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BORN IN THE USA BUT NOT A CITIZEN? HOW THE BIRTH VISA CAN SOLVE TODAY'S IMMIGRATION CHALLENGES

RONALD RIZZO*

INTRODUCTION

A woman checks into a ritzy hotel on the Upper East Side of Manhattan.¹ She has arrived for the first time in the U.S. from Turkey and in a month will give birth to a boy in a New York City hospital. She paid over \$8,000 to cover her month-long stay at the hotel, a package deal which includes round-trip transportation to the airport and also a baby cradle for her one-bedroom suite.² Another woman has spent days making the arduous, and illegal, journey across the U.S. border from Mexico. She will also give birth to a child in a month in a U.S. hospital. However, unlike the woman from Turkey, the Mexican woman cannot afford a one-month stay at a luxury hotel. These two women, who have completely different socio-economic backgrounds, share a quite common occurrence: both of them will be conferring the gift of U.S. citizenship on their child.

The Turkish woman was attracted by the "birth package" that the hotel offers specifically to foreigners interested in "birthright tourism," providing month-long stays in the U.S. with the unique aim of giving birth on U.S. soil for citizenship purposes.³ She will return to Turkey shortly after giving birth, hopeful that one day her child will benefit from something she does not have: U.S. citizenship. Her child will be able to work and attend school in the U.S. without the hassle of applying and waiting for a visa.⁴ She is one of the many people who take advantage of the *jus soli* law created by the current interpretation of the Fourteenth Amendment. The Latin term *jus*

* J.D., St. John's University School of Law, 2013; B.A., *cum laude*, Fordham University, 2009.

¹ See Devin Dwyer, *A New Baby Boom? Foreign Birth Tourists Seek U.S. Citizenship for Children*, ABC NEWS (Apr. 14, 2010), <http://abcnews.go.com/Politics/birth-tourism-industry-markets-us-citizenship-abroad/story?id=10359956#.T0GosdSrKSo>.

² *Id.*

³ *Id.*

⁴ *See id.*

soil means "right of the soil," and refers to the granting of citizenship based on an individual's place of birth.⁵

Though the exact number of women who come to the U.S. solely for the purpose of giving birth in a U.S. hospital is unclear, the market for "birthright tourism" is certainly outweighed by the number of children born to women who spend days illegally crossing the border into the U.S. from Mexico.⁶ Every year, 363,000 children are born to illegal immigrants.⁷ Out of the 5.5 million children of illegal immigrants in the U.S., it is estimated that 73%, or just over 4 million, were born in the U.S.⁸ Unlike those attracted by "birthright tourism," illegal immigrants who give birth on U.S. soil generally intend to remain in the U.S., albeit illegally.⁹

The U.S. born children living with their illegal immigrant parents are a significant cost to U.S. citizens.¹⁰ Throughout the country, approximately 71% of households headed by illegal immigrants with U.S. born children access some type of welfare assistance.¹¹ In 2010, U.S. born children of illegal immigrants cost Los Angeles County over \$600 million in welfare benefits.¹² The welfare benefits that the children of illegal immigrants receive as U.S. citizens ultimately end up in the hands of the illegal immigrant parents themselves, providing them with a major incentive to give birth on U.S. soil.¹³ Furthermore, upon reaching the age of 21, a U.S.

⁵ See Jason Jay Darfus, *Attaining Citizenship in the United States: Jus Soli, Jus Sanguinis*, AVVO, <http://www.avvo.com/legal-guides/ugc/attaining-citizenship-in-the-united-states-jus-soli-jus-sanguinis-etc> (last visited Jan. 28, 2014).

⁶ See Dwyer, *supra* note 1.

⁷ *Birthright Citizenship*, FED'N FOR AM. IMMIGR. REFORM, <http://www.fairus.org/issue/birthright-citizenship> (last updated Aug. 2010) [hereinafter *Birthright Citizenship*].

⁸ See Emily Bazar, *Most Illegal Immigrants' Kids are U.S. Citizens*, USA TODAY (Apr. 15, 2009), http://www.usatoday.com/news/nation/2009-04-14-immigrant-report_N.htm.

⁹ See Dustin Volz, *Tough Laws Don't Make Illegal Immigrants 'Self-Deport'*, CRONKITE NEWS (Feb. 22, 2012), <http://cronkitenewsonline.com/2012/02/report-tough-immigration-laws-dont-make-illegal-immigrants-self-deport/>; Leah Muse-Orlinoff, *Staying Put but Still in the Shadows: Undocumented Immigrants Remain in the Country Despite Strict Laws*, CENTER FOR AM. PROGRESS 5 (Feb. 2012), http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/mexico_immigration.pdf.

¹⁰ See *Birthright Citizenship, supra* note 7; *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments*, CONG. BUDGET OFF. 2-3 (Dec. 2007), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf>.

¹¹ See Steven A. Camarota, *Welfare Use by Immigrant Households with Children*, CENTER FOR IMMIGR. STUD. 1 (Apr. 2011), <http://www.cis.org/sites/cis.org/files/articles/2011/immigrant-welfare-use-4-11.pdf> [hereinafter Camarota, *Welfare Use*].

¹² See *Welfare Tab for Children of Illegal Immigrants Estimated at \$600 Million*, FOXNEWS.COM (Jan. 19, 2011), <http://www.foxnews.com/politics/2011/01/19/welfare-tab-children-illegal-immigrants-estimated-m-la-county>.

¹³ See Peter A. Schulkin, *Child Tax Credits for Illegal Immigrants*, CENTER FOR IMMIGR. STUD. 1 (Nov. 2010), <http://www.cis.org/sites/cis.org/files/articles/2010/child-tax-credits.pdf>; William M. Stevens, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment's Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population*

born child of illegal immigrants can sponsor his or her parents for legal permanent residence in the U.S., thus creating another incentive for illegal immigrants to give birth on U.S. soil.¹⁴ The *jus soli* system of citizenship established by the current interpretation of the Fourteenth Amendment has the indirect effect of granting benefits and rights to illegal immigrants through their U.S. born children.

The Fourteenth Amendment controls the granting of citizenship in the U.S.¹⁵ The Supreme Court has interpreted the Fourteenth Amendment numerous times, and ultimately established that virtually all individuals born on U.S. soil are U.S. citizens.¹⁶ However, the current interpretation of the Fourteenth Amendment goes against the intent of the framers, since the framers drafted the Fourteenth Amendment to specifically exclude from its breadth the children of illegal immigrants and temporary visitors born in the U.S. As a result, the past decades have brought about an array of proposed amendments to the U.S. Constitution to change the current interpretation of the Fourteenth Amendment, which grants birthright citizenship to the children born of illegal immigrants and temporary visitors on U.S. soil. An example of such a proposal is the recent amendment introduced by Senators David Vitter and Rand Paul in January of 2011.¹⁷ The Vitter-Paul proposal would limit birthright citizenship to those babies born in the U.S. with at least one parent who is either a U.S. citizen, a lawful permanent resident residing in the U.S., serving in the armed forces, or naturalized under immigration law.¹⁸ While it is clear that universal birthright citizenship is problematic to the U.S., the Vitter-Paul Amendment unfairly punishes innocent children with no control over their birth circumstances, branding them with the same illegal status as their parents.

This Note calls for an amendment based on a middle ground, in which children born to illegal immigrants or temporary visitors on U.S. soil would acquire an entirely new status under immigration law. This proposal would

Migrations, Globalization, and Conflicting Cultures, 14 TEX. WESLEYAN L. REV. 337, 349 (2008).

¹⁴ See *Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen> (last updated Mar. 30, 2011) [hereinafter *Green Card*].

¹⁵ See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .").

¹⁶ See *United States v. Wong Kim Ark*, 169 U.S. 649, 706 (1898); *Miller v. Albright*, 523 U.S. 420, 453 (1998).

¹⁷ See Catalina Camia, *GOP Senators Seek Change in Who is Born a U.S. Citizen*, USA TODAY (Jan. 27, 2011), <http://content.usatoday.com/communities/onpolitics/post/2011/01/immigration-14th-amendment-us-citizenship-/1#.T0EwP9SrKSo>.

¹⁸ S.J. Res. 2, 112th Cong. (2011).

grant children born to parents who are illegal immigrants, or who entered the country using the Visa Waiver Program or a visa, the status of a birth visa that allows them to remain legally in the United States.¹⁹ Children born on U.S. soil to at least one parent who is a U.S. citizen, a legal permanent resident, or a holder of a valid visa other than a visitor visa will continue to be U.S. citizens at birth.

The birth visa would be valid for forty-five years and upon reaching the threshold age of forty, those with a birth visa would be eligible to apply to become U.S. citizens. Birth visa holders cannot access welfare or public education funded by U.S. citizens and legal permanent residents; however, a new taxpayer funded regime will ensure that children with a birth visa will not be left destitute. Furthermore, the birth visa mitigates the concern that children born to illegal immigrants in the U.S. will eventually sponsor their parents for legal permanent residence, since those with a birth visa will not be able to sponsor anyone until becoming a U.S. citizen at age forty. If the person with a birth visa does not choose to become a U.S. citizen by age forty-five, the visa expires, and that person will lose legal status in the U.S. The birth visa will also discourage the market of "birthright tourism," since the visa would need to be renewed every five years, upon a showing that the child has resided continuously in the U.S. for the five years prior to renewal. Since parents attracted by "birthright tourism" intend to return with their child to their country of origin shortly after giving birth, the child would surely fail the residency requirement necessary for renewal.

Part I of this Note will compare means of obtaining citizenship in the U.S. today, to that of other developed countries. Part II will analyze the history of the implementation and interpretation of the Fourteenth Amendment. It will focus on the intentions of those who drafted the Fourteenth Amendment. Part III will discuss the shortcomings of the current interpretation of the Fourteenth Amendment itself and proposals to alter it, particularly the Vitter-Paul proposal. Part IV will discuss why a middle ground based on a birth visa can cure the problems created by both

¹⁹ The Visa Waiver Program permits nationals of 36 participating countries to enter the U.S. only for tourism or business purposes for 90 days or less, without obtaining a visa. See *Visa Waiver Program*, U.S. DEP'T OF ST. <http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html> (last visited Jan. 28, 2014). In terms of visitor visas, there are the B-1 business visitor visa and the B-2 pleasure visitor visa. Both permit stays of 90 days or less in the U.S. The B-1 and B-2 visitor visas can be issued in conjunction with each other. See *Visitor Visas*, U.S. DEP'T OF ST., <http://travel.state.gov/content/visas/english/visit/visitor.html> (last visited Jan 28, 2014). For purposes of this paper, a "visitor visa" encompasses both the B-1 business visitor visa, and the B-2 pleasure visitor visa.

the current interpretation of the Fourteenth Amendment, and such extreme proposed amendments like the Vitter-Paul proposal.

I. HOW CITIZENSHIP IS ACQUIRED IN OTHER COUNTRIES

A. *The Global Shift from Jus Soli to Jus Sanguinis*

The U.S. is one of only thirty countries in the world that grants automatic citizenship to nearly all persons born on its soil.²⁰ Some other countries that grant birthright citizenship are Canada, Brazil, Argentina, Venezuela, and Colombia.²¹ The other 164 countries in the world follow completely different systems of citizenship.²² Citizenship in most of those countries is granted according to the *jus sanguinis* system.²³ *Jus sanguinis*, or "right of blood," is a system in which citizenship at birth is determined according to the citizenship of the child's ancestors.²⁴ It is important to note that the U.S. also uses a *jus sanguinis* system for children born outside the U.S.²⁵ For example, if a child born outside the U.S. has parents who are both U.S. citizens and at least one parent has a residence in the U.S., that child is a U.S. citizen.²⁶

According to the International Monetary Fund, the United States and Canada are the only advanced economies in the world that still grant automatic citizenship at birth to the children of illegal immigrants and temporary visitors.²⁷ In fact, the past years have seen a general movement away from the system which grants automatic birthright citizenship to everyone born on the soil of a particular nation.²⁸ In 2004, Ireland, through a national referendum, ended universal birthright citizenship, mainly due to concerns of "birth tourism" in the country.²⁹ New Zealand followed Ireland's example and in 2006 ended their long established system of

²⁰ See Jon Feere, *Birthright Citizenship in the United States: A Global Comparison*, CENTER FOR IMMIGR. STUD. 15 tbl.1 (Aug. 2010), <http://www.cis.org/sites/cis.org/files/articles/2010/birthright.pdf>.

²¹ See *id.*

²² See *id.*

²³ See *id.* at 5.

²⁴ See *id.*

²⁵ See Darfus, *supra* note 5.

²⁶ *Id.*; *Acquisition of U.S. Citizenship by a Child Born Abroad*, U.S. DEPT OF ST., <http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/citizenship-child-born-abroad.html> (last visited Jan. 28, 2014).

²⁷ Feere, *supra* note 20, at 2.

²⁸ See *id.* at 4.

²⁹ See Rainer Baubock, *Who are the citizens of Europe?*, EUROZINE 2 (Dec. 23, 2006), <http://www.eurozine.com/pdf/2006-12-23-baubock-en.pdf>.

birthright citizenship.³⁰ In 2010, the Dominican Republic ended automatic birthright citizenship³¹ and now, instead, the Dominican citizenship law requires that at least one parent of a child born in the Dominican Republic is of Dominican nationality.³²

B. The Example of Australia

Australia ended automatic birthright citizenship in 1986, and provides a unique example of the injustices that can be created when a country amends its citizenship system, and how the birth visa proposal avoids those injustices.³³ Australia does not grant automatic citizenship to children born to illegal aliens on Australian soil.³⁴ Such children are not eligible for Australian citizenship until they reach the age of ten, and make a showing that they have resided continuously in Australia for the past ten years.³⁵ This "delayed citizenship" model recognizes the inherent faults of granting automatic citizenship to children born to illegal immigrants or temporary visitors simply because they were born on Australian soil. The Parliamentary debates in the Australian House of Representatives provide unique insight into the reasoning behind amending Australian citizenship law. The Australian Minister for Immigration and Ethnic Affairs, referring to Australia's long time grant of universal birthright citizenship, stated, "[t]his generosity in our law can be exploited by visitors and illegal immigrants who have children born here in order to seek to achieve residence in Australia."³⁶ It is striking that the driving concern behind amending Australian citizenship law in 1986 is the same concern which the U.S. faces today. Illegal aliens seeking to use their U.S. born children for residency purposes is one of the major consequences of the current interpretation of the Fourteenth Amendment.

The "delayed citizenship" model "has the effect of conferring upon a

³⁰ Feere, *supra* note 20, at 14.

³¹ *Id.*

³² See Open Soc'y Justice Initiative & Ctr. for Justice & Int'l Law, *Submission to the United Nations Human Rights Committee: Review of the Dominican Republic*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. 5 (Mar. 12, 2012), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/OSJI_and_CJIL_DominicanRepublic_HRC104.pdf.

³³ See Feere, *supra* note 20, at 14.

³⁴ See Australian Citizenship Amendment Act, 1986, c. 70, § 4.

³⁵ *Id.*

³⁶ *Australian Citizenship Amendment Bill* 1986, Second Reading Speech, 19 Feb. 1986, Parl. Deb., H.R. at 868, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1986-02-19%2F0096%22>.

new born non-citizen child the same immigration status as one of its parents. If their immigration status differs, the child will be given the status of the one with the longer, unexpired period of permitted stay in Australia."³⁷ In other words, if at birth neither of the child's parents holds a valid Australian visa, that child ultimately has the same illegal status as his or her parents and can be deported. This makes it very hard for the child to remain in Australia for the ten-year citizenship requirement, given that both the child and his or her parents can be deported at any time. In reality, the "delayed citizenship" model can only be satisfied by children with parents who are both legally present in Australia. This harsh aspect of the "delayed citizenship" model has withstood judicial scrutiny. In 2004, in *Singh v. Commonwealth*,³⁸ the High Court of Australia found that though born on Australian soil, a child born to illegal immigrants could still constitutionally be deemed an alien, and therefore be removed from Australia.³⁹

The birth visa proposal is similar to the "delayed citizenship" model since both schemes fail to grant citizenship at birth to the children of illegal immigrants and temporary visitors. However, unlike the "delayed citizenship" model, the birth visa would allow a child born to illegal immigrants in Australia to remain legally in the country in between the time of birth and eligibility for citizenship. The child would not be punished for the illegal actions of his or her parents by risking deportation. Australia serves as a prime example of how the birth visa proposal would work since the "delayed citizenship" model already denies automatic birthright citizenship to children born to illegal immigrants or temporary visitors on Australian soil. However, in amending its longstanding grant of universal birthright citizenship in 1986, Australia punished children born to illegal immigrants, in the same way the Vitter-Paul proposal does. There is something inherently unfair in a child who has no control over his or her birth circumstances being given an illegal status and risking deportation.

II. THE HISTORY AND CURRENT INTERPRETATION OF THE FOURTEENTH AMENDMENT

A. The Original Intent of the Framers of the Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the

³⁷ *Id.*

³⁸ (2004) 209 ALR 355 (Austl.).

³⁹ *Id.*

jurisdiction thereof, are citizens of the United States and of the State wherein they reside."⁴⁰ This is the first sentence of the Fourteenth Amendment, often referred to as the "Citizenship Clause." At first glance, it seems that the Fourteenth Amendment was intended to grant U.S. citizenship to virtually everyone born in the U.S. However, an analysis of its history reveals a quite different story.

In 1857, before the Fourteenth Amendment was passed, the Supreme Court decided one of the most controversial cases in U.S. history, *Dred Scott v. Sandford*. In *Dred Scott*, the Court held that black people were not U.S. citizens, including those that were no longer slaves and those that were born in the U.S.⁴¹ Congress reacted to the Supreme Court's decision by passing the Civil Rights Act of 1866, overturning the *Dred Scott* decision.⁴² This Act would later have enormous influence in interpreting the Fourteenth Amendment.⁴³ The Civil Rights Act of 1866 stated, "[a]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."⁴⁴

In 1868, when the Fourteenth Amendment was officially adopted, its language closely paralleled that of the Civil Rights Act of 1866.⁴⁵ While the Civil Rights Act includes the language "subject to any foreign power," the Fourteenth Amendment uses the phrase "subject to the jurisdiction thereof."⁴⁶ From a plain textual reading of both the Fourteenth Amendment and its influential predecessor, it is clear that both contain a condition. This conditional language is significant, since it demonstrates how the framers expressly intended to identify certain groups of individuals who would not be deemed citizens simply by their birth on U.S. soil.

The meaning of "subject to the jurisdiction thereof" is clarified by the 1866 congressional debates on the Fourteenth Amendment. Senator Trumbull, a sponsor of the Civil Rights Act of 1866, explained that "subject to the jurisdiction of the United States" means "[n]ot owing

⁴⁰ U.S. CONST. amend. XIV, § 1.

⁴¹ See *Scott v. Sandford*, 60 U.S. 393, 427 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁴² Feere, *supra* note 20, at 6.

⁴³ *Id.*; Robert Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 204 (2005) ("Because the provisions of the Civil Rights Act of 1866 are central to the meaning and scope of the Fourteenth Amendment, it is necessary to examine the statute's provisions.").

⁴⁴ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

⁴⁵ Feere, *supra* note 20, at 6.

⁴⁶ Compare Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)) with U.S. CONST. amend. XIV, § 1.

allegiance to anybody else."⁴⁷ Illegal aliens and temporary visitors owe allegiance to their respective country of citizenship, and not to the United States. However, the allegiance of children born to illegal aliens or temporary visitors on U.S. soil must still be addressed. Senator Reverdy Johnson noted in 1866 that if children born in the U.S. are to become U.S. citizens, their parents must be "subject to the authority of the United States."⁴⁸ Senator Johnson stated, "[t]he amendment says that citizenship may depend upon birth, and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States."⁴⁹ In other words, the loyalties that illegal immigrants and temporary visitors owe to their respective countries of origin are ultimately transferred to their child born on U.S. soil. Senator Johnson wanted to ensure that the Fourteenth Amendment would not be construed too broadly by adding, "I am, however, by no means prepared to say, as I think I have intimated before, that being born within the United States, independent of any new constitutional provision on the subject, creates the relation of citizen to the United States."⁵⁰ The framers of the Fourteenth Amendment intended to exclude from birthright citizenship the children of illegal aliens and temporary visitors born on U.S. soil, given that they, and their parents, owe allegiance to a foreign government.

B. The Current Interpretation of the Fourteenth Amendment

Given the clear intentions of the drafters of the Fourteenth Amendment, it is vexing that the current interpretation of the Fourteenth Amendment is extremely broad and grants citizenship to children born to illegal aliens and temporary visitors on U.S. soil. Early cases interpreting the Fourteenth Amendment were true to the intention of the drafters. In 1873, the *Slaughter-House Cases* were among the first to address the meaning of "subject to the jurisdiction of the United States" and noted that the phrase was meant to "exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."⁵¹ The 1884 case of *Elk v. Wilkins* focused on the citizenship of a Native

⁴⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull).

⁴⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Slaughter-House Cases*, 83 U.S. 36, 73 (1873).

American born in a tribe on U.S. soil.⁵² The Court explained that "subject to the jurisdiction of the United States" meant "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."⁵³ The Court ultimately held that the Native American could not be deemed to be a citizen of the U.S. at birth, since his immediate allegiance was to his natal tribe.⁵⁴ In both of these cases, then, the Court excludes those born on U.S. soil whom owe foreign allegiances as in line with the original intent of the drafters of the Fourteenth Amendment.

On the other hand, *United States v. Wong Kim Ark*,⁵⁵ decided in 1898 by the Supreme Court, is mistakenly understood to hold that the Fourteenth Amendment should be broadly construed to include virtually everyone born on U.S. soil.⁵⁶ In *Wong Kim Ark*, a child born in San Francisco to Chinese citizens with legal permanent residence in the U.S. was deemed to be a U.S. citizen.⁵⁷ The Court held that a child born to parents that have a permanent domicile and residence in the U.S. becomes a citizen at birth.⁵⁸ The Court's underlying rationale for this holding is rooted historically in English common law.⁵⁹ Under English common law, citizenship was granted to all born in England, except children born to foreign diplomats and alien enemies.⁶⁰ The Court explained that the English common law tradition regarding citizenship was passed down to the U.S. constitution.⁶¹ The Court reasoned that since Wong Kim Ark did not fall into the traditional categories of birthright citizenship exclusion under English common law, he was indeed a citizen of the U.S. at birth.⁶² Furthermore, regarding the intent of the framers, the court reasoned that given the English common law history, by qualifying "[a]ll persons born in the United States" with the words "and subject to the jurisdiction thereof," the framers intended to exclude from birthright citizenship only the children of consuls and children born of alien enemies in hostile occupation.⁶³ The Court's holding in *Wong Kim Ark* is responsible for the current

⁵² See *Elk v. Wilkins*, 112 U.S. 94, 98 (1884).

⁵³ *Id.* at 102.

⁵⁴ See *id.* at 109.

⁵⁵ 169 U.S. 649 (1898).

⁵⁶ See generally *id.*

⁵⁷ See generally *id.*

⁵⁸ See *id.* at 705.

⁵⁹ See *id.* at 655-58.

⁶⁰ *Id.* at 655.

⁶¹ See *id.* at 658.

⁶² See *id.* at 705.

⁶³ *Id.* at 682.

interpretation of the Fourteenth Amendment, in which all persons born on U.S. soil are considered U.S. citizens, except children born of alien enemies in hostile occupation and children of diplomatic representatives of a foreign State.⁶⁴

Chief Justice Fuller delivered the dissent in *Wong Kim Ark* and stated, "the children of aliens, whose parents have not only not renounced their allegiance to their native country . . . must necessarily remain themselves subject to the same sovereignty as their parents."⁶⁵ The dissent was following prior Supreme Court precedent and was surprised at the new approach the Court took in *Wong Kim Ark*. The dissent also emphasized that the Fourteenth Amendment did not follow the English common law tradition.⁶⁶ Chief Justice Fuller, in a statement remarkably relevant to the discussion of illegal immigrants and temporary visitors today, noted "[t]he English common law rule recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents. . . . But a different view as to the effect of permanent abode on nationality has been expressed in this country."⁶⁷ Chief Justice Fuller went on to explain how the Fourteenth Amendment meant to exclude from birthright citizenship children born to parents on U.S. soil who owed merely "local and temporary allegiance" to the U.S., while owing permanent allegiance to another country.⁶⁸

Wong Kim Ark has caused a myriad of different reactions to its holding. Influential U.S. Circuit Court Judge Richard Posner stated in *Oforji v. Ashcroft* that "Congress should rethink . . . awarding citizenship to everyone born in the United States. . . . We should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children."⁶⁹ Former Texas solicitor general James Ho sides with the majority opinion in *Wong Kim Ark* and expressed the view that "subject to the jurisdiction thereof" means only being legally required to obey U.S. law.⁷⁰ Regardless of the conflicting opinions on the holding in *Wong Kim Ark*, it is important to note that *Wong Kim Ark* made absolutely no holding regarding children born to illegal aliens and temporary visitors on U.S. soil. The parents of the child held to be a U.S.

⁶⁴ See *id.*; *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982).

⁶⁵ *Wong Kim Ark*, 169 U.S. 649, 725 (1898) (Fuller, J., dissenting).

⁶⁶ *Id.* at 729.

⁶⁷ *Id.* at 718.

⁶⁸ *Id.* at 721.

⁶⁹ *Oforji v. Ashcroft*, 354 F. 3d 609, 620-21 (7th Cir. 2003).

⁷⁰ James C. Ho, *Birthright Citizenship and the 14th Amendment*, WALL ST. J. (Jan. 4, 2011), <http://online.wsj.com/article/SB10001424052970203731004576045380685742092.html>.

citizen in *Wong Kim Ark* were legal permanent residents.⁷¹ Interestingly enough, no court has ever taken on the direct issue of the citizenship status of a child born in the U.S. to illegal immigrants or temporary visitors.⁷² *Wong Kim Ark* does not apply to the U.S. born children of illegal immigrants and temporary visitors, and there is absolutely no legal precedent for arguing that it does.

III. THE SHORTCOMINGS OF THE CURRENT INTERPRETATION OF THE FOURTEENTH AMENDMENT AND THE VITTER- PAUL PROPOSAL

A. The Consequences of the Current Interpretation of the Fourteenth Amendment

By granting the hundreds of thousands of children born every year to illegal immigrants on U.S. soil automatic citizenship, serious consequences have resulted in the draining of U.S. social service programs funded by U.S. citizen tax dollars. The current approach encourages illegal immigrants to have children in the U.S., as they will be able to claim benefits, such as food stamps and Medicaid, to which they otherwise would not be entitled.⁷³ Since programs such as food stamps do not allow direct payment to minors, the benefits must be paid through an authorized representative, normally a parent of the child.⁷⁴ In registering as an authorized payee of welfare benefits, the payee's lawful presence in the country is not investigated.⁷⁵ The control of the U.S. born child's welfare benefits is immediately in the hands of the illegal immigrant parent assigned as a payee, thereby allowing them access to benefits, which they are not legally entitled to themselves.⁷⁶ The welfare benefits that are most commonly used by the illegal immigrant population are food assistance programs and Medicaid.⁷⁷ It is estimated that throughout the country, 71% of households headed by illegal aliens with U.S. born children receive some type of welfare assistance.⁷⁸ In New York, 76% of illegal alien

⁷¹ See *Wong Kim Ark*, 169 U.S. 649, 652 (1898).

⁷² See Feere, *supra* note 20, at 2.

⁷³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-98-30, ILLEGAL ALIENS: EXTENT OF WELFARE BENEFITS RECEIVED ON BEHALF OF U.S. CITIZEN CHILDREN 3 (1997).

⁷⁴ *Id.* at 3-4.

⁷⁵ See *id.* at 4.

⁷⁶ See *id.*

⁷⁷ See *id.* at 5.

⁷⁸ See Camarota, *Welfare Use*, *supra* note 11, at 12. But see Steven A. Camarota, *Immigrants in the United States: A Profile of America's Foreign-Born Population*, CENTER FOR IMMIGR. STUD. 73 tbl.39

headed households with U.S. born children receive welfare assistance.⁷⁹ In California, the state with the largest illegal immigrant population, 77% of illegal alien headed households are receiving welfare assistance.⁸⁰ This is in contrast to 37.3% of households headed by non-immigrant families that access welfare assistance, strikingly lower than the 71% of illegal immigrant headed households.⁸¹

The cost of issuing benefits to illegal immigrants with U.S. born children is a tremendous financial burden on the states and the federal government. New York spends \$648 million every year in issuing welfare benefits to the U.S. born children of illegal aliens.⁸² In 2011, Los Angeles County alone spent \$646 million in issuing welfare and food stamp benefits to illegal immigrants for their U.S. born children.⁸³ On a federal level, the numbers are just as staggering. Every year, the government spends over \$1.2 billion in Medicaid expenditures solely to cover the cost of illegal immigrants giving birth in U.S. hospitals.⁸⁴ After giving birth, the native born children of illegal immigrants are entitled to Medicaid benefits, costing the government over \$2.3 billion every year.⁸⁵ In terms of welfare benefits, the government spends over \$4.7 billion every year on the U.S. born children of illegal immigrants.⁸⁶

The cost of educating the children of illegal immigrants born on U.S. soil is also overwhelming. It is estimated that there are 2.55 million school-aged children of illegal immigrants that were born on U.S. soil.⁸⁷ Every year, the federal government spends over \$1.5 billion on the education of children

(Aug. 2012), <http://www.cis.org/articles/2012/immigrants-in-the-united-states-2012.pdf> [hereinafter Camarota, *Immigrants*] (estimating that 47% of unauthorized immigrant households nationwide receive one or more forms of public assistance).

⁷⁹ See Camarota, *Welfare Use*, *supra* note 11, at 18 tbl.7. *But see* Camarota, *Immigrants*, *supra* note 78, at 73 tbl.39 (estimating that 43% of New York's unauthorized immigrant households receive some form of public assistance).

⁸⁰ See Camarota, *Welfare Use*, *supra* note 11, at 18 tbl.7. *But see* Camarota, *Immigrants*, *supra* note 78, at 73 tbl.39 (estimating that 55% of California's unauthorized immigrant households receive some form of public assistance).

⁸¹ See Camarota, *Welfare Use*, *supra* note 11, at 15 tbl.5. *But see* Camarota, *Immigrants*, *supra* note 78, at 57 tbl.28 (estimating that 22.8% of native households nationwide receive some form of public assistance).

⁸² Jack Martin & Eric A. Ruark, *The Fiscal Burden of Illegal Immigration on United States Taxpayers*, FED'N FOR AM. IMMIGR. REFORM 71 tbl.15, http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921 (last updated Feb. 2011).

⁸³ Press Release, Supervisor Michael D. Antonovich, *Welfare Costs for Children of Illegal Aliens Exceeds \$646 Million* (Feb. 16, 2012), available at <http://capoliticalnews.com/2012/03/06/antonovich-la-county-cost-for-illegal-aliens-is-1-6-billion-per-year/>.

⁸⁴ Martin & Ruark, *supra* note 82, at 16.

⁸⁵ *Id.* at 17.

⁸⁶ *Id.* at 31 tbl.5.

⁸⁷ See *id.* at 45.

born to illegal aliens in the U.S.⁸⁸ However, the real cost of educating the U.S. born children of illegal immigrants is on state and local governments.⁸⁹ New York spends over \$3.5 billion annually on the K-12 public education of children born to illegal immigrants in the U.S.⁹⁰ California spends over \$6.7 billion every year on educating the U.S. citizen children of illegal aliens.⁹¹ The estimated total outlay of all state and local governments on the K-12 education of children born to illegal immigrants on U.S. soil is over \$29.8 billion.⁹²

Perhaps an even more startling consequence of universal birthright citizenship is its impact on the sponsorship system. Upon turning twenty-one, a U.S. citizen can sponsor their non-citizen parents and any foreign-born brothers or sisters for legal permanent residence.⁹³ This system of sponsorship further encourages illegal aliens to give birth to children in the U.S., knowing eventually that their children will be able to sponsor them for legal permanent residence. Given the current system, there are very few disadvantages to illegal aliens giving birth to children on U.S. soil. They will be able to access welfare benefits on behalf of their U.S. born children and, furthermore, may one day be able to become U.S. citizens themselves through the system of sponsorship.

A potential disincentive for illegal immigrants to give birth on U.S. soil is the risk of being separated from their U.S. born children through deportation back to their native country. In fact, the risk of illegal immigrants being separated from their U.S. born children is rather substantial. In a government report, which reflects data from January through June of 2011, 22% of deportees had U.S. born children.⁹⁴ However, given the benefits illegal aliens can obtain from their U.S. born children, and the misguided belief that having a child on U.S. soil will

⁸⁸ See *id.* at 14 tbl.1. This number was arrived at by multiplying \$2,107,800,000 by 73%. FAIR estimates that there are about 950,000 illegal alien children in U.S. public schools, and 2.55 million children of illegal immigrants born on U.S. soil are in U.S. public schools. Therefore, children born on U.S. soil to illegal immigrants account for about 73% of the total cost of educating the children of illegal immigrants. See *id.* at 13.

⁸⁹ See *id.* at 13; see also Table 6, *Student Membership and Current Expenditures Per Pupil for Public Elementary and Secondary Education, by Function and State or Jurisdiction*, NAT'L CENTER FOR EDUC. STAT. (2007), http://nces.ed.gov/pubs2009/expenditures/tables/table_06.asp.

⁹⁰ See Martin & Ruark, *supra* note 82, at 51 tbl.8. This number was arrived at by multiplying \$4,879,400,000 by 73%.

⁹¹ See *id.* at 50 tbl.8. This number was arrived at by multiplying \$9,226,900,000 by 73%.

⁹² See *id.* at 55 tbl.11. This number was arrived at by multiplying \$40,883,000,000 by 73%.

⁹³ See *Green Card*, *supra* note 14.

⁹⁴ See Daniel Gonzalez, *22% of Deportees Have U.S. Born Children*, USA TODAY (Apr. 5, 2012), <http://www.usatoday.com/news/washington/story/2012-04-05/deportations-immigration-report-parents/54040378/1>.

somehow legitimize their status in the U.S., the risk of deportation and the subsequent separation from their children is unlikely to deter illegal aliens from giving birth on U.S. soil.⁹⁵

Another consequence of the current interpretation of the Fourteenth Amendment is the market of "birth tourism."⁹⁶ This is distinguished from the issue of illegal immigrants giving birth on U.S. soil by the fact that those attracted by "birth tourism" enter the country legally, either under the Visa Waiver Program or a visitor visa, and then leave without obtaining government benefits.⁹⁷ "Birth tourism" costs the U.S. socially by allowing individuals to view U.S. citizenship as a cost-benefit analysis, and not as a means to contribute meaningfully to U.S. society. For example, it is estimated that since 2003, nearly 12,000 Turkish children have been born in the U.S. with the mother's sole mission to make her child a U.S. citizen.⁹⁸ The Turkish-owned Marmara Hotels group has several locations, including one in Manhattan.⁹⁹ In 2009, the hotel chain announced a "birth tourism" package at its Manhattan location, targeted at Turkish women who could afford the \$45,000 cost of staying at the hotel for a month.¹⁰⁰ The manager of the hotel admitted hosting fifteen families under its "birth tourism" package in 2009.¹⁰¹

There are also travel agencies throughout Turkey that specialize in "birth tourism," such as Gurib Tourism.¹⁰² The owner of Gurib Tourism told a Turkish newspaper in 2010 that, "[w]e have been involved in medical tourism since 2002 . . . [b]ut we were also receiving so many demands about this issue that we decided to sell birth packages."¹⁰³ A Turkish woman who gave birth to her daughter in the U.S. stated, "[w]e found a company on the Internet and decided to go to Austin for our child's birth . . . [i]t was incredibly professional. They organized everything for

⁹⁵ See Shannon Blanchard, *Do Illegal Immigrants with U.S. Born Children Ever Get Deported?*, LAWINFO, <http://blog.lawinfo.com/2011/08/15/do-illegal-immigrants-with-u-s-born-children-ever-get-deported/> (last visited Jan. 28, 2014); Byron Pitts, *Illegal Immigrant Births-At Your Expense*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/8301-18563_162-4000401.html.

⁹⁶ See Ann Schecter, *Born in the U.S.A.: Birth Tourists Get Instant U.S. Citizenship for their Newborns*, NBC NEWS (Oct. 28, 2011), http://rockcenter.nbcnews.com/_news/2011/10/28/8511587-born-in-the-usa-birth-tourists-get-instant-us-citizenship-for-their-newborns.

⁹⁷ See *id.*

⁹⁸ Isıl Egrikavuk, *Birth Tourism in US on the Rise for Turkish Parents*, HURRIYET DAILY NEWS (Mar. 12, 2010), <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=birth-tourism-to-the-usa-explodes-2010-03-12>.

⁹⁹ *Id.*

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

¹⁰² See *id.*

¹⁰³ *Id.*

me. I had no problem adjusting and I had an excellent birth."¹⁰⁴ Most of the women attracted to the U.S. by "birth tourism" want their children to have the advantage of being a U.S. citizen, and not having to worry about obtaining a visa if they wish to study or work in the U.S.¹⁰⁵

Affluent women from China planning to give birth in the U.S. can utilize at least four "birth tourism" centers in Queens, New York.¹⁰⁶ An owner of one of the centers, Katie, stated, "I spoke to a lawyer before opening my business to make sure I would not get in trouble with U.S. authorities."¹⁰⁷ Given the current interpretation of the Fourteenth Amendment, there is no need for Katie to worry, since nearly all children born on U.S. soil are legally U.S. citizens. Katie admits to having hosted around 150 women since she opened the "birth tourism" center in 2008.¹⁰⁸ After the costs of giving birth in a hospital near the center, lodging, and airfare, the three to four month stay at Katie's facility in Queens can cost up to \$30,000.¹⁰⁹ One of the women who gave birth to a girl at Katie's facility expressed her desire that her daughter "will return to the United States to attend high school and college."¹¹⁰ "Birth tourism" is another prime example of the consequences of the current interpretation of the Fourteenth Amendment.

B. The Shortcomings of the Vitter-Paul Proposal

While the current interpretation of the Fourteenth Amendment has some significant flaws, the proposals to cure those consequences have gone to the opposite extreme. The Vitter-Paul proposal would completely repeal the granting of universal birthright citizenship to any child born on U.S. soil, and would limit U.S. citizenship to those with at least one parent who is a U.S. citizen, a lawful permanent resident residing in the U.S., serving in the armed forces, or naturalized under immigration law.¹¹¹

The problem with this proposal is that it punishes children born to illegal aliens on U.S. soil by deeming them illegally present in the U.S. Given that an unborn child has no control over his or her circumstances, it is unfair to brand the child with an illegal status in the U.S. The Vitter-Paul proposal is on the right track for curing the issues raised by "birth tourism," since

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*; Schechter, *supra* note 96.

¹⁰⁶ *See* Schechter, *supra* note 96.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ S.J. Res. 2, 112th Cong. (2011).

temporary visitors to the U.S. would no longer be able to confer U.S. citizenship upon their children. However, the problems it would create for children born to illegal immigrants are unavoidable. This is why another route is needed to solve the problems created by both the current interpretation of the Fourteenth Amendment and the Vitter-Paul proposal.

IV. THE MIDDLE GROUND OF THE BIRTH VISA

A. The Birth Visa

The birth visa system will grant children born to illegal immigrants and temporary visitors in the U.S. a visa valid for forty-five years. The clock starts ticking at the child's birth. The visa will need to be renewed every five years, with renewal dependent on showing that the child has resided in the U.S. for those past five years. Upon reaching the age of forty, a person holding a birth visa will be eligible to become a U.S. citizen. If the birth visa holder does not exercise her option to become a U.S. citizen by age forty-five, the visa expires, rendering the person illegally present in the U.S. A birth visa holder will be entitled to work and study in the U.S. with no restrictions. However, a birth visa holder cannot access welfare funded by U.S. citizen tax dollars. The public education of a birth visa holder will also not be funded by the tax dollars of U.S. citizens and legal permanent residents.

The birth visa cures the problems created by the current interpretation of the Fourteenth Amendment. Since children with a birth visa will be ineligible for welfare benefits and public education funded by U.S. citizen tax dollars, an enormous drain will end on the financial resources of state and local governments and the federal government. Furthermore, a birth visa holder will be completely barred from sponsoring any family members from coming to the U.S. until the age of forty when he or she can claim citizenship, thus greatly discouraging illegal aliens from having children on U.S. soil for the purpose of becoming legal permanent residents. Under the current system, upon reaching the age of twenty-one, a U.S. citizen can sponsor his or her non-citizen parents as legal permanent residents.¹¹² Since children with a birth visa will not be able to become citizens until the age of forty, their parents would be significantly older when their child finally acquires U.S. citizenship. This difference of nearly twenty years until sponsorship will reduce any incentive the parents may have to give

¹¹² See *Green Card*, *supra* note 14.

birth on U.S. soil.

The granting of a birth visa to the U.S. born children of temporary visitors will completely dissolve the "birth tourism" market. One of the motivating factors for a mother-to-be to give birth on U.S. soil is that one day her child can attend school or work in the U.S.¹¹³ This will be impossible, since renewal of the birth visa every five years depends on showing the child has resided in the U.S. for those past five years. Since the "birth tourism" market focuses on coming to the U.S. only for giving birth and then returning to one's country of origin, the U.S. born child certainly would not be residing in the U.S., leading to the birth visa being cancelled.

The birth visa also cures the problems created by the Vitter-Paul proposal. By granting the children of illegal immigrants birth visas, they will not immediately receive the full set of rights that U.S. citizenship offers them. However, they will not be deemed illegally present in the U.S. and risk removal from the country. Unlike the Vitter-Paul proposal, the birth visa will prevent the children of illegal immigrants from being punished for the actions of their parents.

The birth visa proposal raises the question of the illegal immigrant parents of the child born on U.S. soil having to show their unlawful presence in the country in order for their child to be granted a birth visa. The parents of a potential birth visa holder will not have to reveal their unlawful immigration status in order for their child to obtain a birth visa. Under the birth visa scheme, if both parents are unable to show that they are U.S. citizens, legal permanent residents, or holders of a valid visa other than a visitor visa, a designation will go on the birth certificate of the child representing that fact. The child will be granted the birth visa according to the designation on his or her birth certificate. In the U.S., birth certificates are granted by the State in which the birth occurs.¹¹⁴ The birth visa legislation will ensure that all states are required to keep the birth visa designation on the birth certificate strictly confidential. Given illegal immigrants will not have to reveal their unlawful status for their child to obtain a birth visa, and the required confidentiality of their child's birth certificate, illegal immigrants will not have to worry about going to a hospital to give birth.

The birth visa scheme also raises the question of the parents of a birth visa holder having to reveal their unlawful status in order to satisfy the

¹¹³ See Egrikavuk, *supra* note 98.

¹¹⁴ See *Birth Data*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/births.htm> (last visited Jan. 28, 2014).

birth visa renewal requirement. When the birth visa is up for renewal every five years, the parents of the birth visa holder will not have to reveal their unlawful status. The parents of a birth visa holder will only have to make a showing that their child has resided continuously in the U.S. for the five years prior to renewal in order for the child's birth visa to be renewed. The immigration status of the parents of the birth visa holder will not be investigated at all during the renewal phase of the birth visa.

The birth visa proposal will prohibit children born to illegal immigrants on U.S. soil from claiming welfare benefits, potentially muting those children at risk of destitute living conditions. This potential issue can be solved through the existing individual taxpayer identification number system set up by the IRS.¹¹⁵ The current ITIN system provides a nine-digit number to those who are ineligible for a social security number.¹¹⁶ Those who are unauthorized to work in the U.S., but nevertheless are earning income and are required to file taxes under the Internal Revenue Code, must obtain an ITIN.¹¹⁷ The purpose of the ITIN is to ensure that the IRS is collecting as much tax revenue as possible from the broadest potential group, regardless of an individual's legal status in the U.S.¹¹⁸ It is impossible to know the exact number of illegal immigrants who have ITINs.¹¹⁹ This is mainly due to the fact that under Section 6103 of the Internal Revenue Code, the IRS is prohibited from releasing taxpayer information to other government agencies, such as U.S. Citizenship and Immigration Services.¹²⁰ Given the required confidentiality of taxpayer information, illegal immigrants can file taxes using the ITIN system and not have to worry about being removed from the U.S. Though many legal non-resident aliens have ITINs, it is "widely believed most people using ITINs are in the United States illegally."¹²¹

A large amount of tax revenue is collected from the ITIN system.

¹¹⁵ See *General ITIN Information*, IRS, <http://www.irs.gov/Individuals/General-ITIN-Information> (last visited Jan. 28, 2014).

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See Marti Dinerstein, *Giving Cover to Illegal Aliens: IRS Tax ID Numbers Subvert Immigration Law*, CENTER FOR IMMIGR. STUD. 2 (Nov. 2002), <http://www.cis.org/sites/cis.org/files/articles/2002/back1202.pdf>.

¹¹⁹ *Illegal Immigrants Filing Taxes More Than Ever*, NBC NEWS, http://www.nbcnews.com/id/18077009/ns/business-personal_finance/t/illegal-immigrants-filing-taxes-more-ever/#.T0GQAtSrKSo (last updated Apr. 13, 2007) [hereinafter *Illegal Immigrants*]; see Elizabeth Llorente, *Tax Returns by Illegal Immigrants Fall*, FOX NEWS LATINO (Nov. 16, 2010), <http://latino.foxnews.com/latino/news/2010/11/16/undocumented-filed-tax-returns-year/>.

¹²⁰ See Confidentiality and Disclosure of Returns and Return Information, 26 U.S.C. § 6103 (2010).

¹²¹ *Illegal Immigrants*, *supra* note 119.

Between 1996 and 2003, \$50 billion was the overall taxpayer liability of ITIN filers.¹²² During that time, more than 7.2 million ITINs were issued.¹²³ Given that, every year, the federal government spends \$4.7 billion on providing welfare benefits to the U.S. born children of illegal immigrants and \$1.5 billion on educating children born on U.S. soil to illegal aliens, the estimated \$7.14 billion collected every year from ITIN filers is enough to cover those costs.¹²⁴ Given the sufficient funds collected through the ITIN system, a separate federal welfare scheme funded solely by ITIN revenues will be established for children who are birth visa holders.

Tax revenue produced from Social Security Number holders will not be intermingled in the welfare fund for birth visa holders. Since U.S. citizens and legal permanent residents hold Social Security Numbers, these individuals will not have the burden of contributing to the welfare system for children born to illegal immigrants on U.S. soil.¹²⁵ The ITIN funds will also help to pay for the public education of birth visa holders, so the tax dollars of U.S. citizens can be further tailored to pay only for the public education of children born to parents legally present in the U.S. Furthermore, a welfare system for birth visa holders funded strictly from ITIN revenues is fully sustainable in the long run. Individuals have absolutely no incentive to stop applying for and paying taxes through the ITIN system, especially provided that the current ITIN structure does not even inquire into the legal status of those applying for ITINs.¹²⁶ Once again, since Section 6103 of the Internal Revenue Code violates the sharing of taxpayer information with government agencies, illegal alien have no fear of removal from the U.S. by paying taxes.¹²⁷

CONCLUSION

The current interpretation of the Fourteenth Amendment has had the adverse effect of encouraging illegal immigrants to give birth on U.S. soil

¹²² *Id.*

¹²³ Tiffany Gabbay, *IRS Opened Back Door for Illegal Aliens to Enter U.S. Credit Market*, CNS NEWS (Oct. 17, 2008), <http://cnsnews.com/news/article/irs-opened-back-door-illegal-aliens-enter-us-credit-market>.

¹²⁴ \$7.14 billion of ITIN tax revenue a year was arrived at by dividing the overall taxpayer liability between 1996 and 2003 of \$50 billion by 7 years.

¹²⁵ *Obtaining a Social Security Number*, WHITMAN C., <http://www.whitman.edu/offices-and-services/human-resources/immigration-information/obtaining-a-social-security-number> (last visited Jan. 28, 2014).

¹²⁶ See Dinerstein, *supra* note 118, at 3.

¹²⁷ Confidentiality and Disclosure of Returns and Return Information, 26 U.S.C. § 6103 (2010).

for financial and citizenship purposes. Additionally, the current interpretation of the "Citizenship Clause" has created an entire market of "birthright tourism," in which individuals are encouraged to come to the U.S. for short stays solely in order to make their future children U.S. citizens. Equally unsettling are the proposals to amend the Fourteenth Amendment, all of which fail to take into account the innocent child being born, subsequently branding that child illegally present in the U.S., just like his or her parents. In terms of illegal immigration, the middle ground of the birth visa system would prevent the children of illegal immigrants from being punished for the actions of their parents, while not immediately granting them the full set of rights that accompany U.S. citizenship, a set of rights their parents have absolutely no access to. Furthermore, the birth visa system would eliminate the "birth tourism" market, a result of the current interpretation of the Fourteenth Amendment that certainly was not intended by the framers. The birth visa is the answer to solving the immigration challenges caused by the current interpretation of the Fourteenth Amendment and the inhumane proposals to alter it.

