COULD THE SUPREME COURT DEFY THE "LEGAL CONSENSUS" AND UPHOLD A TRUMP-LIKE EXECUTIVE ORDER ON BIRTHRIGHT CITIZENSHIP?

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CONTENTS

INTRODUCTION

On October 29, 2018, President Trump announced a plan to issue an executive order that would "remove the right to citizenship for babies of . . . unauthorized immigrants born on U.S. soil . . . ."[2] Scholars, pundits, and lawmakers "on both the left and right immediately pushed back"[3] against the proposal, arguing

1. *Professor, Kean University (Wenzhou campus). Email: bgr2@georgetown.edu.* *I would like to thank the Charleston Law Review's editorial staff for their hard work and excellent feedback on this article. I would also like to thank Dr. Stephen Shoemaker, Director of Liberal Arts, DCE, Harvard University, for leading a wonderful graduate research seminar, during which this piece was written as a research paper.*

2. Jonathan Swan & Stef W. Kight, *Exclusive: Trump targeting birthright citizenship with executive order*, AXIOS (Oct. 30, 2018), https://www.axios.com/trump-birthright-citizenship-executive-order-0cf4285a-16c6-48f2-a933-bd71fd72ea82.html [https://perma.cc/ZZD4-8J4N].

3. James Griffiths, *Birthright citizenship: Trump claims only the US grants*

that it would run counter to "Supreme Court decisions" and a "scholarly . . . consensus."[4] Trump's announcement was widely panned as nothing more than a "political stunt" designed to rally his base before the midterm elections, as "[m]any legal experts argue[d] there's virtually no chance" that the order would withstand constitutional scrutiny.[5]

In the aftermath of recent rulings like *Dobbs*,[6] however, legal experts may no longer be so confident that the Court would strike down such an executive order in the future. Observers are already warning that "[o]ther long-standing Supreme Court decisions implicating immigrants' rights may now be at risk."[7] Though Trump never made good on his threat to issue an executive order on birthright citizenship,[8] the idea could be revived if a Republican takes the White House in 2024.[9]

Unlike *Dobbs*, the Court would not have to directly overturn precedent to hold that birthright citizenship does not extend to children of illegal immigrants.[10] Surprisingly, considering the

it, he's wrong, CNN (Oct. 31, 2018), https://edition.cnn.com/2018/10/31/politics/birthright-citizenship-world-intl/index.html [https://perma.cc/2Z49-PTM4].

4. Adam Liptak, *Trump's Birthright Citizenship Proposal Is at Odds With Legal Consensus*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/us/politics/birthright-citizenship-executive-order-trump.html [https://perma.cc/MV6R-BWP8].

5. Mike Lillis, *Trump plans executive order to end birthright citizenship*, THE HILL (Oct. 30, 2018), https://thehill.com/homenews/house/413977-trump-plans-executive-order-to-end-birthright-citizenship [https://perma.cc/XDM7-RG5H].

6. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

7. *See, e.g.*, *Immigrant Rights Look Very Different After the Latest Supreme Court Term*, IMMIGR. IMPACT (July 6, 2022), https://immigrationimpact.com/2022/07/06/immigrant-rights-supreme-court-term/ [https://perma.cc/KY6H-GEMV].

8. *See* BOB WOODWARD & ROBERT COSTA, PERIL 65–66 (2021) (describing how Attorney General Bill Bar rebuffed Trump's repeated requests for a draft executive order on birthright citizenship).

9. *After Roe, Here Are Seven More Precedents the Post-Trump Supreme Court Should Smash*, REVOLVER (May 9, 2022), https://www.revolver.news/2022/05/supreme-court-roe-v-wade-and-seven-other-terrible-precedents/ [https://perma.cc/RT4H-ZU9X] ("A future Republican administration should directly challenge [birthright citizenship for children of illegal immigrants], and the Supreme Court should correct it.").

10. The term "illegal" immigrant is politically-loaded. *See, e.g.*, Jonathan Kwan, *Words Matter: Illegal Immigrant, Undocumented Immigrant, or Unauthorized Immigrant?*, MARKKULA CENTER FOR APPLIED ETHICS (Feb. 11,

profound ramifications of the issue, "[t]he Supreme Court has not ruled explicitly on a citizenship case involving children born in the United States to undocumented parents."[11] The "legal consensus" cited by observers in the wake of Trump's announcement was based on inferences drawn from *United States v. Wong Kim Ark*[12] and *Plyler v. Doe*,[13] neither of which directly address the issue.

This raises the question: could the Court defy the legal consensus and uphold such an executive order? This article concludes that it could, as the argument against birthright citizenship for children born in the U.S. to illegal immigrant parents may be stronger than is widely appreciated. The article highlights a route the Court could take in upholding an executive order denying birthright citizenship to children of illegal aliens.

Part I of this article discusses why *Wong Kim Ark* and *Plyler* are not dispositive for a case involving children of illegal immigrants, and how *Obergefell v. Hodges* would require the Court to reexamine the "broad principles" of birthright citizenship. Part II then reviews *jus soli* principles, showing that it is based on the idea that a "reciprocal bond of obedience and protection" is "the essence of citizenship."[14] Historically, birthright citizenship was granted to the children of loyal and "obedient" subjects living under the sovereign's "protection," as these children were expected

2021), https://www.scu.edu/ethics/focus-areas/immigration-ethics/immigration-ethics-resources/immigration-ethics-blog/words-matter-illegal-immigrant-undocumented-immigrant-or-unauthorized-immigrant/ [https://perma.cc/2AAG-VF53]. This article adopts the term because the Supreme Court uses the prefix "illegal" to describe persons who are present in the country in violation of immigration laws. *See, e.g.*, Kansas v. Garcia, 140 S. Ct. 791, 797 (2020).

11. Louis Jacobson, *Rand Paul says legality of birthright citizenship not fully adjudicated due to facts of 1898 case*, POLITIFACT (Sept. 18, 2015), https://www.politifact.com/factchecks/2015/sep/18/rand-paul/rand-paul-says-legality-birthright-citizenship-not/ [https://perma.cc/99ZQ-88Y8]. *See also* Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants*, 7 STAN. L. & POL'Y REV. 127 (1996) (noting that neither the plain text of the Constitution nor Supreme Court precedent directly address whether children of illegal immigrants are entitled to birthright citizenship).

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

13. Plyler v. Doe, 457 U.S. 202 (1982).

14. KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 203 (2004).

to grow up to be loyal and obedient subjects themselves.[15] Part III argues that the Court could conclude that the children of illegal immigrants are not eligible for birthright citizenship under the Fourteenth Amendment, as such immigrants are not living in "obedience" to the sovereign, and the sovereign in turn does not provide them with the most basic form of "protection[:]" the right to dwell in within the sovereign's borders. Part IV concludes by cautioning readers not to underestimate the possibility that a Trump-like executive order could be upheld by the Court. It suggests that congressional legislation is the most constitutionally-sound way to provide citizenship for children of illegal immigrants.

I. HOW THE COURT COULD DISTINGUISH (OR EVEN DISCARD) *WONG KIM ARK* AND *PLYLER*

This section will discuss the framework the Court could take in a case involving birthright citizenship for children of illegal immigrants. The argument that birthright citizenship applies to all immigrants born in the U.S., regardless of immigration status, is usually based on a synthesized reading of two Supreme Court precedents: *Wong Kim Ark* and *Plyler*.[16] This section suggests that these cases are not dispositive. It concludes that *Obergefell*'s framework for determining a right's "outer boundaries" is the most relevant precedent for this issue.[17]

15. *See, e.g.,* Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., concurring in part and dissenting in part) ("Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligenance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, de facto.").

16. *See, e.g.*, Katherine Nesler, *Resurgence of the Birthright Citizenship Debate*, 55 WASH. U. J. L. & POL'Y 215, 225–26 (2017) ("Opponents of the present broad interpretation of the Fourteenth Amendment insist *Wong Kim Ark* is not controlling on the issue because the issue in that case pertained to a child born to Chinese parents who were legally domiciled within the United States. In further support of the current, broad interpretation, some scholars point to a more recent Supreme Court case, *Plyler v. Doe*.").

17. Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (stating that the Court should look to "broad principles" when determining where a right's "outer

Wong Kim Ark established that the Fourteenth Amendment's Citizenship Clause generally "applies to children of foreigners present on American soil."[18] The subject of that case was born on U.S. soil to immigrant parents who, though lawfully residing in the United States, were ineligible for citizenship.[19] The Court concluded that Wong Kim Ark's parents were "entitled to the protection of, and owe[d] allegiance to, the United States so long as they [we]re permitted by the United States to reside here," and thus were "subject to the jurisdiction thereof" at the time their son was born.[20]

Plyler held the Fourteenth Amendment's Equal Protection Clause generally applies to illegal aliens.[21] That case involved a Texas public school policy requiring illegal immigrants to pay tuition,[22] while providing tuition-free education for lawful residents.[23] After holding that illegal immigrants who are "present within a State's boundaries and subject to its laws" are "within the jurisdiction" of a state for equal protection purposes, the Court concluded that charging different tuition rates on the basis of legal status violated the Equal Protection Clause.[24]

Though *Wong Kim Ark* did not involve illegal immigrants and *Plyler* did not involve the Citizenship Clause, scholars have argued that by putting two-and-two together, the cases mandate birthright citizenship for children born in the U.S. to illegal

boundaries" should be set). *See also* Billy Gage Raley, *The More Perfect Union: Monogamy and the Right to Marriage,* 19 GEO. J. GENDER & L. 455, 457–62 (2018) (offering a rationale in support of *Obergefell*'s "outer boundaries" analysis, explaining that the practice of referring to a right's "broad principles" rather than specific precedents helps ensure a historically-marginalized group is not unjustly excluded from a right's protection through the inertia of bad precedent).

18. Garrett Epps, *The Citizenship Clause, A "Legislative History"*, 60 AM. U. L. REV. 331, 332 (2010). Epps notes that "[t]he Court has not re-examined this issue since the concept of 'illegal alien' entered the language . . . ." *Id.* at 332–33.

19. *See* United States v. Wong Kim Ark, 169 U.S. 649, 704 (1898) (noting "acts of congress [and] treaties have not permitted Chinese persons born out of this country to become citizens by naturalization").

20. *Id.* at 694.

21. Plyler v. Doe, 457 U.S. 202, 215 (1982).

22. *Id*. at 206 n.2.

23. *Id*. at 205 n.1.

24. *Id.* at 211.

immigrant parents.[25] In support of this interpretation, they note that *Wong Kim Ark* stated the phrase "subject to the jurisdiction" in the Citizenship Clause is "no less comprehensive" than the phrase "within the jurisdiction" in the Equal Protection Clause.[26] There is language in a *Plyler* footnote that bolsters this interpretation.[27]

Though many legal experts have concluded that "[f]or all practical purposes, this debate has been resolved" by decisions like *Wong Kim Ark* and *Plyler*,[28] the Court has plausible grounds for distinguishing those precedents from a case involving birthright citizenship and illegal immigrants. The following paragraphs identify several justifications the Court could give in holding that illegal immigrants who are (according to *Plyler*) "within the jurisdiction" under the Equal Protection Clause are not "subject to the jurisdiction" under the Citizenship Clause.

First, *Wong Kim Ark* specifically states the equivalence it draws between "within" and "subject to" the jurisdiction is merely an additional "confirm[ation]" of its ultimate conclusion,[29] so this passage could be dismissed as dicta.[30] The possible ramifications

25. *See, e.g.*, James C. Ho, *Defining "American" Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 374 (2006) ("To be sure, the question of [birthright citizenship for children of] illegal aliens was not explicitly presented in *Wong Kim Ark*. But any doubt was put to rest in *Plyler v. Doe* (1982).").

26. *See, e.g.*, Alberto R. Gonzales, *Immigration Crisis in a Nation of Immigrants: Why Amending the Fourteenth Amendment Won't Solve our Problem*, 96 MINN. L. REV. 1859, 1867–68 (2012).

27. *Plyler*, 457 U.S. at 211 n.10 (discussing the terms "within" and "subject to the jurisdiction" in the Fourteenth Amendment, and concluding that "given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.").

28. Cristina M. Rodriguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363 (2009).

29. *Wong Kim Ark*, 169 U.S. at 687.

30. *See, e.g.*, Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 275 (1998) (Courts "make law accretionally, with each case a small step forward. Any reasoning not necessary to the court's decision is dicta that does not bind the court. In this way, courts have the benefit of the experience brought to bear by each new case.").

that "illustrat[ive]" principles (i.e., dicta) could have for other cases are "seldom completely investigated," so courts do not treat dicta as binding precedent.[31] There is good reason to suspect that the Court will treat the passage as "ill-considered dicta that [courts] are inclined to ignore,"[32] as *Wong Kim Ark*'s plain language comparison of "within" and "subject to" is out-of-sync with the rest of the opinion's complex, highly-detailed, original-intent examination of the Citizenship Clause. *Plyler*'s footnote ten could also be dismissed as dicta.[33]

Second, the landmark 2015 decision *Obergefell v. Hodges* held that while the Fourteenth Amendment's various clauses "are connected in a profound way,"[34] in that they were all included in furtherance of the same objective,[35] they still "set forth independent principles."[36] Though "in some instances," rights under the various Clauses "may be instructive as to the meaning and reach of the other," they ultimately "rest on different precepts and are not always co-extensive."[37] As we will see in the following section, the Court has held the Citizenship Clause's jurisdiction language was intended to reflect common law *jus soli* principles.[38] It is more complex than the simple geographic meaning of the Equal Protection Clause's jurisdiction language.[39] The equivalence

31. Cohens v. Virginia, 19 U.S. 264, 399–400 (1821).

32. Kappos v. Hyatt, 566 U.S. 431, 443 (2012).

33. Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. L. REV. & POL. 1, 11 (2009) (describing *Plyler*'s footnote ten as "pure dictum–a gratuitous statement unnecessary to the decision of the case").

34. Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

35. That objective being to clarify that preexisting rights (birthright citizenship, privileges and immunities, due process, and equal protection) applied to African-Americans. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 306 (1879); Elk v. Wilkins, 112 U.S. 94, 101 (1884).

36. *Obergefell*, 576 U.S. at 672.

37. *Id.*

38. United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898) (stating that under the common law, birthright citizenship was limited to children "born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.").

39. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Equal Protection Clause is "universal in [its] application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . .").

that *Wong Kim Ark* and *Plyler* drew between the Equal Protection and Citizenship Clauses' jurisdiction language could thus be dismissed as "obsolete constitutional thinking."[40]

Third, *Plyler* was a five to four decision, and the Court is more likely to distinguish and limit the applicability of closely decided cases. As Justice Frankfurter explained, when a precedent "is not the dubious pronouncement of a gravely divided Court but is [an] unanimous conclusion of a long-matured deliberative process[,]" it holds more authority.[41] The Court, therefore, might be inclined to distinguish *Plyler* as an Equal Protection Clause ruling that has limited relevance for a Citizenship Clause case.

Even if the Court does find that *Wong Kim Ark* and *Plyler* grant birthright citizenship to the children of illegal aliens, the Court could simply overrule them under the *Obergefell* approach to constitutional rights. In overturning a previous decision that limited the right to marry to opposite-sex couples,[42] *Obergefell* asserted that courts must give less weight to stare decisis principles in cases involving the scope and applicability of constitutional rights.[43] It held that courts must not rigidly follow precedent and "specific historical practices" regarding inclusion under or exclusion from a right's protection, but should rather be guided by the right's underlying principles.[44] Applying *Obergefell*

40. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

41. Cooper v. Aaron, 358 U.S. 1, 24 (1958) (Frankfurter, J., concurring). *See also* Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring) ("Insofar as the Constitution commits the duty of making this accommodation [between liberty and order] to this Court, it demands vigilant judicial self-restraint. A single decision by a closely divided court, unsupported by the confirmation of time, cannot check the living process of striking a wise balance between liberty and order as new cases come here for adjudication."); Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 269 (1960) (citing Justice Frankfurter's concurrences in *Kovacs* and *Aaron*).

42. *See Obergefell*, 576 U.S. at 675 ("*Baker v. Nelson* must be and now is overruled").

43. For a more in-depth review of *Obergefell*'s treatment of fundamental rights, *see* Raley, *supra* note 17, at 457–62 (providing a detailed overview of the "underlying principles" doctrine).

44. *Obergefell*, 576 U.S. at 663–71. *See also* Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 BYU EDUC. & L.J. 59, 68 n.50 (2017) (explaining how *Obergefell*'s underlying principles doctrine was developed out of recognition that "courts throughout history have unjustly held that disfavored minorities are not covered by a right's protection.").

to the birthright citizenship question, the Court may look past *Wong Kim Ark* and *Plyler*, as well as the executive branch's long practice of recognizing the citizenship of children of illegal immigrants,[45] and instead conduct a fresh review of how *jus soli* principles apply to the issue.

The Court may be especially reluctant to apply a "mechanical formula of adherence"[46] to *Wong Kim Ark* and *Plyler*'s broad interpretations of "jurisdiction." If the Court defines birthright citizenship too narrowly, "correction through legislative action"[47] is possible under Congress's power "[t]o establish an uniform Rule of Naturalization."[48] If the Court defines birthright citizenship too broadly, however, "correction through legislative action is practically impossible."[49]

This article will proceed with the understanding that *Plyler* and *Wong Kim Ark* have not settled the issue, and will follow the *Obergefell* approach by looking to history for "broad principles rather than specific requirements."[50] The article presumes that general historical principles should determine where the "outer boundaries"[51] of birthright citizenship lie. The following section will discuss "the basic reasons why the right to [birthright citizenship] has been long protected."[52]

II. THE "BROAD PRINCIPLES" OF BIRTHRIGHT CITIZENSHIP

This section will examine the "broad principles" of birthright citizenship. The U.S. Supreme Court has recognized *Calvin's Case*[53] as "the leading case" regarding *jus soli* doctrine.[54] The Court held that the 1608 case "clearly, though quaintly" sets forth the "fundamental principle" of birthright citizenship.[55] *Calvin's Case*

45. *See* 8 FAM § 301.1-1(d).
46. Payne v. Tennessee, 501 U.S. 808, 828 (1991).
47. *Id*.
48. U.S. CONST. art. I, § 8, cl. 4.
49. *Payne*, 501 U.S. at 828.
50. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).
51. *Id.*
52. *Id.* at 665.
53. Calvin's Case, 77 Eng. Rep. 377, 382 (K.B. 1608).
54. United States v. Wong Kim Ark, 169 U.S. 649, 655–56 (1898).
55. *Id.*

is the source we should turn to in our search for "broad principles," "essential attributes," and "basic reasons why [birthright citizenship] has been long protected."[56]

But before discussing *Calvin's Case*, some broader context is in order. *Calvin's Case* was decided at a time when Western ideas regarding citizenship were undergoing a profound revolution.[57] During this era, there was a shift from the old, Aristotelian, privilege-based concept of citizenship to a new, Hobbesian, social contract-based concept.

Aristotle defined citizenship as follows: "[O]ne who has the right to participate in deliberative or judicial office is a citizen of the state in which he has that right."[58] There was no universal franchise in the Aristotelian polis, as women, manual laborers, slaves, and foreigners were excluded from the political process.[59] Citizenship was therefore limited to a privileged few who possessed the right to rule.

Even under this privilege-based concept of citizenship, obedience and subjection were still expected of those who possessed the right to rule. "It is doubtless," Aristotle stated, "that the goodness of a citizen consists in ability both to rule and to be ruled well."[60] An Aristotelian citizen was not only entitled to make law, but also obligated to follow it.

The Enlightenment brought about a radical redefinition of citizenship: a citizen was no longer one who possessed the right to rule, but one who had given that right up. Jean Bodin, the sixteenth century political philosopher who is "rightly considered

56. Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

57. DANIEL LEE, THE RIGHT OF SOVEREIGNTY: JEAN BODIN ON THE SOVEREIGN STATE AND THE LAW OF NATIONS 135 (2021) ("It is difficult to stress just how much Bodin's treatment of citizenship marked a monumental achievement in the intellectual history of the concept. . . . In (re)defining citizenship in terms of subjection, it's no mystery that Bodin's primary target was Aristotle.").

58. ARISTOTLE, POLITICS 1275b (H. Rackham trans., 1944).

59. Pierre Pellegrin, *Aristotle's Politics*, *in* THE OXFORD HANDBOOK OF ARISTOTLE 571 (Christopher Shields ed. 2012).

60. ARISTOTLE, *supra* note 58, at 1277b–78a. Aristotle argued that the citizens' experience with subjection is crucial to their ability to self-govern, stating that it is "impossible to become a good ruler without having been a subject." *Id.*

the father of the modern theory of Sovereignty,"[61] developed this concept of citizenship that Lord Coke would go on to endorse in *Calvin's Case*. Bodin argued that a citizen is one who trades absolute but untenable anarchic freedom for a more limited but sustainable "ordered liberty."[62] Bodin argued that "he who did not want to give up some of his liberty, which is necessary to live under the laws and commands of someone else, lost all of his liberty" through death or enslavement.[63] The relationship between a citizen and sovereign, Bodin argued, was the product of a contractual bargain: subjection for protection.[64] Bodin's full redefinition of citizenship is as follows:

> [P]rivileges [enjoyed by Aristotelian citizens] do not make a citizen. It is the acknowledgement and obedience of a free subject towards his sovereign prince, and the guidance, justice and the defense of the prince towards the subject which makes the citizen and which is the essential difference between a citizen and a foreigner.[65]

Thomas Hobbes would later perfect Bodin's theory of citizenship in *The Leviathan*. Hobbes wrote that people will voluntarily submit to a powerful protector (the Leviathan) to avoid experiencing a "nasty, brutish, and short" life in the state of nature.[66] An effective Leviathan must be an intimidatingly powerful and loyalty inspiring authority figure; one whose protection provides security, and whose punishment instills fear.[67]

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61. JACQUES MARITAIN, MAN AND THE STATE 30 (1951).

62. The term "ordered liberty" is often employed by the Supreme Court in unenumerated rights cases. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937). One of the earliest American uses of that term appears in a letter by Puritan leader John Cotton citing Bodin's theory of sovereignty. Scott McDermott, *The Opening of the American Mind: Protestant Scholasticism at Harvard, 1636-1700*, *in* CATHOLICISM AND HISTORICAL NARRATIVE 43 (Kevin E. Schmiesing ed., 2014).

63. KIM, *supra* note 14, at 207.

64. *See id.* at 203 ("In Bodin's mind, this reciprocal bond of obedience and protection must be the essence of citizenship.").

65. *Id.* (*citing* JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE VOL. I 131–41 (Christiane Frémont et al. eds., Fayard 1986) (alteration in original)).

66. THOMAS HOBBES, THE LEVIATHAN 62 (1651).

67. *Id.* at 87–88 (the Leviathan "hath the use of so much Power and Strength conferred on him, that by terror thereof, he is inabled to performe the wills of them all, to Peace at home, and mutuall ayd against their enemies abroad.").

Coke's *Calvin's Case* (1606) is a clear product of its time, comfortably situated between Bodin's *Six Livres* (1576) and Hobbes' *Leviathan* (1651). Coke used "almost identical language [to Bodin] in his famous decision"[68] when holding that "ligeance join[s] together the Sovereign and all his subjects . . . for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects."[69] *Calvin's Case* also foreshadows *The Leviathan* when it states that "power and protection draweth ligeance."[70]

It should be noted that the term "allegiance" used to convey a deeper meaning than the shallow, jingoistic overtones it carries today. Under its traditional definition, "allegiance" referred to a citizen's recognition of his sovereign's comprehensive right to rule—not just in opposition to rival sovereigns, but also in opposition to the citizen himself. The duty of "allegiance" involved not only defending the ruler during wartime, but also submitting to the ruler during peacetime.[71]

In *Calvin's Case*, Coke asserted that people will gravitate towards and submit to a powerful protector.[72] As explained later by Blackstone, "natural allegiance" begins developing in "all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude . . . ."[73] This naturally-developing allegiance of a person born under the sovereign's protection was considered "intrinsic, and primitive, and antecedent to [all] other"

68. LINAS ERIKSONAS & LEOS MÜLLER, STATEHOOD BEFORE AND BEYOND ETHNICITY 56 (2005).

69. Calvin's Case, 77 Eng. Rep. 377, 382 (K.B. 1608).

70. *Id.* at 388.

71. As the Supreme Court explains, "[b]y allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives." Carlisle v. United States, 83 U.S. 147, 154 (1872).

72. *Calvin's Case*, 77 Eng. Rep. at 382 (stating that "*protectio trahit subjectionem, et subjectio protectionem*," which translates to "protection inspires subjection, and subjection protection").

73. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (The Clarendon Press 1765).

allegiances—a bond so strong that it endures for a lifetime, transcends borders, and cannot be unilaterally renounced.[74]

Though the birthright citizenship principles developed by *Calvin's Case* are now known as the *jus soli* ("by reason of the soil") doctrine, this is a misnomer. *Calvin's Case* is clear that it is not "the soil, but ligeantia and obedientia that make the subject born" a citizen.[75] To prove this point, Coke provided two examples of how a child can be born within the king's territory but not within the "obedience or ligeance" of the king and vice versa, which came to be known as the "ambassadors and invaders" exceptions to birthright citizenship.[76]

Ambassadors are expected to be void of any sentiments of loyalty or attachment towards their host countries—in fact, governments often rotate diplomatic assignments out of concern that diplomats might "go native" if they stay at one post for too long.[77] Children of English ambassadors were thus considered "natural subjects" even when they were "born out of the King's dominions," because their parents were still under the king's ligeance and obedience. Conversely, the child of a foreign invader "is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience."[78]

The U.S. Supreme Court would later identify another exception: "Indians" born on U.S. soil. This exclusion was also based on "ligeance and obedience" considerations. The Court concluded that Native Americans "recognize[d] the headship of their chiefs" and "owed immediate allegiance to their several tribes," so vesting them with birthright citizenship "would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to

74. *Id.* at 357–58 (stating that, as "a principle of universal law," birthright citizenship "cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now.").

75. *Calvin's Case*, 77 Eng. Rep. at 384.

76. *Id.* at 399.

77. G. R. BERRIDGE, DIPLOMACY: THEORY AND PRACTICE 117 (5th ed. 2015).

78. *Calvin's Case*, 77 Eng. Rep. at 399.

their tribal head."[79]

Some scholars have taken Coke's illustrative counter-examples and blown them out of proportion, claiming that *Calvin's Case*'s "ambassadors and invaders" are, with the later addition of "Indians," the sole exceptions to birthright citizenship. Losing sight of the basic premise that underlies the exceptions (i.e., that "natural born citizens" are those who can be expected to subject themselves out of a "debt of gratitude" for the sovereign's protection), they claim the exemptions rest on legal technicalities. Under this argument, "ambassadors, invaders, and Indians" are entitled, respectively, to diplomatic, combatant, and tribal immunity, and thus are not technically "subject to the jurisdiction" of the United States.[80]

This interpretation would lead to absurd outcomes. If exclusion from birthright citizenship is based solely on jurisdictional immunity:

1. The children of friendly foreign ambassadors would not be

79. Elk v. Wilkins, 112 U.S. 94, 119 (1884). *See also id.* at 118 (holding that the Fourteenth Amendment grants "national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations and within one of the States or Territories of the Union.").

80. *See, e.g.*, Ho, *supra* note 25, at 369 ("[T]he jurisdictional requirement of the Citizenship Clause must do something – and it does. It excludes those persons who, for some reason, are immune from, and thus not required to obey, U.S. law. Most notably, foreign diplomats and enemy soldiers – as agents of a foreign sovereign – are not subject to U.S. law, notwithstanding their presence within U.S. territory. Foreign diplomats enjoy diplomatic immunity, while lawful enemy combatants enjoy combatant immunity. Accordingly, children born to them are not entitled to birthright citizenship under the Fourteenth Amendment."); *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Hearing Before the Subcomm. on Immigration and Claims and Subcomm. on the Constitution of the Comm. on the Judiciary, H. Comm. on the Judiciary*, 104th Cong. 103–04 (1995) (statement of Gerald L. Neuman, Professor, Columbia University Law School) ("'[S]ubject to the jurisdiction' . . . means actual subjection to the lawmaking power of the United States. . . . The common law exceptions included children of foreign diplomats, who were legally immune from domestic law, and children born to women accompanying invading armies, who were practically immune from domestic law."); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 63 (1997) ("[T]ribal sovereignty would suggest that Indians born on reservations live under the jurisdiction of tribal laws, even though they also live within the borders of the United States.").

eligible for birthright citizenship, but the children of unregistered foreign spies would;

2. The children of lawful combatants would not be eligible for birthright citizenship, but the children of terrorists and marauding war criminals would; and

3. The children of Native Americans living on federally-recognized tribal lands would not be eligible for birthright citizenship, but the children of nomadic indigenous Canadians who unwittingly encroached into U.S. territory would.

These examples demonstrate the dangers of confusing dicta for doctrine. Coke included the "ambassadors and invaders" exceptions simply to prove a point, not to provide an exhaustive list of exclusions.[81] This shows why the *Obergefell* rule, which requires courts to investigate broad principles rather than mechanically apply specific exclusions, is necessary.

Coke's ruling in *Calvin's Case* profoundly influenced how American courts understand birthright citizenship. In two pre-Fourteenth Amendment Supreme Court cases concerning British subjects born in the American colonies, "the doctrine laid down in Calvin's Case . . . was very amply discussed."[82] Those cases highlight the connection between birthright citizenship and allegiance, as it was understood that "[b]irth is but evidence of allegiance,"[83] and that "[a]n alien is a subject that is born out of the ligeance of the king, and under the ligeance of another."[84]

In an 1830 case, the Supreme Court observed that the "doctrine of allegiance" is "the tie which binds the governed to their government, in return for the protection which the government

81. *See* Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., concurring in part and dissenting in part) ("There are some exceptions [to birthright citizenship], which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine.").

82. Dawson's Lessee v. Godfrey, 8 U.S. (4 Cranch) 321, 322 (1808).

83. M'ilvaine v. Coxe's Lessee, 6 U.S. (2 Cranch) 280, 299 (1805).

84. Lambert's Lessee v. Paine, 7 U.S. (3 Cranch) 97, 104 (1805). *See also* Doe *ex dem*. Governeur's Heirs v. Robertson, 24 U.S. (11 Wheat.) 332, 356 (1826) ("'Every person,' says [Bacon], 'is supposed a natural born subject, that is resident in the kingdom, and that owes a local allegiance to the king . . . .'").

affords them."[85] In concurring with the Court's ruling regarding birthright citizenship, Justice Story cited *Calvin's Case* in stating that "[t]o constitute a citizen, the party must be born not only within the territory, but within the ligeance of the government."[86] Most importantly for our discussion, Justice Story repeatedly emphasized that "obedience" and "protection" dictate whether a person is born into citizenship.[87] He also noted that "[b]irth within the dominions of a sovereign is not always sufficient to create citizenship, if the party at the time does not derive protection from its sovereign in virtue of his actual possession."[88]

After the Fourteenth Amendment was adopted, the Supreme Court treated the Citizenship Clause as a constitutional ratification of *Calvin's Case*.[89] In *Wong Kim Ark*, the Court noted "[t]he constitution nowhere defines the meaning of" the words "subject to the jurisdiction," so the term "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution."[90] The Court identified "birth within the allegiance—also called 'ligealty,' 'obedience,' 'faith,' or 'power'—of the king" as the "fundamental principle" underlying the Citizenship Clause.[91] The Court relied heavily on "the leading case known as 'Calvin's Case'" to determine

85. *Inglis*, 28 U.S. (3 Pet.) at 124–25.

86. *Id.* at 167 (Story, J., concurring in part and dissenting in part).

87. *Id.* at 155 (Story, J., concurring in part and dissenting in part) ("Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligenance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, de facto.").

88. *Id.* at 155–56.

89. *See* United States v. Wong Kim Ark, 169 U.S. 649, 706 (1898) (Fuller, J., dissenting) ("[T]he fourteenth amendment is held to be merely declaratory, except that it brings all persons, irrespective of color, within the scope of the alleged rule, and puts that rule beyond the control of the legislative power.").

90. *Id.* at 654.

91. *Id.* at 655.

the "qualifications or explanations" of birthright citizenship.[92]

Wong Kim Ark walked through the "allegiance" rationale for birthright citizenship. The Court cited *Calvin Case*'s maxim "*Protectio trahit subjectionem, et subjectio protectionem*" (meaning "protection inspires subjection, and subjection protection") in recognizing that "allegiance and protection were mutual."[93] The Court explained that allegiance is "predicable of aliens in amity, so long as they were within the kingdom," because such aliens were under the king's protection during their residence.[94] This allegiance was imputed to children born to foreign parents living under the king's protection.[95] Conversely, children of ambassadors and enemy invaders "were not natural-born subjects, because [they were] not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king."[96]

Though the Supreme Court has not revisited birthright citizenship since *Wong Kim Ark*, it has continued to recognize that citizenship is grounded in the reciprocal obligations of protection and allegiance.[97] Federal courts that have more recently addressed birthright citizenship have continued to grapple with the doctrine

92. *Id.* at 655–56.

93. *Id.* at 655. *See also* Calvin's Case, 77 Eng. Rep. 377, 382 (K.B. 1608).

94. *Id.*

95. *Id.*

96. *Id.*

97. *See, e.g.*, Tuan Anh Nguyen v. INS, 533 U.S. 53, 67 (2001) ("Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process. If citizenship is to be conferred by the unwitting means petitioners urge, so that its acquisition abroad bears little relation to the realities of the child's own ties and allegiances, it is for Congress, not this Court, to make that determination.") (emphasis added); Wilson v. Garcia, 471 U.S. 261, 279 n.40 (1985), *citing* CONG. GLOBE, 42d CONG., 1ST SESS., 322 (1871) (Rep. Stoughton) ("It is a fundamental principle of law that while the citizen owes allegiance to the Government he has a right to expect and demand protection for life, person, and property."); Miller Bros. Co. v. Maryland, 347 U.S. 340, 345 (1954) ("Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally reciprocal duties of protection by the state and of allegiance and support by the citizen.").

of allegiance.[98] Even in a case that did not involve birthright citizenship, the Ninth Circuit cited *Calvin's Case* in observing that "[p]rotection is the *quid pro quo* for our allegiance to the government."[99]

To summarize, birthright citizenship is based on the idea that children of "obedient" subjects living under the sovereign's "protection" will naturally grow up to be loyal and obedient subjects themselves. The Bodinian theory of subjection-for-protection is "the basic reason[] why the right . . . has been long protected."[100] Courts have consistently recognized this principle for over four centuries.

III. WHY THE "BASIC PRINCIPLE" OF BIRTHRIGHT CITIZENSHIP MAY NOT APPLY TO CHILDREN OF ILLEGAL IMMIGRANTS

Having reviewed the "basic reasons why [birthright citizenship] has been long protected," we will now turn to discuss whether those rationales "apply with equal force"[101] to illegal immigrants. Is "allegiance and protection . . . predicable of [illegal] aliens . . . so long as they [are] within" the United States?[102] The Supreme Court could conclude the answer is "no," as the "reciprocal bond of obedience and protection" that has long been considered "the essence of citizenship"[103] is severed when it comes to illegal immigrants.

Regarding "ligeance or obedience," illegal immigration betrays a lack of allegiance in that it demonstrates a refusal to recognize

98. *See, e.g.*, Fitisemanu v. United States, 1 F.4th 862, 871–73 (10th Cir. 2021) (distinguishing *Wong Kim Ark* and *Calvin's Case* from cases involving persons born in unincorporated territories); Tuaua v. United States, 788 F.3d 300, 305 (D.C. Cir. 2015) ("[A]ssuming the framers intended the Citizenship Clause to constitutionally codify *jus soli* principles, birthright citizenship does not simply follow the flag. Since its conception *jus soli* has incorporated a requirement of allegiance to the sovereign."); Rabang v. INS, 35 F.3d 1449, 1461 (9th Cir. 1994) (Pregerson, J., dissenting) (arguing that Filipinos born when the Philippines was a U.S. territory were entitled to birthright citizenship because "all citizens of the Philippine Islands *owed allegiance to the United States*").

99. Young v. Hawaii, 992 F.3d 765, 814 (9th Cir. 2021).

100. Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

101. *Id*.

102. United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898).

103. Kim, *supra* note 14 at 203.

the sovereign's "right to rule" over immigration matters. And unlike one-off crimes, illegal immigration constitutes an ongoing act of defiance; the U.S. Supreme Court has held an illegal immigrant's very presence on American soil "plainly constitute[s] a continuing crime."[104] If granted birthright citizenship, a child born on U.S. soil to illegal aliens would be a spurious citizen—a citizen born of an illicit act. It would be difficult to square birthright citizenship for a child born in the shadow of immigration law with *Calvin's Case*'s declaration that "any place within the King's dominions without obedience can never produce a natural subject."[105]

Regarding protection, the government refuses to provide illegal immigrants with the most basic protection of all: the right to dwell within the secure confines of the nation's borders, under "the King's peace." As Trump's White House press secretary pointed out, "everybody who is here illegally is subject to removal at any time."[106] Deportation is a banishment from the sovereign's protective custody. Its horror resembles the outcome of the Parable of the Banquet: in that story, when a guest (like illegal immigrants) violated the sovereign's rules, the king said to his servants, "[t]ie him hand and foot, and throw him outside, into the darkness, where there will be weeping and gnashing of teeth."[107] Though illegal immigrants are entitled to equal protection, due process, and certain other constitutional protections,[108] it strains credibility to claim they are "protected" by the sovereign in the Bodinian sense of the word.

Apart from these two principled objections, there are also two practical dangers that would arise from granting citizenship to the children of illegal immigrants. First, there is the risk of extending citizenship to those who do not possess the deep bond of "natural allegiance" that natural-born citizens are supposed to have.

104. INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 n.3 (1984).

105. Calvin's Case, 77 Eng. Rep. 377, 399 (K.B. 1608).

106. Jeffrey Kaye, *The kids are citizens. The parents are undocumented. What now?*, LA TIMES (Mar. 10, 2017, 4:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-kaye-mixed-status-la-families-20170310-story.html [https://perma.cc/SP3E-AF7J].

107. *Matthew* 22:13 (NIV).

108. *See* Zadvydas v. Davis, 533 U.S. 678, 690–96 (2001).

Second, there is the risk of straining the allegiance of citizens who were not born to illegal immigrants.

In regard to the first risk, children who grow up in the shadows of immigration law, with parents who live under fear of deportation, may well view the American Leviathan as a persecutor rather than a protector. Instead of a "debt of gratitude," they may feel a grudge of resentment at how the nation treated them and their family during their formative years. They might identify an immigrant-friendly political party as their protector rather than the broader American establishment and electorate. The admission of this type of citizen—one who has an "intrinsic, and primitive, and antecedent" allegiance to a political party rather than to the country, and who has grown up viewing the current demographic majority (which supported the enactment of the nation's immigration laws) as a threat to their very family—could accelerate the trend of hyper-partisanship.[109]

With regard to the second risk, granting birthright citizenship to children of illegal immigrants could undermine the allegiance of the broader citizenry. Whether one welcomes the change or fears it, immigration is widely expected to dispossess those who could be described as "Tocqueville-Americans"[110] of their voting majority.[111] If this dispossession is attributed to lawful immigration, it would have at least some semblance of a

109. Lee Drutman, *Hyperpartisanship could destroy US democracy*, VOX (Sept. 5 2017, 8:20 AM), https://www.vox.com/the-big-idea/2017/9/5/16227700/hyperpartisanship-identity-american-democracy-problems-solutions-doom-loop [https://perma.cc/F5AZ-CP2S].

110. "Tocqueville Americans" are the demographic majority that existed from the nation's early years (as evidenced by Tocqueville's generalizations about Americans in the 1830s) up to recent years. These Americans are white, Christian, and "conservative" in the sense that they hold traditional Tocquevillian values: liberty, egalitarianism (as in equality of opportunity, not equality of outcome), individualism, populism, and laissez-faire economics. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans. 1835); SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 31 (1996). The Jackson-supporting Americans who Tocqueville described could be considered the political ancestors of the Americans who elected Trump in 2016. *See* Jean M. Yarbrough, *Trump—and Tocqueville?*, CITY JOURNAL (Oct. 8, 2017), https://www.city-journal.org/html/trump-and-tocqueville-15482.html [https://perma.cc/7LQK-VTEE].

111. *See, e.g.*, JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY (2002).

legitimate, voluntary replacement. An argument could be made that replacement through lawful immigration cannot be held against the government, because the majority "voted for it."

Demographic replacement attributable to illegal immigration, however, does not bear the imprimatur of democratic legitimacy. Though "[p]eople understand that some of the Constitution's language is hard to fathom,"[112] if the Court holds that children of illegal immigrants, born on U.S. soil in defiance of the voters' wishes, are entitled to compete against voters at the ballot box, this could be seen by many citizens as the second of a two-step act of betrayal by their sovereign: first, by allowing illegal immigrants into the country, then by rewarding their unlawfulness with citizenship for their children. The growing popularity of the "great replacement" theory is a sign this sentiment is already beginning to take hold.[113]

If Tocqueville-Americans feel they have been dispossessed of their voting majority because the sovereign defaulted on its obligation to provide "protection," it is not unforeseeable that they will withdraw their allegiance. If, as Coke claimed, "power and protection draweth ligeance,"[114] we can conversely assume that weakness and dereliction invite rebellion (in fact, one of the specific grievances listed in the Declaration of Independence was that the King "abdicated Government here, by declaring us out of his Protection").[115] If the sovereign is unable or unwilling to protect its citizens from a demographic conquest by immigrants, those citizens may end up seeking protection from another source. As the Ninth Circuit recently warned, "[t]he king who cannot guarantee the security of his subjects—from threats internal or external—will not likely remain sovereign for long."[116]

With these considerations in mind, the Court could hold that granting birthright citizenship to children of illegal immigrants is

112. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992).

113. *See, e.g.*, Steve Rose, *A deadly ideology: how the 'great replacement theory' went mainstream*, THE GUARDIAN (June 8, 2022, 1:00 PM), https://www.theguardian.com/world/2022/jun/08/a-deadly-ideology-how-the-great-replacement-theory-went-mainstream [https://perma.cc/862Z-94ZP].

114. Calvin's Case, 77 Eng. Rep. 377, 388 (K.B. 1608).

115. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

116. Young v. Hawaii, 992 F.3d 765, 814 (9th Cir. 2021).

not consistent with the "fundamental principles" of the Citizenship Clause. Such a ruling would punt the explosive issue back to Congress to deal with under the Naturalization Clause. This approach would be consistent with how the Court dealt with abortion in *Dobbs*.[117]

CONCLUSION

To summarize, Anglo-American courts have long held that the "reciprocal bond of obedience and protection" are "the essence of citizenship."[118] When it comes to the relationship between illegal immigrants and the United States, that "obedience and protection" is absent. Since the Court must "respect the basic reasons why [birthright citizenship] has been long protected" when defining that right's "outer boundaries,"[119] it is very possible that the Court could hold that children of illegal immigrants are not entitled to birthright citizenship.

In light of the constitutional issues discussed in this article, immigrant-rights activists may want to focus their efforts on congressional legislation that provides citizenship for children of illegal immigrants. The Constitution clearly empowers Congress "[t]o establish a uniform Rule of Naturalization."[120] While the Court may uphold a Trump-like executive order barring children of illegal immigrants from claiming birthright citizenship under the Citizenship Clause, it would certainly uphold a legislative act granting it under the Naturalization Clause.

117. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (observing that the *Dobbs* decision "leaves the [abortion] issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy").

118. KIM, *supra* note 14, at 203.

119. Obergefell v. Hodges, 576 U.S. 644, 664–65 (2015).

120. U.S. CONST. art. I, § 8, cl. 4.