 *Id.* at 191.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*

children of its nationals are not citizens of that foreign country, then the foreign country could guarantee that those children could claim state citizenship in the United States because the children would be otherwise "stateless."[149] Mexico, for example, could ensure Mitt Romney's Michigan state citizenship—under the example given above—simply by changing its nationality laws so that a Michigan-born child of a male Mexican citizen would not be considered a Mexican national.[150] Mexico could also "have it both ways" by passing a law allowing a child-like Mitt Romney to claim Mexican citizenship when he reaches the age of majority or at some other convenient point after his birth.[151]

Perhaps the most startling aspect of the modern calls to change the meaning of the Fourteenth Amendment's Citizenship Clause is the large number of persons potentially affected by such a change.[152] Presumably, any such change would not be retroactive, but many modern proponents of a change have argued that the change should be retroactive because the Fourteenth Amendment has been "misinterpreted" for more than a hundred years and their revisionist interpretation is the correct one.[153] Thus, argues Professor Eastman, millions of Americans like Senator Harris, who have thought all their lives that they were citizens, would suddenly be deprived of this status and would be rendered "unauthorized immigrants," with no recognized lawful status.[154]

In the amicus brief, discussed earlier in this Article, which was filed with the United States Supreme Court in the case of *Hamdi v. Rumsfeld*, Professor Eastman argued that under the Fourteenth Amendment,

> mere birth on U.S. soil was insufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., *not* owing allegiance to another sovereign) was the constitutional mandate, a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization.[155]

Professor Eastman's argument in *Hamdi* was obviously intended to create a retroactive change to the Fourteenth Amendment. He filed the amicus brief for the purpose of arguing that Yaser Hamdi, an American born in Louisiana in 1980,

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149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.* at 193.
153 *Id.*
154 *See* Eastman, *supra* note 1.
155 Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents at *4, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 871165.

should not be considered a US citizen today; or in other words, Professor Eastman argued that Hamdi's U.S. citizenship should not be recognized because Hamdi's parents were in the United States temporarily on work visas when Hamdi was born.[156] He makes the same argument in the case of Senator Harris.[157]

But Professor Eastman has not felt compelled to challenge the eligibility for high office of other persons whose parents were also in the United States on temporary visas at the time of their birth.[158] He has not challenged, for example, the eligibility for high office of Republican candidate Mia Love of Utah, whose Haitian parents were in the United States in tourist status (or perhaps as unauthorized immigrants) at the time of her birth.[159] Nor has he challenged the eligibility of Bobby Jindal to be Governor of Louisiana, although Jindal's parents owed "allegiance" to India at the time of Jindal's birth.[160]

In all the literature that proponents of a "new interpretation" of the Fourteenth Amendment have written, they have never explained how their new interpretation would apply to groups whom they disfavor, while not being applied to groups whom they favor. Professor Eastman, for example, has never explained how his "allegiance" rule would be applied to past generations of Americans, including many current American political candidates.[161] Is there a way to apply the "new interpretation" only to Senator Harris, and not apply it to Nikki Haley, Bobby Jindal, Mia Love, Marco Rubio, or Donald Trump?[162] One suspects—based on the dearth of any scholarship on how an actual change to the Fourteenth Amendment would be implemented, or to whom it might apply—that suggestions for a "new interpretation" of the Fourteenth Amendment are not principled, but are being made only to appeal in thirty second sound bite fashion to voters who are superficially certain that the "new rule" could not possibly apply to him, or to any candidate that he might favor.

Proponents of a change to the American birthright citizenship rule fail to explain how their new interpretation or new rule would be implemented, and never admit what should be obvious at this point: their new proposed rule would not be easy to implement, and would have unanticipated side effects.[163]

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156 STOCK, *supra* note 10, at 193.
157 Eastman, *supra* note 1.
158 STOCK, *supra* note 10, at 194-95.
159 *Id.* at 196.
160 *Id.*
161 *See* Eastman, *supra* note 1.
162 STOCK, *supra* note 10, at 196.
163 *Id.*

Of course, their proposals have not made much headway, which may underscore a fundamental point—there is great value in rules that make it relatively easy to identify the citizens of one's country, and Americans may fundamentally value a simple, more inclusive rule more than a complex, less inclusive one.[164]

III. THE PROBLEMS WITH PROFESSOR EASTMAN'S CURRENT THEORY

Although he made this argument previously, Professor Eastman has apparently now abandoned the theory that birthright citizenship only applies to children born of two U.S. citizen parents with no foreign allegiance.[165] He now argues that the Fourteenth Amendment's guarantee of citizenship to all persons born "in the United States, and subject to the jurisdiction thereof" extends a bit further, but only to persons whose parents are U.S. citizens or Lawful Permanent Residents. [166] It is unclear what Professor Eastman relies on as the basis of his theory that the children of Lawful Permanent Residents enjoy birthright citizenship but other children in the United States born to non-citizen parents do not.[167] He claims that *Wong Kim Ark* was limited to the children of parents domiciled in the United States and uses that to analogize to modern green card holders but admits that the legal concept of Lawful Permanent Resident did not exist at the time of the decision.[168]

Lawful Permanent Residence and "domicile" are not synonyms. A person's domicile is based on the person's *subjective intent* to make a home for himself or herself in a fixed place and remain there.[169] While *most* non-immigrant visitors to the United States are expected to have a domicile outside the United States to which they intend to return after a limited period of time in

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164 *Id.*

165 Eastman, *supra* note 1.

166 *Id.*

167 *Id.*

168 *Id.*

169 Our modern definition of "domicile" can be traced back to the writings of Justice Joseph Story. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGEMENTS §§ 41, 43, at 39, 41–42 (Hilliard, Gray, and Co. eds., 1834). Justice Story's definition, based on the individual's subjective intent, continues to inform how "domicile" is determined today, including how states determine domicile for tax purposes. *See*, *e.g.*, *Domicile (Residency) for Individuals*, MINN. DEP'T OF REVENUE, https://www.revenue.state.mn.us/domicile-residency-individuals [http://perma.cc/3CRF-53JS] (last visited Nov. 1, 2020); *Part-Year Residents and Nonresidents*, N.J. DEP'T OF THE TREASURY, at 2 (Dec. 2019), https://www.state.nj.us/treasury/taxation/pdf/pubs/tgi-ee/git6.pdf [http://perma.cc/3P77-9E4L]; *Administrative Release No. 37*, COMPTROLLER OF MD. (Dec. 2009), https://marylandtaxes.gov/forms/Tax_Publications/Administrative_Releases/Income_and_Estate_Tax_Releases/ar_it37.pdf [http://perma.cc/8BKT-5R7H].

the United States,[170] there are other categories of people who are not considered immigrants, do not have Lawful Permanent Resident status, but are still allowed to maintain a domicile in the United States.[171] These include skilled workers (H1-B visa holders),[172] foreign journalists (I visa holders),[173] foreign religious workers (R visa holders),[174] and executives or managers taking part in an intra-company transfer (L visa holders).[175] There are also asylees and refugees in the United States who have no home outside the country and who intend to be domiciled here, but do not have Law Permanent Resident status.[176] Even foreign diplomats, whom everyone agrees cannot seek U.S. citizenship for their children born here, can be treated as domiciled in the United States.[177] Finally, unauthorized immigrants with no home outside the United States may be domiciled in the United States although they are clearly not Lawful Permanent Residents.[178] For all of these categories of persons, whether or not they are domiciled in the United States is a matter of their subjective intent.

Moreover, every single day, people who enter the United States with a domicile elsewhere change status. Temporary foreign visitors or foreign workers fall in love, marry, and apply to become permanent residents.[179] Students complete their academic programs, accept job offers, change status, and establish lives here.[180] Immigrants become domiciled in the United States when they *subjectively intend* to remain in the

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170 Immigration and Nationality Act of 1952 § 214, 8 U.S.C.A. § 1184 (2020).

171 *See* U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL §§ 402.10–402.12 (2020) [hereinafter 9 FAM].

172 *Id.* at § 402.10–10(A).

173 *Id.* at § 402.11–5.

174 *Id.* at § 402.16–6.

175 *Id.* at § 402.12–4(A)(8).

176 *See* Immigration Nationality Act, § 101(a)42.

177 Unlike U.S. Diplomats, who typically serve no more than three years in any foreign posting, many foreign countries will post their diplomats abroad on indefinite assignments, particularly for key posts. [footnote]. Hersey Kyota, Palau's ambassador to the United States, has been in that position for twenty-three years. If he has dependent family members in the United States, they would be permitted to be treated as domiciled here for purposes of in-state tuition at public universities, for example. *See*, *e.g.*, *Aliens with Visas that Allow them to Domicile in the United States*, TEX. HIGHER EDUC. COORD. BD., http://www.thecb.state.tx.us/DocID/PDF/0440.PDF [http://perma.cc/526G-YPL6]. Diplomats and certain employees of international institutions are also not subject to the requirement that they maintain a domicile outside the United States. *See* 9 FAM, *supra* note 171, at § 402.3–4(B) (explaining 214(b) ineligibility as an intending immigrant not applicable to A, G, or NATO visa applicants); *id.* at § 402.3–7(C) (stating G visas cannot be denied on the basis that the international organization employee is an intending immigrant).

178 Mark Shawhan, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L. J. 1351 (2010).

179 *See* Immigration Nationality Act, § 245(a).

180 *Id.* at § 101(a)(15)(K).

United States and abandon any former domicile. So what happens if they form that intent before receiving their green card? What happens if during the time period between forming the intent to stay here permanently and becoming a Lawful Permanent Resident, they have a child? Based on Professor Eastman's new theory, which is not grounded in statute, legislative history, or case law, that child is not an American citizen.[181]

So how would we determine who is and is not a natural born citizen, under Professor Eastman's theory? It would no longer be sufficient to demonstrate that you were born in the United States (and not to foreign diplomats) to establish your eligibility to vote or get a passport.[182] You would have to prove your parents were citizens or Lawful Permanent Residents, and perhaps even prove their "intent" when they last entered. And if your parents acquired their citizenship through birth in the United States (which is how most Americans establish their citizenship), how would you go about proving *they really were* U.S. citizens, and not like Senator Harris, merely born here? That would depend on proving that *their* parents were citizens or Lawful Permanent Residents.[183] How far back up your family tree would you be expected to go? And what about children whose fathers do not acknowledge paternity, but could provide the basis for the child's citizenship? Would we be compelling paternity tests before people register to vote or travel abroad for the first time? What of children born to parents only one of whom was citizen or Lawful Permanent Resident? Are they born subject to the "complete jurisdiction" of the United States government? Taking Professor Eastman's theory to its logical conclusion, an entire new bureaucratic system would have to be created to police these new (and confusing) boundaries of citizenship.

Many people would struggle to obtain the documents that could prove their citizenship. Many government employees, in passport offices and registrars of voters and departments of motor vehicles, would struggle to adjudicate these citizenship claims fairly. Mistakes would be inevitable, and people entitled to U.S. citizenship would be deprived of it. We know this because a similarly challenging process of adjudicating citizenship is necessary for children born abroad to American parents.[184] The documentation necessary and the calculations that bureaucrats must make to adjudicate these claims are complex

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181 Eastman, *supra* note 1.
182 *Id.*
183 *Id.*
184 *See* Immigration Nationality Act, § 301(c).

and confusing.[185] Many people rely on the assistance of highly skilled immigration lawyers to present their claims in order to prove their citizenship.

Replicating that complex and confusing system but applying it to the *millions* of people born in the United States every year would be a disaster. Ostensibly, the same would have to be done for children and adults who have never had their citizenship formally adjudicated by the federal government (including pretty much everyone without a passport).[186] People whose entire lives were spent in the United States, from birth to the present, and who contribute tremendously to their communities, would be excluded from some of the most important rights and obligations of living in a democratic society.

Professor Eastman advances no discernible public benefit from this radical change in our long-settled understanding of who is an American.[187] And he provides no explanation for how to get from the subjective concept of domicile to the bright line test of Lawful Permanent Resident status.[188] This does not even address the larger problem that almost all Lawful Permanent Residents do not meet the test Professor Eastman himself sets out—that they owe no allegiance to anyone else.[189] Almost all Lawful Permanent Residents hold permanent allegiance to a foreign country, at least until they are naturalized as United States citizens.[190]

The most fatal flaw in Professor Eastman's theory, if his conception of who can be a citizen by birth was in fact the correct interpretation of the Fourteenth Amendment's citizenship clause, is that the Fourteenth Amendment would then have failed to accomplish its primary purpose—to bestow citizenship upon formerly enslaved persons.[191] Before the ratification of the Thirteenth Amendment, enslaved African Americans had no ability to establish a domicile and were not considered citizens.[192] As Justice Taney stated, they had no rights at all that the white

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185 *Acquisition of U.S. Citizenship at Birth by a Child Born Abroad*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html#:~:text=A%20person%20born%20abroad%20in,prior%20to%20the%20person's%20birth [http://perma.cc/9JJE-CVFU].

186 *See* Eastman, *supra* note 1. If we take him at his word, Professor Eastman most likely believes we will need to implement a system to strip citizenship from millions of people who have lived their entire lives believing they were U.S. citizens.

187 *See* Eastman, *supra* note 1.

188 *Id.*

189 *Id.*

190 *See* Immigration Nationality Act § 101(a)(15)(v)(19).

191 *See 14th Amendment*, *supra* note 19.

192 *Id.*

man (or the government for that matter) had to respect.[193] So if a newly freed African American's father and mother were neither citizens nor domiciliaries of the United States, if they had been brought here in bondage, unlawfully, against their will, before his birth, how could their child born here have a claim to U.S. citizenship under the Fourteenth Amendment? If the Fourteenth Amendment's citizenship clause was to have its intended effect, it could not be limited to the children of citizens and domiciliaries. And if there was supposed to be a special exception for former slaves to this unstated rule, the framers of the Amendment surely would have spelled it out. Professor Eastman's interpretation would instead read a "grandfather clause" into the Fourteenth Amendment's Citizenship Clause, undermining its entire purpose.

Finally, Professor Eastman ignores the fact that the Fourteenth Amendment sets a floor for establishing who is a citizen at birth, not a ceiling.[194] Congress established by statute birthright citizenship for those born abroad to American citizen parents.[195] Congress also uses language like the Fourteenth Amendment's to recognize the birthright citizenship of all persons born in the United States and subject to its jurisdiction.[196] Congress did the same in statutes recognizing the citizenship of persons born in Alaska and Hawaii and outlying territories. The Departments of State and Homeland Security implement these statutes through regulations, which make clear that all persons born in the United States except those born to accredited foreign diplomats, are natural born citizens of the United States.[197] The courts grant these regulations substantial deference and have not seen fit to even seriously entertain challenges to them.[198] Even if Professor Eastman were correct that the Fourteenth Amendment does not guarantee citizenship to the U.S. born children of foreigners without green cards, statutes and regulations make clear that Senator Harris and

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193 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

194 *See 14th Amendment*, *supra* note 19.

195 8 U.S.C. § 1401 (2020). The current version of this language is the same as what was in effect when Senator Harris was born.

196 *Id.*

197 U.S. DEP'T OF STATE, 8 FOREIGN AFFAIRS MANUAL § 301.1 (2018) [hereinafter 8 FAM].

198 Professor Eastman repeatedly cites his own amicus brief in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), as evidence that his is a serious argument considered at the highest levels when debating an unsettled question. *See Eastman, supra* note 39, at 302. This amicus brief and its reasoning were never referenced in the plurality, concurring, or dissenting opinions in the *Hamdi* case. The amicus brief had no bearing on the outcome of that case, nor did it raise serious questions about Hamdi's citizenship. Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents, Hamdi v. Rumsfeld, 542 U.S. 507 (No. 03-6696), 2004 WL 871165.

those similarly situated are natural born citizens. Professor Eastman also routinely fails to acknowledge that he brought his unique theory to the attention of the United States Supreme Court quite recently, and the Court ignored his arguments, acknowledging in its opinion that the U.S. born child of two temporary immigrants was in fact a United States citizen.[199]

IV. CONCLUSION

Speculation that Senator Kamala Harris's parents were not yet Lawful Permanent Residents when she was born does not change the fact that she attained citizenship based on being born in the United States and subject to its jurisdiction. This debate was settled by the Supreme Court well over a hundred years ago, in reliance on legal principles that were then already centuries old. Revisionist legal history will not change that. Nor will attempts to recast Professor Eastman's arguments as part of an "arcane legal debate" alter the fact that they are inextricably bound up with casting suspicion on immigrants and their children as insufficiently American.

If there was any doubt that this is exactly what Professor Eastman was insinuating, he dispelled that doubt by ending his article arguing that Senator Harris is not only probably not a natural born citizen, she might not even be a citizen *at all* despite being born and raised in the United States.[200] And if she is not a citizen, she is surely ineligible to serve in the Senate, he concludes.[201]

Professor Eastman's reliance on the forced expulsion of Mexican immigrants as well as Mexican Americans in the 1930s, and again in the 50s, and 60s (including Operation Wetback), without regard to whether these immigrants were lawfully present in the United States or even American citizens, demonstrates that his argument has neither legal nor factual support.[202] That the federal government has violated the rights of its citizens in the past, particularly members of a marginalized community, does not meant that those citizens had no rights.

Professor Eastman invites us to ignore the plain meaning of the language of Fourteenth Amendment, the centuries' long history of legal understanding underpinning it, and the simple, easy to enforce, and fair outcome that results.[203] He wants us instead to adopt a tortured, illogical, historically unmoored

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199 Hamdi v. Rumsfeld, 542 U.S. 507, 523 (2004).
200 Eastman, *supra* note 1.
201 *Id.*
202 *Id.*
203 *Id.*

alternative reading that will result in confusion, chaos, and a bureaucratic morass. There is neither a good legal, historical, or political reason to do so.

Professor Eastman has a long and consistent history of seeking to restrict or revoke birthright citizenship.[204] But these arguments are not supported by sound legal scholarship. They ignore settled precedent, federal laws and regulations, and a jurisprudential history that has built upon and expanded, not restricted, the notion of who is entitled to the rights of citizenship.

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204 *See*, *e.g.*, Eastman, *supra* note 1; Alex Nowrasteh, *John Eastman on Birthright Citizenship, Kamala Harris, the Mexican Repatriation, and Citizenship for the Children of Braceros*, CATO INSTITUTE (Aug. 14, 2020 11:21 AM), https://www.cato.org/blog/john-eastman-birthright-citizenship-kamala-harris-mexican-repatriation-citizenship-children [http://perma.cc/9NSA-Z7FC]; John Eastman, *Birthright Citizenship Is Not Actually in the Constitution*, N.Y. TIMES (Dec. 22, 2015 11:59 AM), https://www.nytimes.com/roomfordebate/2015/08/24/should-birthright-citizenship-be-abolished/birthright-citizenship-is-not-actually-in-the-constitution [http://perma.cc/4NFT-GMZ3].