

BORN IN THE USA: AN ALL-AMERICAN VIEW OF BIRTHRIGHT CITIZENSHIP AND INTERNATIONAL HUMAN RIGHTS

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I. INTRODUCTION

“We are trying to protect America.”¹ The ultimate justification for many political claims has recently surfaced in a unique context surrounding the debate in the United States on immigration. In 2010 a couple of politicians claimed to have knowledge that international terrorists were giving birth to “terror babies.”² The assertion was that terrorists were entering the United States as unauthorized immigrants in order to have a child on American soil.³ Afterwards, the terrorist parents would return to their homeland to train and indoctrinate the “terror baby,” and in twenty to thirty years the child would return to the United States as a citizen.⁴ The citizen-terrorist would then use their citizenship status to infiltrate the country and attack Americans on home soil.⁵

Although a rather wild claim,⁶ it is just the latest manifestation of an argument to end America’s long-standing

1. *Anderson Cooper 360°* (CNN television broadcast Aug. 12, 2010), available at <http://ac360.blogs.cnn.com/2010/08/12/video-rep-gohmert-on-terror-babies-conspiracy/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. No credible evidence of such a claim has ever surfaced. *Id.*

practice of conferring citizenship upon any child born on U.S. soil.⁷ So called “birthright citizenship” guarantees that any child born in the territorial United States is automatically a citizen, regardless of the citizenship status of the parents.⁸ With the debate over immigration raging on in the United States, some politicians have advocated ending this guarantee of citizenship for many different reasons.⁹

Birthright citizenship was put into the Fourteenth Amendment of the U.S. Constitution specifically to confer citizenship and equal standing under the law to *all* persons.¹⁰ The importance of this initiative was evident as a result of the system that existed after the infamous *Dred Scott*¹¹ decision where African Americans had no avenue to obtain citizenship.¹² By rejecting African Americans from the class of citizens, a racial caste system existed where law only protected the rights of the privileged.¹³ The Fourteenth Amendment changed that system specifically to end the oligarchic caste system that developed under *Dred Scott* and the “Black Codes.”¹⁴

Repealing birthright citizenship would lead to the establishment of a permanent class of stateless individuals that are not recognized as citizens anywhere.¹⁵ This class of persons would be excluded from social membership for generations, and

7. See U.S. CONST. amend. XIV, § 1.

8. See *id.*; United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

9. See FEDERATION FOR AMERICAN IMMIGRATION REFORM, <http://www.fairus.org/site/PageNavigator/issues> (last visited Jan. 15, 2011) [hereinafter FAIR].

10. See Eric Ward, *A New Nativism: Anti-Immigration Politics and the Fourteenth Amendment*, in *Made in America: Myths & Facts about Birthright Citizenship*, IMMIGRATION POLICY CENTER, Sept. 2009, 24, available at <http://www.immigrationpolicy.org/sites/default/files/docs/Birthright%20Citizenship%20091509.pdf>.

11. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

12. See Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 446 (2008).

13. *Id.* at 447.

14. See Ward, *supra* note 10, at 24.

15. See Jennifer Van Hook & Michael Fix, *The Demographic Impacts of Repealing Birthright Citizenship*, MIGRATION POLICY INSTITUTE, Sept. 2010, at 2, available at <http://www.migrationpolicy.org/pubs/BirthrightInsight-2010.pdf>.

would mirror the racial caste system that the Fourteenth Amendment sought to end.¹⁶ The development of the caste of stateless individuals would also violate the duties of the United States under international law, for example equal protection, right of nationality, and non-discrimination.¹⁷

This paper analyzes the debate of birthright citizenship from a perspective that most have seemingly ignored, that of the impact from international law. Part I discusses the history of immigration and citizenship within the United States. This section will look at the reasons and ways Congress has regulated immigration and naturalization. It will examine the origins of the birthright citizenship clause of the Fourteenth Amendment, and introduce the problems that repeal would create.

Part II will discuss debate over the meaning and constitutional status of the citizenship clause in the Fourteenth Amendment. It will then look at the historical context and goals of the clause. This section will conclude with the conflict that would arise between the original purpose of the Fourteenth Amendment and repeal of birthright citizenship.

Part III turns to international law, beginning with a general overview. A review of the sources of international law, namely treaties and customary international law, is included. It also covers the ways that both sources of international law have been incorporated domestically, and how the various branches of government in the United States are bound.

Part IV then looks at three specific instrumentalities of international law that may have an effect on attempts of ending birthright citizenship: the United Nations Charter (UN Charter), the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (ICCPR). The section will conclude with how these instruments could affect domestic legislation and what

16. See Margaret D. Stock, *Policy Arguments in Favor of Retaining America's Birthright Citizenship Law*, in *Made in America: Myths & Facts about Birthright Citizenship*, IMMIGRATION POLICY CENTER, Sept. 2009, at 29, 33, available at <http://www.immigrationpolicy.org/sites/default/files/docs/Birthright%20Citizenship%20091509.pdf>.

17. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 7, 15 (Dec. 10, 1948) [hereinafter Universal Declaration].

they should mean to the process. Part V then briefly covers how these international human rights may be enforced domestically through either treaties or custom.

Since its birth, the United States of America has always proudly proclaimed that “All men are created equal.”¹⁸ Repealing birthright citizenship would run counter to that goal, and would revert the United States to a societal structure that the Fourteenth Amendment was enacted to end.

II. IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES

A. *History of Immigration*

“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.”¹⁹

Discussion over citizenship status for immigrants did not necessarily frame the debate or ratification of the Fourteenth Amendment. Congress did not even restrict access into the United States for immigrants until after the Amendment was enacted.²⁰ Until 1819 with the enactment of a law requiring newly arriving immigrants to be counted at ports, people were simply dropped off by ships wherever they could dock.²¹ Although the federal government slowly began regulating immigration in the mid-1800s²² there was no such term as “illegal immigrant” because passports were not required for admittance into the country until 1918.²³

The first notable phase of anti-immigrant fervor began in

18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. U.S. CONST. amend. XIV, § 1.

20. 1 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 2.02[2] (Matthew Bender, ed. 2011).

21. Sara Catherine Barnhart, *Second Class Delivery: The Elimination of Birthright Citizenship as a Repeal of the “Pursuit of Happiness,”* 42 GA. L. REV. 525, 536–37 (2008).

22. See *id.* Although control over immigration was originally left to the states, in 1875 the Supreme Court ruled that the federal government had exclusive jurisdiction over immigration. *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

23. Barnhart, *supra* note 21, at 536–37.

the nineteenth century and was directed largely at incoming Catholics immigrating from French Canada and then from Germany and Ireland.²⁴ In the early nineteenth century an Anglo-Saxon-centric ideology arose which fueled movements to exclude other races.²⁵ Not unique to today, in the early 1800s much of the race-based xenophobia was directed heavily towards Mexicans, particularly in the southwest United States.²⁶ After the Civil War, and even the ratification of the Fourteenth Amendment, anti-immigration sentiment was directed at the large numbers of Chinese workers arriving in the western United States in the late nineteenth century.²⁷ This fervor ultimately led to the passage of the Chinese Exclusion Act in 1882, which suspended Chinese immigration for ten years.²⁸ In the 1880s anti-immigration focus shifted toward non-white and presumed inferior groups of European descent, including Slavic, Asian and Latin.²⁹ Sharing many of the same characteristics, the largest anti-immigration pushback today is directed at Mexican immigrants.³⁰

The Johnson-Reed Act of 1924³¹ is another example of clear animus as the foundation for immigration legislation.³² The Act had the goal of establishing and maintaining white domination of the populace by placing quotas on the influx of foreign

24. See ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 265 (2d ed. 2002).

25. Barnhart, *supra* note 21, at 533.

26. *Id.* at 533.

27. *Id.* at 534–35. Asian Americans were excluded from immigration and naturalization on the grounds of “racial unassimilability.” Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521, 2522 (2007).

28. Chinese Exclusion Act, 22 Stat. 58 (1882); Ch. 220, 23 Stat. 115 (1884); Ch. 1015, 25 Stat. 476 (1888). The aim of the act was to curb the influx of Chinese immigrant workers that could compete with citizens for employment. 18 U.S. Op. Att’y Gen. 542 (1887) (“It was the Chinese laborer, who came to our shores for the purpose of exercising his calling as laborer in competition with our own labor, that was intended to be excluded as a disturbing element”).

29. Barnhart, *supra* note 21, at 535–36.

30. *Id.* at 539–41.

31. Immigration Act of 1924, Ch. 190, 43 Stat. 153.

32. Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare Reform*, 71 *S. CAL. L. REV.* 547, 554 (1998).

nationals based on the strength of their presence already in the United States.³³

Since Congress began regulating access into the United States, the numbers of immigrants have steadily risen. For example, the number of persons obtaining legal permanent resident status³⁴ in the United States was 8,385 in the year 1820; 448,572 in the year 1900; and 1,218,480 in the year 1914.³⁵ Congress dropped the rate of legal permanent residents drastically in 1915 to 326,700, and until 1989 the number of new legal permanent residents never exceeded a million.³⁶ While the number of legal permanent residents has maintained relatively steady since 1989³⁷, there has been a large increase in the number of unauthorized immigrants residing in the United States.³⁸ The estimated number of unauthorized immigrants was 3,500,000 in 1990, which jumped to 7,000,000 by 2000.³⁹ From 2000 to 2009 the unauthorized immigrant population increased by twenty-seven percent to 10,800,000.⁴⁰

B. Citizenship

The Fourteenth Amendment guarantees the right of citizenship to all persons born in the United States to legal or unauthorized parents, if not by plain terms then by judicial

33. *Id.*

34. OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2009 1, 3 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf (Defining legal permanent residents as “persons who have been granted lawful permanent residence in the United States. They are also known as “green card recipients”).

35. *Id.* at 5.

36. *Id.*

37. *Id.*

38. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 15 (2001), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf.

39. *Id.*

40. Michael Hofer, Nancy Rytina & Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, DEPARTMENT OF HOMELAND SECURITY, Jan. 2010, at 1, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

interpretation.⁴¹ This affirms that the Fourteenth Amendment confers citizenship status based on the principle of *jus soli*⁴², or citizenship by birth, whereby a person born within a country's territory is a citizen regardless of the status of the parents.⁴³ The other major principle by which countries define citizenship is *jus sanguinis*⁴⁴ or citizenship by descent, in which an individual is a citizen based on his or her parentage.⁴⁵

A country that recognizes *jus sanguinis* and not *jus soli* will exclude from citizenship a person born in the territory of the country to immigrants, but would confer status as a citizen to a child born to citizens of the country regardless of where the birth took place.⁴⁶ Oftentimes countries that practice *jus soli* also recognize *jus sanguinis*, such as the United States.⁴⁷ In a somewhat informal survey, around thirty-three countries were found to still use *jus soli*⁴⁸, while around one hundred sixty refuse the use of *jus soli*⁴⁹. Also of note, eight countries have

41. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

42. Meaning in Latin literally "right of the soil." BLACK'S LAW DICTIONARY 942 (9th ed. 2009).

43. James C. Ho et al., *Made in America: Myths & Facts about Birthright Citizenship*, IMMIGRATION POLICY CENTER, Sept. 2009, at 4, available at <http://www.immigrationpolicy.org/sites/default/files/docs/Birthright%20Citizenship%20091509.pdf> [hereinafter *Made in America*]; James C. Ho, *Defining "American" Birthright Citizenship and the Original Understanding of the 14th Amendment*, 33 ADMIN. & REG. L. NEWS 3, 6–7 (2007) [hereinafter *Defining Birthright Citizenship*]; Margaret Stock, *Birthright Citizenship – The Policy Arguments*, Fall ADMIN. & REG. L. NEWS 3, 7–8 (2007).

44. Meaning in Latin literally "right of blood." BLACK'S LAW DICTIONARY 941 (9th ed. 2009).

45. *Made in America*, supra note 43, at 4.

46. *Id.*

47. *Id.*

48. *Nations Granting Birthright Citizenship*, NUMBERSUSA.COM, <http://www.numbersusa.com/content/learn/issues/birthright-citizenship/nations-granting-birthright-citizenship.html> (last visited Aug. 10, 2011). These include: Antigua and Barbuda, Argentina, Azerbaijan, Barbados, Belize, Bolivia, Brazil, Canada, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Fiji, Grenada, Guatemala, Guyana, Honduras, Jamaica, Lesotho, Nicaragua, Pakistan, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay and Venezuela.

49. *Id.* These countries include: Afghanistan, Albania, Algeria, Andorra, Angola, Armenia, Austria, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Benin, Bermuda,

somewhat recently abandoned their domestic practice of *jus soli*.⁵⁰

Although birthright citizenship is contained within the first clause of one of the most analyzed amendments to the Constitution, it was largely ignored until fairly recently.⁵¹ Despite a history of anti-immigrant fervor, birthright citizenship was not attacked to stem the flow of immigration until the past couple of decades.⁵²

C. Calls for Repeal of Birthright Citizenship

Proponents of immigration reform have used many different issues to support their recent calls for change. Indicative of these, The Federation for American Immigration Reform or FAIR—one of the nation's largest groups advocating change to immigration policy—cites issues of labor, homeland security, school overcrowding, public health, crime and even impacts on the environment as reasons that reductions in immigration are necessary.⁵³

Bhutan, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Colombia, Comoros, Congo, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Egypt, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Faroe Islands, Finland, Gabon, Gambia, Georgia, Germany, Greece, Guinea, Haiti, Holy See, Hong Kong, Hungary, Iceland, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kosovo, Kuwait, Kyrgyz Republic, Lao PDR, Latvia, Lebanon, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, Niger, Nigeria, Norway, Oman, Papua New Guinea, Philippines, Poland, Qatar, Romania, Russia, Rwanda, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, South Korea, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen, Zambia, Zimbabwe.

50. *Id.* These countries include: Australia, France, India, Ireland, Malta, New Zealand, Portugal, and United Kingdom.

51. See Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 54–55 (1997).

52. See *id.* at 55–56.

53. See FAIR, *supra* note 9.

Although it is definitely not a new development, economic conditions have been one of the primary reasons for many calls for immigration reform. This justification stretches back to the beginnings of the immigration debate in the United States and typically closely follows the pendulum swing of the economy: during times of labor shortages immigrants are more welcomed in order to cover increased demand, while in tough economic times immigrants are often blamed for the struggles of the economy.⁵⁴ Exemplifying the fears of foreigners draining the domestic economy was a law in 1882 that excluded from citizenship “any person unable to take care of himself or herself without becoming a public charge.”⁵⁵ With much of the current political debate centering on the economy—including high unemployment numbers,⁵⁶ under-funding of social security,⁵⁷ and the federal budget deficit⁵⁸—many objectors to birthright citizenship point to the drain (whether real or perceived) that unauthorized immigrants have on the national economy.⁵⁹

Most estimates of the fiscal impact that immigrants have on the economy, however, have concluded that the revenues from taxes paid by unauthorized immigrants far exceed the cost of

54. See Barnhart, *supra* note 21, at 535–36; see also Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1523 (1995).

55. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214.

56. See Seth McLaughlin, *Jobless Rates of Minorities Linked to Illegals*, WASH. TIMES, Mar. 1, 2011, <http://www.washingtontimes.com/news/2011/mar/1/jobless-rates-of-minorities-linked-to-illegals/> (House members point to an estimate of 7 million “illegal workers” as partial cause to high unemployment among minorities); *Jobless Claims Hit 2-1/2 Year Low Last Week*, REUTERS (Mar. 3, 2011), <http://www.reuters.com/article/2011/03/03/us-jobless-claims-idUSTRE7223GU20110303>.

57. See Neil King & Scott Greenberg, *Poll Shows Budget-Cuts Dilemma*, WALL ST. J., Mar. 3, 2011, <http://online.wsj.com/article/SB10001424052748704728004576176741120691736.html> (Congressional members plan on looking at entitlement spending, including social security, to combat the federal deficit).

58. See *id.*; David Pitt, *Retirement Worries: Deficit, Jobs Top the List*, BUS. WK., Mar. 2, 2011, <http://www.businessweek.com/ap/financialnews/D9LN9FPG0.htm> (polls show that the federal budget deficit ties with unemployment as the biggest worries for investors).

59. See FAIR, *supra* note 9.

services to the population in the aggregate and long-term.⁶⁰ The largest fiscal gain from unauthorized immigrants is felt at the federal level, but at the local and state levels the expenditures usually outweigh the revenues because of the nature of the services that must be provided from each relevant level of government.⁶¹ For example, most unauthorized immigrants are not allowed to draw from many federal programs, such as Social Security, Medicaid, and Food Stamps.⁶² The federal government, however, often requires that state and local governments provide basic services to all individuals, including unauthorized immigrants.⁶³ There have also been numerous studies and scholastic works generated that conclude that immigration does not increase native unemployment⁶⁴ and conversely actually increases the wealth of the United States.⁶⁵

The uptake in the levels of immigration and the domestic effects felt within the United States has generated heated rhetoric in the political landscape. On the heels of this conversation have come several attempts to change the way immigrants obtain citizenship, namely the repeated attempts in recent years to eliminate birthright citizenship.⁶⁶ Proponents of

60. CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1 (2007), <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *E.g.*, JULIAN L. SIMON, IMMIGRATION: THE DEMOGRAPHIC AND ECONOMIC FACTS 18–25 (1995).

65. *See* Alexander T. Tabarrok, Research Director, *Economic and Moral Factors in Favor of Open Immigration*, THE INDEP. INST. (Sept. 14, 2000), <http://www.independent.org/issues/article.asp?id=486>.

66. Most recently, U.S. Representative Nathan Deal re-introduced the Birthright Citizenship Act of 2009, which attempts to curtail birthright citizenship by limiting those who would be “subject to the jurisdiction” to:

(1) a citizen or national of the United States;(2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the armed forces (as defined in section 101 of title 10, United States Code).

H.R. 1868, 111th Cong. (1st Sess. 2009). *See also* Citizenship Reform Act of 2007, H.R. 133, 110th Cong. (1st Sess. 2007); Citizenship Reform Act of 2005, H.R. 698, 109th Cong. (1st Sess. 2005).

such a move argue that birthright citizenship encourages illegal immigration because unauthorized persons illegally immigrate to the United States in order to give birth to children that can later sponsor them for admission as legal permanent residents.⁶⁷

For many, the main reason behind ending birthright citizenship is a simple means of reducing the number of unauthorized immigrants in the United States. The thought behind this is that birthright citizenship encourages disrespect for the law by rewarding unauthorized immigrants with the incentive of citizenship for their child.⁶⁸ By removing the incentive it is believed the rate of unauthorized immigrants would fall.⁶⁹

A recent study put forward in September of 2010 by Jennifer Van Hook, professor of Sociology and Demography at Pennsylvania State University, and Michael Fix, Senior Vice President and Director of Studies at the Migration Policy Institute, cast serious doubt on that claim.⁷⁰ Using standard demographic techniques, the authors estimate that the population of unauthorized immigrants would rise from around 11,000,000 today to around 16,000,000 by 2050 with repeal of birthright citizenship.⁷¹ Additionally, the share of U.S. children who would be unauthorized would double, from two percent to four percent.⁷² The estimates produced were based on four different rules and the effects stemming from them: 1) Birthright citizenship,⁷³ 2) Mother and Father rule,⁷⁴ 3) Mother rule,⁷⁵ and 4) Mother or Father rule.⁷⁶ Quite logically, the

67. See Newman, *supra* note 12, at 473–81.

68. See FAIR, *supra* note 9.

69. See Van Hook & Fix, *supra* note 15, at 1.

70. *Id.*

71. *Id.*

72. *Id.*

73. The current law of granting citizenship to all US-born children. *Id.* at 2.

74. Denies legal status to children only if both parents are unauthorized. *Id.* This rule is embodied in the 2009 proposed Birthright Citizenship Act. H.R. 1868, 111th Cong. (1st Sess. 2009). See also Citizenship Reform Act of 2007, H.R. 133, 110th Cong. (1st Sess. 2007); Citizenship Reform Act of 2005, H.R. 698, 109th Cong. (1st Sess. 2005).

75. Denies legal status to any child whose mother is unauthorized. See Van Hook & Fix, *supra* note 15, at 2.

76. Denies legal status to any child whose mother *or* father is unauthorized, even if

estimated number of unauthorized immigrants would be greatest under the Mother or Father rule, followed by the Mother rule, Mother and Father rule, and Birthright Citizenship respectively.⁷⁷

A major problem arising under repealing birthright citizenship is that it would establish a permanent class of stateless individuals with no legitimate claim to any sovereign.⁷⁸ Since children born to unauthorized immigrants would have no U.S. citizenship, and there is a good chance the child will not have citizenship to their parent's country of origin, the effect of stateless individuals would continue to perpetuate through generations.⁷⁹ This stateless class would be excluded from social membership and eventually lead to the creation of a caste system within the United States.⁸⁰ This is exactly what the Fourteenth Amendment tried to avoid,⁸¹ and is also what international legal duties instruct against.⁸²

III. THE HISTORY AND RIGHTS UNDERLYING THE FOURTEENTH AMENDMENT

A. *Debate Over the Meaning*

It has not always been the practice of the United States to confer citizenship based on birth within the country. Birthright citizenship was embraced in early American jurisprudence, as *jus soli* was not only established English common law but also the practice of Europe generally at the time of the adoption of the Constitution in 1789.⁸³ This was the practice until 1856 and the infamous *Dred Scott* decision, wherein the Supreme Court denied citizenship to children of African Americans born in the

one parent is a U.S. citizen. *Id.* at 2–3.

77. *See id.* at 3, Figure 1.

78. *Id.* at 6.

79. *See id.*

80. *See Newman, supra* note 12, at 481.

81. *Id.* at 448.

82. Universal Declaration, *supra* note 17, art. 15.

83. *See Wong Kim Ark*, 169 U.S. at 666–67 (1898).

territorial United States.⁸⁴

The birthright citizenship clause of the Fourteenth Amendment was adopted specifically to bring *jus soli* to the level of a Constitutional principle and overrule *Dred Scott*.⁸⁵ In the introduction of the Amendment, Senator Jacob Howard of Michigan stated:

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. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States.⁸⁶

In order to meet the intention whereby every person born in the territory of the United States is a citizen, the current language of the Amendment was adopted.⁸⁷ Seemingly straightforward at first, the clause has created confusion for some with the qualification of birthright citizenship to those “subject to the jurisdiction.”

Some scholars, politicians and media pundits claim that the “subject to the jurisdiction” phrase limits birthright citizenship to only children of *legal* parents within the United States.⁸⁸ The argument is often premised on the delineation between partial and complete jurisdiction, whereas partial jurisdiction refers simply to protection of the laws and complete refers to commitments of a greater extent and quality between citizens

84. *Scott v. Sandford*, 60 U.S. 393 (1856).

85. See *Defining Birthright Citizenship*, *supra* note 43, at 6.

86. CONG. GLOBE, 39th CONG., 1st SESS. 2890 (1866).

87. U.S. CONST. amend. XIV, § 1.

88. See William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT* (1985).

and the sovereign.⁸⁹ The idea would follow that only those subject to complete jurisdiction of the United States would be entitled to birthright citizenship because of the allegiance owed to the sovereign, whereas those subject only to partial jurisdiction and having no allegiance to the United States would not be entitled to birthright citizenship.⁹⁰ These scholars assert the delineation between partial and complete jurisdiction is in the text of the Fourteenth Amendment itself, found in the particular context of the two distinct uses of the word “jurisdiction.”⁹¹ In the citizenship phrase of the Amendment, the citizenship portal is granted to those “*subject to the jurisdiction,*” referring to those subject to *complete* jurisdiction.⁹² Conversely, the equal protection clause asserts that the United States guarantees equal protection of the laws to all persons “*within its jurisdiction,*” meaning everyone, whether subject to complete jurisdiction or merely partial jurisdiction.⁹³

This strained reading inserts subjective definitions of “jurisdiction” into the text of the Fourteenth Amendment that were not intended to exist.⁹⁴ First of all, there is simply no reference in the text of the Amendment to either “allegiance” or “complete” and/or “partial” jurisdiction.⁹⁵ The most natural reading for the word “jurisdiction” within the Amendment’s text is that it refers to “[a] government’s general power to exercise authority over all persons and things within its territory.”⁹⁶ This interpretation is not a redundancy, as objectors claim, because it does not include people that fall under common law exceptions under the immunity legal fiction.⁹⁷ The people in this group at the time of the adoption of the Fourteenth Amendment were foreign diplomats and members of an invading foreign army, meaning children of these two groups would not be granted

89. Mayton, *supra* note 88, at 245–47.

90. *Id.*

91. *Id.* at 247.

92. *Id.*

93. *Id.*

94. See Newman, *supra* note 12, at 453–54.

95. See *Defining Birthright Citizenship*, *supra* note 43, at 7.

96. BLACK’S LAW DICTIONARY 867 (8th ed. 2004).

97. See Newman, *supra* note 12, at 453–54.

birthright citizenship.⁹⁸ This interpretation, which included the existing common-law immunity exception to those “subject to the jurisdiction,” was the one adopted by the Framers of the Amendment.⁹⁹ Illustrative of this once again is the statement of Senator Howard where he said “[t]his amendment which I have offered is simply declaratory of what I regard as *the law of the land already . . .*”¹⁰⁰

Objectors to birthright citizenship for unauthorized immigrants additionally point to the language used by Senator Howard, particularly the wording of, “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.”¹⁰¹ Some look at this statement as a list of those excluded, meaning that persons born to foreigners, *as well as* those born to aliens, *as well as* those born into families of ambassadors, are not “subject to the jurisdiction” of the United States for citizenship purposes.¹⁰² These objectors believe that the birthright citizenship guarantee contained within the Fourteenth Amendment can be negated by an act of congress since they argue there is no constitutional right to *jus soli* citizenship for foreigners.

The objectors that point to Senator Howard’s remarks in the debate surrounding the Fourteenth Amendment ignore the context of the statement as well as the historical context surrounding the adoption of the amendment.¹⁰³ The Senators involved in the debate of the Fourteenth Amendment had the common understanding that Howard’s introductory statement was not a list of persons excluded from birthright citizenship, but rather described a single excluded class, the families of foreign diplomats that fell under the immunity exception.¹⁰⁴

98. *Id.* at 453.

99. *Id.* at 453–54.

100. *See id.* at 453–54. “The law of the land already” being *jus soli* citizenship with the common-law immunity exceptions. *Id.*

101. CONG. GLOBE, 39TH CONG., 1ST SESS. 2890 (1866).

102. *See Made in America*, *supra* note 43, at 10.

103. *Id.* at 21; *see also Defining Birthright Citizenship*, *supra* note 43, at 6–7.

104. *See Defining Birthright Citizenship*, *supra* note 43, at 8–10, 21.

Even many of the Senators that voted against the amendment did so for the very reason that it was understood to confer citizenship to every person born in the United States.¹⁰⁵ For example, Senator Edgar Cowan of Pennsylvania voted against the amendment because he feared that granting citizenship to children of foreigners of different races—such as Chinese in California and Gypsies in his home state of Pennsylvania—would deprive states of the ability to remove them.¹⁰⁶ Exemplifying the common understanding of Senator Howard's statement was the response of Senator John Conness of California to Senator Cowan's fears, where he assured that the United States is entirely ready to entitle the children of foreigners to equal protection of the law and access to basic civil rights.¹⁰⁷

The debate is effectively moot, however, since the U.S. Supreme Court declared in *Wong Kim Ark* that any child born in the United States, even to unauthorized alien parents, is granted citizenship by way of the Fourteenth Amendment.¹⁰⁸ Ever since this decision the Court has upheld the idea that citizenship is conferred by the Constitution upon any child that is born on American soil.¹⁰⁹ Since the Court has declared this as a matter of Constitutional interpretation, if Congress intends to repeal birthright citizenship it must amend the Constitution.¹¹⁰ Despite this, the debate rages on regarding the efficacy of birthright citizenship.

B. The Historical Context of the Fourteenth Amendment

In order to understand the possible effect of international human rights on birthright citizenship it is important to understand the overall context of the amendment within U.S. history. As previously mentioned, the *Dred Scott* decision in

105. *Id.* at 9–10.

106. *Id.* at 9.

107. *Id.*

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

109. *See, e.g., Plyler v. Doe*, 452 U.S. 202 (1982); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

110. *See Marbury v. Madison*, 5 U.S. 137 (1803); *Dickerson v. United States*, 530 U.S. 428 (2000).

1857 held that even emancipated African Americans were not citizens despite being born in the United States.¹¹¹ The view adopted by the Supreme Court was that the Founders restricted citizenship to a closed community, excluding African Americans as “beings of an inferior order, and altogether unfit to associate with the white race.”¹¹² The decision left African Americans without any means of obtaining citizenship, as the ruling effectively made citizenship an exclusive club for whites, therefore creating a racial caste system.¹¹³

Although the Thirteenth Amendment to the U.S. Constitution prohibited the practice of slavery¹¹⁴, it did nothing in terms of protecting the status of African Americans.¹¹⁵ Given this, southern states passed what came to be known as “Black Codes” in order to protect and uphold the racial caste system.¹¹⁶ These Black Codes did such things as prevented African Americans from voting, choosing their profession, owning land and accessing public accommodations.¹¹⁷ In response, Congress passed the Civil Rights Act of 1866¹¹⁸ in an attempt to end the racial caste system that lingered under the Black Codes by extending citizenship to African Americans.¹¹⁹ However, since the *Dred Scott* decision was a constitutional pronouncement, it became clear that mere legislation would not be able to confer citizenship on African Americans and a constitutional amendment would be necessary.¹²⁰ In fact, during the senate debate over the Act much of the discussion revolved around whether a constitutional amendment was necessary to achieve the goals underlying the Act.¹²¹

111. *Dred Scott*, 60 U.S. at 404.

112. See Newman, *supra* note 12, at 447 (quoting *Dred Scott*, 60 U.S. at 407).

113. *Id.*

114. U.S. CONST. AMEND. XIII.

115. See Newman, *supra* note 12, at 447–48.

116. *Id.*

117. *Id.* at 448; see also Ward, *supra* note 10, at 24.

118. CIVIL RIGHTS ACT, CH. 31, 14 STAT. 27 (1866).

119. Newman, *supra* note 12, at 448.

120. *Id.*

121. See Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 795–97 (1997).

Thus the Fourteenth Amendment was ratified with the intent to assert and protect equal rights of *all* U.S. citizens.¹²² In order to achieve this, a clear standard of citizenship was included for the first time in the Constitution.¹²³ The fundamental concepts underlying the Fourteenth Amendment¹²⁴ were that all persons should be guaranteed equal standing and treatment before the law, and that citizenship and the requisite rights associated should be asserted equally.¹²⁵ While likely not a norm of international law at the time of enacting the Fourteenth Amendment, these same fundamental concepts pervade not only binding international treaties entered into by the United States, but likely customary international law as well.¹²⁶

C. Conflict Between the Purpose of the Fourteenth Amendment and Repeal of Birthright Citizenship

Repealing birthright citizenship would return the United States to the same social caste system that the Fourteenth Amendment sought to avoid. The significance of changing birthright citizenship is that U.S. born descendants of unauthorized immigrants would be denied legal status in the United States and would likely not have such status anywhere else.¹²⁷ The problem would perpetuate and magnify itself across generations because descendants would have no claim to citizenship from their place of birth, and oftentimes have no claim to citizenship in the country of their ancestors.¹²⁸ This would result in the establishment of a permanent class of unauthorized, stateless persons with no legitimate claim of citizenship to any sovereign, who would therefore be excluded from social membership for generations.¹²⁹ Indeed even the U.S.

122. See Ward, *supra* note 10, at 24.

123. *Id.* at 25 (referencing the birthright citizenship clause of the Fourteenth Amendment).

124. *Id.*

125. *Id.*

126. See discussion *infra* Part IV.

127. See Van Hook & Fix, *supra* note 15, at 2.

128. *Id.*

129. *Id.* at 1–2.

Supreme Court touched on this possibility, when Justice Harlan acknowledged that denying birthright citizenship would create

a despised and rejected class of persons, with no nationality whatsoever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.¹³⁰

Although any children of unauthorized immigrants could become members of the permanent class of stateless persons, in light of modern patterns of immigration this hereditary caste in society would exemplify an extreme form of racial marginalization, mirroring that which the Fourteenth Amendment sought to eliminate.¹³¹ Allowing Congress to amend birthright citizenship would amount to allowing a political majority to decide which persons, based entirely on class, are entitled to the fundamental rights inherent to citizenship, which would deny equal protection and standing under the law.¹³² This sort of caste system is exactly the evil that the Fourteenth Amendment sought to remedy in the wake of *Dred Scott* and the Black Codes. Justice Curtis' dissent in *Dred Scott* articulated the dangers of the majority's decision, which would once again become real:

[Allowing] Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States would empower[] Congress to create privileged classes within the States, who alone can be entitled to the franchises and powers of citizenship of the United States . . . [allowing] Congress to declare what free persons, born within the several States, shall be citizens of the United States . . . [would have] the necessary consequence [], that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States . . . By

130. *Elk v. Wilkins*, 112 U.S. 94, 122–23 (1884) (Harlan, J., dissenting).

131. See Ngai, *supra* note 27, at 25–29.

132. *Defining Birthright Citizenship*, *supra* note 43, at 5–7.

virtue of it, though Congress can grant no title of nobility, they may create an oligarchy, in whose hands would be concentrated the entire power of the Federal Government.¹³³

Birthright citizenship was placed in the Constitution precisely to put the question of who may be a citizen beyond the whims of a majority and the sentiments of the day.¹³⁴ As declared in *Wong Kim Ark*, inalienable rights are not put up for vote, and the Fourteenth Amendment “conferred no authority upon congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.”¹³⁵ The Fourteenth Amendment was drafted in order to guarantee equality and grant citizenship to every person born in the United States, regardless of creed, color or origin.¹³⁶ Birthright citizenship ensures that minority groups will have their rights, privileges and immunities protected without the need to win a popular vote.¹³⁷ Protection and promotion of these rights is not only a matter of Constitutional law, however, because since the adoption of the Fourteenth Amendment the development of international law may be another source of duty to continue birthright citizenship.

IV. INTERNATIONAL LAW AND DOMESTIC INCORPORATION

While politicians and pundits continue to debate the ability and efficacy of ending birthright citizenship, one aspect that has gone overlooked is what impact, if any, international law would have on the effort.

International law can generally be broken down into two primary areas: treaties or international agreements, and customary international law.¹³⁸ A treaty is any international agreement entered into between parties and governed by

133. *Dred Scott*, 60 U.S. at 577–78.

134. *Defining Birthright Citizenship*, *supra* note 43, at 6–7.

135. *Id.* at 19 (quoting *Wong Kim Ark*, 169 U.S. at 703).

136. *Id.*

137. *Id.*

138. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1804 (2009).

international law.¹³⁹ Parties that are able to enter into treaties include states, nations, international organizations, tribes and other entities.¹⁴⁰ Treaties are technically only binding upon the parties to the agreement.¹⁴¹ The Vienna Convention on the Law of Treaties (Vienna Convention) is oftentimes cited as authority for the law governing treaties.¹⁴²

Customary international law, as opposed to treaties, is universally obligatory.¹⁴³ It is shown by general practices accepted as law, and is thus comprised of two elements that must coincide at a relevant moment: 1) general practice or behavior, and 2) general patterns of legal expectation or *opinio juris*.¹⁴⁴ As far as the first element is concerned, practice by actors need only be general and not necessarily universal.¹⁴⁵ Practice can be shown by almost any action or inaction by international actors.¹⁴⁶ The second element of customary international law, *opinio juris*, means that international actors must appear to be acting from a sense of legal obligation.¹⁴⁷ This element can be evidenced in almost any way as well, including judicial decisions, jurist works, commentators, treaties, constitutions, executive orders, reports, resolutions or even testimony.¹⁴⁸ Since customary international law is based on general patterns of legal expectation, consent is not necessary to be bound.¹⁴⁹

139. Vienna Convention on the Law of Treaties art. 2(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

140. JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 2 (3d ed. 2009).

141. *Id.* Treaties are also an important source of customary international law, which is universally binding. *Id.*

142. The Vienna Convention is technically limited to agreements between two or more states. *See* Vienna Convention on the Law of Treaties art. 3, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

143. PAUST, DYKE, & MALONE, *supra* note 140, at 2.

144. *Id.* at 93.

145. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b (1987).

146. *See id.*

147. *See id.* § 102, cmt. c

148. Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 70–72 (1990).

149. PAUST, DYKE, & MALONE, *supra* note 140, at 2.

Despite no necessity of consent to be bound by customary law, the U.S. Constitution has incorporated customary international law into the laws of the country. As declared by the first Chief Justice of the U.S. Supreme Court and reaffirmed ever since, the “laws of the United States” include the law of nations, or customary international law.¹⁵⁰ Indeed all branches of government at the federal and state level in the United States are bound by international law.

The judiciary is bound by Article III, section 2, clause 1, which expresses that “[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States¹⁵¹, and treaties made, or which shall be made, under their authority.”¹⁵² International law is incorporated through the legislature in Article I in that “[t]he Congress shall have the power¹⁵³ . . . [t]o define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.”¹⁵⁴ In 1801, Chief Justice John Marshall announced a long-standing principle referred to as the *Charming Betsy* rule, stating “the laws of the United States ought not . . . be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”¹⁵⁵ The *Charming Betsy* rule is about interpreting congressional statutes in order to avoid conflict with international law.¹⁵⁶ The Chief Justice asserted that Congress must recognize and uphold as sacred the principles of international law in their actions.¹⁵⁷ Chief Justice Marshall was

150. *Henfield’s Case*, 11 F. Cas. 1099, 1101 (C.C.D.Pa. 1793) (Jay, C.J.); *see also* *United States v. Ravara*, 2 U.S. 297, 299 (1793); *Banco Nacional De Cuba v. Sabbatino*, 193 F. Supp. 375, 381–82 (S.D.N.Y. 1961); *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980); *United States v. Crews*, 605 F. Supp. 730, 734 n.1 (S.D. Fla. 1985).

151. Including customary international law. *See* *Henfield’s Case*, 11 F. Cas. at 1101.

152. U.S. CONST. art. III, § 2, cl. 1.

153. *Id.* art. I, § 8, cl. 1.

154. *Id.* art. I, § 8, cl. 10.

155. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (Marshall, C.J.).

156. Shayana Kadidal, “*Federalizing Immigration Law: International Law as a Limitation on Congress’s Power to Legislate in the Field of Immigration*,” 77 *FORDHAM L. REV.* 501, 506–07 (2008).

157. *Talbot*, 5 U.S. at 44. (“[C]ongress will never violate those principles which we

re-asserting that the U.S. Congress shall follow the law of nations and not infringe on any rights derived there from.¹⁵⁸

The executive is also bound by international law in Article II to “take care that the Laws¹⁵⁹ be faithfully executed.”¹⁶⁰ Even state and local governments are bound by international law through the Supremacy Clause of the Constitution.¹⁶¹

Treaties are even more explicitly dealt with in the American legal framework than customary international law. The judicial competence of the courts is spelled out in Article III of the Constitution as specifically including “treaties made, or which shall be made, under their authority.”¹⁶² Additionally, the Supremacy Clause of the Constitution includes “all Treaties made” as the “supreme Law of the Land.”¹⁶³ This puts treaties at very least on equal footing with statutes and the Constitution itself in regards to enforceability in U.S. domestic courts.¹⁶⁴

V. INTERNATIONAL INSTRUMENTS RELATING TO BIRTHRIGHT CITIZENSHIP

Charged with the knowledge that repealing birthright citizenship would likely have the effect of creating a permanent class of stateless individuals within a newly formed caste system, it becomes the duty of the United States under international law to refrain from doing so. Most notably, the Charter of the United Nations,¹⁶⁵ the United Nations General

believe, and which it is our duty to believe, the legislature of the United States will always hold sacred”).

158. See *Talbot*, 5 U.S. at 43–44; see also Kadidal, *supra* note 156, at 506.

159. Again, “the Laws” include customary international law as well as treaties. See *supra* note 150.

160. U.S. CONST. art. II, § 3.

161. *Id.* art. VI, § 2, cl. 2. (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding”).

162. *Id.* art. III, § 2, cl. 1.

163. *Id.* art. VI, § 2, cl. 2.

164. Carlos Manuel Vazquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 600 (2008).

165. U.N. Charter.

Assembly's Universal Declaration of Human Rights,¹⁶⁶ and the International Covenant on Civil and Political Rights¹⁶⁷ can be read to impose an affirmative duty on the United States to maintain the status quo of birthright citizenship.

A. *United Nations Charter*

The United Nations is in effect a treaty entered into by the President of the United States after the U.N. Charter initially created it in 1945.¹⁶⁸ When the United States ratified the treaty it accepted the obligations contained in Article 55¹⁶⁹ of the U.N. Charter, by way of Article 56.¹⁷⁰

As stated in the Charter itself, purposes include: "respect for the principle of equal rights and self-determination of peoples",¹⁷¹ "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁷² It additionally prescribes that, "[a]ll members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."¹⁷³ At its most basic level, the purposes and principles embodied in Articles 1 and 2 create a continuing obligation on the United States to observe in good faith and scrupulous care all of the undertakings

166. Universal Declaration, *supra* note 17.

167. International Covenant on Civil and Political Rights, art. 1, Dec. 9, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

168. *People v. Weiner*, 85 Misc. 2d 161, 164, 378 N.Y.S.2d 966 (City Crim. Ct. 1976).

169. U.N. Charter art. 55 ("With a view to the creation of conditions of stability and well-being . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.")

170. *Id.* art. 56 ("All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55").

171. U.N. Charter art. 1, para. 2.

172. *Id.* art. 1, para 3.

173. *Id.* art. 2, para. 2.

embodied under the U.N. Charter and U.N. agreements.¹⁷⁴

B. Universal Declaration of Human Rights

Many international agreements have given content to the pledges set forth in the U.N. Charter.¹⁷⁵ Chief among these is the Universal Declaration of Human Rights, which was adopted by the U.N. General Assembly in 1948.¹⁷⁶

The Preamble to the United Nation's Universal Declaration of Human Rights provides a cogent purpose to the declaration overall:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights . . . and have determined to promote social progress and better standards of life in larger freedom . . . Member states have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms¹⁷⁷

“Initially adopted only as ‘a common standard of achievement for all peoples and all nations,’ the [Universal] Declaration today exerts a moral, political, and legal influence far beyond the hopes of many of its drafters.”¹⁷⁸ Indeed, many of the provisions contained within the Universal Declaration have become incorporated into customary international law as comprised by general patterns of practice and legal expectation.¹⁷⁹

Some commentators go as far as claiming that the *entire* Universal Declaration is now evidence of customary

174. 48 C.J.S. *International Law* § 63 (2010).

175. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996).

176. *Id.* at 289 n.1.

177. Universal Declaration, *supra* note 17, at pmb1.

178. Hannum, *supra* note 175, at 289.

179. *Id.* at 319.

international law binding on all countries.¹⁸⁰ Support of this position can be found in the proclamation issued by the World Conference on Human Rights that was held in Vienna in 1993, stating “[a]ll human rights are universal, indivisible and interdependent and interrelated.”¹⁸¹ Additionally, the International Conference of Human Rights of Tehran in 1968 proclaimed “[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”¹⁸² The importance of the principles of interdependence and indivisibility is that the enjoyment of a particular human right (such as those expressed in the Universal Declaration) is dependent on the necessary possession of the other basic rights.¹⁸³

Further still, some scholars believe that the rights expressed in the Universal Declaration are *jus cogens*,¹⁸⁴ or rights so fundamental to the international community so as to be

180. *Id.* at 323–27. In fact, John Humphrey, one of the Declarations authors, declared that “the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of the human rights left undefined by the Charter.” *Id.* at 323–24.

181. World Conference on Human Rights, July 12, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF. 157/23 (July 12, 1993).

182. International Conference on Human Rights, April 22–May 13, 1968, *Final Act of the International Conference on Human Rights, Proclamation of Tehran*, ¶ 13, U.N. A/CONF.32/41 (Dec. 16, 1977).

183. Johan D. van der Vyver, *The Binding Force of Economic and Social Rights Listed in the Universal Declaration of Human Rights*, 30 *HAMLIN J. PUB. L. & POL’Y* 125, 140–41 (2008).

184. See Hannum, *supra* note 175, at 326–27. For example, Justice M. Haleem wrote in 1998 “[T]he Universal Declaration is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the U.N. Charter and as established customary law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights.” *Id.* at 326 (quoting Justice M. Haleem, *The Domestic Application of International Human Rights Norms*, in *JUDICIAL COLLOQUIUM IN BANGALORE, DEVELOPING HUMAN RIGHTS JURISPRUDENCE* 33, 97 (1998)).

regarded as peremptory norms and non-derogable.¹⁸⁵

Regardless of whether one views the Universal Declaration as *jus cogens* or not, at the very least most scholars and judicial decisions regard many of the rights contained within the Universal Declaration as evidence of customary international law.¹⁸⁶ Indeed, there are numerous decisions, United Nations Resolutions and extrajudicial sources declaring that states have a duty to “fully and faithfully observe the provisions of the Universal Declaration.”¹⁸⁷ Also of note is the link that can be found between the Universal Declaration and the United Nations Charter, whereas although the former may not be binding in and of itself, it is at least an interpretive aid in the application of relevant provisions of the latter.¹⁸⁸

An Article of the Universal Declaration that seems to directly relate to birthright citizenship is Article 15, which provides that “. . . [e]veryone has the right to a nationality . . . [and n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”¹⁸⁹ Eliminating birthright citizenship in the United States would eventually lead to a permanent and ever-growing class of stateless individuals with no ability to claim a nationality in any country.¹⁹⁰ An international human right may not be withheld on the basis of “discrimination for reasons of parentage.”¹⁹¹ Therefore, repeal of birthright citizenship would thus deny the human right of a nationality guaranteed in the Universal

185. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. (n) (1987).

186. See Hannum, *supra* note 175, at 317–52.

187. G.A. Res. 1904 (XVIII), U.N. GOAR, 18th Sess., Supp. No. 15, U.N. Doc. A/1904, at 37, art. 11 (Nov. 20, 1963); see also UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, at 8–15, U.N. Doc. ST/HR/2/Rev. 2, U.N. Sales No. e.83.XIV.2 (1983); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 Reporter’s note 4, 6 (1987).

188. See *South West Africa, 1966 I.C.J. 6 (Second Phase) (Judgment of July 18) (Tanaka, J., dissenting)*.

189. Universal Declaration, *supra* note 17, art. 15.

190. See *supra* Part II(C).

191. Hernandez-Truyol & Johns, *supra* note 32, at 577–78 (quoting International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 10, 993 U.N.T.S. 3, 7 I.L.M. 360, 363).

Declaration Article 15 based on the impermissible and arbitrary grounds of parentage.¹⁹²

Article 1 of the Universal Declaration provides that “[a]ll human beings are born free and equal in dignity and rights.”¹⁹³ Article 2 instructs that:

Everyone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.¹⁹⁴

Article 6 provides that “[e]veryone has the right to recognition as a person before the law.”¹⁹⁵ Finally, Article 7 states that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”¹⁹⁶ Taken together, these four Articles express that there is a fundamental right of equal treatment and standing under the law with respect to guaranteed human rights.¹⁹⁷ This inherent right to equal treatment under the law has likewise repeatedly been considered a norm under customary international law.¹⁹⁸

It is important to recognize that all of the Articles of the Universal Declaration discussed here make no distinction between citizen and non-citizen. Rather, the rights guaranteed are extended to “everyone,”¹⁹⁹ and “all²⁰⁰ human beings.”²⁰¹

192. *Id.* at 578–80.

193. Universal Declaration, *supra* note 17, art. 1.

194. *Id.* art. 2.

195. *Id.* art. 6.

196. *Id.* art. 7.

197. *See* Hannum, *supra* note 175, at 342–43.

198. *Id.*

199. *See* Universal Declaration, *supra* note 17, art. 2, 6, 15.

These terms were not arbitrarily selected but were rather intentional and conscious choices.²⁰² Their repeated use emphasizes that these rights shall be guaranteed to all persons, regardless of citizenship status.²⁰³ Non-citizens are entitled to the same basic human rights as citizens.²⁰⁴ When examining the justifications of groups championing removal of birthright citizenship it is at least arguable that malice toward non-citizens is a major motivating factor. Removing birthright citizenship could be a violation of the right to acquire a nationality based on impermissible discrimination, both of which are human rights as evidenced by the Universal Declaration.

C. *International Covenant on Civil and Political Rights*

The ICCPR generally imposes negative obligations on parties or restricts states from interfering with certain human rights.²⁰⁵ U.S. President Jimmy Carter submitted the treaty to the Senate for advice and consent in 1978 accompanied by a series of reservations,²⁰⁶ declarations,²⁰⁷ and understandings.²⁰⁸ It was finally ratified and deposited with the United Nations in 1992 containing a reservation “that the provisions of Articles 1

200. *Id.* art. 7.

201. *Id.* art. 1.

202. Hernandez-Truyol & Johns, *supra* note 32, at 570.

203. *Id.* at 568–70.

204. *Id.*

205. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 138 (1999).

206. “[R]eservation’ means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.” Vienna Convention on the Law of Treaties art. 2(d), May 23, 1969, 1155 U.N.T.S. 331.

207. A declaration is a unilateral statement that does not purport to exclude or modify the legal effect of any provision of a treaty. *See Vazquez, supra* note 164, at 678 n. 348. Under the Vienna Convention a statement may be a reservation even if called a declaration if it purports to modify some aspect of the treaty to which it is attached. *Id.* The following discussion will refer to the reservations, declarations and understandings attached to the ICCPR by the United States solely as a “reservation” since it was attempting to modify the domestic legal effect.

208. Sloss, *supra* note 205, at 139.

through 27 of the ICCPR are not self-executing.”²⁰⁹

While this ‘reservation’ intuitively is attempting to limit the treaty so as to not create any new or independently enforceable private causes of action,²¹⁰ on its face it appears to fail in its goal. The reservation only explicitly reaches Articles 1 through 27,²¹¹ which are more or less the substantive rights in the ICCPR.²¹² What the reservation expressly does *not* reach is Article 50, which states that “[t]he provisions of the present Covenant shall extend to all parts of the federal states without any limitations or exceptions.”²¹³ The inclusion of the mandatory “shall” language in Article 50 makes at least Article 50 self-executing.²¹⁴ However, Article 50 also reaches back to *all* of “the provisions of the present Covenant”, including Articles 1 through 27.²¹⁵ This should effectively bound up Articles 1 through 27 within Article 50, the article of the ICCPR that is self-executing and outside of the reservation by the United States.²¹⁶ Therefore, the rights contained within the ICCPR should be enforceable and have the force and effect of supreme federal law through the self-executing Article 50.²¹⁷

Further still, any reservation that is “incompatible with the object and purpose of [a] treaty”²¹⁸ is void *ab initio* as a matter of law.²¹⁹ The ICCPR clearly intended to confer rights on

209. *Id.* at 141 (quoting SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: REPORT, S. REP. NO. 102-23, at 19 (1992)).

210. S. REP. NO. 103-29, at 25 (1994).

211. *Id.*

212. ICCPR, *supra* note 167, art. 1-27.

213. *Id.* art. 50.

214. JORDAN J. PAUST, INTERNATIONAL LAW AS THE LAW OF THE UNITED STATES 361-62 (2d ed. 2003).

215. *Id.*

216. *Id.* Professor Paust goes on to argue that since treaties must be construed in a liberal manner so as to protect express and implied rights, the U.S. declaration should be interpreted consistently with Article 50. *Id.* The ICCPR is at least partly self-executing, by way of Article 50, and thus has the full force and effect of supreme federal law. *Id.*

217. *Id.*

218. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331.

219. Vazquez, *supra* note 164, at 679.

individuals and obligate states to protect those rights.²²⁰ Indeed that is the whole reason for a treaty on human rights.²²¹ This adds to the conclusion that the whole of the ICCPR should be determined to be self-executing, and any reservation that violates that object and purpose of affirmatively conferring rights on people is void.²²²

The ICCPR opens up with the preamble stating the overall purpose of the treaty:

in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights²²³

One of the obligations imposed on States is to “respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as . . . national or social origin . . . birth or other status.”²²⁴ Additionally, “[e]veryone shall have the right to recognition everywhere as a person before the law.”²²⁵

Perhaps most directly related to the birthright citizenship debate in the United States, the ICCPR provides that “[e]very child has the right to acquire a nationality.”²²⁶ Similar to the discussion of the Universal Declaration, the child’s “right to acquire a nationality”²²⁷ cannot be denied to any child on the

220. John Quigley, Symposium, *The Ratification of the International Covenant on Civil and Political Rights*, 42 *DEPAUL L. REV.* 1287, 1300 (1993).

221. *Id.*

222. *Id.*

223. ICCPR, *supra* note 167, pmb1.

224. *Id.* art. 2, para. 1.

225. *Id.* art. 16.

226. *Id.* art. 24, para. 3.

227. *Id.* art. 24.

basis of “national or social origin”²²⁸ or “birth or other status,”²²⁹ and every child must be recognized as a person before the law.²³⁰ Repealing birthright citizenship would violate these principles by removing a child of unauthorized immigrants of the right to acquire a nationality solely on the basis of birth and/or national or social origin. It would also effectively deny the children of the ability to be treated as a person before the law when they become a member of the permanent stateless class in the caste system, which is not extended the full bundle of rights that are guaranteed to children of U.S. citizens.

Examining the movement for repeal of birthright citizenship and how it parallels the original reasoning for its inclusion in the Fourteenth Amendment also implicates Article 26, which provides that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status²³¹

In interpreting this provision of customary international law in the United States, we should rightfully examine the motivation or intent behind any proposed birthright citizenship repeal. If animus toward a protected group is detected, not only would our Constitution prohibit such action,²³² but also so should customary international law as evidenced by Article 26 of the ICCPR. Looking at the history and motivations of many attempts at immigration reforms, including the elimination of birthright citizenship, the malice toward minority groups in protected classes could be found.²³³

The ICCPR makes it clear that discrimination based on race,

228. *Id.* art. 2.

229. *Id.*

230. ICCPR, *supra* note 167, art. 24.

231. ICCPR, *supra* note 167, art. 26.

232. *See Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

233. Barnhart, *supra* note 21, at 532.

color, language, national origin and place of birth are impermissible under international law. Given the background historically surrounding immigration legislation and the debate revolving around repeal of birthright citizenship, it would appear that any attempt to do so would violate the fundamental international human right of nondiscrimination.²³⁴

According to the *Charming Betsy* rule, the legislative acts aiming to repeal birthright citizenship discussed in Part I(C)²³⁵ would require a clear expression of the extraordinary intent to violate international law.²³⁶ Seeing as none of the bills introduced in Congress have come close to even acknowledging the norms of international law,²³⁷ it would appear difficult for a court to see the clear and express intent necessary to diverge from the expressions of some of the great evidences of human rights law.

VI. ENFORCEMENT OF HUMAN RIGHTS DOMESTICALLY

Assuming that removing birthright citizenship would violate international human rights, the next important question must be how the violation is remedied or combated. As noted earlier, international law has consistently been upheld as part of the “laws of the United States.”²³⁸

234. See Hernandez-Truyol & Johns, *supra* note 32, at 569–72.

235. See Tabarrok, *supra* note 65.

236. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) (“An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision of is clear or if the act and the earlier provision cannot be fairly reconciled”). See also, *Cook v. United States*, 288 U.S. 102, 120 (1933).

237. See *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding “The law of Congress ought never to be construed to violate the law of nations if any other possible construed to violated neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 417 (1997) (*Murray v. Charming Betsy* creates a “presumption [which] indicates that the Court viewed international law a a backdrop to all legislation, ever-present in legislative deliberations and enforceable by the courts through statutory construction.”).

238. U.S. CONST. art. III, § 2, cl. 1.

A. Treaties

One important judicially created distinction that has become important in treaty enforcement is self versus non-self-executing treaties.²³⁹ Although this distinction was not developed by the Framers to be included in the Constitution²⁴⁰ and did not even arise until 1829,²⁴¹ many courts have relied on the treaties' language considered in context to determine the domestic legal affect.²⁴² The reasoning behind this development is inherently a separation of powers issue, as some view the ability of the president to ratify a treaty,²⁴³ and thus create law as invading the province of the legislature's Constitutional powers. The idea is that the legislature is the body that creates law while the President simply executes the law.²⁴⁴ However, such a view ignores the idea that the powers enumerated in Article I section

239. See Vazquez, *supra* note 164, at 628–30.

240. PAUST, *supra* note 214, at 67–70. Professor Paust argues that the distinction between self and non-self-executing treaties is “the most glaring of attempts to deviate from the specific text of the Constitution” since it very explicitly says “*all* treaties . . . shall be the supreme law of the land.” U.S. CONST. art. VI, § 2, cl. 2 (emphasis added). He goes on to argue that early historic patterns of expectation showed that the Framers intended for all treaties to immediately become binding on the entire nation as the supreme law of the land. PAUST, *supra* note 214, at 67–80. Indeed, the only way that domestic implementing legislation would be required would be if the treaty itself *expressly* required it in order to become operative, as that would simply be a condition of the law itself. *Id.*

241. *Foster v. Neilson*, 27 U.S. 253 (1829) (Marshall, Circuit Judge).

242. See PAUST, *supra* note 214, at 80. This language of the treaty test should also be applied with a presumption of self-execution. *Id.* However, a few legal scholars have taken the position of Judge Robert Bork from his concurrence in a 1984 case that treaties should be presumed non-self-executing. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (“treaties of the United States . . . do not generally create rights that are privately enforceable in courts”); See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1590 (2003); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2219–20 (1999).

243. As is clearly spelled out in Article II of the Constitution, it is the President that ratifies treaties, after advice and consent by the Senate. U.S. CONST. art. II, § 2, cl. 2 (“He shall have the power, by and with the advice and consent of the Senate, to make treaties . . .”). Recently Chief Justice John Roberts unfortunately wrote repeatedly that the Senate ratifies treaties in *Medellin*. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 527 (2008).

244. *Medellin v. Texas*, 552 U.S. 491, 526–28 (2008).

8 of the Constitution are powers held concurrently with the Executive.²⁴⁵ Additionally, the Constitution expressly grants the treaty power to the President with advice and consent of the Senate, and declares that treaty power is the supreme law of the land.²⁴⁶ It seems like clear judicial fiat to ignore the specific text of the Constitution that upholds *all* treaties as supreme law of the United States, and rather require *another* action by the legislature beyond the advice and consent called for by Article II section 2.²⁴⁷

A treaty that is self-executing is judicially enforceable without any implementing legislation, as it is regarded as equivalent to an act of Congress.²⁴⁸ Important in regards to human rights that may be violated with a repeal of birthright citizenship, treaties should be treated as self-executing “whenever a right grows out of, or is protected by, a treaty.”²⁴⁹ As discussed in PART IV, the U.N. Charter, Universal Declaration, and ICCPR protect numerous human rights, including the same rights that the Fourteenth Amendment was enacted to protect. Given the assumption of self-execution generally, especially when a treaty protects a right, those rights delineated in the treaties entered into by the United States should give rise to justiciable claims.²⁵⁰

A treaty deemed non-self-executing, then, would require some sort of implementing legislation in order to become judicially enforceable as a cause of action.²⁵¹ However, after the

245. See PAUST, *supra* note 214, at 76–77. It would appear that the sole power that is in the exclusive dominion of Congress would be the power to declare war. *Id.*

246. *Id.* at 67–80.

247. *Id.* at 67.

248. See Vazquez, *supra* note 164, at 628.

249. PAUST, *supra* note 214, at 73 (quoting *Owings v. Norwood’s Lessee*, 9 U.S. 344, 348–49 (1809) (Marshall, C.J.)). See also *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (Miller, Circuit Justice); *Baldwin v. Franks*, 120 U.S. 678, 703 (1887) (Field, J., dissenting).

250. See *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is preferred”); *United States v. Payne*, 264 U.S. 446, 448 (1924) (“Constru[e] the treaty liberally in favor of the rights claimed under it . . .”).

251. PAUST, *supra* note 214, at 78–80.

*Foster*²⁵² case in 1829, no Supreme Court decision had denied relief on the basis of finding a treaty to be non-self-executing until *Medellin*²⁵³ in 2008, which was also the first time the Court had *ever* denied relief *solely* on the grounds of finding a treaty to be non-self-executing.²⁵⁴ Regardless, a treaty still can produce legal effects even if it is found to be non-self-executing.²⁵⁵ Since *all* treaties are still part of the supreme law of the land, non-self-executing treaties are still binding on the United States and its nationals at the international level if such a result is called for under the terms of the treaty considered in context and under international law generally.²⁵⁶

B. Customary International Law

Courts have recognized that customary international law is enforceable domestically throughout the history of the United States.²⁵⁷ Customary international law is actionable in courts as long as a party is able to identify rights that are “sufficiently determinable.”²⁵⁸ The rights contained in the U.N. Charter, Universal Declaration and ICCPR of a nationality and non-discrimination are sufficiently determinable to give rise to a claim in the United States.

Additionally, any claim by a plaintiff arising under a violation of customary international law should meet federal

252. *Foster v. Neilson*, 27 U.S. 253 (1829).

253. *Medellin v. Texas*, 552 U.S. 491 (2008).

254. *See Vazquez*, *supra* note 164, at 628.

255. PAUST, *supra* note 214, at 78.

256. *Id.* at 78. Paust makes another argument under the structure of the Constitution against non-self-executing treaties using the duties of the Executive. *Id.* Since the President not only has the power, but indeed the duty to execute law, he *must* faithfully execute proper federal law. *Id.* *See also* U.S. CONST. art. II, §§ 1, 3. Recognizing that *all* treaties are supreme law of the land, including non-self-executing ones, the President has the power and indeed duty to faithfully execute the non-self-executing treaty, therefore making it enforceable in the United States. PAUST, *supra* note 214, at 78.

257. *See Hernandez-Truyol & Johns*, *supra* note 32, at 590–94. *See also* *The Paquete Habana*, 175 U.S. 677, 711 (1900); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

258. *See Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003).

question jurisdiction through 28 U.S.C. § 1331.²⁵⁹ The federal question statute of § 1331 grants jurisdiction to all claims arising under the “laws . . . of the United States,”²⁶⁰ and as has been repeatedly mentioned, customary international law is a part of the “laws of the United States.”²⁶¹

C. Enforcement of Rights Under the U.N. Charter, Universal Declaration, and ICCPR.

Given the fact that the U.N. Charter, Universal Declaration and ICCPR are all effectively treaties entered into by the United States, the enforcement of the rights protected by them should be actionable domestically.²⁶² An even stronger argument, however, is that the U.N. Charter, Universal Declaration and ICCPR are all examples of evidence of customary international law, namely: equal protection and standing under the law; non-discrimination based on race, color or national origin or parentage; and right to nationality. These rights, protected by customary international law, would be enforceable as law in the United States.²⁶³ The United States has pledged itself through treaties and is bound under customary law to protect these rights, as well as promote solutions to economic, social and cultural problems. Repeal of birthright citizenship would be a step backwards in the United States in protection of fundamental human rights,²⁶⁴ which would violate our international obligations.

259. 28 U.S.C.A. § 1331 (West 2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”).

260. *Id.*

261. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a)(1987).

262. See Hernandez-Truyol & Johns, *supra* note 32, at 591–95.

263. *Id.* at 591–94.

264. See Ward, *supra* note 10, at 27 (Repealing birthright citizenship “would be the first time since the infamous ‘three-fifths clause’ that the Constitution has been written to restrict civil rights rather than expand them”).

VII. CONCLUSION

The United States was founded on the proposition that all men are created equal. This concept has not always held true; in certain periods throughout the nation's history, various people have been excluded from social membership. The Fourteenth Amendment was enacted to eliminate the racial caste system that developed under *Dred Scott* and the Black Codes, and it sought to guarantee citizenship and the requisite rights to all people born in the United States. Since that time, the international community has established that the rights guaranteed and goals sought by the Fourteenth Amendment are fundamental human rights that cannot be arbitrarily deprived. Repealing birthright citizenship would deny persons born in the United States of their right to a nationality as a result of that person's parentage, and would create a perpetual class of stateless individuals denied equal protection under the law. This denial of access to social membership would violate international law, as well as the very principles of the United States of America.