

Born in the Americas: Birthright Citizenship and Human Rights

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INTRODUCTION

Over 140 years ago, in response to the *Dred Scott* decision denying citizenship to former slaves and their descendants, the Fourteenth Amendment of the U.S. Constitution was enacted to guarantee the right to citizenship for all persons born within the United States and subject to its jurisdiction.¹ As was reported in September of 2010: “For more than a century, the rules governing U.S. citizenship have included a straightforward test: With rare exception, a person born within the country’s borders is an American citizen.”² However, what had been a “simmering academic debate” about that straightforward test has moved into the political arena, as many Members of Congress and state lawmakers plan to challenge whether children of undocumented immigrants should continue to be granted birthright citizenship.³

The academic debate was sparked by Peter Schuck and Rogers Smith of Yale University, who authored a book in 1985 criticizing Supreme Court precedents upholding birthright citizenship for children of immigrants.⁴ The United States provides citizenship to anyone born in this country, ex-

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1. Section 1 of the Fourteenth Amendment mandates that: “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.” U.S. CONST. amend. XIV, § 1.

2. Greg Stohr, *Children of Illegal Immigrants Spark Clash on U.S. Citizenship*, BLOOMBERG (Sept. 13, 2010), <http://www.bloomberg.com/news/2010-09-13/children-of-illegal-immigrants-spark-clash-on-u-s-citizenship-procedures.html>.

3. See JON FEERE, CENTER FOR IMMIGRATION STUDIES, BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES: A GLOBAL COMPARISON (2010), <http://www.cis.org/articles/2010/birthright.pdf>. The author alleges that the United States should not provide children of unauthorized immigrants with birthright citizenship because “[t]he overwhelming majority of the world’s countries do not offer automatic citizenship to everyone born within their borders.” *Id.* at 1. See also *infra* Section II.

4. PETER H. SHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

cept for children of diplomats, regardless of the legal status of his or her parents.⁵ This system will be defined as “birthright citizenship.” Proponents of retracting birthright citizenship for children of undocumented immigrants argue that many other countries do not offer such birthright citizenship, and that therefore the United States has been overly generous and would be well within the bounds of international law to retract it.⁶

Opponents and constitutional law experts, such as former Assistant Attorney General Walter Dellinger, argue that retracting birthright citizenship would be unconstitutional.⁷ They argue that the only conceivably legal means for retracting birthright citizenship for children of undocumented immigrants would be a constitutional amendment, but that such a constitutional amendment would be unwise for policy reasons.⁸ This Article will demonstrate that retraction of birthright citizenship, even through a constitutional amendment, would be legally questionable under international human rights norms applicable to the United States. Retrogression of birthright citizenship, particularly if it disparately impacts certain racial or ethnic “minority” groups, may violate human rights law. Therefore, the argument that the United States is permitted to retract birthright citizenship because other countries do not provide it to all children of undocumented immigrants is incomplete. Although international law permits sovereign states to make their own rules regarding citizenship, retrogression of birthright citizenship is nonetheless highly problematic under international human rights law.⁹

Furthermore, none of the legal, academic, and policy debates about birthright citizenship should be separated from their clear context of attempting to limit access to citizenship for the children of Latino immigrants. Human rights law requires such an analysis. The historical context must also be taken into account. As will be discussed herein, the Fourteenth Amendment was enacted to prevent discrimination against people of color, including immigrants of color. For many years, throughout different waves of immigration, birthright citizenship was the law of the land. It is no coincidence that birthright citizenship for children of undocumented immi-

5. 8 U.S.C. § 1401 (2006).

6. See *Notes and Citations Regarding Birthright Citizenship Laws*, NUMBERS USA, <http://www.numbersusa.com/content/node/7628> (last visited Feb. 20, 2012).

7. *Legislation Denying Citizenship at Birth to Certain Children Born in the United States: Statement Before the Subcomm. of Immigration and Claims and on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1995) (statement of Walter Dellinger, Former Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice) [hereinafter Dellinger Testimony] (“A bill that would deny citizenship to children born in the United States to certain classes of alien parents is unconstitutional on its face. A constitutional amendment to restrict birthright citizenship, although not technically unlawful, would flatly contradict the Nation’s constitutional history and constitutional traditions.”).

8. *Id.* See also *infra* notes 203-206 and accompanying text (regarding the likely unreviewability of a constitutional amendment regarding nationality under U.S. law, due in part to the Plenary Power doctrine).

9. See, e.g., *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 138 (Sept. 8, 2005).

grants is being seriously challenged now that the 2010 Census found that 23% of children in the United States are Hispanic, and many of their parents are immigrants.¹⁰ In addition, advocates for retracting birthright citizenship frequently rely on negative stereotypes about immigrant women.¹¹ This Article will demonstrate that international human rights law does not treat the right of sovereigns to make their own requirements for citizenship in a vacuum,¹² but instead requires an analysis of factual context.¹³

In 2005, in the Case of *Dilcia Yean and Violeta Bosico v. Dominican Republic*, the Inter-American Court of Human Rights found that while the Dominican Republic had the right to enact its own rules regarding citizenship, those rules were also subject to norms providing for the right to a nationality, especially for children, as well as the right to freedom from discrimination.¹⁴ The Inter-American Court held that the Dominican Republic's refusal to provide birth certificates for children of undocumented Haitian immigrants was in violation of international human rights law regarding the rights of the child, the right to a nationality, and the right to equality before the law.¹⁵

Since then, in 2010, the Dominican Republic amended its constitution to retract birthright citizenship entirely from children of undocumented immigrants.¹⁶ This was quickly challenged by a person of Haitian descent, Mr. Emildo Bueno Oguis, who was born in the Dominican Republic and

10. JEFFREY S. PASSEL, D'VERA COHN & MARK HUGO LOPEZ, PEW HISPANIC CENTER, CENSUS 2010: 50 MILLION LATINOS, HISPANICS ACCOUNT FOR MORE THAN HALF OF NATION'S GROWTH IN PAST DECADE (2011), <http://pewhispanic.org/files/reports/140.pdf>; JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, U.S. POPULATION PROJECTIONS: 2005–2050 (2008), <http://pewhispanic.org/files/reports/85.pdf> (stating that Hispanics are projected to increase to 29% of the total U.S. population by 2050, with most of the increase driven by births, many the descendants of the recent immigration wave). Another recent analysis of census data and fertility rates found that, in contrast to previous growth driven primarily by immigration, from 2000–2010 the Mexican-American population grew by 7.2 million due to births, and 4.2 million due to immigration. From 2006–2010, more than half of Mexican-American babies were children of immigrants. PEW HISPANIC CENTER, THE MEXICAN-AMERICAN BOOM: BIRTHS OVERTAKE IMMIGRATION 2 (2011), <http://pewhispanic.org/files/reports/144.pdf> (“At 31.8 million in 2010, Mexican Americans comprise 63% of the U.S. Hispanic population and 10% of the total U.S. population.”).

11. SAM FULWOOD III & MARSHALL FITZ, CENTER FOR AMERICAN PROGRESS, LESS THAN CITIZENS: ABOLISHING BIRTHRIGHT CITIZENSHIP WOULD CREATE A PERMANENT UNDERCLASS IN OUR NATION 7-8 (2011), http://www.americanprogress.org/issues/2011/05/pdf/birthright_brief.html.

12. *See, e.g.*, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (SER. A) No. 4, ¶ 33 (Jan. 19, 1984) (“The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.”).

13. *See, e.g.*, *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 18; *see also infra* Part III.

14. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 86.

15. *Id.* ¶¶ 170-187.

16. *See* CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA, *as amended*, cap. V, sec. I, art. 18, GACETA OFICIAL No. 10561, ENERO 26, 2010.

would lose his nationality under the new rules.¹⁷ His June 2010 complaint before the Inter-American Commission on Human Rights alleges that the new nationality provision “directly contradicts the ruling of the Inter-American Court of Human Rights in *Dilcia Yean and Violeta Bosico v. Dominican Republic* that the migratory status of a parent should have no bearing on a child’s right to nationality.”¹⁸ The Bueno petition also alleges that:

the congressional debate surrounding the recent modification of the constitution suggests that racial discrimination was a factor in the decision to change the law on [birthright] citizenship. . . . While a government may change constitutional or statutory provisions governing access to nationality, it may not do so for prohibited reasons, such as racial discrimination, or in a manner that generates discriminatory effect.¹⁹

While the hearing on the Bueno petition is still pending, as will be discussed herein, the decision of the Inter-American Court in the case of the Yean and Bosico children made clear that any retraction of birthright citizenship which has a discriminatory impact is legally questionable.²⁰ Therefore, even a constitutional amendment retracting birthright citizenship is questionable under the superior norms of fundamental Inter-American human rights law.²¹

Furthermore, the Dominican Republic is one of the few nations in the Americas that do not provide birthright citizenship to the children of unauthorized immigrants.²² As will be discussed below, a study of the constitu-

17. OPEN SOCIETY JUSTICE INITIATIVE & CEJIL, SUMMARY OF INITIAL PETITION IN THE CASE OF EMILDO BUENO OGUIS V. DOMINICAN REPUBLIC ¶ 18 (2010) [hereinafter SUMMARY OF EMILDO BUENO OGUIS PETITION], available at <http://www.soros.org/initiatives/justice/litigation/bueno/Petition%20Summary-20100601.pdf>.

18. *Id.* ¶ 18.

19. *Id.* ¶ 20.

20. See *infra* Part III. Note that as of October 27, 2011, there was no hearing held yet on the petition of Mr. Bueno Oguis; however, on October 24, 2011, the Inter-American Commission on Human Rights (“IACHR”) held a “Public Thematic Hearing” regarding “Judicial Response in Denationalization Cases in the Dominican Republic.” Schedule of Hearings, 143rd Sessions—Oct. 2011, Inter-American Commission on Human Rights (IACHR), CIDH.ORG, <http://www.cidh.org/comunicados/English/2011/Calendar143en.htm>. During the Public Thematic Hearing, the organizations representing Mr. Bueno said that “the application of Article 12-07 of the Constitution disproportionately affects Dominicans of Haitian descent. . . . [P]arents who are not citizens are considered to have committed fraud if they register children,” and that there have been “1588 cases of Dominicans being denied birth records.” Kelly Fay Rodriguez, Notes on hearing before the Inter-American Commission of Human Rights (Oct. 24, 2011) (manuscript at 1) (on file with author). Also, “in some cases mothers are told that they are too black to receive a certificate for their children.” *Id.* at 1. The Government of the Dominican Republic responded that the constitutional amendment retracting birthright citizenship is facially neutral, denied the allegations of discrimination, and said that the new policies of denial of birth certificates are needed to combat fraud, especially considering that some noncitizen athletes had adulterated their birth certificates so that they could join Major League Baseball training camps for minors in the Dominican Republic. *Id.*

21. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 138 (Sept. 8, 2005).

22. See *infra* Part I.A.

tions and immigration laws of the countries of the Western Hemisphere reveals that 30 out of 35 sovereign nations in the Americas provide automatic birthright citizenship to children of undocumented immigrants.²³ Therefore, if the United States were to retract such birthright citizenship, it may be following a global trend, but it would not be following the customary law of this hemisphere, the nations of which have historically been dependent on immigration.²⁴

In addition, the legal theories of the Dominican citizenship cases are based upon fundamental human rights norms that are also applicable in the United States. Although the United States is not party to the American Convention on Human Rights, which is the main treaty instrument in the Dominican citizenship cases, it is party to other applicable human rights instruments. Moreover, as will be discussed below, the main legal norm at issue in these cases—the right to freedom from discrimination—is such a fundamental right that it applies even in countries that have not acceded to treaties spelling out the relevant international legal rules and obligations.²⁵ This Article will also illustrate that fundamental human rights law includes heightened obligations to protect children due to their vulnerable age, such that retracting the basic rights that come with nationality from millions of future children of immigrants would have serious consequences under international human rights law.

Discriminatory impact is also at issue in both countries. The Dominican Republic has no significant immigrant population other than persons arriving from Haiti.²⁶ In the United States, currently, three out of four unauthorized immigrants are Hispanic, and retraction of birthright citizenship for their children would disproportionately affect the nation's Latino community.²⁷ Evidence of discriminatory intent in violation of fundamental equality rights can also be found in the debates about retracting birthright citizenship for children of undocumented immigrants in both countries.²⁸ Therefore, a U.S. constitutional amendment limiting birthright citizenship for children of undocumented immigrants would not only be unwise for policy reasons, but it may also violate the fundamental human rights norms that apply in the United States.

Although the United States has recently retreated from the jurisdiction of international courts, it remains subject to the review of various human rights commissions.²⁹ For example, the Inter-American Commission on

23. *Id.*

24. See *infra* Part I.B.

25. See *infra* Part III.C.1.

26. SUMMARY OF EMILDO BUENO OGUIS PETITION, *supra* note 17, ¶ 9.

27. JENNIFER VAN HOOK & MICHAEL FIX, MIGRATION POLICY INSTITUTE, THE DEMOGRAPHIC IMPACTS OF REPEALING BIRTHRIGHT CITIZENSHIP 5 (2010), <http://www.migrationpolicy.org/pubs/BirthrightInsight-2010.pdf>.

28. See *infra* Part II.B.2.

29. After the decision of the International Court of Justice (“ICJ”) finding that the execution by the state of Texas of Mexican nationals who were not informed of their rights to consular assistance

Human Rights, the United Nations (“U.N.”) Human Rights Committee, and the U.N. Human Rights Council may find that U.S. policies are in violation of human rights law and issue corresponding recommendations.³⁰ U.S. courts may also take into account the fundamental human rights issues at stake.³¹ Perhaps most importantly, policy-makers should be aware of the incompleteness of the argument that international law gives governments *carte blanche* to make decisions about citizenship rules. Although other countries do not provide birthright citizenship to children of undocumented immigrants, if the United States were to retract such citizenship from children of the current generation of immigrants and retrogress from the standard set by the Fourteenth Amendment, that move would be in violation of the most fundamental of all human rights: that each person should be treated equally and judged on their own merits.

Part I of this Article will assess the factual basis of the argument that the United States would only be following the customs of the majority of the

violated the Vienna Convention on Consular Relations, in 2005, the United States withdrew from the Optional Protocol to the Vienna Convention, which had provided consent to the specific jurisdiction of the ICJ regarding claims arising from the Vienna Convention. *See* *Medellín v. Texas*, 552 U.S. 491, 499-500 (2008). The United States conceded to the general jurisdiction of the ICJ in 1946, but it withdrew its consent to general ICJ jurisdiction in 1985. *Id.* at 500. Despite this, and despite reservations made by the United States regarding individual complaints in the United Nations system, the U.N. Human Rights Committee still has jurisdiction to issue comments about the U.S. regarding compliance with the International Covenant on Civil and Political Rights (ICCPR). International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the U.S. Sept. 8, 1992); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. b, § 703 cmt. g (1987).

30. The Inter-American Commission on Human Rights has jurisdiction to review complaints about the United States regarding the American Declaration on Human Rights, and to issue recommended remedies. *See, e.g.*, *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, ¶ 199 (2011) (reviewing U.S. actions in light of the American Declaration and concluding that the United States “failed to act with due diligence to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from domestic violence, which violated the State’s obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration. The State also failed to undertake reasonable measures to prevent the death of Leslie, Katheryn and Rebecca Gonzales in violation of their right to life under Article I of the American Declaration, in conjunction with their right to special protection as girl-children under Article VII of the American Declaration. Finally, the Commission concludes that the State violated the right to judicial protection of Jessica Lenahan and her next-of-kin, under Article XVIII of the American Declaration.”) Various United Nations bodies may also provide relevant determinations. In addition to the Human Rights Committee, which monitors the implementation of the ICCPR, the United Nations Human Rights Council was established in 2006 and empowered with a new Universal Periodic Review mechanism requiring regular review of “the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States” for all U.N. Member States, including the United States. G.A. Res. 60/251, ¶ 5(e), U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/251 (Apr. 3, 2006); *see also* Rep. of the United States of America, Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review 27 (2009), available at <http://www.state.gov/documents/organization/146379.pdf> (“The United States regularly submits lengthy and detailed reports on its implementation of several of the human rights treaties listed above, specifically the International Covenant on Civil and Political Rights, the Convention against Torture, the Convention on the Elimination of All Forms of Racial Discrimination, and the two Optional Protocols to the Convention on the Rights of the Child.”).

31. *See infra* Part III.C.1.

countries in the world if it were to retract birthright citizenship. A survey of citizenship laws in the Americas will demonstrate that the great majority of nations in the Western Hemisphere provide birthright citizenship, or *jus soli*, to children of undocumented immigrants. This may be because the Americas are all “nations of immigrants,” or it may be because the nations were founded on broader principles of democracy than in other parts of the world. In any case, the finding shows that by providing *jus soli*, the United States is not practicing “American exceptionalism” by providing something more generous than other nations, at least in this hemisphere.

Part II will continue that factual analysis by discussing how birthright citizenship was established in the United States to end inequality. This section will summarize the work of numerous legal experts and scholars who have established that retraction of birthright citizenship would be unconstitutional, precisely because the Fourteenth Amendment was enacted to remedy discrimination in access to citizenship for former slaves, as well as for children of immigrants. Part II will also examine the potentially widespread, negative, and disparate impact of the proposals for retraction of birthright citizenship from children of the current generation of immigrants.

Part III will analyze this factual context in light of the fundamental human rights norms that apply to the United States, and particularly in light of the Dominican citizenship cases and the rules of the Inter-American system for the protection of human rights. The section will thereby test the legal argument that international law permits each country to make its own rules regarding citizenship and nationality, and demonstrate that such a proposition is incomplete. Part IV will then discuss the implications of the finding that in the Americas, retraction of birthright citizenship for children of undocumented immigrants is likely to be in violation of fundamental human rights law, and make corresponding recommendations for law- and policy-makers.

I. AMERICAN “EXCEPTIONALISM”

In *Birthright Citizenship in the United States: A Global Comparison*, a policy report issued by the Center for Immigration Studies (CIS), Jon Feere asserts:

The overwhelming majority of the world’s countries do not offer automatic citizenship to everyone born within their borders. Over the past few decades, many countries that once did so—including Australia, Ireland, India, New Zealand, the United Kingdom, Malta, and the Dominican Republic—have repealed those policies. Other countries are considering changes.³²

32. FEERE, *supra* note 3, at 1.

The policy report includes a study of citizenship laws from around the world, and a map indicating that most countries do not provide it.³³ On this map, the countries that CIS identifies as providing automatic birthright citizenship to children of undocumented immigrants are all in the Western Hemisphere.³⁴

The CIS report generally argues that the United States can and should retract birthright citizenship.³⁵ It begins by stating that some 300,000 to 400,000 children are born to illegal immigrants in the United States each year, yet the government provides them with automatic birthright citizenship.³⁶ The report “explains some policy concerns that result from an expansive application of the Citizenship Clause, highlights recent legislative efforts to change the policy, provides a historical overview of the development of the 14th Amendment’s Citizenship Clause, and includes a discussion of how other countries approach birthright citizenship.”³⁷ The report includes the map of the world’s birthright citizenship laws described above, and ends with a section titled “An International Comparison.”³⁸ Based on this analysis, it concludes that “[s]hould the United States end the practice of granting automatic and universal citizenship to anyone born on U.S. soil, the nation would be following a global trend already embraced by most of the world’s democracies.”³⁹ Among the CIS report’s main findings is the conclusion that “[o]nly 30 of the world’s 194 countries grant automatic citizenship to children born to illegal aliens.”⁴⁰

Similarly, Numbers USA, a group advocating restrictive immigration policies, asserts that “[t]he U.S. is one of only two industrialized nations (Canada) to still grant automatic citizenship to newborns.”⁴¹ Their webpage includes a campaign to end birthright citizenship.⁴² This is linked to another page with various studies and policy arguments, and then to a study titled “Nations Granting Birthright Citizenship.”⁴³ Numbers USA also uses the argument that few “developed” countries offer birthright citizen-

33. *Id.* at 12-13.

34. *Id.* at 12 (map of the American hemisphere showing only the Dominican Republic, Haiti, Cuba, Costa Rica, Suriname and French Guiana and French territories as not providing “automatic birthright citizenship”).

35. *Id.* at 17.

36. *Id.* at 1.

37. *Id.*

38. *Id.* at 14-17.

39. *Id.* at 17.

40. *Id.* at 2.

41. *End Birthright Citizenship*, NUMBERS USA (Jan. 25, 2011), <http://www.numbersusa.com/content/news/january-5-2011/end-birthright-citizenship.html>.

42. *See, e.g., Nations Granting Birthright Citizenship*, NUMBERS USA (Oct. 10, 2011), <http://www.numbersusa.com/content/learn/issues/birthright-citizenship/nations-granting-birthright-citizenship.html>.

43. *Id.*

ship to support their federal legislative campaign to repeal it.⁴⁴ Numbers USA supported a bill that was introduced in the 112th U.S. Congress (2011-2012) by Representative Steven King,⁴⁵ which had 83 co-sponsors,⁴⁶ while the companion Senate bill had four.⁴⁷ The Numbers USA study backing this legislative campaign found that only 33 countries in the world grant birthright citizenship, although they do not mention that 28 are in the Americas.⁴⁸ The countries in the Western Hemisphere that are not on the Numbers USA list of *jus soli* countries are Chile, Cuba, and the United States; however, the omission of all three is inaccurate.⁴⁹

A. *Birtright Citizenship in the Americas*

Review of the constitutions and nationality laws of the 35 nations in the Western Hemisphere demonstrates that 30 of these countries provide birthright citizenship automatically to children of any immigrants. These are: (1) Antigua and Barbuda;⁵⁰ (2) Argentina;⁵¹ (3) Barbados;⁵² (4) Belize;⁵³ (5) Bolivia;⁵⁴ (6) Brazil;⁵⁵ (7) Canada;⁵⁶ (8) Chile;⁵⁷ (9) Colombia;⁵⁸ (10) Cuba;⁵⁹ (11) Dominica;⁶⁰ (12) Ecuador;⁶¹ (13) El Salvador;⁶² (14) Grenada;⁶³ (15) Guatemala;⁶⁴ (16) Guyana;⁶⁵ (17) Honduras;⁶⁶ (18) Jamaica;⁶⁷ (19) Mex-

44. See, e.g., *End Birthright Citizenship: Four More Bill Co-Sponsors*, Numbers USA (June 7, 2011), <http://www.numbersusa.com/content/news/june-7-2011/end-birtright-citizenship-4-more-bill-co-sponsors-aderholt-hensarling-herger-mckee>.

45. *Id.*

46. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011).

47. Birthright Citizenship Act of 2011, S. 723, 112th Cong. (2011).

48. See *Nations Granting Birthright Citizenship*, *supra* note 42.

49. See *Notes and Citations Regarding Birthright Citizenship Laws*, *supra* note 6. Cuba is not included as a country in the Numbers USA study, *id.*, but the Cuban constitution does provide birthright citizenship for children of immigrants. See CONSTITUCIÓN DE LA REPÚBLICA DE CUBA 1992, arts. 28-33. Chile is listed as not providing for birthright citizenship, which is incorrect. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 10(1) (“Chileans are: Those born in the Chilean territory, with the exception of children of foreigners who are in Chile in service of their Government, and the children of foreigners in transit, all of whom may, however, opt for Chilean nationality.”).

50. CONSTITUTION OF THE REPUBLIC OF ANTIGUA AND BARBUDA § 113(a).

51. Law No. 346 art. 1, Oct. 8, 1869, A.D.L.A. 1852-1880.

52. CONSTITUTION OF BARBADOS 1966, § 4.

53. Belize Nationality Act (1981), ch. 127A of the Laws of Belize, R.E. 1980-1990, as amended, Belizean Nationality Act, ch. 161, R.E. 2000 (2000). Belizean Nationality Act, ch. 161 R.E., part 3, section 5-(1) (2000).

54. CONSTITUCIÓN DE LA REPÚBLICA DEL BOLIVIA 2009, art. 141.

55. CONSTITUIÇÃO FEDERAL art. 12.

56. Canadian Citizenship Act, R.S.C. 1985, c. C-29, § 3.

57. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 10.

58. CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 100; L. 43/93, febrero 1, 1993, [DIARIO OFICIAL] D.O. 40.735.

59. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA 1992, arts. 28-33.

60. CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978, art. 98.

61. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR 1998, art. 7.

62. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR 1983, art. 90.

63. GRENADA CONSTITUTION 1973, § 96.

64. CONSTITUCIÓN DE LA REPÚBLICA DE GUATEMALA 1985, art. 144.

65. CONSTITUTION OF THE COOPERATIVE REPUBLIC OF GUYANA 1980, § 43.

ico;⁶⁸ (20) Nicaragua;⁶⁹ (21) Panama;⁷⁰ (22) Paraguay;⁷¹ (23) Peru⁷² (although registration is required at age 18);⁷³ (24) Saint Kitts and Nevis;⁷⁴ (25) Santa Lucia;⁷⁵ (26) Saint Vincent and the Grenadines;⁷⁶ (27) Trinidad and Tobago;⁷⁷ (28) United States;⁷⁸ (29) Uruguay;⁷⁹ and (30) Venezuela.⁸⁰ This is the same total of 30 countries that CIS reports worldwide.

Only five of the 35 countries in the Americas do not provide automatic birthright citizenship to children of undocumented immigrants. First, the Bahamas only provides automatic birthright citizenship if one parent is a citizen, although anyone born in the Bahamas can apply for citizenship at age 18.⁸¹ Secondly, Colombia is more restrictive and only provides *jus soli* if one of the parents is a citizen.⁸² Third, Haiti does not provide *jus soli*. Haiti has few immigrants, and only confers citizenship through *jus sanguinas*, to any person born of a native-born Haitian mother, or through a fairly accessible naturalization application process.⁸³ Fourth, citizenship in Suriname is not embodied in its constitution, which refers jurisdiction over the issue to immigration legislation, which is subject to various interpretations and may be in violation of Inter-American human rights law.⁸⁴ Finally, as CIS

66. CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS 1982, art. 23.

67. Jamaican Nationality Act of 1962, amended Mar. 2, 1993.

68. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, *as amended*, art. 30, DIARIO OFICIAL DE LA FEDERACIÓN, 20 de marzo de 1998.

69. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA art. 16, LA GACETA, DIARIO OFICIAL [L.G.], 2 Jan. 1989, *as amended* by Ley No. 330, Reforma Parcial a la Constitución Política de la República de Nicaragua, Jan. 18. 2000, L.G. Jan. 19, 2000.

70. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA 1972, art. 9.

71. CONSTITUCIÓN DE LA REPÚBLICA DE PARAGUAY 1992, art. 146.

72. CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, art. 52; Peru Nationality Law No. 26574, 11 January 1996. Perhaps misinterpreting criticisms of discrimination against indigenous peoples as denial of birthright citizenship—rather than the full spectrum of rights accorded to each citizen—with no citation, the CIS report alleges that “Peru has an indigenous population that makes up approximately 45 percent of the nation’s total population, but the indigenous do not have access to Peruvian citizenship.” FEERE, *supra* note 3, at 17.

73. CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, art. 30 (providing for registration at age 18).

74. CONSTITUTION OF ST. KITTS AND NEVIS 1983, § 91.

75. CONSTITUTION OF SAINT LUCIA 1978, § 100.

76. CONSTITUTION OF SAINT VINCENT AND THE GRENADINES 1979, § 91; Saint Vincent and the Grenadines Citizenship Act, 4 July 1984.

77. CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO 1976, § 17; Trinidad and Tobago Citizenship Act, 31 July 1976.

78. Immigration and Nationality Act [INA], 8 U.S.C. §§ 1101-1524 (1952); *see also* discussion of the Fourteenth Amendment *infra* Part II.A; 8 U.S.C. §§ 1401-1409 (1986).

79. CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL DEL URUGUAY 1967, *as amended*, art. 74.

80. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA 1999, art. 32.

81. CONSTITUTION OF THE COMMONWEALTH OF THE BAHAMAS 1973, arts. 6-7.

82. CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 96.

83. CONSTITUTION DE LA RÉPUBLIQUE D’HAÏTI 1987, arts. 10-12.

84. GRONDWET VAN DE REPUBLIEK SURINAME [CONSTITUTION] 1987, art. 3. Numbers USA also lists Suriname as not providing *jus soli*. *Notes and Citations Regarding Birthright Citizenship*, *supra* note 6. The birthright citizenship provisions of Suriname’s naturalization law are complex, subject to various interpretations, and limit birthright citizenship according to the nationality of the father. *See* Law on Nationality and Residence, State Ordinance of 24 November 1975 for the Regulation of the Surinamese Nationality and Residence in Suriname (last amended 1983), 25 November 1975, *available at* <http://>

notes, the Dominican Republic retracted birthright citizenship from children of undocumented immigrants through a 2010 constitutional amendment.⁸⁵ This policy was criticized in the most recent report of the U.S. State Department on the human rights practices of the Dominican Republic.⁸⁶ The 2010 report documented “a large number of functionally stateless persons” and “severe discrimination against Haitian migrants and their descendants,” and criticized these practices as “serious human rights violations.”⁸⁷ Moreover, a June 2010 petition before the Inter-American Commission on Human Rights alleges that the Dominican Republic’s retraction of birthright citizenship from children of undocumented immigrants violates human rights law.⁸⁸ As will be discussed below, the Dominican Republic was previously held in violation of human rights law for failure to provide birth certificates to children of undocumented Haitian immigrants, and it is likely that the Inter-American Human Rights Commission will also find the country in violation of human rights law due to the discriminatory impact of its 2010 constitutional amendment.

www.unhcr.org/refworld/docid/3ae6b50714.html. Article 3 of the Nationality and Residence Law provides that “[a] Surinamese national by birth shall be: a. the legitimate or legitimized child or natural child acknowledged by the father, if at the birth of said child, the father has the Surinamese nationality; b. the legitimate child of a Surinamese national who died before the birth of the child; c. the natural, non-acknowledged child whose mother, at the time of birth of this child, had the Surinamese nationality; d. the natural, non-acknowledged child born in Suriname, unless it appears that this child has the nationality of another State.” *Id.* at art. 3. However, Article 4 provides that a father’s differing nationality can cancel birthright citizenship for the child born of a Surinamese mother. *Id.* at art. 4 (“A Surinamese national shall also be: a. the child who is found (a foundling) or abandoned within the territory of Suriname, if both parents are unknown; b. the child born in Suriname, at the time of whose birth the mother has the Surinamese nationality, unless it appears that the child derives a different nationality from his non-Surinamese father. In that case the child will be deemed never to have possessed the Surinamese nationality.”) (emphasis added). These provisions may violate customary Inter-American human rights law, by discriminating between men and women in their ability to provide nationality and citizenship for their family members. See Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter. Am. Ct. H.R., Adv. Op. OC-4/84. (ser. A), No. 4, ¶ 67 (Jan. 19, 1984) (proposed naturalization law permitting husbands to sponsor their wives for citizenship, but prohibiting wives from sponsoring their husbands, would violate customary Inter-American human rights norms prohibiting gender discrimination).

85. A 2010 amendment to the Dominican Constitution denied *jus soli* to children of undocumented immigrants. See CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA 2010, art. 18.

86. U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: DOMINICAN REPUBLIC (April 8, 2011) at 1, available at <http://www.state.gov/documents/organization/160162.pdf>.

87. *Id.* The State Department criticizes mass deportations of Haitian migrants and persons of Haitian descent in “roundups” without following due process or basic human rights guidelines. *Id.* at 16. Of a total population of 9.6 million, there were 900,000 to 1.2 million undocumented immigrants, mostly of Haitian descent, including a large influx since the January 2010 earthquake, and also including many children. *Id.* at 18. The report also documented that “[g]overnment officials continued to take strong measures against citizenship for persons of Haitian descent, including retroactive cancellation of birth and identity documents, many pertaining to persons of Haitian descent[.]” *Id.* at 19, and that the repercussions of such measures meant lack of documentation, leading to lack of access to voting, courts and judicial proceedings, freedom of movement, jobs, public education, banking, and property rights. *Id.* at 18-19; see also David M. Robinson, *Statelessness and the Dominican Republic*, U.S. DEP’T OF STATE (Oct. 26, 2011), <http://www.state.gov/g/prm/rls/rmks/2011/176201.htm> (reiterating the U.S. State Department’s position).

88. SUMMARY OF EMILDO BUENO OGUIS PETITION, *supra* note 17, ¶¶ 14–28.

Despite this context in the Americas, proponents of retracting birthright citizenship from children of undocumented immigrants in the United States continue to argue that international law and practice would permit it.⁸⁹ This is the argument of a coalition of state legislators who are trying to enact state-level citizenship laws retracting birthright citizenship, which would force a challenge at the Supreme Court level.⁹⁰ For example, Representative John Kavanagh, sponsor of an Arizona bill that would retract birthright citizenship, told the *New York Times* that “[t]his is not a far-out, extremist position. . . . Only a handful of countries in the world grant citizenship based on the GPS location of the birth.”⁹¹

Although the majority of the world’s sovereign nations may not provide birthright citizenship to children of undocumented immigrants, the Western Hemisphere is home to thirty that do.⁹² This is not a trivial number. The great majority, or over 85 percent, of sovereign nations in the Americas provide birthright citizenship. Why are the Americas so different from the rest of the world? It may be that the granting of fundamental citizenship rights by virtue of being born in the territory of a sovereign nation developed precisely *because* the history of modern nation-building and independence in the Americas is a history of immigration.⁹³ But birthright citizenship also developed because American principles of democracy and individual rights were purposefully tied to independence from Europe.⁹⁴ In

89. See, e.g., FEERE, *supra* note 3.

90. Ashby Jones, *Is Birthright Citizenship the Next Immigration Battlefield?*, WALL ST. J. LAW BLOG (Jan. 5, 2011), <http://blogs.wsj.com/law/2011/01/05/is-birthright-citizenship-the-next-immigration-battlefield/>; Nathan Koppel, *Arizona Legislation Targets Birthright Citizenship*, WALL ST. J. LAW BLOG (Jan. 28, 2011), <http://blogs.wsj.com/law/2011/01/28/arizona-legislation-targets-birthright-citizenship/>.

91. Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, Jan. 4, 2011, at A1.

92. See *supra* notes 49-84 and accompanying text.

93. Carl Shurz, the “German-American soldier, diplomat, and politician” who influenced debates on the 14th Amendment, “insisted that the new American republic must include immigrants and their children on equal terms with other Americans.” GARRETT EPPS, *DEMOCRACY REBORN, THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 12 (2006). During the 1859 Congressional debates of the 14th Amendment, Shurz commented as follows:

The youthful elements which constitute the people of the new world cannot submit to the rules which are not of their own making; they must throw off the fetters which bind them to an old decrepit order of things. They resolve to enter the great family of nations as an independent member. And in the colony of free humanity, whose mother-country is the world, they establish *the Republic of equal rights, where the title of manhood is the title to citizenship.*

Id. (quoted in introductory page [emphasis in original]).

94. *Id.* Note that the laws of newly-independent countries in Latin America encouraged immigration. See, e.g., FERNANDO BASTOS DE ÁVILA, *LA INMIGRACIÓN EN AMÉRICA LATINA* 9-22 (1964) (history of *laissez faire* Latin American immigration policies from 1870-1945, encouraging European immigration). Prior to independence, Latin American immigration was characterized by Spanish and Portuguese invasion, conquest and colonization, followed by free immigration as well as the “imposed immigration” of slaves. *Id.* at 10. After independence, free immigration and generous naturalization rules were adapted as part of the constitutions of the new Latin American republics. *Id.*; see also MAIA JACHIMOWICZ, *MIGRATION POLICY INSTITUTE, ARGENTINA: A NEW ERA OF MIGRATION AND MIGRATION POLICY* (2006), <http://www.migrationinformation.org/Profiles/display.cfm?ID=374> (“After gaining its independence from Spain in the early 19th century, Argentina adopted an open immigration

this regard, the Latin American struggle for independence from the Spanish monarchy and colonialism was in some ways more revolutionary than that of the United States.⁹⁵

Unlike the United States, after the Haitian revolution of 1791, early Latin American independence movements rejected slavery and thus included more people in their conceptualization of citizenship.⁹⁶ Regarding the rights to equality of the new Latin American citizenship, Simón Bolívar, “Liberator” of six nations and founder of Latin American unity, famously declared in 1819:

[O]ur people are not European, nor North American, but are closer to a blend of Africa and America than an emanation from Europe, for even Spain herself lacks European identity, because of her African blood, her institutions, and her character. It is impos-

policy and encouraged immigrants to embrace the country as their own. For a short period at the end of the 1880s, the government went so far as to subsidize immigrant boat passages. It is estimated that the country received over seven million immigrants, predominantly from Spain and Italy, between 1870 and 1930.”); Susana Novick, *Evolución Reciente de la Política Migratoria Argentina*, Paper presented at the XXV International Population Conference, Tours, France (July 18–23, 2005), available at <http://iussp2005.princeton.edu/abstractViewer.aspx?submissionId=50348> (citing historical Argentine immigration laws and census data). The Argentine Constitution still encourages European immigration, although today’s immigrants are more likely to be from poorer, neighboring South American countries. *Argentina: An Open Door*, THE ECONOMIST, Mar. 7, 2007. The laws of the new Republic of Gran Colombia (including Venezuela and New Granada), of which Simón Bolívar was President from 1819 to 1828, similarly encouraged European and North American immigration, while incorporating Latin Americans of mixed Spanish, indigenous, and African heritages. EL LIBERTADOR: WRITINGS OF SIMÓN BOLÍVAR 38–39 (David Bushnell ed., Frederick Fornoff trans., 2003); see also ÁVILA, *supra* at 14–16. Bolívar founded Bolivia in 1824 and was its first president, and also won the independence of Colombia, Ecuador, Peru and Panama, and held various congresses seeking Latin American unity. EL LIBERTADOR, *supra* at xiii–xvi.

95. The U.S. rejection of monarchy was the basis of, but did not immediately lead to equality and the guarantee of birthright citizenship. As Walter Dellinger summarized:

Since the Civil War, America has thrived as a republic of free and equal citizens. This would no longer be true if we were to amend our Constitution in a way that would create a permanent caste of aliens, generation after generation after generation born in America but never to be among its citizens. To have citizenship in one’s own right, by birth upon this soil, is fundamental to our liberty as we understand it. In America, a country that rejected monarchy, each person is born equal, with no curse of infirmity, and with no exalted status, arising from the circumstance of his or her parentage. All who have the fortune to be born in this land inherit the right, save by their own renunciation of it, to its freedoms and protections. Congress has the power to propose an amendment changing these basic principles. But it should hesitate long before so fundamentally altering our republic.

Dellinger Testimony, *supra* note 7.

96. After being defeated by Royalist forces in Caracas in 1814, Latin American “Liberator” Simón Bolívar was exiled and in 1815, he was welcomed as a hero in Haiti, which had won independence from France through a 1791 slave rebellion. The Haitians donated weapons and freedom fighters who also wanted to set free all colonial territories. When Bolívar was welcomed in to Haiti in 1815, Haitian president Pétion requested the freedom of all slaves in the countries that Bolívar was going to set free. EL LIBERTADOR, *supra* note 94, at xxxii (regarding Haiti), 51 (from the speech entitled *Draft of a Constitution for Bolivia*: “Those who were slaves are now free. Those who were previous enemies of a stepmother [the Spanish queen] are now defenders of their country. . . . I leave to your supreme judgment the amendment of all my statutes and decrees, but I beg the confirmation of absolute freedom for the slaves, just as I would beg for my life and the life of the republic.”), 172 (*Decree for the Emancipation of the Slaves*), 187 (*Proclamation for the Civil Rights of Indians*).

sible to say with certainty to which human family we belong . . . The European has mixed with the American and the African, and the African has mixed with the Indian and with the European. All born in the womb of our common mother [the new country], our fathers, different in origin and blood, are foreigners, and all differ visibly in the color of their skin.⁹⁷

Bolívar, apparently a proponent of birthright citizenship, went on to conclude that:

The citizens of Venezuela, governed by a constitution that serves to interpret Nature, all enjoy a perfect equality. While such equality may not have been a feature of Athens, France, or North America [in 1819], it is important for us to consecrate it . . . [as] the fundamental principle of our system demands that equality be immediately and exclusively established and put into practice in Venezuela.⁹⁸

Similarly, other early Latin American constitutions included rights to equality, based upon birthright citizenship, for anyone born within the territory.⁹⁹

More recently, Argentina's retraction and subsequent restitution of birthright citizenship shows the relevance of human rights law to the birthright citizenship debate. Argentine migration policy became restrictive during the era of military dictatorships (1976-1983).¹⁰⁰ Provisions for equality and human rights for immigrants are found as far back as the statements of Juan Bautista Alberdi, whose political writings were the basis for the 1853 Constitution.¹⁰¹ Argentine constitutional expert Erica Gorbak has found that birthright citizenship was first established in 1869, through Law No. 346; that law was then modified to retract birthright citizenship when the country entered a period of dictatorship in 1978.¹⁰² When democracy was re-established in 1983, Argentine birthright citizenship was re-established, and became part of the constitution in 1994.¹⁰³ Currently in Argentina, one of the reasons for providing equal rights for all immigrants, including from neighboring Latin American nations, was Argentina's original founding philosophy, "Gobernar es poblar" ("To govern is to populate").¹⁰⁴ Al-

97. *Id.* at 38-39.

98. *Id.* at 39.

99. See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DEL BOLIVIA (Bol. 1826) art 10; see also EL LIBERTADOR, *supra* note 94, at 65 (quoting art. 10 of Bolívar's 1826 Draft of a Constitution of Bolivia, which also provided naturalization procedures for foreigners and citizenship to all former slaves, who were liberated by the publication of the Constitution).

100. Novick, *supra* note 94, at 31-33.

101. *Id.*

102. Erica E. Gorbak, Nacionalidad y Ciudadanía en El Sistema Jurídico Argentino (Oct. 11, 2011) (unpublished comment) (on file with author).

103. *Id.*

104. *Argentina: An Open Door*, *supra* note 94.

though the original philosophy served to successfully encourage European migration, today, based upon human rights principles, it applies to all immigrants to Argentina.¹⁰⁵

Caribbean history also demonstrates the connection between birthright citizenship, independence from European colonial practices, and equality rights. In the Caribbean, aside from the 1791 Haitian revolution, it generally took nearly a century for independence, and several generations after independence to make the indigenous peoples and former slaves full citizens in their own land.¹⁰⁶ Since then, with the exception of Haiti and the Dominican Republic, all of the post-independence Caribbean constitutions have provided birthright citizenship to anyone born within the territory.¹⁰⁷ In Haiti, which has very few immigrants, children of undocumented immigrants can become full citizens at the age of 18.¹⁰⁸ As will be discussed below, in the Dominican Republic, children of undocumented immigrants are effectively stateless for life and subjected to discriminatory treatment due to lack of birthright citizenship.¹⁰⁹ This practice has been challenged before the Inter-American Human Rights Commission, indicating that retraction of birthright citizenship could violate the fundamental human rights that apply in every country in the Americas.¹¹⁰

B. *Exceptional Inter-American Customary Law*

The fact that the majority of nations in the Americas provide birthright citizenship may also define rights under the customary international law of the region, which may be exceptional and different from the rest of the world.¹¹¹ In the United States, liberals and conservatives alike argue that birthright citizenship is just another example of American exceptionalism.¹¹² James Ho argues that retraction of birthright citizenship would fundamentally violate the conservative value of “American exceptionalism, that there are just some things about America and in particular American law that [are] different than from [sic] other countries, and proudly so.”¹¹³ A representative of the Cato Institute contrasted U.S. laws with those of Europe: “The birthright immigration doctrine has served our nation well.

105. *Id.*

106. *See supra* notes 50, 59–60, 67, 74–77 (citing the constitutions or domestic legislation of Antigua and Barbados, Cuba, Dominica, Jamaica, Saint Kitts and Nevis, Santa Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago, incorporating birthright citizenship).

107. *Id.*

108. CONSTITUTION DE LA RÉPUBLIQUE D’HAÏTI, *supra* note 83.

109. *See infra* Part III.

110. *Id.*

111. *See infra* notes 129–130 and accompanying text.

112. *See, e.g.,* Fulwood & Fitz, LESS THAN CITIZENS, *supra* note 11, at 3; Tyler Lewis, *Americans for Constitutional Citizenship Coalition Now More than 80 Groups and Individuals*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS LCCR (Mar. 28, 2011) (describing diverse coalition), available at <http://www.civilrights.org/archives/2011/03/1178-acc.html> (describing diverse coalition).

113. FULWOOD & FITZ, *supra* note 11, at 3.

We make sure that we don't have second and third generation, marginalized immigrants, as Germany does. . . . This is part of what makes the U.S. exceptional."¹¹⁴ In this context, the finding that birthright citizenship is customary in the Western Hemisphere suggests that this theory of exceptionalism should be applied to all of the Americas.

Whatever the theoretical underpinning, the fact that the countries providing birthright citizenship are mainly in the Americas also offers a pertinent legal context.¹¹⁵ A close look at the laws of the Americas illustrate that it is not customary for countries to withhold *jus soli* from children of undocumented immigrants, but rather that full *jus soli* is the custom of the Americas. Customary law in the Americas thus differs from the portrayal of Yale professors Peter Schuck and Rogers Smith, who began the academic and policy debate about birthright citizenship with the publication of *Citizenship Without Consent: Illegal Aliens in the American Polity*, in 1985.¹¹⁶ Among other arguments, they contend that prior to the Fourteenth Amendment to the U.S. Constitution, birthright citizenship was not customary among the nations of the world.¹¹⁷ Looking towards Europe, they argued that, "[e]ven the citizenship law of the United Kingdom, for whose antecedents our common-law citizenship was originally derived, and which continues to adhere to the birthright citizenship principle, does not extend it to the native-born children of either illegal aliens or temporary resident aliens. The same is true of other Western European countries."¹¹⁸

Rogers Smith has since reversed his overall conclusion on birthright citizenship, but he still holds the belief that the United States would be unique in providing it.¹¹⁹ Smith changed his position in July 2009, in an article

114. Jennifer Rubin, *Birthright Citizenship*, WASH. POST (Jan. 30, 2011), http://voices.washingtonpost.com/right-turn/2011/01/birthright_citizenship.html.

115. Under customary international law, human rights law, and U.S. law. See *infra* Parts I & III.

116. See, e.g., Cristina Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363, 1363 (2009) (the "extended debate in the late twentieth century among scholars and advocates" about whether children of undocumented immigrants fall under the Fourteenth Amendment's provisions for birthright citizenship was "largely due to the result of the publication by Peter Schuck and Rogers Smith of *Citizenship Without Consent* in 1985, in which they argue that the original understanding of the Citizenship Clause did not support extending the *jus soli* rule to the children of the unauthorized") (referencing Schuck & Smith, *supra* note 4).

117. SCHUCK & SMITH, *supra* note 4, at 42-54.

118. Peter Schuck & Rogers Smith, *Two Yale Professors Argue Against the Concept of Citizenship Without Consent*, THE SOCIAL CONTRACT 23 (Fall 1996). In their book, Schuck and Smith also argued that "at birth, the new American state inherited two legal traditions concerning public membership," that is, 17th century Anglo common law, which utilized *jus soli*, and European "continental public law," which did not). SCHUCK & SMITH, *supra* note 4, at 42-49. But they viewed the continental public law tradition as well as the Lockean emphasis on citizenship by consent as imperfect, because their major theorists failed to consider "the extent to which cultural homogeneity might be necessary in order for societies based on consensual membership to endure." *Id.* at 49 (discussing the political theories of John Locke as well as Swiss philosophers Emmerich de Vattel and Jean-Jacques Burlamaqui).

119. See Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329, 1329-30 (2009) ("More than two decades ago in *Citizenship Without Consent*, Peter Schuck and I argued that the best, if still imperfect, way, to bring logical coherence to the Citizenship Clause . . . was to draw on the international law writers invoked by American jurists and

noting that numerous proposals to retract birthright citizenship have been “political non-starters.”¹²⁰ Smith wrote that, in the wake of his and Schuck’s book, “a number of organizations favoring immigration restriction have repeatedly advocated either for congressional legislation denying birthright citizenship to children of undocumented aliens, or for a constitutional amendment to achieve that result, or for both.”¹²¹ For example, in 1993 and in every congressional session thereafter, “Representative Elton Gallegly of Simi Valley, California has been particularly energetic in introducing legislation to achieve denial of birthright citizenship to illegal alien children . . . sometimes citing our book.”¹²² In 2009, Smith observed that “since the 1990s, the nation’s legislators and one political party have regularly raised and debated the issue of birthright citizenship for undocumented aliens, with strong advocacy for exclusion. These efforts have all failed.”¹²³ Smith concluded that “[i]t therefore makes much more sense than it did in 1985 to say that Americans have, through their representatives and their votes for their representatives, consented to reading the Fourteenth Amendment to provide birthright citizenship to children of all aliens born on American soil, whether legally present or not.”¹²⁴ This rationale supports an idea of American exceptionalism, in the sense of U.S. exceptionalism. Under this theory, the fact that Americans have voted to consent to birthright citizenship for children of the undocumented means that they could always vote against it in the future.

On the other hand, as birthright citizenship is the customary law of the majority of the sovereign nations in the Americas, it may be legally questionable for the United States to retract it. Customary international law may develop from states’ practices. Arguably, customary Inter-American law regarding birthright citizenship may have developed through what the Restatement of the Foreign Relations Law of the United States defines as rules of law resulting “from a general and consistent practice of states followed by them from a sense of legal obligation.”¹²⁵ The Restatement suggests that in determining customary international law, the actual practice of states may be more important than the subjective belief that the behavior is obligatory. In fact, practice can demonstrate a belief that protecting

legislators when trying to define the status of native tribes, particularly Emmerich de Vattel and Jean-Jacques Burlamaqui.”); *see also* Dellinger Testimony, *supra* note 7.

120. Rodríguez, *supra* note 116, at 1364 (2009).

121. Smith, *supra* note 119, at 1332.

122. *Id.*

123. *Id.* at 1333. The reference to “one political party” is to the Republican Party. The 1996 Republican Party Platform read in part: “We support a constitutional amendment or constitutionally-valid legislation declaring that children born in the United States of parents who are not legally present in the United States *or who are not long-term residents* are not automatically citizens.” *Id.* at 1332–33 (citation omitted) (emphasis added).

124. *Id.* at 1333–1334.

125. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 (2) (1987).

human rights is obligatory.¹²⁶ The Restatement comments summarize the rules of customary international law as follows: “A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.”¹²⁷ According to these rules, it may not be critical that countries in other regions of the world do not provide birthright citizenship. The Restatement explains that “[f]ailure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become ‘particular customary law’ for the participating states.”¹²⁸ In this framework, “particular” customary law may be considered “special” or “regional” customary international law for the participating states.¹²⁹ This comprehensive view of international law would indicate that rules of customary international law regarding birthright citizenship may vary from region to region. Inter-American customary international law may be different than European customary international law.¹³⁰

Furthermore, here in the Americas, the general rule of granting of birthright citizenship rights to all, without discrimination, has been progressively developing, rather than retrogressing. Although the Dominican Republic recently retracted birthright citizenship, this practice has been challenged before the Inter-American Commission for Human Rights.¹³¹ Based on the Commission’s prior rulings, the challenge is likely to succeed.¹³² Moreover, since the abolition of slavery and colonialism, the practices of the great majority of the nations of this hemisphere demonstrate that birthright citizenship has become the particular regional customary law for the Americas. Under human rights law, such customary law carries the weight of an international legal rule. For example, customary international law has been taken into account in an Advisory Opinion of the Inter-American Court of Human Rights on the rights of undocumented migrant workers.¹³³ It could also be taken into account in U.S. courts.¹³⁴ Finally, the

126. *See id.* at cmt. c (“Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.”).

127. *Id.* at cmt. b.

128. *Id.*

129. *Id.* at cmt. e (“The practice of states in a regional or other special grouping may create ‘regional,’ ‘special,’ or ‘particular’ customary law for those states *inter se*. It must be shown that the state alleged to be bound has accepted or acquiesced in the custom as a matter of legal obligation, ‘not merely for reasons of political expediency.’ Such special customary law may be seen as essentially the result of tacit agreement among the parties.”) (internal citations omitted).

130. *Id.*; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 183 (June 27); Fisheries Jurisdiction (U.K. v. N. Ir.), 1974 I.C.J. 3, 79 and 94 (June 25); North Sea Continental Shelf (Ger. v. Den.) 1969 I.C.J. 2, 62-63 (Feb. 20).

131. *See* SUMMARY OF EMILDO BUENO OGUIS PETITION, *supra* note 17.

132. *See infra* Part III.

133. Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., (ser. A) No. 18, ¶ 77 (Sept. 17, 2003).

134. *Id.* ¶167.

argument that developed nations have different customs than developing nations cannot justify retrogression of human rights protections, because human rights law instead requires the progressive development of the law in order to expand human rights protections.¹³⁵ Therefore, the Numbers USA argument that ending birthright citizenship is justified because the United States is only one of two developed economies providing birthright citizenship would contravene the norm that international law should progressively develop to protect human rights.¹³⁶

For these reasons, a truly international view would take into account the distinct customary law of the majority of the nations of the Americas. Inter-American customary law is indeed exceptional, and argues against any retrogression of *jus soli* from children of undocumented immigrants. As will be discussed below, in addition to the weight of the customary law of the nations of the Americas, the main reason that retraction of birthright citizenship would contravene human rights law is that it would have a discriminatory impact.¹³⁷

II. CONTEXTUAL ANALYSIS OF BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES

An analysis of the retraction of birthright citizenship under human rights law would take into account the historical context and egalitarian principles for which the Fourteenth Amendment's provision of birthright citizenship was enacted. It would also include the current factual context, such as any discriminatory impact, in which retraction of birthright citizenship would be implemented. Each of these factors will be analyzed in turn below.

A. *Historical Context*

Numerous scholars and legal experts agree that retraction of *jus soli* from children of undocumented immigrants would violate the letter and purpose of the Fourteenth Amendment. As Fourteenth Amendment historian Garrett Epps puts it:

[T]here is an alarming irony in the proposition that the United States should alter its constitutional system to create a large internal population of native-born noncitizens, a hereditary subordinate caste of persons who are subjected to American law but do not belong to American society. To one with a historical memory, the new proposed status, supposedly implicit in the

135. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at Preamble and Article 30 (Dec. 10, 1948).

136. *Id.*

137. See *infra* Part III.C.3.

Fourteenth Amendment, looks very much like an old status that was supposedly cured by the Thirteenth Amendment [abolishing slavery]. There is a huge difference between a Republic in which all those born or naturalized are equal, and one in which all animals are equal but some are less equal than others. The idea of legalized inequality has a logic that history forbids us to deny; it leads toward forced labor, deportation, and concentration camps.¹³⁸

Professor Epps concludes that: “If the children of ‘illegal aliens’ are illegal themselves, then we have taken a giant step toward recreating slavery in all but name.”¹³⁹ Many other legal scholars and experts strongly concur that retraction of birthright citizenship from children of undocumented immigrants would be unconstitutional, because the Fourteenth Amendment was clearly enacted to provide equal access to citizenship.¹⁴⁰

Retraction of birthright citizenship would also violate the precedent set by the Supreme Court in 1898 in *United States v. Wong Kim Ark*, holding that children of Chinese immigrants who were then subject to the Chinese exclusion laws and unable to naturalize were entitled to birthright citizenship.¹⁴¹ The Court reasoned that before the Civil Rights Act and Fourteenth Amendment of the Constitution it was “beyond doubt that . . . all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.”¹⁴² This was the American legal rule of *jus soli*, but it was limited by racial discrimination. Slavery was abolished by the Thirteenth Amendment in 1865, but the 1857 Supreme Court decision in the *Dred Scott* case still held that former slaves and their descendants could not become citizens.¹⁴³ In *Wong Kim Ark*, the Supreme Court noted that the Civil Rights Act of April 9, 1866 corrected this inequity through the following specific language: “*all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed,*¹⁴⁴ are hereby

138. Garrett Epps, *Constitutional Citizenship: A Legislative History*, 60 AM. U. L. REV. 331, 389-90 (2010) (citations omitted).

139. *Id.* at 390.

140. See, e.g., *Children Born In The U.S. To Illegal Alien Parents: Hearing on H.R. before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution* 104th Cong. (1995) (testimony of Professor Gerald L. Neuman [hereinafter Neuman testimony] (testifying that the reading of the Fourteenth Amendment to include birthright citizenship for children of undocumented immigrants was “well-established for many years,” and that the Shuck and Smith revisionist book is “poorly reasoned and historically inaccurate”); see also Dellinger Testimony, *supra* note 7.

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

142. *Id.* at 674-75.

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

144. This exclusion was based on the fact that American Indians, like diplomats, had a unique status and were considered citizens of their own sovereign territories. Dellinger Testimony, *supra* note 7, at 13. Over time, the U.S. legal system’s view of the citizenship of Indians changed from “a geographical approach to one based primarily on membership.” T. ALEXANDER ALEINIKOFF, *SEMBLANCES*

declared to be citizens of the United States[.]”¹⁴⁵ The Civil Rights Act went on to guarantee that “such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens[.]”¹⁴⁶ Therefore, the Civil Rights Act of 1866 clearly intended to provide *jus soli* to every person born in the United States.

The Court also examined the adoption of the Fourteenth Amendment by the same Congress in June 1866, as well as its ratification by the requisite number of states in July of that year. The Court found that the constitutional amendment was intended to make certain that the American rule of birthright citizenship for all persons born in the United States, without discrimination, could not be changed by legislation.¹⁴⁷ The Court then analyzed the clear and unequivocal language of the Fourteenth Amendment: “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.”¹⁴⁸ After reviewing this language and the legislative history of the Fourteenth Amendment, the 1898 Supreme Court found that “[a]s appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States[.]”¹⁴⁹ Moreover, the Court found that although the Fourteenth Amendment was clearly adopted to remedy the infamous *Dred Scott* decision, its language and intent clearly “embrace equally all races, classes and conditions of men.”¹⁵⁰

OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 112 (2002). For example, the 1832 Supreme Court held that “[t]he Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force.” *Id.* at 97 (quoting *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)). That is why treaties were made with Indian nations, in the same way as they were made with other sovereign nations. *Id.* at 114. But this view changed as “by the late 1800s few tribes exercised anything approaching full sovereignty,” *id.* at 97, and over time, Indian citizenship became based on membership rather than geography. *Id.* at 112. Thus, at the time of the enactment of the Fourteenth Amendment in 1866, the U.S. legal view of American Indians as citizens of their own sovereign nation and territory was still intact. They could not be sued in U.S. courts, and their situation was not comparable to that of undocumented immigrants, who in contrast are subject to the jurisdiction of the United States. Moreover, the legislative history of the Fourteenth Amendment shows that American Indians were purposefully excluded from the guarantee of birthright citizenship for all born in the U.S. and subject to its jurisdiction, whereas children of immigrants were intended to be included. See, e.g., Garrett Epps, *How Da Vinci Code “Originalism” Misreads the Citizenship Clause*, THE ATLANTIC MAGAZINE (Apr. 25, 2011), <http://www.theatlantic.com/national/archive/2011/04/how-da-vinci-code-originalism-misreads-the-citizenship-clause/237828/>.

145. *Wong Kim Ark*, 169 U.S. at 675 (emphasis added).

146. *Id.* (emphasis added).

147. *Id.*

148. *Id.* at 676.

149. *Id.* (emphasis added).

150. *Id.* at 676–79 (citing the Slaughterhouse Cases). Also in the Slaughterhouse Cases, “after observing that the Thirteenth, Fourteenth and Fifteenth Articles of Amendment of the Constitution

Therefore, the Court ruled that Wong Kim Ark was a U.S. citizen from birth, and the restrictions of the Chinese Exclusion Act did not apply to him.¹⁵¹ As one scholar noted, “in one particularly interesting passage, the Court asked how citizenship could be denied to children of the Chinese when it extends to children of Scottish, German, and other immigrants.”¹⁵² The Court held that the Chinese Exclusion Act of Congress could not trump the Constitution and “cannot control [the Constitution’s] meaning, or impair its effect, but must be construed and executed in subordination to its provisions.”¹⁵³ Since then, no other Supreme Court has overturned the *Wong Kim Ark* decision, and later decisions have reaffirmed the concept of birthright citizenship.¹⁵⁴ Moreover, the legislative history of the Fourteenth Amendment includes specific discussions of the Citizenship Clause’s application to children of immigrants, demonstrating that it was intended to apply to all.¹⁵⁵ For these reasons, despite the persistence of some debate, most legal experts agree that retraction of birthright citizenship from the children of undocumented immigrants would be unconstitutional.¹⁵⁶

were all addressed to the grievances of the negro race, and were designed to remedy them,” the majority opinion continued as follows:

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. *And so if other rights are assailed by the states, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.*”

Id. at 677 (quoting *Slaughterhouse Cases*, 16 U.S. 36 (1873) (emphasis added)).

151. *Id.* at 680.

152. Rodríguez, *supra* note 116, at 1368 (citing *Wong Kim Ark*, 169 U.S. at 694).

153. *Wong Kim Ark*, 169 U.S. at 699.

154. See, e.g., *I.N.S. v. Rios-Pineda*, 471 U.S. 444, 446 (1985) (stating that deportable alien’s child “born in the United States, was a citizen of this country”); *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982) (citing *Wong Kim Ark*’s interpretation of the “jurisdiction” clause of the Fourteenth Amendment); *Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (finding that Congress has no power to take away citizenship attained by birth); *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (observing that the framers of the Fourteenth Amendment “wanted to put citizenship beyond the power of any governmental unit to destroy”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 114, 159 (1963); *Morrison v. California*, 291 U.S. 82, 85 (1934).

155. See, e.g., ELIZABETH WYDRA, AMERICAN CONSTITUTION SOCIETY, BORN UNDER THE CONSTITUTION: WHY RECENT ATTACKS ON BIRTHRIGHT CITIZENSHIP ARE UNFOUNDED (2011), http://www.acslaw.org/sites/default/files/Wydra_Born_Under_Constitution_0.pdf; EPPS, *supra* note 93, at 234-36 (discussing legislative debates regarding “Gypsies” and Chinese immigrants).

156. See, e.g., Daniel B. Wood, *Illegal immigration: Can states win fight against ‘birthright citizenship’?*, CHRISTIAN SCIENCE MONITOR (Jan. 7, 2011), <http://www.csmonitor.com/USA/Politics/2011/0107/Illegal-immigration-Can-states-win-fight-against-birthright-citizenship> (“Most legal experts agree that the 14th Amendment of the Constitution guarantees citizenship to any person born in the U.S., regardless of parentage.”); see also Dellinger Testimony, *supra* note 7, at 5 (“Both the courts and commentators have consistently cited and followed the principles of *Wong Kim Ark*. I am aware of only one statement of the contrary view that birthright citizenship may be modified by a simple act of legislation. In their 1985 book, Professors Peter Schuck and Rogers Smith argue for a novel ‘reinterpretation’ of the citizenship clause.” (citations omitted)).

B. *Current Challenges and Implications*

Advocates of retracting birthright citizenship from children of immigrants are pressing for a constitutional challenge. On January 5, 2011, the Birthright Citizenship Act of 2011 was introduced in the U.S. House of Representatives,¹⁵⁷ and on April 5, 2011, its companion bill was introduced in the Senate.¹⁵⁸ While “[a]cknowledging the right of birthright citizenship established by section 1 of the 14th amendment to the Constitution,” the act would amend the Immigration and Nationality Act (“INA”) to provide that a person born in the United States is only “subject to the jurisdiction thereof” language of the Fourteenth Amendment if one of his parents is a U.S. citizen, a permanent legal resident, or performing active service in the armed forces.¹⁵⁹ The bills do not mention any constitutional amendment, and the House version reportedly relies on the authority under Section 5 of the Fourteenth Amendment, which declares that “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”¹⁶⁰ Paradoxically, this is the provision of the amendment enabling the enforcement of its civil rights protections through subsequent legislation (such as the 1965 INA’s elimination of the formerly express provisions permitting national origin discrimination in the provision of visas).¹⁶¹

Also in 2011, State Legislators for Legal Immigration (“SLLI”), a coalition that strives to force a constitutional challenge, helped to introduce bills in Arizona and several other states that would retract birthright citizenship.¹⁶² Civil and immigrants’ rights groups have formed their own coalition, Americans for Constitutional Citizenship, to prepare to challenge any new laws that would retract *jus soli* from children of immigrants.¹⁶³

157. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011).

158. Birthright Citizenship Act of 2011, S. 723, 112th Cong. (2011).

159. H.R. 140, *supra* note 157; cf. U.S. v. Won Kim Ark, 169 U.S. 649 (1898) (discussing the clear and unequivocal language of the 14th Amendment).

160. U.S. CONST. amend. XIV, §5; H.R. 140, 157 CONG. REC. H45 (2011).

161. See, e.g., Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).

162. See, e.g., Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, N.Y. TIMES, Jan. 5, 2011, at A16 (reporting that a group of legislators from Arizona, Georgia, Oklahoma, Pennsylvania and South Carolina have presented a plan to introduce bills retracting birthright citizenship in at least fourteen states); Julianne Hing, *Lawmakers in 14 States Coordinate Birthright Citizenship Attack*, COLORLINES (Jan. 5, 2011), http://colorlines.com/archives/2011/01/state_legislators_announce_plans_to_attack_birthright_citizenship.html (“The coordinated state ambush is a joint effort between right-wing state legislators . . . and State Legislators for Legal Immigration, an anti-immigration group of lawmakers”); Catherine A. Traywick, *Weekly Diaspora: Why Arizona’s Birthright Bill is Bad for the Economy*, HUFFINGTON POST (Jan. 27, 2011), http://www.huffingtonpost.com/the-media-consortium/weekly-diaspora-why-arizo_b_814845.html (birthright citizenship bill in Arizona was “[m]odeled after birthright citizenship legislation unveiled by the nativist coalition State Legislators for Legal Immigration (SLLI) earlier this month”).

163. Tyler Lewis, *Americans for Constitutional Citizenship Coalition Now More than 80 Groups and Individuals*, THE LEADERSHIP CONFERENCE FOR CIVIL AND HUMAN RIGHTS (Mar. 28, 2011), <http://www.civilrights.org/archives/2011/03/1178-acc.html>.

There is also a chance that an amendment to the U.S. Constitution revoking birthright citizenship may be proposed. Press reports indicated that the Birthright Citizenship Act of 2011 would in fact amend the Constitution,¹⁶⁴ and some policy analysts agreed.¹⁶⁵ Some of the staunchest advocates for retracting birthright citizenship have repeatedly asserted that they would be prepared to seek an amendment.¹⁶⁶ As will be discussed, under human rights law, even a constitutional amendment retracting birthright citizenship would be illegal, due to its discriminatory impact.¹⁶⁷

1. *Disparate Impact*

Retraction of *jus soli* would have a profoundly negative, disparate impact on Latino immigrants. Of course, it would also discriminate based on the immigration status of one's parents, which is another form of national origin discrimination. Speaking for Americans for Constitutional Citizenship, Wade Henderson stated that "[t]hese legislators want to pass state laws that would create two tiers of citizens—with potentially millions of natural-born Americans being treated as somehow less than entitled to equal protection of the laws that our nation has struggled so hard to guarantee."¹⁶⁸ Even the conservative author Linda Chavez believes that retraction of birthright citizenship "would fundamentally change what it means to be an American."¹⁶⁹

But the most profound impact would fall upon children of immigrants who are people of color, as the current immigration system makes it harder for their parents to obtain legal status due to the country-specific backlogs in issuing visas. This is in sharp contrast to our country's past immigration policies, when the great majority of immigrants were European. Although access to citizenship was limited through policies such as the prohibition on naturalization for Asians, historically U.S. immigration was largely unregulated, and millions entered the United States with no need to even register until 1882.¹⁷⁰ During the 1920s, quotas adopted based on the 1890 "Anglo-Saxon Census" legally limited immigration from any place except

164. See, e.g., *Senate Proposal Would Amend Constitution to Restrict Birthright Citizenship*, FOXNEWS.COM (Jan. 28, 2011), <http://www.foxnews.com/politics/2011/01/28/senate-proposal-amend-constitution-restrict-birthright-citizenship/>.

165. FULWOOD & FITZ, *supra* note 11, at 1.

166. Peter Grier, *14th Amendment: Why Birthright Citizenship Change 'Can't be Done'*, CHRISTIAN SCIENCE MONITOR (Aug. 10, 2010), <http://www.csmonitor.com/USA/Politics/2010/0810/14th-Amendment-why-birthright-citizenship-change-can-t-be-done> (noting that Senator Lindsey Graham of South Carolina was considering proposing a constitutional amendment to retract birthright citizenship).

167. See *infra* Part III.C.3.

168. Julianne Hing, *Birthright Citizenship Fight—From Arizona to the Supreme Court?*, COLORLINES (Jan. 27, 2011), http://colorlines.com/archives/2011/01/arizonas_birthright_citizenship_bills_arrive.html.

169. FULWOOD & FITZ, *supra* note 11, at 2.

170. Roger Daniels, *The Immigration Act of 1965: Intended and Unintended Consequences of the 20th Century in* HISTORIANS ON AMERICA 78 (2008), <http://www.america.gov/media/pdf/books/historians-on-america.pdf#popup>.

Western Europe.¹⁷¹ At that time, Europeans constituted 90 percent of immigrants to the United States, whereas today only 10 percent of U.S. immigrants are European.¹⁷² The 1920s quotas favoring Europeans became part of the 1952 INA.¹⁷³ Passage of the 1965 Civil Rights Act led to the elimination of such express national origin discrimination in the INA,¹⁷⁴ and to the adoption of the INA's current provision against national origin discrimination.¹⁷⁵ The post-1965 rule is now that all countries are eligible for a maximum of seven percent of the world's U.S. visas.¹⁷⁶ Yet this more egalitarian rule does have a disparate impact, as applicants from more populous countries such as India, the Philippines, China, and Mexico must wait for up to twenty-three years to immigrate legally.¹⁷⁷

Recent immigration enforcement efforts have also had a disparate impact. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act restricted or canceled various types of humanitarian relief and pardons, and severely diluted due process rights for immigrants.¹⁷⁸ Concurrent aggressive immigration control measures such as "Operation Gatekeeper," a Clinton-era border control campaign, resulted in the deaths of thousands of immigrants in the treacherous desert crossing.¹⁷⁹ These and other expanded immigration enforcement measures introduced during the Clinton Administration have been strictly interpreted and even heightened since the terrorist attacks of September 11, 2001.¹⁸⁰ During the Bush Administration, post-9/11 federal policies loosened restrictions on racial profiling in immigration enforcement and expanded expedited removal

171. The 1920s quotas were set according to the 1890 Census, which was termed "the Anglo-Saxon Census," thus making legal immigration much faster and easier for persons from Western Europe, who were primarily white, than for persons from other regions of the world. *Id.* at 79.

172. Currently, immigrants from European Union Member States represent about 10% of all permanent immigrants in the country, down from 90% in the mid-19th century. Of those immigrants, the vast majority earn better wages, are more highly educated, are more strongly represented as scientists, professionals, businesspeople, and have greater English proficiency than other immigrant groups. They also tend to be older and are more likely to be naturalized citizens than others. Madeleine Sumption & Xiaochu Hu, Migration Policy Institute: Scientists, Managers, and Tourists: The Changing Shape of European Migration to the United States 1 (2011), available at <http://www.migrationpolicy.org/pubs/EuropeanMigration.pdf>.

173. Daniels, *supra* note 170, at 81.

174. See, e.g., Chin, *supra* note 161, at 275–276.

175. Immigration and Naturalization Act, 8 U.S.C. §1152(a)(1) (2000).

176. *Id.*

177. See, e.g., U.S. DEP'T OF STATE, 34(9) VISA BULLETIN: IMMIGRANT NUMBERS FOR JULY 2011 1–2, http://travel.state.gov/pdf/visabulletin/VisaBulletin_July2011.pdf (reporting that there are currently 25,620 family- and employment-based visas allocated to each country, and the backlogs for such visas range from 7–23 years for applicants from India, the Philippines, China and Mexico).

178. See, e.g., LAWYERS' COMM. FOR HUMAN RIGHTS, DUE PROCESS: IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN AMERICA (2000) (discussing expedited removal without due process); AM. BAR ASS'N, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 33 (2004) (discussing further dilution of due process and elimination of discretionary relief, among other issues).

179. Steven W. Bender, *Compassionate Immigration Reform*, 38 FORDHAM URB. L.J. 107, 112 (2010).

180. See, e.g., AM. BAR ASS'N, *supra* note 178, at 1–2.

proceedings.¹⁸¹ A plethora of state and local initiatives to enforce federal immigration laws, some of which are legally questionable, also developed during the past decade.¹⁸² Most recently, the Obama Administration increased deportations by the thousands, by nearly ten percent above the heightened levels that were reached during the Bush Administration.¹⁸³

Because the great majority of immigrants to the United States are from Latin America, restricted access to legal status post-1996 and the aggressive enforcement policies in the Bush and Obama Administrations have had a disparate impact on Latino immigrants.¹⁸⁴ The increasing concentration of immigration enforcement along the border with Mexico also disproportionately affects Latino immigrants. In 2010, 97% of deportees were Latino—and due to increasingly aggressive immigration enforcement policies, for the first time, Latinos became the majority of persons incarcerated in federal prisons.¹⁸⁵

The Pew Hispanic Center found that the 2009 American Community Survey (“ACS”) showed that almost 30% of all foreign-born persons living in the United States were Mexican; in all, over 40% were Latino and an additional 9% were from the Caribbean.¹⁸⁶ The second-largest group of immigrants, making up 24% of the foreign-born population, came from South

181. Katherine Culliton, *How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination against Latino Citizens and Immigrants*, 8 U. D.C. L. REV. 141, 142-47 (2004).

182. See generally Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579 (2009).

183. Peter Slevin, *Deportation of Illegal Immigrants Increases Under Obama Administration*, WASH. POST, (July 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072501790.html?hpid=topnews> (reporting that, although refocusing on criminal aliens, the Obama Administration expected to deport about 400,000 people in 2010, nearly 10% above the Bush Administration's 2008 total, and 25% more than were deported in 2007; workplace raids also quadrupled since Bush's final year in office); N.C. Aizenman, *Bush Moves to Step Up Immigration Enforcement*, APOSTILLE U.S. (Aug. 11, 2007), https://apostille.us/news/bush_moves_to_step_up_immigration_enforcement.shtml (describing 26 proposed measures to tighten border security and to pressure employers to fire illegal immigrant workers); *Government to Step Up Immigration Enforcement*, FOXNEWS.COM (Aug. 11, 2007), <http://www.foxnews.com/story/0%2C2933%2C292806%2C00.html>.

184. See Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1635-37 (2009) (finding that it is well-documented through empirical studies that current immigration law and enforcement policies have a disparate racial and national origin impact).

185. Mark Hugo Lopez, Anna Gonzalez-Barrera & Seth Motel, *As Deportations Rise to Record Levels, Most Latinos Oppose Obama's Policy*, PEW HISPANIC REPORT (Dec. 28, 2011), <http://www.pewhispanic.org/2011/12/28/ii-recent-trends-in-u-s-immigration-enforcement/?src=prc-section>; *Latinos Majority of Those Imprisoned on Felonies This Year*, DENVER POST (Sept. 7, 2011), http://www.denverpost.com/nation/world/ci_18208744 (U.S. Sentencing Commission Report showed that although Latinos make up 16% of the total U.S. population, for the first time, Latinos made up the majority of persons sentenced for felonies, mostly due to immigration enforcement); Amanda Lee Meyers, *More Hispanics Go to Federal Prison*, ARIZ. CAPITOL TIMES (June 4, 2011), <http://azcapitoltimes.com/news/2011/06/06/more-hispanics-go-to-federal-prison/> (describing new expedited removal proceedings and sentencing for federal immigration crimes, particularly at the U.S.-Mexican border, which account for about 87% of the increase in Latinos sentenced to federal prison over the last decade).

186. PEW HISPANIC CENTER, STATISTICAL PORTRAITS OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES Tbl. 3 (2011), <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=69>.

and East Asia, while 3.7% were from the Middle East.¹⁸⁷ The 2009 ACS also found that 65.9% of Asians and Pacific Islanders and 7.7% of African Americans in the United States were foreign-born.

As these numbers indicate, the retraction of birthright citizenship would have a disparate impact on various immigrant groups. That impact would be heightened for the large percentage of immigrants who are people of color, who may also experience racial, ethnic, and/or national origin discrimination. But the harshest impact would be on Latinos, due to their prevalence among the undocumented population. About 58% of the undocumented immigrants in the United States are from Mexico, and 81% are Latin Americans.¹⁸⁸ Consistent with this census data, in September 2010, a study entitled *The Demographic Impacts of Repealing Birthright Citizenship* found that “about three out of four unauthorized immigrants are Hispanic, so Hispanics would be disproportionately affected by a change in the citizenship law.”¹⁸⁹ Population trends projected under current law would mean that if birthright citizenship were retracted, by 2050, the number of unauthorized Hispanics would remain the same, but their percentage would decline dramatically, from 17% to 7%.¹⁹⁰ If retraction of birthright citizenship were limited to cases in which both parents were undocumented, by 2050, the number of undocumented Latinos would increase from 8 million to 11.6 million, and the percentage would decline to about 10.5%.¹⁹¹ If it were retracted in cases where only one parent was undocumented, the number of unauthorized Latino immigrants would more than double, rising from 8 million to 18.2 million, and the share would remain about the same.¹⁹² Furthermore, the report found that repeal of birthright citizenship would not “shrink” the undocumented population, but would instead expand it, and that the disadvantages of being undocumented would be perpetuated across many generations of U.S.-born children of immigrants.¹⁹³

2. *Questionable Intent*

Advocates of retracting birthright citizenship must be aware of the demographic implications discussed above. On December 1, 2010, Peter Shuck, the co-author of the book that first “seriously questioned” the legitimacy of

187. *Id.* at Tbl. 6.

188. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS 11 (2011), <http://pewhispanic.org/files/reports/133.pdf> (census data indicating that “Mexicans make up the majority of the unauthorized immigrant population, 58%, or 6.5 million. Other nations in Latin America account for 23% of unauthorized immigrants, or 2.6 million.”).

189. VAN HOOK & FIX, *supra* note 27, at 5.

190. *Id.*

191. *Id.* at 6.

192. *Id.*

193. *Id.* at 8.

birthright citizenship,¹⁹⁴ published this exact demographic analysis of immigration. He analyzed the “ethno-racial and regional compositions” of immigrants since the 1965 civil rights-based reforms of our immigration system, which ended the prior system of national origin quotas.¹⁹⁵ He argued as follows:

Consider that in 1968, when this law went into effect, there were 200 million Americans, of whom fewer than ten million (4.7 percent) were foreign-born. In 2008, our population had grown to 303 million, an increase of over 50 percent. The foreign-born population was not only much larger (having almost quadrupled to 38 million), but it now constituted 12.5 percent, one out of every eight people in America

Most striking, this vastly increased legal and illegal immigration *has altered the ethno-racial and regional compositions of the population*. In 1968, more than one-third of new legal immigrants came from Europe, a vestige of the four-decades-old national origins quotas repealed by the 1965 reform. By 2008, fewer than one in ten was from Europe. Most of the rest came from Asia and Latin America. Those regions (except for Mexico) previously had supplied relatively few immigrants; by 2008 they supplied 77 percent of the total. This shift has quite literally transformed the face of America in ways that few predicted during the contemporaneous civil rights revolution (of which the 1965 immigration reform was one manifestation). Indeed, Kennedy and Johnson administration officials advocating the new law told a wary Congress that it would have only a small effect on new migration from Asia and Latin America—*surely one of the most fateful miscalculations in our history*.¹⁹⁶

Peter Shuck is the main source relied upon by proponents of federal actions to retract birthright citizenship, who also cite concerns about the changing racial composition of the United States due to the fertility of Latinas and other immigrant women of color.¹⁹⁷ Although U.S. law generally has stricter standards of proof than international human rights law, this type of discriminatory intent may even be prohibited under U.S. civil rights

194. SHUCK & SMITH, *supra* note 4, at 2, 5 (asserting that at the time of the publication of the book, the Fourteenth Amendment’s provision of birthright citizenship to children of undocumented immigrants had never yet been “seriously considered”).

195. Peter H. Shuck, *Citizen Terrorist*, 164 HOOPER INST. POLICY REV. (2010), <http://www.hoover.org/publications/policy-review/article/58011>.

196. *Id.* (emphasis added).

197. See, e.g., Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color from a Reproductive Justice Perspective*, 36 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2012); Mary Romero, “Go After the Women”: Mothers Against Illegal Aliens’ Campaign Against Mexican Women and Their Children, 83 IND. L.J. 1355 (2008); Daniel Ibsen Morales, *In Democracy’s Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 69-70 (2009).

law.¹⁹⁸ The U.S. Supreme Court has held that facially neutral legislation and legislative purpose may be shown to be intentionally discriminatory, if the proponents were aware of the discriminatory impact.¹⁹⁹ For example, the Supreme Court has held that taking facially neutral action to protect property values, while knowing that the impact will be discriminatory by keeping minorities out, is part of a totality of circumstances that may demonstrate discriminatory intent.²⁰⁰ But U.S. law alone may be insufficient to prevent retraction of birthright citizenship.

As discussed above, a majority of legal experts have concluded that legislation retracting birthright citizenship would be unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment,²⁰¹ and thus it would take a constitutional amendment to retract birthright citizenship,²⁰² a move that would be difficult to counter under United States law. Since the 1996 immigration reforms discussed above, restrictive immigration policies have been passed with specific language stating that they are unreviewable by federal courts, due to the Plenary Power of the federal government regarding immigration and naturalization policy.²⁰³ An amendment to the U.S. Constitution's birthright citizenship clause could similarly include language stating that it is not reviewable due to the Plenary Power. Moreover, federal courts have deferred to the federal government in immigration and nationality matters—this doctrine is well-illustrated by recent federal court holdings that major portions of Arizona and Alabama's restrictive immigration laws are pre-empted by the Plenary Power.²⁰⁴ Therefore, the Supreme Court is likely to consider a constitutional amendment limiting birthright citizenship, passed by two-thirds of the U.S. Congress, to fall under the exclusive and unreviewable jurisdiction of the federal government.²⁰⁵ Finally, the Constitution is also the highest

198. See, e.g., Denise Gilman, A "Bilingual" Approach to Language Rights: How Dialogue Between U.S. and International Human Rights Law May Improve the Language Rights Framework, 24 HARV. HUM. RTS. J. 1, 17–27 (2010).

199. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489–90 (1997); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 56 (1980).

200. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 266 (1997).

201. See *supra* Part II.A.

202. See, e.g., *Dellinger Testimony*, *supra* note 7.

203. See *Johnson*, *supra* note 184, at 1622–23 (“The so-called “plenary power” doctrine is perhaps the most exceptional feature of U.S. immigration law and makes it wildly inconsistent with most other bodies of American law. The doctrine immunizes from constitutional scrutiny much of the immigration laws and has allowed them over the course of U.S. history to discriminate based on, among other things, race, class, political opinion, gender, sexual orientation, and disability. Consistency—and fairness—demands an end to the plenary power doctrine, one of the features of U.S. immigration law that scholars simply love to hate. Although that doctrine was created by the U.S. Supreme Court, Congress could expressly provide that the immigration laws are subject to the same kind of constitutional constraints as other bodies of law.”).

204. See, e.g., *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2010); *cf.* *United States v. Alabama*, 2011 WL 4863957 (11th Cir. 2011); *United States v. Alabama*, 2011 WL 4469941 (N.D. Ala. 2011).

205. *Id.*; see also *Johnson*, *supra* note 184, at 1628 (“Besides being inconsistent with other bodies of law, the lack of judicial review of immigration decisions has resulted in inconsistent and differential

law of the land. Given the limits of reviewability under U.S. law, the fundamental human rights law analysis set forth below may be useful to prove that the power of a sovereign nation to regulate citizenship and immigration is not unlimited, especially in the case of a constitutional amendment.²⁰⁶

If birthright citizenship were retracted through any sort of legislative or constitutional amendments, the stated motives of some members of the SLLI coalition of state legislators and their advisors seeking to end birthright citizenship may prove violations of the anti-discrimination provisions of applicable Inter-American human rights law.²⁰⁷ Numerous statements demonstrate that the intent of SLLI coalition members and their legal and political advisors in their campaign to retract birthright citizenship is race-based. One Arizona member of SLLI “flaunts her relationship” with the Minutemen border vigilante group.²⁰⁸ Another has sent emails containing neo-Nazi materials and claimed that “illegal aliens kill more people on an annual basis than we probably lost in the Iraq war to date.”²⁰⁹ A Texas member falsely blamed undocumented immigrants for 70% of births in Houston public hospitals and alleged that “illegal immigrants were bringing polio, the plague, leprosy, tuberculosis, malaria, chagas disease and dengue fever to the United States ‘in alarming numbers.’”²¹⁰ An Oklahoma member has complained that “Latin Americans will not assimilate like previous waves of immigrants.”²¹¹ This echoes the sentiments of their legal advisors from the Federation for American Immigration Reform (“FAIR”).²¹²

The statements of FAIR are relevant to legislative purpose because the SLLI states that it has a “working partnership” with FAIR, which drafts model legislation and provides ongoing advice.²¹³ FAIR was present with the SLLI in January 2011 when it unveiled its state-level campaign to reform birthright citizenship.²¹⁴ The Southern Poverty Law Center (“SPLC”) has identified FAIR as a hate group due to its white nationalist agenda and

treatment of similarly-situated noncitizens. Indeed, the U.S. immigration laws currently include a variety of provisions that in operation amount to not-so-subtle national origin and racial discrimination. In most basic terms, this means that the law treats similarly situated noncitizens differently depending on nothing other than their country of origin, something that other bodies of American law do not generally tolerate.”).

206. See *infra* Part III.

207. See *infra* Part III.C.2.

208. HEIDI BEIRICH, SOUTHERN POVERTY LAW CENTER, ATTACKING THE CONSTITUTION: STATE LEGISLATORS FOR LEGAL IMMIGRATION AND THE ANTI-IMMIGRANT MOVEMENT 8-9 (2011) (discussing Rep. Judy Burges).

209. *Id.* at 12-13 (discussing Rep. Russell Pearce).

210. *Id.* at 8 (discussing Rep. Leo Berman).

211. *Id.* at 15 (discussing Rep. Randy Terrell).

212. *Id.* at 6.

213. *Id.*

214. *Id.*

ties to other racist groups.²¹⁵ FAIR President Dan Stein has repeatedly criticized the 1965 INA reforms abolishing national origin quotas as being enacted to retaliate against Anglo-Saxon dominance, and alleges that immigrants are engaged in “competitive breeding” to diminish white power.²¹⁶ FAIR leadership and their allies have made discriminatory statements against African Americans, Catholics, Muslims, and Jews, demonstrating their overall white supremacist agenda, but their anti-immigrant campaigns have particularly targeted Latinos. SPLC reports that FAIR’s founder and board member, John Tanton, has a long history of racist comments:

Tanton has said that unless U.S. borders are sealed, America will be overrun by people “defecating and creating garbage and looking for jobs.” He has warned of a “Latin onslaught,” complained of Latinos’ allegedly low “educability,” and said that Western culture and European-American majority status is “under siege” by immigration.²¹⁷

The FAIR television program “Borderline” features statements from FAIR leaders as well as prominent white supremacists that include numerous derogatory criticisms of Latino immigrants.²¹⁸ Furthermore, in memos to FAIR leadership, Tanton asked, “[c]an *homo contraceptivus* [meaning whites] compete with *homo progeneriva* [meaning Latinos] if borders aren’t controlled?”²¹⁹

FAIR’s website includes a section on “Anchor Babies,” explaining that birthright citizenship is often termed “the anchor-baby issue,” and that “[a]n anchor baby is defined as an offspring of an illegal immigrant or other non-citizen, who under current legal interpretation becomes a United States citizen at birth.”²²⁰ Although U.S. citizen children cannot sponsor their parents for immigration benefits until they are 21 years old, and undocumented parents would have to leave the United States for ten years before ultimately gaining legal status, FAIR argues that retracting birthright citizenship would reduce illegal immigration as it would remove the incentive for legal status based on family unity.²²¹ SLLI members echo these views. Although the vast majority of children of undocumented parents were born

215. *Id.* at 2.

216. *Id.* at 17.

217. *Id.* at 18.

218. *Id.* at 19 (white nationalists discuss a foreign “invasion” and fear that “Anglo-Saxon culture will be displaced by degenerate, Third World cultures”; Dan Stein asks, “[h]ow can we preserve America if it becomes 50% Latin American?”).

219. *Federation for American Immigration Reform*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/groups/federation-for-american-immigration-reform-fair> (last visited Oct. 29, 2011).

220. *Id.*

221. *Id.*; see also BEIRICH, *supra* note 208, at 5.

at least a year after their parents arrived,²²² SLLI members have stated that hundreds of thousands cross the border in order to “drop and leave” or “exploit” their “anchor baby” to obtain citizenship.²²³ SLLI member Russell Pearce, sponsor of various bills in Arizona that would retract birthright citizenship, circulated and later defended an email from a constituent stating: “[i]f we are going to have an effect on the anchor baby racket, we need to target the mother. Call it sexist, but that’s the way nature made it. Men don’t drop anchor babies, illegal alien mothers do.”²²⁴ After reviewing this context, the Center for American Progress concluded that denying birthright citizenship to children of undocumented women, most of whom are women of color, is “undeniably an attack on immigrant women’s fertility.”²²⁵ For this reason, regulation of birthright citizenship would have a discriminatory impact on women, and could lead to ethnic profiling of pregnant women and mothers of young children seeking health care.²²⁶ Consistent with this, emerging legal scholarship also argues that the intent behind retracting birthright citizenship may violate equal protection norms for women in the United States.²²⁷

III. HUMAN RIGHTS ANALYSIS

As was shown above, the discriminatory impact of proposals to retract *jus soli* from children of undocumented immigrants is multiplied by various types of discrimination. Because ending birthright citizenship would create a two-tiered system of citizens and generations of immigrant noncitizens, it would discriminate between children of immigrants and children of U.S. citizens.²²⁸ Second, by far the greatest number of persons in the United States who would no longer enjoy birthright citizenship and its attendant rights, including voting rights, would be Latino.²²⁹ Third, by virtue of regulating birth, the main focus of such laws would be on women and their babies, and in this context, on Latina immigrant women and their babies.²³⁰ This implicates rights to freedom from race, ethnic, national origin and gender discrimination, as well as the rights of children. Finally, in addition

222. BEIRICH, *supra* note 208, at 5.

223. See, e.g., Gebe Martínez, Ann García, & Jessica Arons, *Birthright Citizenship is a Thinly-Veiled Attack on Immigrant Mothers*, CENTER FOR AMERICAN PROGRESS (Aug 18, 2010), http://www.americanprogress.org/issues/2010/08/citizenship_debate.html.

224. *Id.*

225. FULWOOD & FITZ, *supra* note 11, at 7.

226. *Id.* at 7-8.

227. See Harry, *supra* note 197.

228. See, e.g., Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011); Birthright Citizenship Act of 2011, S. 723, 112th Cong. (2011).

229. See *supra* notes 188-192 and accompanying text.

230. See *supra* notes 225-227 and accompanying text. By contrast, if today’s immigration laws had been applied in the 1800s, the great majority of impacted immigrants would have been non-Hispanic White. SUMPTION & HU, *supra* note 172.

to these various forms of discriminatory impact, there are indications of explicit discriminatory intent on the part of legislative sponsors and their partners in the campaign to try to retract birthright citizenship.²³¹

If the legislative campaigns described above are successful, the United States would be one of the few countries in the Americas not providing birthright citizenship to children of immigrants. The Dominican Republic ended the practice in 2010.²³² As will be shown below, due primarily to discriminatory impact, both countries could be subject to challenges for legality under fundamental human rights norms. This is because Inter-American human rights law includes exceptionally clear and compelling protections against discrimination in the application of citizenship laws. As will be demonstrated below, the fundamental human rights norms of the Americas limit the legal right of States to retract birthright citizenship, particularly if a discriminatory impact is predictable.

A. States' Rules for Naturalization May Not Contravene Human Rights

In the 2005 case of *Dilcia Yean and Violeta Bosico v. the Dominican Republic*, the Inter-American Court of Human Rights found that the rights of nations to make their own citizenship rules are limited by human rights. The court analyzed the case of two girls born in the Dominican Republic whose fathers were Haitian migrants and whose mothers were Dominican nationals, and who were not permitted to register their birth due to their fathers' illegal migratory status, resulting in severe limitations on their rights to education and nationality.²³³ The court found that "despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by states in that area . . ."²³⁴

The Inter-American Court contrasted the traditional legal rule that sovereign states have unlimited discretion to make rules regarding citizenship with modern human rights law, which prohibits discrimination. The court relied on its 1984 Advisory Opinion criticizing proposed amendments to the Constitution of Costa Rica, which would have continued the legal rule that Costa Rican men could sponsor their wives for citizenship, but that Costa Rican women could not.²³⁵ The court reasoned that through the 1984 opinion, it had already established that "the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their

231. See *supra* notes 208–211 and accompanying text.

232. See SUMMARY OF EMILDO BUENO OGUIS PETITION, *supra* note 17, ¶ 18.

233. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶¶ 162–69 (Sept. 8, 2005).

234. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 138.

235. *Id.* ¶ 138, fn. 92.

obligations to ensure the full protection of human rights.”²³⁶ The court found that “determination of who has a right to be a national continues to fall within a State’s domestic jurisdiction,” but that this discretion is “gradually being restricted with the evolution of international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States.”²³⁷ The Inter-American Court named two fundamental rights that limit the authority of States to make their own nationality laws, falling under two state obligations. These are: “on the one hand, by their obligation to provide individuals with the equal and effective protection of the law, and, on the other hand . . . their obligation to prevent, avoid and reduce statelessness.”²³⁸ In other words, the right to freedom from discrimination and the right to nationality limit the rights of States to determine their own laws regarding access to citizenship. Each of these rights will be discussed in turn below.

B. *The Right to Nationality*

The Inter-American Court found that, under new paradigms of international law, “States have the obligation not to adopt practices or laws concerning the grant of nationality, the application of which fosters an increase in the number of stateless persons. . . . Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability.”²³⁹ Article 1 of the Convention on the Reduction of Statelessness mandates that States grant nationality to any person born on their territory who would otherwise be stateless.²⁴⁰ This Convention was signed by the Dominican Republic; therefore, the Inter-American Court considered the Convention when deciding the case of the Yean and Bosico Girls.²⁴¹ The United States has not signed the Convention on the Reduction of Statelessness, but there are other parts of the Inter-American Court’s ruling on the right to a nationality that apply. The Court held that a State cannot deny the right to a nationality arbitrarily, or in a discriminatory manner.²⁴² As will be discussed herein, given that the right to freedom from discrimination is a *jus cogens* right, its application to the United States is unquestionable.

In the Yean and Bosico case, the Dominican Republic had argued that the fathers of the girls, who were undocumented migrants, were “in transit,” and therefore fell under the exceptions to birthright nationality.²⁴³

236. *Id.*

237. *Id.* ¶ 140.

238. *Id.*

239. *Id.* ¶ 142.

240. *Id.* ¶ 143 (citing Convention on the Reduction of Statelessness art. 1, Aug. 30, 1961, 989 U.N.T.S. 175).

241. *Id.*

242. *Id.* ¶¶ 166-74, 260(2).

243. *Id.* ¶¶ 150, 152.

The mothers of the Yean and Bosico girls were Dominican citizens, but their nation still refused to issue their children birth certificates.²⁴⁴ The Inter-American Court held that even though the fathers were illegal, they were clearly not “in transit” as they had lived in the Dominican Republic for several years.²⁴⁵ The Dominican Republic’s argument is similar to the Shuck and Smith argument that undocumented immigrants are not “subject to the jurisdiction” of the United States, the clause of the Fourteenth Amendment that parallels the “in transit” exception in the Dominican Republic.²⁴⁶ Both exceptions cover children of diplomats, but they are not applicable to the situation of undocumented immigrants. As has been proven repeatedly, undocumented immigrants are certainly subject to the jurisdiction of the United States, as they are not immune from prosecution.²⁴⁷

Perhaps most importantly, the Inter-American Court found that “[t]he migratory status of a person is not transmitted to the children. . . .”²⁴⁸ Little more needs to be said about such a fundamental concept of individual rights.²⁴⁹ The law does not, and should not punish children for the transgressions of their parents.²⁵⁰ It is based on this finding in the case of the Yean and Bosico Girls that the Dominican Republic’s subsequent 2010 constitutional amendment retracting birthright citizenship has also been

244. *Id.* ¶¶ 3, 85.

245. *Id.* ¶ 138.

246. See SHUCK & SMITH, *supra* note 4. In the Yean and Bosico case, the Inter-American Court reasoned that “[i]t is not possible to consider that people are in transit when they have developed innumerable connections of all kinds.” *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 150–53 (Sept. 8, 2005).

247. See, e.g., Neuman Testimony, *supra* note 140, at 7.

248. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 156(b).

249. Garrett Epps asserts that concept is fundamental to American moral-legal traditions: “To punish babies, much less to proscribe and entirely outlaw them, because of the perceived sins of their parents is alien to our moral and ethical tradition. Guilt is not hereditary; it is individual.” Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 AMER. U. L. REV. 331, 371 (2011). The presumed innocence of children of undocumented immigrants was foreseen in the legislative debates of the Fourteenth Amendment. During those debates, “some expressed concern about so-called ‘gypsies’ becoming citizens, calling them, ‘those people who flout our laws.’” American Constitutional Society, *Epps on “Da Vinci Code Originalism” and the Citizenship Clause*, ACS BLOG (April 27, 2011), <http://www.acslaw.org/acsblog/epps-on-%E2%80%9Cda-vinci-code-originalism%E2%80%9D-and-the-citizenship-clause> (“This is what [Garrett] Epps termed the ‘Lou Dobbs moment’ in the debate, and the drafters, unequivocally rejecting these concerns, had the following response: ‘How someone who professes such high regard for humanity and civilization could object to making citizens of these innocent children is simply beyond us.’”).

250. Echoing these sentiments, the U.S. Supreme Court has found that the minor children of undocumented immigrants should not be punished for the wrongdoing of their parents. *Plyler v. Doe*, 457 U.S. 202, 219–20 (1982). The Supreme Court reasoned that: “[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.” *Id.* at 220 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 175 (1972)). The Court added that children do not have control over the undocumented status of their parents, *id.*, and so ruled that Texas’ denying public education to undocumented minors violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 222.

challenged through a petition before the Inter-American Commission on Human Rights.²⁵¹

In the case of the Yean and Bosico Girls, the Inter-American Court held that the acquisition of nationality flows simply from birth in the territory of a State, in instances where the child would not have a right to any other nationality.²⁵² The court found that the actions of the Dominican Republic kept the girls stateless and “placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights.”²⁵³ Furthermore, because the victims were children, the court considered that their vulnerability arising from statelessness affected the “free development of their personalities” by impeding access to their rights as well as the special protection to which children are entitled.²⁵⁴

Some would argue that because Mexico permits dual citizenship, retracting birthright citizenship from children of undocumented Mexican immigrants would not render them stateless.²⁵⁵ The Dominican Republic made a similar argument before the Inter-American Court, contending that “it had not failed to meet the obligation that the children should have a nationality, because, if they had not been granted Dominican nationality,

251. See SUMMARY OF EMILDO BUENO OGUIS PETITION, *supra* note 17, ¶ 18, fn. 4. Note that not only the 2010 constitutional amendment, but also a prior Dominican Supreme Court decision are at issue. The U.S. State Department, which criticized the disparate impact of the Dominican Republic’s limits on birthright citizenship on children of Haitian migrants, reported that:

The new constitution provides that anyone born in the country is a Dominican national, except children born to diplomats, children born to parents who are “in transit,” or children born to parents who are in the country illegally. The exception for children of parents illegally in the country is an addition to what the previous constitution provided and reflects a 2005 Supreme Court ruling that children born to parents who were in the country illegally did not qualify as citizens. Thus, even before implementation of the new constitution, children of illegal migrants were denied Dominican nationality.

U.S. DEP’T OF STATE, *supra* note 86, at 18.

252. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 156(c).

253. *Id.* ¶ 166.

254. *Id.* ¶ 167.

255. See *infra* note 266 (arguments regarding Mexican dual nationality); but cf. Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255 (2008); see also Cristina M. Rodríguez, *Peter J. Spiro’s Beyond Citizenship After Globalization*, 103 AM. J. INT’L L. 180, 182-83 (2009) (book review) (“The actual connection between the existence of dual or triple nationals who prefer to channel their participatory energies in Canada, Mexico, or Ireland and the erosion of citizenship’s value to those whose focus is primarily on the United States is elusive.”) Rodríguez also points out that Spiro’s concern that the United States may “no longer [have] a distinctive identity as compared to the rest of the world,” *id.* at 184, is not applicable in a *jus soli* regime in which the rule of birthright citizenship “embodies not just the presumption that birth in a territory serves as an effective proxy for long-term loyalty, but also the insight that all persons affiliated with the polity from birth ought to be treated as formally equal.” *Id.* Rodríguez further argues that “the American psyche has undergone a fundamental change with respect to how we go about defining outsiders. As a result, the erosion of exclusivity has actually contributed to the vitality of American citizenship—in particular, by transforming it into an institution that more closely adheres to the foundational ideals and mythology of the United States as a country of opportunity, equality, and openness to all who are interested in participating in its endeavor.” *Id.* at 183.

they would be Haitian.”²⁵⁶ Despite this, the court still found that the Dominican Republic had violated the children’s right to nationality by not providing birth certificates, and ruled that “[t]he fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.”²⁵⁷ This holding mirrors the language of Article 20 of the Inter-American Convention on Human Rights, which provides that everyone “has the right to a nationality,” that “[n]o one shall be arbitrarily deprived of his [or her] nationality,” and that “every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.”²⁵⁸

In its opinion, the Inter-American Court did not discuss whether the Yean and Bosico children would have had Haitian nationality, but this may have been because of the apparently severe consequences of deprivation of Dominican nationality, as they and their parents lived in the Dominican Republic. The court considered that, like many children of Haitian descent who were born in the Dominican Republic of undocumented parents, the Yean and Bosico girls had difficulty registering for school and receiving health care, would be unable to vote, and lived with the constant threat of separation from their family and their country of origin.²⁵⁹ Furthermore, their condition left them without a juridical personality.²⁶⁰ The court considered that stateless persons, by definition, do not have recognized juridical personality, and that “nationality is a prerequisite for recognition of juridical personality.”²⁶¹ It then found that, “[i]n this specific case, the State maintained the Yean and Bosico children in a legal limbo in which, even though the children existed and were inserted into a particular social context [in the Dominican Republic], their existence was not recognized juridically; in other words they did not have a juridical personality.”²⁶² The court considered that failure to recognize the juridical personality that pertains to nationality “harms human dignity, because it denies absolutely an individual’s condition of being a subject of rights and renders him [or her] vulnerable to non-observance of his [or her] rights by the State or other individuals.”²⁶³ This similarly describes the implications of withholding birthright citizenship from children born of undocumented immigrants in the United States.

256. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 32.

257. *Id.* ¶ 156(c).

258. Organization of American States, American Convention on Human Rights art. 20, Nov. 22 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

259. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 169–73.

260. *Id.* ¶¶ 177–78.

261. *Id.* ¶ 178.

262. *Id.* ¶ 180.

263. *Id.* ¶ 179.

While it is true that some children born in the United States of undocumented immigrants may have the means to gain nationality in their parents' country of origin, the overwhelming majority do not. First, they are children and cannot apply for any rights without relying on the aid and support of their parents or other legal guardians. Moreover, many countries do not offer dual nationality,²⁶⁴ and therefore there could be a risk of statelessness. Additionally, some would not even qualify for full citizenship rights in their parents' country of origin.²⁶⁵

As discussed above, the majority of children born to undocumented immigrants in the United States are of Mexican origin. Proponents of retracting birthright citizenship in the United States have argued that the Mexican policy of permitting dual citizenship would not render the U.S.-born children of Mexican migrants stateless.²⁶⁶ However, the fact that Mexico permits dual nationality would not guarantee the children's rights to a nationality in terms of human rights law. Currently, U.S.-born children of Mexican migrants must submit documents including their own birth certificate and that of their parents in order to claim Mexican nationality.²⁶⁷ Full citizenship is not available until Mexican nationals reach 18 years of age.²⁶⁸ Because claiming Mexican nationality from abroad involves taking affirmative bureaucratic steps, children whose parents lacked the relevant documents or otherwise failed to complete these steps on their children's behalf would be left without status in either country.

Even as Mexican nationals, U.S.-born children would not have the benefit of nationality as conceived of in international human rights law. Like the

264. See, e.g., THOMAS FAIST & JÜRGEN GURDES, MIGRATION POLICY INSTITUTE, DUAL CITIZENSHIP IN THE AGE OF MOBILITY, App. B (2008).

265. See U.S. STATES PERSONNEL MGMT. INVESTIGATIONS SERV., 1S-I, CITIZENSHIP LAWS OF THE WORLD 4 (2001) ("Citizenship of a nation is passed on to a child based upon at least one of the parents being a citizen of that nation, regardless of the child's actual country of birth. The term for this is '*jus sanguinis*.' Though most countries adhere to the principle of citizenship by descent, they differ on some factors [father's vs. mother's rights, citizenship of one or both parents, the marital status of the parents, and others]"). For instance, to obtain *jus sanguinis* rights in Argentina, both parents must be Argentinian. *Id.* at 19.

266. Congress has even held a hearing on the alleged problems associated with birthright citizenship and dual nationality. *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 109-63 (2006) (Opening Statement of Rep. John Hostettler, Chairman, Subcomm. on Immigration, Border Security, and Claims, alleging that: "Birthright citizenship is . . . a major issue in the context of illegal immigration. The Center for Immigration Studies estimates that 383,000 children are born each year to illegal alien mothers, accounting for nearly 10 percent of all births in the United States"; and, after discussing dual nationality in general and in Mexico in particular, arguing that "[t]he U.S. Department of State, which does not formally recognize dual citizenship, aptly noted that 'dual nationals owe allegiance to both United States and the foreign country'" (quoting another source)); see also Edward J. Erler, *Birthright Citizenship and Dual Citizenship: Harbingers of Administrative Tyranny*, IMPRIMIS, July 2008, at 1, cited in FEERE, *supra* note 3, at 5-6.

267. Ley de Nacionalidad [Nationality Law], cap. 1, art., DIARIO OFICIAL DE LA FEDERACIÓN, 1 de diciembre de 2005.

268. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 34, DIARIO OFICIAL DE LA FEDERACIÓN, 20 de marzo de 1998.

children of undocumented Haitian migrants born in the Dominican Republic, they would live in fear of separation from their family and the country they were born into, and they would not have equal access to education or health care. They would also not have a proper juridical personality, which in fact “denies absolutely an individual’s condition of being a subject of rights and renders him [or her] vulnerable to non-observance of his [or her] rights by the State or other individuals.”²⁶⁹

C. *The Right to Freedom From Discrimination*

One of the main reasons that the Dominican Republic was found to have violated the rights of the Yean and Bosico girls was the discriminatory impact of the government’s refusal to issue birth certificates to children of undocumented migrants, as the majority of migrants to the Dominican Republic are Haitian.²⁷⁰ As will be demonstrated below, the application of human rights law regarding freedom from discrimination to the situation of the U.S.-born children of undocumented immigrants yields similar results. This is because the right to freedom from discrimination has reached the level of *jus cogens* and as such, it is a peremptory international legal norm that may not be violated, even by States that have not signed or ratified treaties obliging them to refrain from discrimination.²⁷¹ In fact, racial discrimination, including unintentional discriminatory impact, is prohibited by every international human rights instrument.²⁷² In the case of the Dominican girls, the Inter-American Court also emphasized that “the obligation to respect and ensure the principle of right to equal protection is irrespective of a person’s migratory status in a State. . . . States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause.”²⁷³

1. *Jus Cogens*

In the Inter-American system, determination that freedom from discrimination is a *jus cogens* norm was first made in the Inter-American Court of Human Rights 2003 Advisory Opinion regarding the Juridical Status and Rights of Undocumented Migrants.²⁷⁴ The Advisory Opinion was re-

269. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 179 (Sept. 8, 2005).

270. *Id.* at ¶¶ 141, 166–74.

271. *Id.* ¶ 141 (citing *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 133, ¶ 88; *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 44 (Aug. 28, 2002)).

272. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §702(i) (2011).

273. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 155 (citing *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 133, ¶ 118).

274. *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 133, ¶¶ 97–101.

quested by Mexico and applies to the United States.²⁷⁵ Among the four questions submitted to the court was the issue of “the status that the principles of legal equality, non-discrimination, and equal and effective protection of the law have achieved in the context of the progressive development of international human rights law and its codification.”²⁷⁶ The basis for these rights included the Universal Declaration of Human Rights (Universal Declaration), the American Declaration on the Rights and Duties of Man (American Declaration), the International Covenant for Civil and Political Rights (ICCPR), and the OAS Charter, in relation to OAS Member States.²⁷⁷ These international legal instruments all apply to the United States. The United States is not a State Party to the Inter-American Convention on Human Rights and has not accepted the jurisdiction of the Inter-American Court, but it is an OAS Member State and has ratified the ICCPR and the Universal Declaration. The United States also adopted the American Declaration along with twenty other original OAS member states in Bogotá, Colombia in 1948.²⁷⁸

The Inter-American Court issued its opinion on the Juridical Status and Rights of Undocumented Migrants based on this legal framework, and its competence to render Advisory Opinions on the interpretation of the OAS Charter.²⁷⁹ The opinion begins by clarifying that “the Court decides that everything indicated in this Advisory Opinion applies to the OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols.”²⁸⁰ While this legal framework is difficult to enforce in U.S. courts,²⁸¹ it accurately describes the anti-discrimination rules of Inter-American human rights law that apply to the United States.²⁸²

Through this legal framework, individuals can petition the Inter-American Commission on Human Rights to decide whether the United States has violated the rights at stake, and the Commission can order recommenda-

275. *Id.* ¶ 1

276. *Id.* ¶ 51.

277. *Id.* ¶ 60.

278. The American Declaration was adopted by 21 nations in the same conference at which the OAS Charter was adopted. *ORG. OF AMERICAN STATES, OUR HISTORY*, http://www.oas.org/en/about/our_history.asp (last visited March 10, 2012).

279. *Id.* ¶ 60.

280. *Id.*

281. *See, e.g.*, *Flores-Nova v. Att’y Gen. of the U.S.*, 652 F.3d 488, 493 (3d. Cir. 2011) (concluding that the United States is not subject to binding legal obligations under the American Declaration, even considering a 2008 Inter-American Commission on Human Rights decision that the United States is “bound to respect” the American Declaration (citing *Andrea Mortlock v. United States*, Rep. Inter-Am. Comm’n H.R., Report No. 63/08 ¶ 50 (July 25, 2008))).

282. *See, e.g.*, Katherine M. Culliton, *Finding a Mechanism to Enforce Women’s Rights to State Protection from Domestic Violence in the Americas*, 34 *HARV. INT’L L.J.* 507, 557–60 (1993).

tions for remedial measures.²⁸³ In addition, OAS Member States can request Advisory Opinions from the Inter-American Court regarding issues of discrimination that impact undocumented immigrants in the United States.²⁸⁴

Moreover, two recent lines of cases holding that Inter-American laws are not enforceable in U.S. courts can be distinguished from a case involving fundamental equality rights. Recent U.S. court cases limiting enforceability of international law have not dealt directly with *jus cogens* norms regarding the right to freedom from discrimination. In the 2008 case of *Medellín v. Texas*, the Supreme Court refused to enforce a judgment of the International Court of Justice (ICJ) against the United States for failure to comply with the Vienna Convention on Consular Relations.²⁸⁵ The Supreme Court decided whether the ICJ decision could be enforced on behalf of an individual Mexican national convicted of “the gang rape and brutal murders of two Houston teenagers.”²⁸⁶ The Court held that the ICJ decision was not enforceable on behalf of an individual in U.S. courts, because the underlying treaty was not self-executing.²⁸⁷ The U.S. Supreme Court also examined the Optional Protocol, the United Nations Charter, and the ICJ Statute, which formed the basis of the ICJ decision, and similarly found that “none of these treaty sources creates binding federal law in the absence of implementing legislation.”²⁸⁸

But due to the superior nature of *jus cogens* norms, it is arguable that the fundamental human right to freedom from discrimination is enforceable in U.S. courts, particularly in more favorable factual circumstances. *Jus cogens* norms are not treaty-based, and do not require ratification of a treaty to be applicable, so they cannot be non-self-executing. Furthermore, even the majority *Medellín* Supreme Court opinion emphasized that lack of enforceability in U.S. courts did not mean that decisions of the ICJ do not constitute international legal obligations.²⁸⁹ The Court distinguished non-self-executing treaties from self-executing treaties by clarifying that “not all international law obligations automatically constitute binding federal law enforceable in United States courts.”²⁹⁰ Therefore, post-*Medellín*, self-executing international legal obligations (including *jus cogens* rules) may still be automatically enforceable in U.S. courts, and other international legal obligations are not cancelled simply because they are not fully enforceable in U.S. courts.

283. *Id.* at 543–49.

284. *See, e.g.*, Juridical Condition and Rights of Undocumented Migrants, *supra* note 133.

285. 552 U.S. 491 (2008).

286. *Id.* at 501.

287. *Id.* at 504–06.

288. *Id.* at 506.

289. *Id.* at 507–08. The United States has since retracted its submission to the jurisdiction of the ICJ for the purposes of claims arising out of the Vienna Convention, and it retracted its submission to the general jurisdiction of the ICJ in 1985. *Id.* at 500.

290. *Id.* at 504.

Another line of recent U.S. court decisions limiting the enforceability of Inter-American human rights law is also distinguishable. On July 25, 2011, in the case of *Flores-Nova v. Attorney General of the United States*, the Third Circuit ruled on the appeal of an undocumented Mexican husband and wife.²⁹¹ The appeal relied on a decision of the Inter-American Commission on Human Rights (“IACHR”) finding that removing lawful permanent residents without giving them an opportunity for a meaningful hearing would violate the American Declaration on Human Rights, as well another decision of the IACHR stating that the United States is “bound to respect” the American Declaration.²⁹² The Third Circuit concluded that the decisions of the IACHR do not create binding obligations on the United States, because the language of the OAS Charter and of the IACHR’s governing statute indicate that its decisions are only recommendations.²⁹³ The Third Circuit referenced a 2001 case, *Garza v. Lappin*, regarding another Mexican national seeking relief from a death sentence and relying on an IACHR decision that the death penalty violates the American Declaration.²⁹⁴ In the *Garza* case, the Seventh Circuit had reviewed the IACHR statute and held that “[t]he Commission’s power is only to make ‘recommendations,’ which, according to the plain language of the term, are not binding.”²⁹⁵ The Third Circuit agreed with this conclusion and held that “the IACHR’s advisory opinions are not binding on the United States, and, therefore, they are not enforceable domestically.”²⁹⁶ Furthermore, the Third Circuit held, the American Declaration is not a treaty and instead “represents a noble statement of the human rights aspirations of the American States, but creates no binding set of obligations.”²⁹⁷

However, unlike the principles at issue in these *Medellín*, *Flores Nova* and *Garza* cases, the fundamental right to freedom from discrimination has reached the level of *jus cogens*. According to Black’s Law Dictionary, a *jus cogens* norm is “a mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.”²⁹⁸ Under the Vienna Convention on the Law of Treaties, a *jus cogens* norm is: “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a

291. 652 F.3d 488 (2011).

292. *Id.* at 492-93.

293. *Id.* at 494 (analyzing language of OAS Charter and IACHR statute stating that “recommendations” may be made regarding the duties of member states who have only agreed to the American Declaration, and contrasting the situation of other bases for jurisdiction when states ratify the American Convention on Human Rights or agree to the jurisdiction of the IACHR under other treaty instruments).

294. *Id.*

295. *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001).

296. *Flores-Nova*, 652 F.3d at 494 (2011).

297. *Id.* at 494-95.

298. BLACK’S LAW DICTIONARY 937 (9th ed. 2009).

subsequent norm of general international law having the same character.”²⁹⁹ The U.S. Restatement (Third) of the Foreign Relations Law agrees with this standard, and adds that a *jus cogens* norm is established where there is acceptance and recognition by a “large majority” of states, even if over dissent by “a very small number of states.”³⁰⁰ The Inter-American Court of Human Rights has declared that *jus cogens* norms include the right to freedom from discrimination.³⁰¹

Such *jus cogens* norms are enforceable in U.S. courts,³⁰² and the United States has also recognized the binding character of customary international law more generally.³⁰³ Both arise from the practice and tacit agreement of the majority of nations, but customary international law has lesser legal weight than *jus cogens*.³⁰⁴ The difference is that the international community recognizes that no derogation from *jus cogens* norms is permissible.³⁰⁵ U.S. courts enforce both, but also distinguish the heavier weight of *jus cogens*. As the Ninth Circuit explained in its 1992 decision in *Siderman de Blake v. Argentina*, “[w]hereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.”³⁰⁶ U.S. courts have also recognized that both customary and *jus cogens* law develop progressively. For example, in the *Siderman de Blake* case, the Ninth Circuit discussed the recognition of the prohibition of torture as customary international law in the “landmark” *Filártiga v. Peña-Irala* case by the Second Circuit over ten years prior.³⁰⁷ A decade later, in 1992, the Ninth Circuit held that the prohibition of torture had since developed into a *jus cogens*

299. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1135 U.N.T.S. 331.

300. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102, reporter’s note 6 (1986) (citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, *Vienna Convention on the Law of Treaties*, U.N. Doc. A/Conf. 39/11, at 471–72).

301. See *id.* § 702 cmt n (listing “systemic racial discrimination” as a violation of *jus cogens* norms); see also Juridical Condition and Rights of Undocumented Migrants, *supra* note 133, ¶ 101 (finding that “the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*”).

302. See, e.g., *United States v. Struckman*, 611 F.3d 560, 576 (9th Cir. 2010) (finding that *jus cogens* norms could provide basis for dismissal of extradition, because “like statutory and constitutional laws, they are justiciable in our courts.”).

303. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Filártiga v. Peña-Irala*, 630 F.2d 876, 880–81 (2d. Cir.1980).

304. The Ninth Circuit summarized the difference as follows: “[*Jus cogens* ‘embraces customary laws considered binding on all nations’ . . . and ‘is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.’” *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (internal citations omitted).

305. Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir.1988).

306. *Siderman de Blake*, 965 F.2d at 717 (“[W]e conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.”).

307. *Id.* at 716 (discussing *Filártiga*, 630 F.2d 876).

norm.³⁰⁸ With regard to discrimination, U.S. courts have recognized that a prohibition on systemic racial discrimination is a *jus cogens* norm,³⁰⁹ but they have not yet discussed whether bars on other types of discrimination have reached the level of *jus cogens*.

In its opinion on the Juridical Status and Rights of Undocumented Migrants, the Inter-American Court of Human Rights found that many aspects of the fundamental right to freedom from discrimination have reached the level of *jus cogens*. In 2003, the Inter-American Court considered that “the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates laws.”³¹⁰ The court went on to elucidate that:

Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. . . . At the existing stage of development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.³¹¹

The Inter-American Court went on to explain that the *jus cogens* obligation “to respect and guarantee human rights, without any discrimination . . . has various consequences and effects that are defined in specific obligations.”³¹² These specific obligations include that “[s]tates must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination.”³¹³ As will be discussed below, retraction of birthright citizenship in the Dominican Republic and the United States involves both direct and indirect discrimination.

The Inter-American Court also clarified that “[s]tates are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies. . . . This implies the special obligation to protect that the

308. *Id.* at 717 (reasoning that this was the holding in *Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 941-42).

309. *See, e.g., Siderman de Blake*, 965 F.2d at 717 (“Supporting this case law is the Restatement, which recognizes the prohibition against official torture as one of only a few *jus cogens* norms. Restatement § 702 Comment n (also identifying *jus cogens* norms prohibiting genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination)”).

310. Juridical Condition and Rights of Undocumented Migrants, *supra* note 133, ¶ 101.

311. *Id.*

312. *Id.* ¶ 102.

313. *Id.* ¶ 103.

State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory practices.”³¹⁴ Given the anti-immigrant movement in the United States, rendering the children of immigrants undocumented would expose them to a wide variety of discrimination by private parties. Finally, according to the *jus cogens* norms regarding discrimination, “[s]tates may only establish objective and reasonable distinctions when these are made with due respect for human rights and in accordance with . . . the norm that grants protection to the individual.”³¹⁵ As will be discussed herein, withholding or retraction of birthright citizenship, which has been the law of the land in the Americas, would be arbitrary and unreasonable, as it would likely not accomplish the stated purpose of deterring illegal immigration. Moreover, such measures would uniquely target current generations of immigrants, whereas past generations have enjoyed full *jus soli* rights.

2. Direct Discrimination Prohibited

In the case of the Yean and Bosico girls, the types of discrimination at issue were both direct and indirect.³¹⁶ Both direct and indirect discrimination are also alleged in the Bueno petition before the Inter-American Commission of Human Rights, challenging the Dominican Republic’s 2010 constitutional amendment retracting birthright citizenship from children of undocumented immigrants.³¹⁷

In the case of the Yean and Bosico girls, the Inter-American Court found that by applying stricter requirements for the registration of births for children over 13, the Dominican Republic “acted arbitrarily, without using reasonable criteria, and in away [sic] that was contrary to the superior interest of the child, which constitutes discriminatory treatment to the detriment of the children”³¹⁸ No particular discriminatory statements were made, but there were arbitrary and unreasonable rules regarding late registration of birth that disparately impacted children of Haitian migrants.³¹⁹ If U.S. birthright citizenship were retracted, it may or may not be considered as discriminatory treatment (or intentional discrimination), depending on the circumstances. But discriminatory intent may be imputed where the change in law is arbitrary and unreasonable, and made with the knowledge

314. *Id.* ¶ 104.

315. *Id.* ¶ 106.

316. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶¶ 166–192 (Sept. 8, 2005).

317. See SUMMARY OF EMILDO BUENO OGUIS PETITION, *supra* note 17, ¶¶ 19–20; see also ¶ 9 (“Furthermore, whatever the intent behind *Circular 017*, its disproportionate impact is clear; those affected by these instructions have been almost exclusively Dominicans of Haitian descent.”).

318. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 166.

319. *Id.* ¶ 109(10)–109(28).

of a likely disparate impact. Such intent would violate fundamental human rights law.³²⁰

The Dominican Republic's recent constitutional amendment retracting birthright citizenship is being challenged as discrimination in violation of the Inter-American system for protection of human rights. The petition of Mr. Bueno Oguis to the Inter-American Commission on Human Rights alleges direct discrimination regarding *Circular 017* issued in March 2007, which "for the first time made legal residence and/or regularized status of parents a requirement for their children to acquire Dominican nationality."³²¹ Mr. Bueno Oguis was born in the Dominican Republic to undocumented Haitian migrants "who were working and living in the country."³²² His petition clarifies that although the language of Circular 017 is *prima facie* neutral as it applies only to "children of foreign parents," because most undocumented immigrants are Haitian, it has a discriminatory impact on their Haitian children.³²³ Moreover, due to these numbers, although *prima facie* neutral, the new instructions regarding children of foreign parents "were clearly targeting one ethnic group."³²⁴ These allegations aver that, as in the United States, facially neutral legislation that has a known discriminatory impact may be prohibited as a form of direct or intentional discrimination.

The Bueno petition also alleges that discriminatory intent is manifest in the behavior of some birth registry officials who have replaced the term "foreign parents" with "Haitian parents" on official documents pertaining to *Circular 017*, or who "used skin color, racial features, and or [sic] 'Haitian-sounding' names of applicants as the basis for concluding that individuals are carrying 'suspect' documents."³²⁵ Like other anti-immigrant measures already imposed in the United States, the retraction of birthright citizenship would very likely result in similar types of discriminatory treatment of Latinos.³²⁶

As discussed above, statements by proponents of retracting birthright citizenship in the United States suggest even more discriminatory intent than what was reported in the Yean and Bosico case.³²⁷ The main advisors to U.S. lawmakers who seek to overturn birthright citizenship, as well as some of the legislators themselves, have clearly stated that their campaign is based on anti-Latino sentiment.³²⁸ A similar type of discriminatory intent based on statements of legislators is alleged in the Bueno Oguis petition

320. *Id.* at 166. See Questionable Intent, *supra* Part II.B.2.

321. SUMMARY OF EMILDO BUENO OGUI'S PETITION, *supra* note 17, ¶¶ 7-8.

322. *Id.* ¶ 2.

323. *Id.* ¶ 9.

324. *Id.*

325. *Id.*

326. See *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2011 WL 4469941 (N.D. Ala. 2011).

327. See *supra* Part II.B.2.

328. *Id.*

before the Inter-American Commission.³²⁹ The petition further alleges that “[b]y denying nationality to persons born in the country because of their parents’ residency status, this new provision codifies within the constitution the discriminatory elements of both *Circular 017* and the Law on Migration 285/04.”³³⁰ Mr. Bueno Oguis’s petition summarizes Inter-American law on birthright citizenship as follows: “While a government may change constitutional or statutory provisions governing access to nationality, it may not do so for prohibited reasons, such as racial discrimination, or in a manner that generates discriminatory effect.”³³¹ The petition also alleges that retracting nationality rights based on discriminatory motives constitutes degrading treatment, which is another violation of human rights law.³³² Because the retraction of nationality rights was based on “discriminatory motives,” the petition also alleges that “[s]uch an official policy of singling out members of a racial, ethnic or national origin group for exclusion from nationality constitutes degrading treatment.”³³³

In the United States, discrimination may also be indicated by the fact that retraction of birthright citizenship is unlikely to achieve its proponents’ stated goal of deterring illegal immigration,³³⁴ and by the certain disparate impact on Latino immigrants.³³⁵ As discussed above, in the case of the Yean and Bosico girls, the Inter-American system for the protection of human rights found discriminatory treatment in the arbitrary and unreasonable measures which made it difficult for children of Haitian migrants to obtain birth certificates.³³⁶ Similarly, in the United States, many generations of immigrants’ children obtained birthright citizenship when the composition of U.S. immigrants was predominantly European, and there is no viable reason to change the policy now that fewer than ten percent of immigrants are European.³³⁷ In particular, retraction of birthright citizenship would not serve its stated purpose of decreasing illegal immigration.³³⁸ For all these reasons, it would be arbitrary and unreasonable to change *jus soli* simply to exclude children of the current generation of immigrants. If there is no rational reason for the policy, the discriminatory impact of a facially neutral policy is apparent, and therefore the policy would be pro-

329. Paragraph 20 of the petition states that “the congressional debate surrounding the recent modification of the constitution suggests that racial discrimination was a factor in the decision to change the law on citizenship, and that it was drafted and approved in order to exclude Dominicans of Haitian descent from the right to nationality on the basis of their race.” SUMMARY OF EMILDO BUENO OGUIS PETITION, *supra* note 17, ¶ 20.

330. *Id.*

331. *Id.*

332. *Id.* ¶ 23.

333. *Id.*

334. See VAN HOOK & FIX, *supra* note 27.

335. See *supra* Part II.B.1.

336. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶¶ 109, 166 (Sept. 8, 2005).

337. SUMPTION & HU, *supra* note 172.

338. VAN HOOK & FIX, *supra* note 27.

hibited under the *jus cogens* norms protecting rights to freedom from direct or intentional discrimination in the Americas.

3. *Indirect Discrimination Prohibited*

Even if direct discrimination cannot be proven, indirect discrimination (or disparate impact) alone is prohibited by human rights law. As discussed above, the ban on indirect discrimination is a *jus cogens* norm.³³⁹ The types of indirect discrimination considered by the Inter-American Court in the case of the Yean and Bosico girls included: “that the discriminatory treatment imposed by the State on the Yean and Bosico children is situated within the *context* of the vulnerable situation of the Haitian population and Dominicans of Haitian origin in the Dominican Republic, to which the alleged victims belong.”³⁴⁰ The United Nations Committee on the Rights of the Child reported concerns “at the discrimination against children of Haitian origin born in the territory [of the Dominican Republic] or belonging to Haitian migrant families, especially their limited access to housing, education, and health services[.]”³⁴¹ The full U.N. report considered by the court included findings that:

Haitians live in the country in very precarious conditions of extreme poverty. Furthermore, most of them are undocumented and must face a generally hostile political and social situation, without the possibility of legal assistance and with limited access to health, sanitation and education services, and this includes children of Haitians, who have been born in this country.³⁴²

Similarly, U.S. Census data has shown again and again that Latino immigrants in the United States experience the lowest socio-economic indicators in education, income, and health.³⁴³ By 2010, Latino children were the largest group of children living in poverty, even though the majority of

339. See Juridical Condition and Rights of Undocumented Migrants, *supra* note 133, ¶¶ 101, 103.

340. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 168 (emphasis added).

341. *Id.* ¶ 169 (citing U.N. Comm. on the Rights of the Child, Examination of the Reports presented by the States Parties under Article 44 of the Convention, Concluding Observations, The Dom. Rep., ¶¶ 22, 26, U.N. Doc. CRC/C/15/Add.150, at 21 (Feb. 21, 2001)).

342. *Id.* ¶ 109(3) (citing U.N.D.P. Human Dev. Office of the Dom. Rep., *Informe Nacional de Desarrollo Humano 2005: Hacia una inserción mundial incluyente y renovada*, at 121, 139, 141, 143, 222).

343. See, e.g., *The Toll of the Great Recession: Hispanic Household Wealth Fell by 66% from 2005 to 2009*, PEW HISPANIC CENTER (July 26, 2011), <http://pewhispanic.org/reports/report.php?ReportID=145>; *Statistical Portraits of Hispanics in the United States, 2009*, PEW HISPANIC CENTER (Feb. 17, 2011), <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=70> at tbl. 22 (lowest portion of college graduates compared to non-Hispanic Asians, Blacks, and Whites), tbl. 24 (lowest school enrollment for ages 3-17), tbl. 31 (highest percentage of persons earning under \$20,000/year, lowest percentage of persons earning \$50,000/year or more), tbl. 32 (lowest average personal earnings), tbl. 38 (highest number of children without health insurance).

U.S. children are non-Hispanic whites.³⁴⁴ Like Haitians living in the Dominican Republic, those Latino immigrants to the United States who are undocumented “face limited access to health, sanitation, and educational services.”³⁴⁵

With regard to the situation of Haitians in the Dominican Republic, the Inter-American Court also considered a report by the U.N. Commission on Human Rights addressing the relationship between undocumented immigration status and racism. The court quoted its finding that:

The issue of racism [. . .] is sometimes manifested among Dominicans themselves, but above all it is evident towards Haitians or those of Haitian origin whose families have, at times, been established for several generations and who continue entering the country. [. . .] There are very few Haitians, even those who have been living in the Dominican Republic since 1957, [. . .] who obtain naturalization. This is the strongest discrimination that the independent expert has met throughout her mission. The authorities are very aware of this problem [. . .]. The fact that Haitians do not have legal existence in the Dominican Republic is based on a deep-rooted lack of recognition [. . .].³⁴⁶

Unfortunately, substituting “Latino” or “Mexican” for “Haitian,” and “United States” for “Dominican Republic,” describes a similar reality for the last several generations of many Latino immigrant families in the United States.³⁴⁷ In a vicious cycle, increasingly restrictive immigration policies have led to increasingly discriminatory impacts on Latinos.³⁴⁸ Based on the same fact pattern, the Inter-American Court found that discriminatory treatment of children of Haitian migrants in the Dominican Republic had led to denying their nationality, leaving them stateless and in an extremely vulnerable position.³⁴⁹ In the case of the Yean and Bosico girls, the Inter-American Court ruled that the Dominican Republic had violated

344. MARK HUGO LOPEZ & GABRIEL VELASCO, PEW HISPANIC CENTER, CHILDHOOD POVERTY AMONG HISPANICS SETS RECORD, LEADS NATION: THE TOLL OF THE GREAT RECESSION 4 (2011), <http://pewhispanic.org/files/reports/147.pdf>.

345. See, e.g., Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the “Contract With America” Congress*, 90 KY. L. J. 1043, 1052–60 (2002) (describing 1996 reforms prohibiting immigrants from receiving public health and other benefits, and their additional impact on mixed-status Latino immigrant families); *Statistical Portraits of Hispanics in the United States, 2009*, PEW HISPANIC CENTER, *supra* note 343 (noting further disparities between U.S. and foreign-born Latinos).

346. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 170 (Sept. 8, 2005) (citing U.N. Comm’n on Human Rights, *Human Rights and Extreme Poverty*, presented by the independent expert on the question of human rights and extreme poverty, A. M. Lizin, under Resolution 2002/30 of the Commission on Human Rights, Addition: Mission to the Dom. Rep., ¶¶ 8–13 UN Doc. E/CN.4/2003/52/Add.1).

347. See *supra* Part II.B.

348. See, e.g., JOHNSON, *supra* note 184, citing sources.

349. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 172.

their rights to a nationality and to equal protection before the law.³⁵⁰ Among other remedies, the Inter-American Court ordered that domestic law be reformed to provide for the acquisition of Dominican nationality.³⁵¹

In the United States, if birthright citizenship were retracted, then the circular problem of lack of access to citizenship for members of a certain race or national origin would be made permanent across generations. It would create a permanent underclass of non-citizens without access to fundamental rights, made up primarily of Latinos, and the number and percent of non-citizens would be increasingly Latino.³⁵² Therefore, retraction of birthright citizenship would violate the right to freedom from indirect discrimination, which is a *jus cogens* right and directly applicable to the United States.

In addition to the State's duty of nondiscrimination, under human rights law States also have duties to protect against discrimination by private parties. This duty was first made clear in the context of protecting women from domestic violence, but has since been applied to similar instances of failure to protect individual rights against discriminatory acts, or in a discriminatory manner.³⁵³ These duties are embodied in the American Declaration of Human Rights and numerous other international legal instruments. As discussed above, the Inter-American Court has determined that States' obligation to protect against third party discrimination has reached the level of *jus cogens*.³⁵⁴ Furthermore, the Inter-American Court has discussed the vulnerable situation of migrants in terms of human rights, finding that migrants are subject to cultural prejudices, racism, and xenophobia as well as degrading treatment that may be exacerbated by poverty, especially for women and children.³⁵⁵ Echoing the findings of United Nations bodies, the Inter-American Court confirmed that States have a duty to protect migrants against third party discrimination.³⁵⁶

For all these reasons, in the Yean and Bosico case, the Inter-American Court considered not only negative but also positive obligations of the State with regard to equality rights. The court summarized human rights law as creating State obligations that include not only the duty to refrain from discrimination, which is the "negative obligation" to respect rights, but also the duty to protect against discrimination, which is the "positive obligation" to guarantee rights.³⁵⁷ The court held that the Dominican Republic failed in both regards, including the duty to guarantee rights, "owing to the situation of extreme vulnerability in which the State placed the Yean

350. *Id.* ¶ 260(2).

351. *Id.* ¶ 260(8).

352. *See supra* Part II.B.1.

353. *See* Juridical Condition and Rights of Undocumented Migrants, *supra* note 133, ¶ 104.

354. *Id.*

355. *Id.* ¶¶ 112-16.

356. *Id.* ¶¶ 117-18.

357. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 173.

and Bosico children, because it denied them their right to nationality for discriminatory reasons.”³⁵⁸ This condition made it impossible for the Haitian-descendant children to receive protection from the State and any benefits due to them.³⁵⁹ Moreover, the State failed to guarantee the right to equality because it placed the children in a context in which they “lived in fear of being expelled by the State of which they were nationals and separated from their families.”³⁶⁰

Similarly, if the United States were to retract birthright citizenship from children born to undocumented immigrants, it would place them in a situation of extreme vulnerability to federal, state, local, and private actions against undocumented immigrants at large.³⁶¹ Because the majority of victims of hate crimes in the United States are Latino immigrants,³⁶² withholding birthright citizenship would also expose these children to greater risk of some of the most serious incidents of discrimination by third parties. It would also negatively impact their daily lives, as they would be forced to live in fear of separation from their homes and their families at any moment.

Furthermore, all of the States’ obligations discussed above would be heightened due to the status of the victims as children.³⁶³ In the international legal regime, children have enhanced rights to family unity. Although every family member enjoys those rights,³⁶⁴ separation from parents and caregivers would be most devastating to young children. Inter-American human rights law recognizes the needs of children for parental protection and care, and the corresponding heightened rights to family unity.³⁶⁵

358. *Id.*

359. *Id.*

360. *Id.*

361. See, e.g., *Immigration Enforcement by State & Local Authorities*, NAT’L IMMIGRATION LAW CTR., http://www.nilc.org/immlawpolicy/LocalLaw/index.htm#fed_lit (last visited Oct. 29, 2011) (indexing litigation involving anti-immigrant measures in Alabama (2011), Georgia (2011), Indiana (2011), South Carolina (2011), Utah (2011), Orleans Parish, Louisiana (2011), Arizona (2010), Farmer’s Branch, Texas (2008), Hazelton, Pennsylvania (2007), as well as other legally questionable anti-immigrant measures).

362. *Victims – Hate Crimes Statistics 2006*, U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, <http://www2.fbi.gov/ucr/hc2006/victims.html>.

363. See, e.g., *Villagrán Morales et. al. v. Guatemala* (the “Street Children” Case), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 191–98 (Nov. 19, 1999).

364. See, e.g., American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM* 17, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992). Article VI describes the right to a family and to protection thereof, Article VII states that “all children have the right to special protection, care and aid,” and Article XXX describes duties to protect children and parents. *Id.*

365. See, e.g., *Juridical Status and Human Rights of the Child*, *supra* note 271, ¶ 71 (“The child has the right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs. Every person’s rights to receive protection against arbitrary or illegal interference with his or her family is implicitly part of the right to protection of the family and the child, and it is also explicitly recognized by Articles 12(1) of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man, 17 of the International Covenant on Civil and Political Rights. . . . These provisions are especially significant when separation of a child from his or

Denying these rights to future generations of immigrants would intensify the discriminatory impact on children.

In the case of the Dominican girls born to undocumented Haitian immigrant fathers, the Inter-American Court noted the plaintiffs' particular rights as children in several important respects. First, with regard to the right to nationality, the court found that: "[b]earing in mind that the alleged victims were children, the Court considers that the vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled."³⁶⁶ The United Nations Committee on the Rights of the Child also "expressed deep concern" about the treatment of children of Haitian origin in the Dominican Republic, who were denied the right to birth registration and as a result "have not been able to enjoy fully their rights, such as access to health care and education."³⁶⁷ Similarly, in the United States, retraction of birthright citizenship would render many children stateless and impede access to the special protections to which children are entitled. All rights, including civil and political as well as socio-economic rights, would be severely limited for U.S.-born children denied citizenship. Whether or not their parents are undocumented, the *jus cogens* right to freedom from all types of discrimination applies to these children and arguably to the family members who are their caretakers, as well.³⁶⁸ Moreover, the discriminatory impact on immigrant women would have implications under the well-developed rules prohibiting direct and indirect discrimination against women in the Inter-American system.³⁶⁹

In sum, the retraction of birthright citizenship would violate several sources of human rights law. Among those are applicable treaties that the United States has signed, including the American Declaration,³⁷⁰ the International Convention on the Elimination of All Forms of Racial Discrimination,³⁷¹ and the Convention on the Rights of the Child.³⁷² Like the

her family is being analyzed.") Furthermore, lack of material resources may not be the only basis for separation of a child from his or her family. *Id.* ¶ 76.

366. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 167 (Sept. 8, 2005).

367. *The Yean and Bosico Children*, Inter-Am. Ct. H.R. (ser. C.) No. 130 ¶ 169 (citing U.N. Comm. on the Rights of the Child, Examination of the Reports presented by the States Parties under Article 44 of the Convention, Concluding Observations, The Dom. Rep., ¶¶ 22, 26, U.N. Doc. CRC/C/15/Add.150, of 21 (Feb. 21, 2001)).

368. Juridical Condition and Rights of Undocumented Migrants, *supra* note 133, ¶ 118.

369. See, e.g., Culliton, *supra* note 282 at 543-49; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter Am. Ct. H.R., Adv. Op. OC-4/84, Ser. A, No. 4 (Jan. 19. 1984) ¶ 67; see also Hartry, *supra* note 197.

370. See, e.g., Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, ¶ 199 (2011).

371. Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* 12 Mar. 1969, 660 U.N.T.S. 195. The U.S. ratified the treaty on October 21, 1994. For the current status of the treaty, please see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

ICCPR,³⁷³ these treaties may be taken into account and enforced in the Inter-American system, particularly when they demonstrate heightened discrimination,³⁷⁴ and they are also reviewable in United Nations human rights fora.³⁷⁵ In addition to these treaties, retraction of birthright citizenship would violate the overarching international legal principle that human rights must progressively develop, and not regress.³⁷⁶ Finally, customary Inter-American law providing for birthright citizenship demonstrates that retracting birthright citizenship is not legally permissible.³⁷⁷ All of these additional international legal obligations would fall under the protection of the *jus cogens* right to freedom from discrimination. As discussed above, discriminatory impact could be proven in this case because the great majority of women, children, and families affected by retraction of birthright citizenship would be Latino.³⁷⁸

A careful study and in-depth analysis of human rights law thus shows that the provision of *jus soli* through the Fourteenth Amendment was not a favor conferred on children of immigrants that the United States can retract at will. On the contrary, birthright citizenship continues to be an essential promise to protect the fundamental right to equality in the Americas.

IV. CONCLUSION: RETRACTING BIRTHRIGHT CITIZENSHIP WOULD VIOLATE FUNDAMENTAL INTER-AMERICAN HUMAN RIGHTS LAW

Retracting birthright citizenship would violate fundamental Inter-American human rights norms. While proponents of retracting birthright citizenship from children of undocumented immigrants in the United States have argued that few countries in the world provide it, the opposite is true in the Americas. In total, 30 of the 35 sovereign nations in the Americas provide birthright citizenship to all children of immigrants.³⁷⁹ Because over 85% of the nations of the Americas provide birthright citizenship, it ap-

372. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3. The U.S. and Somalia are the only two countries that have not ratified this Convention. The U.S. signed it on Feb. 16, 1995. For the current status of the treaty, please see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

373. See, e.g., Juridical Condition and Rights of Undocumented Migrants, *supra* note 133.

374. See, e.g., *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶ 182 (Sept. 8, 2005) (citing rights under the ICCPR, Convention on the Rights of the Child, and other treaties).

375. See, e.g., CENTER FOR CONSTITUTIONAL RIGHTS, FROM RHETORIC TO ACTION: A REPORT ON U.S. ENGAGEMENT WITH THE UNIVERSAL PERIODIC REVIEW PROCESS 4 (2011), http://www.ccrjustice.org/files/CCR_UPR%20Report_March%202011.pdf (describing Universal Periodic Review process established by the United Nations Human Rights Council in 2006, through which “[c]ountries are reviewed every four years on their compliance with human rights obligations under the UN Charter, the Universal Declaration of Human Rights, relevant treaties, declarations and international law”).

376. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), pmb. & art. 30.

377. See sources cited *supra* Part I.B.

378. See sources cited *supra* Part II.B.1.

379. See *supra* Part I.A.

pears that the “exceptional” U.S. practice of *jus soli* is in fact the customary international law of the Americas.

Opponents of birthright citizenship have also argued that international law permits nation-states to do as they like with regard to citizenship rules, and that the United States may therefore permissibly retract birthright citizenship.³⁸⁰ However, human rights law requires a more complete review of the facts and a contextual analysis to determine whether other applicable international legal norms are also at issue. In the United States, the historical context clearly demonstrates that the birthright citizenship provision of the Fourteenth Amendment was enacted to correct prior racial discrimination, and that it was intended to include children of all immigrants. Moreover, the current context also raises issues of discrimination. As this article demonstrated, the current debate on retraction of birthright citizenship features indications of intentional discrimination. Not coincidentally, retraction of birthright citizenship would disparately impact children of Latino immigrants for generations to come.

Presented with similar issues in the case of children of undocumented Haitian immigrants in the Dominican Republic, the Inter-American Court on Human Rights ruled that States’ rights to make their own rules regarding access to citizenship are limited by human rights considerations. In particular, the rights to a nationality and freedom from discrimination are imperative rights in the Inter-American system. The right to a nationality includes the right to freedom from statelessness, especially for children. The Inter-American Court has not yet decided on the precise issue of legal retraction of birthright citizenship through a constitutional amendment, but will decide the matter in the near future as an individual of Haitian descent has petitioned the Inter-American Commission on Human Rights regarding the Dominican Republic’s constitutional amendment retracting *jus soli* from children of undocumented immigrants in 2010. Based on its prior jurisprudence, it is very likely that the Inter-American Commission and Court would rule that retraction of birthright citizenship with a discriminatory impact violates fundamental human rights law.

In its 2003 decision in the case of the Yean and Bosico girls, the Inter-American Court addressed the Dominican Republic’s failure to issue birth certificates to children of undocumented immigrants, and found that the country violated the right to nationality of the children affected. The Inter-American Court took into account that the children were descendents of Haitian immigrants, that the situation of Haitian immigrants in the Dominican Republic was unstable, and that failure to issue birth certificates to children of undocumented immigrants had a disparate impact on Dominicans of Haitian origin. As this article discussed, one of the main reasons for

380. See *supra* notes 89-91 and accompanying text.

the decision that the Dominican Republic had violated human rights law was the legal importance of the right to freedom from discrimination.

The Inter-American Court has made clear that the right to freedom from discrimination has reached the level of *jus cogens*, such that it is compelling and may not be violated even by States who have not signed onto specific treaty obligations regarding the right.³⁸¹ This has several implications. First, the disparate impact analysis of the court's decision in the Yean and Bosico girls case shows that the right to freedom from discrimination outweighs a State's rights to make its own rules regarding access to citizenship. For this reason, it is likely that the Inter-American Commission will rule that the Dominican Republic's retraction of birthright citizenship through a constitutional amendment in 2010 violates human rights law, and that the Inter-American Court would rule the same if the State disagrees with the Commission's findings. Secondly, since the right to freedom from discrimination has reached the level of *jus cogens*, it clearly applies as a peremptory norm to every country, including the United States, despite the fact that the United States has not ratified all human rights treaties. Third, a *jus cogens* norm is not only enforceable internationally as a superior norm to all other laws, but may also be enforceable domestically in the United States, despite recent U.S. federal court decisions indicating resistance to enforcing international legal norms.³⁸² The *jus cogens* right to freedom from discrimination can be distinguished from the Supreme Court's decision in the *Medellin* case as well as recent federal Circuit Court decisions involving immigrants' rights under the American Declaration of Human Rights, because *jus cogens* norms were not at issue in those cases.

Application of this legal framework to the issue of retraction of birthright citizenship has demonstrated that the United States could be in violation of fundamental human rights law if it were to retract *jus soli* from children of undocumented immigrants. Anti-Latino statements made by the coalition of state legislators calling for retraction of birthright citizenship constitute proof of discriminatory intent, which is a form of direct discrimination under human rights law.³⁸³ Another indicator of discriminatory intent is that retraction of birthright citizenship would fail to meet its stated purpose of decreasing illegal immigration; therefore, the measure would be arbitrary and unreasonable, especially considering its foreseeable disparate impact on Latino immigrant families.³⁸⁴ Even if direct discrimination could not be proven, the prohibition of indirect discrimination is also a *jus cogens* norm.³⁸⁵ As this Article demonstrates, census data alone shows the discriminatory impact that retraction of birthright citizenship would have

381. See *supra* Part III.C.1.

382. *Id.*

383. See *supra* Parts II.B.2, III.C.2.

384. VAN HOOK & FIX, *supra* note 27.

385. See *supra* Part III.C.3.

on the Latino community. Furthermore, the discriminatory impact would be severe, as innocent children would live in fear of separation from their families and homes, and would never enjoy equal access to other rights, such as the right to vote, due process rights, or the right to an education. The discriminatory impact would be compounded by its effect on millions of children of immigrants for generations to come. Human rights law also prohibits many other likely consequences of retracting birthright citizenship. The *jus cogens* norm of freedom from discrimination includes protections from the type of third party discrimination that is extremely likely if birthright citizenship is retracted. The United States could be held legally responsible for anti-immigrant hate crimes and other types of human rights violations that could result from the heightened vulnerability of non-citizens. Retraction of birthright citizenship would also violate human rights law by inherently discriminating against immigrant women, and by violating the heightened protections that children are entitled to under human rights law.

This Article also demonstrated that fundamental human rights norms governing whether birthright citizenship could be retracted are not merely theoretical. U.S. retraction of birthright citizenship could be litigated in the Inter-American system, before the Commission, as well as in the United Nations system, before U.N. human rights committees. Any other member state of the Organization of American States could request an Advisory Opinion from the Inter-American Court of Human Rights, asking for clarification of the legality of retracting birthright citizenship. Moreover, because retraction of birthright citizenship would implicate *jus cogens* rights to freedom from discrimination, such a move could also be challenged in U.S. courts.

Finally, the fact that retraction of U.S. birthright citizenship may violate fundamental human rights law should be taken into account by policymakers. The allegation that the United States is one of only a few countries that provide birthright citizenship is false, and the argument that the United States has the sovereign right to retract it is misleading. This Article demonstrates that most nations in the Americas provide birthright citizenship, and that its retraction would violate fundamental human rights. Therefore, Congress should not pass an amendment retracting the guarantees of the Fourteenth Amendment, nor should it enact any legislation limiting birthright citizenship. Similarly, as the states are also bound by fundamental human rights law, no state should take any measure limiting birthright citizenship for children of immigrants. The children represent our collective future, and they should be free to realize the promise of the American dream.