

# BIRTHRIGHT JUSTICE: THE ATTACK ON BIRTHRIGHT CITIZENSHIP AND IMMIGRANT WOMEN OF COLOR

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## ABSTRACT:

Anti-immigrant sentiment in the United States is increasingly focused on restricting women of color’s access to reproductive justice. Rhetoric surrounding “anchor babies” and an “invasion by birth canal” shows how the debate over immigration plays out on the bodies of immigrant women of color. This Article begins by describing the history of exclusion inherent in this country’s immigration laws and the modern political assault on birthright citizenship, both of which are grounded in nativism, sexism, and racism. Using the experiences of individual women and conditions in immigration detention centers as examples, the Article then demonstrates that Immigration and Customs Enforcement appears to be targeting pregnant women for removal with the aim of preventing them from giving birth in this country.

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## I.

## INTRODUCTION

On February 7, 2006, Zhen Xing Jiang arrived at the federal immigration office in Philadelphia for what she thought would be a routine check-in.<sup>1</sup> Instead, while her husband and two young sons waited for her in the lobby, Immigration and Customs Enforcement (“ICE”) officers forced Ms. Jiang “into a minivan, bruised her and bumped her abdomen against the backseat and drove her to Kennedy Airport” for immediate deportation.<sup>2</sup> The ICE officers stopped to buy themselves lunch but gave her nothing to eat over the next eight hours.<sup>3</sup> ICE officers knew that Ms. Jiang was thirteen weeks pregnant with twins.<sup>4</sup>

After hours in a public waiting area at the airport, Ms. Jiang began to suffer severe abdominal cramps.<sup>5</sup> She begged for help from the officers, but they ignored her<sup>6</sup> and even taunted her, saying that she was “not going to get out of

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1. Jeff Gammage, *Zhen Xing Jiang Arrived Here Illegally in 1995 and Lived Quietly for 10 Years. But She Miscarried This Year in U.S. Custody and Now is Fighting to Stay*, PHILA. INQUIRER, June 20, 2006, at A1.

2. Nina Bernstein, *Protests Brew Over Attempt to Deport Pregnant Woman*, N.Y. TIMES, Feb. 14, 2006, at B5.

3. *Id.*

4. See Gammage, *supra* note 1 (“Officials say Jiang was treated with extra care because of her pregnancy.”).

5. Bernstein, *Protests Brew*, *supra* note 2.

6. *Police Brutality Against Women of Color & Trans People of Color: A Critical Intersection of Gender Violence & State Violence*, INCITE! WOMEN OF COLOR AGAINST VIOLENCE, [http://www.incite-national.org/media/docs/5341\\_pv-brochure-download.pdf](http://www.incite-national.org/media/docs/5341_pv-brochure-download.pdf) [hereinafter *Police Brutality*] (“Jiang asked the immigration officers to let her see a doctor because she was having stomach and back pains, but they ignored her requests . . .”) (last visited Nov. 3, 2011).

this” and “would have to have her babies in China.”<sup>7</sup> Eventually, airport police convinced the ICE agents to take her to Jamaica Hospital Medical Center, where doctors determined that she had miscarried.<sup>8</sup>

Ms. Jiang had lived in the United States since 1995, when she entered, without inspection, from China.<sup>9</sup> She met and married Tian Xiao Zhang, another undocumented<sup>10</sup> immigrant, and ran a restaurant with him in central Philadelphia.<sup>11</sup> The couple had two young sons, both of whom were born in this country and are therefore U.S. citizens.<sup>12</sup> In 2004, Ms. Jiang received a deportation order; the order was soon amended to allow her to remain in the country “under supervision,” a status requiring regular check-ins.<sup>13</sup> After the authorities learned that she was pregnant, however, they forcibly took her to the airport for immediate deportation.<sup>14</sup>

Immigrant rights activists and Ms. Jiang’s family do not think the timing was a coincidence. During an interview, Mr. Zhang asked, “The government kidnapped my wife . . . . Why the immigration was in a rush [sic] to send a pregnant woman back to China?”<sup>15</sup> The family’s supporters believe “the authorities decided to deport her when they learned she was pregnant, to prevent her from giving birth to another United States citizen.”<sup>16</sup> Ms. Jiang eventually won asylum,<sup>17</sup> likely due to “increasing public and political pressure” from activists.<sup>18</sup> Her experience with immigration officials, however, is not unique. Indeed, stories like Ms. Jiang’s continue to enter the public consciousness through mainstream media reports of pregnant women targeted for removal.<sup>19</sup>

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7. Gammage, *supra* note 1; *Police Brutality*, *supra* note 6.

8. Bernstein, *Protests Brew*, *supra* note 2. See also Mary Flannery, *Did Feds Cause Miscarriage? Woman was Pregnant with Twins*, PHILA. DAILY NEWS, Feb. 14, 2006, at 7 (“The agents arranged for her to be transported to Jamaica Hospital Medical Center in Queens, where an ultrasound examination could find no heartbeat in either of the 13-week-old fetuses.”).

9. Gammage, *supra* note 1.

10. I use the term “undocumented immigrant” instead of “illegal immigrant” or “illegal alien” because I believe those terms are divisive, incorrect, and dehumanizing. For a more in-depth discussion of terminology, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1140–41 (5th ed. 2009).

11. Gammage, *supra* note 1.

12. *Id.*

13. *Id.* It is unclear why Ms. Jiang was allowed to remain in the country under supervision.

14. Bernstein, *Protests Brew*, *supra* note 2.

15. Gammage, *supra* note 1.

16. Bernstein, *Protests Brew*, *supra* note 2.

17. Nina Bernstein, *Once Facing Deportation, a Woman Gets Asylum*, N.Y. TIMES, Sept. 8, 2007, at B1.

18. Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. & POL’Y REV. 385, 402 (2008).

19. See, e.g., Richard Jacques, *RHS Senior Deported; Parents Concerned*, ROSWELL DAILY REC., Dec. 8, 2007 (reporting on pregnant high school student who was detained at school, turned over to ICE, and deported because of a traffic ticket issued days earlier); *Pregnant Mother’s Arrest at School Sparks Outrage*, NEW AM. MEDIA (Dec. 21, 2007),

At the same time, efforts to repeal birthright citizenship<sup>20</sup> have also been the focus of widespread media attention. Senator Lindsey Graham, in advocating for a constitutional amendment to limit birthright citizenship to the children of U.S. citizens, told Fox News in the summer of 2011:

People come here to have babies. They come here to drop a child, it's called drop and leave. To have a child in America, they cross the border, they go to the emergency room, they have a child, and that child's automatically an American citizen. That shouldn't be the case. That attracts people for all the wrong reasons.<sup>21</sup>

Senator Graham's rhetoric perpetuates a common pernicious image, a myth that "capitalizes on the stereotype that immigrant women of color are overly fertile and conspire to give birth to 'anchor babies.'"<sup>22</sup>

According to this myth, these babies serve as an "anchor" for the "chain migration" of an entire family.<sup>23</sup> However, the Immigration and Nationality Act ("INA") makes this frequently-deployed story a practical impossibility. The INA specifies that a child born in the U.S. must wait until he or she is twenty-one years old to sponsor a parent for naturalization or lawful permanent residency.<sup>24</sup>

[http://news.newamericamedia.org/news/view\\_article.html?article\\_id=0840ee70d1c0286d3525db8b242adabb&from=rss](http://news.newamericamedia.org/news/view_article.html?article_id=0840ee70d1c0286d3525db8b242adabb&from=rss) (describing the arrest and detention of a woman eight months pregnant at her six-year-old daughter's school, despite ICE instruction that agents not arrest pregnant women or immigrants on school grounds); Julia Preston, *Immigrant, Pregnant, Is Jailed Under Pact*, N.Y. TIMES, July 20, 2008, at A13 (reporting on the arrest and detention by local police of a woman nine months pregnant for a routine traffic violation; she was turned over to ICE and released six days later, after she had given birth in shackles); Chris Echegaray, *Woman Shackled During Labor Loses Appeal to Stay in Country*, THE TENNESSEAN, Nov. 11, 2010.

20. Under the doctrine of *jus soli*, enshrined by the Fourteenth Amendment, children born within U.S. territory automatically obtain U.S. citizenship: "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. See also Brooke Kirkland, *Limiting the Application of Jus Soli: The Resulting Status of Undocumented Children in the United States*, 12 BUFF. HUM. RTS. L. REV. 197, 200-01 (2006) (recognizing that the Fourteenth Amendment has long been interpreted to confer citizenship to anyone born on U.S. soil, but also noting proposals to limit *jus soli* citizenship rights).

21. Tim Gaynor, *Republicans Target Birthright Citizenship for Illegal Immigrants' Children*, REUTERS (Aug. 4, 2010), <http://blogs.reuters.com/frontrow/2010/08/04/republicans-target-birthright-citizenship-for-illegal-immigrants-children>.

22. Huang, *supra* note 18, at 400. This terminology is, of course, problematic and offensive to many, and it has been called hate speech. See, e.g., Raoul Lowery Contreras, Commentary, *"Anchor Babies" Is Hate Speech*, N. COUNTY TIMES (Aug. 24, 2007), [http://www.nctimes.com/news/opinion/commentary/article\\_4b609bf2-4072-5dc3-8947-6848fc2b56ec.html](http://www.nctimes.com/news/opinion/commentary/article_4b609bf2-4072-5dc3-8947-6848fc2b56ec.html) ("The media should voluntarily ban today's hate speech ('anchor babies') against Mexicans, Mexican-Americans and anyone with a Spanish surname, the fastest growing community in North County, just as it bans the N-word."). I agree with Contreras and do not endorse the term; when I use it, it only reflects the usage of birthright citizenship opponents.

23. See *Birthright Citizenship*, FED'N OF AM. IMMIGRATION REFORM, [http://www.fairus.org/site/News2?page=NewsArticle&id=16535&security=1601&news\\_iv\\_ctrl=1007](http://www.fairus.org/site/News2?page=NewsArticle&id=16535&security=1601&news_iv_ctrl=1007) (last visited Oct. 26, 2011) (defining these terms from a conservative viewpoint).

24. 8 U.S.C. § 1151(b)(2)(A)(i) (2006).



Even then, the parent is subject to strict admissibility requirements.<sup>25</sup> Among other things, because most parents will not have left the U.S. voluntarily, many parents are found inadmissible simply for being present in the country without admission or for having been previously ordered removed.<sup>26</sup> The fact that “anchor babies” are a weak foothold for their parents, however, has not deterred conservatives from attempting to eliminate birthright citizenship through either a constitutional amendment or a statute.

A recent report by the Pew Hispanic Center<sup>27</sup> has helped fuel the anti-immigrant fire. Using U.S. Census data, it estimates that “340,000 of the 4.3 million babies born in the United States in 2008 were the offspring of unauthorized immigrants.”<sup>28</sup> It also found that four million citizen children born to undocumented immigrants lived in the U.S. in 2009.<sup>29</sup> However, the report’s usefulness is limited, and it is even misleading. The Pew study does not differentiate between citizen children born to a family where only one parent is undocumented and citizen children born to a family where both parents are undocumented,<sup>30</sup> but, as discussed in Part I.B below, most opponents of birthright citizenship advocate eliminating automatic citizenship for children only when both parents are undocumented. Nonetheless, opponents of birthright citizenship have jumped on these numbers, despite the fact that they overstate the number of people who might be affected by a ban on birthright citizenship.<sup>31</sup>

25. 8 U.S.C. § 1182(a)(6)(A)(i), (a)(9) (2006).

26. *Id.* It is theoretically possible for the undocumented parent of a minor citizen-child to be eligible for cancellation of removal where the parent has satisfied all of the following requirements and received a favorable discretionary judgment: (1) continuous physical presence in the U.S. for not less than ten years; (2) “has been a person of good moral character during such period;” (3) has not been convicted of a criminal offense; and (4) “establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1) (2006). Only 4,000 noncitizens are eligible for this adjustment of status each fiscal year. § 1229b(e)(1). Additionally, U.S. case law shows this to be a very difficult standard to meet. *See, e.g.,* *Silva-Calderon v. Ashcroft*, 358 F.3d 1175, 1176 (9th Cir. 2004) (rejecting cancellation where a father had not sufficiently demonstrated his six-year-old daughter’s developmental disabilities); *Ramirez-Durazo v. INS*, 794 F.2d 491, 499 (9th Cir. 1986) (“[U]nique extenuating circumstances [are] necessary to demonstrate ‘extreme hardship.’”); *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (“The common results of deportation or exclusion are insufficient to prove extreme hardship.”); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1170–72 (2006) (noting that the “unavoidable” hardship to citizen children if their parents are deported may not be sufficient).

27. JEFFREY S. PASSEL & PAUL TAYLOR, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN (2010).

28. *Id.* at 1.

29. *Id.*

30. *See* Seth Hoy, *Reframing the Birthright Citizenship Debate with Facts*, IMMIGRATION IMPACT (Aug. 13, 2010), <http://immigrationimpact.com/2010/08/13/reframing-the-birthright-citizenship-debate-with-facts> (explaining that the Pew report only clarified this distinction in a footnote, which was not noted in news articles citing the report’s estimate).

31. *See, e.g.,* Steve Sailer, “*Birthright Citizenship*” (*A.K.A. Jus Soli*) and the Cheating of America, VDARE (Aug. 22, 2010, 12:00 AM), <http://www.vdare.com/articles/birthright-citizenship-aka-jus-soli-and-the-cheating-of-america> (claiming that the “way to put [the study’s

News groups' failure to point out the limitations of the data has further exacerbated the alarmist panic over immigration and national identity.<sup>32</sup>

Given the current climate, this Article seeks to answer Mr. Zhang's question: why *was* ICE so determined to "send a pregnant woman back to China?"<sup>33</sup> I argue that ICE's approach toward pregnant immigrant women has its foundation in general anti-immigrant sentiment, but that sentiment is particularly focused on women of color and, even more specifically, intertwined with their reproductive capacity.<sup>34</sup> National identity is often expressed in terms of gender and sexuality—as well as race and ethnicity—because a unified national identity depends on being able to create, in the words of Benedict Anderson, "imagined communities"<sup>35</sup> against which outsiders can be defined.<sup>36</sup> Noncitizens are construed as the ultimate outsiders in American society, and immigrant women's ability to reproduce these outsiders is particularly threatening when the national body is made up of and defined by the human body.<sup>37</sup> The attack on "anchor babies" and birthright citizenship is a direct attempt to prescribe immigrant women's reproductive decisions regarding pregnancy and childbirth in response to the anxieties involved in creating a particular American identity.

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findings] into perspective is to think of it as a percentage of the entire population of 310 million. Thus, illegals in the US are having the same number of children as a group of 25 million Americans"). Dave Gibson, a blogger on The Examiner, commented on the Pew Hispanic Center study by saying that:

With the unchecked illegal immigration crisis, this country will become another Latin American nation in our lifetime. What will this mean to you? [] The disappearance of the English language, the destruction of our traditional American culture, the overpopulation of our cities, epidemics of once-thought eradicated diseases, crushing poverty, and soaring crime.

Dave Gibson, *Is Mexico Annexing the U.S. Through Their So-Called "Anchor Babies?"*, THE EXAMINER (Aug. 12, 2010), <http://www.examiner.com/immigration-reform-in-national/is-mexico-annexing-the-u-s-through-their-so-called-anchor-babies>.

32. See Hoy, *supra* note 30 ("Numerous news articles ran with the Pew report's estimate as though both parents were undocumented.").

33. Gammage, *supra* note 1.

34. See Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 69 (2009) ("[T]he paradigmatic vision of 'illegal' immigration would surely feature a Mexican woman, brown-skinned and *mestiza*, nine-months pregnant, crossing the Rio Grande under cover of night.").

35. See generally BENEDICT R. ANDERSON, *IMAGINED COMMUNITIES* (1983) (theorizing nations as socially constructed communities "imagined" by the people who perceive themselves as part of that nation).

36. See Jane Sherron De Hart, *Containment at Home: Gender, Sexuality, and National Identity in Cold War America*, in *RETHINKING COLD WAR CULTURE* 124, 142 (Peter J. Kuznick & James Gilbert eds., 2001) (explaining that the mainstream "American" imagined community is tied up with racial categories, and as people of certain ethnicities—such as Irish, Italian, and Jewish people—are accepted into the American community, they are considered "white." Members of other ethnicities—even those who have lived in the Americas for far longer, including American Indians, African Americans, and Hispanic Americans—are considered "others," outside the mainstream "American" imagined community).

37. See *id.* at 144 (arguing that the national body is often defined in terms of the human body). For a more detailed discussion of this analogy, see Part II.A.

This Article demonstrates that the attack on birthright citizenship, a surrogate for an outright onslaught on women of color's reproductive justice, has led ICE to target pregnant women whose very bodies threaten the perceived national body. To do so, Part I explores the history of birthright citizenship and examines the current frontal assault on it by conservative<sup>38</sup> scholars, politicians, pundits, and activists. Part II focuses on the assumptions and prejudices inherent in any attempt to limit citizenship to the children of U.S. citizens, which are compounded by general conservative and nativist fears of the reproductive capacity of women of color. Part III looks at the current treatment of pregnant women in immigration detention centers in the U.S. and women's access to reproductive health care there generally, and demonstrates that ICE is not meeting its obligations to provide adequate care to pregnant detainees. Part IV then connects the assault on birthright citizenship with the targeting of pregnant women for detention and removal, arguing that ICE policy focuses on the bodies of the women who produce these "anchor babies." Ultimately, I argue that ICE has succumbed to the conservative goal of ending the right to birthright citizenship for the children of these immigrants. Even absent a specific ICE policy regarding the detention of pregnant women,<sup>39</sup> pregnancy has become a red flag for the organization. ICE seems to be targeting pregnant women for detention and removal with the aim of preventing them from delivering babies in this country and the ultimate goal of eliminating the possibility of their children gaining U.S. citizenship. Although official policies under President Obama have encouraged ICE officers to focus on apprehending, detaining, and removing immigrants convicted of crimes, there is no indication that the change in administration has led to actual change in immigration enforcement practices.<sup>40</sup>

This Article uses a reproductive justice lens to look at citizenship and reproductive coercion and control in the U.S. For the purposes of this Article, reproductive justice is defined as "the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women's human rights."<sup>41</sup> More concretely, it can be understood as: "(1) the right to have a child; (2) the right not to have a child;

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38. By "conservative," I mean generally resistant to the social, cultural and demographic changes in the U.S. since the mid-twentieth century.

39. Indeed, there is a surprising lack of attention paid to female detainees' needs—and even less attention is paid specifically to pregnant detainees' needs—in the 2000 ICE detention standards. See Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 708–09 (2009) (identifying and describing the four of thirty-eight detention standards that refer specifically to female detainees, and recognizing that the new performance-based standards include some additions and minor alterations to the referenced needs of female detainees).

40. For a discussion of recent ICE policies and an explanation why these changes may not be sufficient to protect pregnant women from ICE attention, see *infra* Part IV.

41. Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK 4, [available at](http://www.protectchoice.org/downloads/Reproductive%20Justice%20Briefing%20Book.pdf) [www.protectchoice.org/downloads/Reproductive%20Justice%20Briefing%20Book.pdf](http://www.protectchoice.org/downloads/Reproductive%20Justice%20Briefing%20Book.pdf).

and (3) the right to parent the children we have.”<sup>42</sup> Reproductive justice, therefore, offers a critical lens through which to evaluate pregnant women’s experiences and to examine pregnancy prevention, access to prenatal healthcare or abortion, bodily determination, and parental rights. The reproductive justice lens therefore is uniquely able to highlight ICE’s exploitation of pregnant immigrants’ bodies.

## II.

### THE HISTORY OF EXCLUSION IN U.S. IMMIGRATION LAW & POLICY

#### A. *The Historical and Legal Underpinnings of Birthright Citizenship.*

Birthright citizenship is a product of America’s particular legal, historical, and social development. When the U.S. Constitution was ratified, it did not specify how citizenship could be obtained, possibly indicating that the Framers intended to continue the English tradition of *jus soli*.<sup>43</sup> *Jus soli* prescribes that everyone born within a nation’s jurisdiction is automatically a citizen, whereas *jus sanguinis* limits citizenship to children born of citizens.<sup>44</sup> Ian Haney López notes that, although *jus soli* may seem to be a less restrictive doctrine, it took more than one hundred years for the U.S. government to ratify the amendment that would allow *jus soli* to apply to all racial minorities within U.S. borders.<sup>45</sup> The birthright citizenship clause of the Fourteenth Amendment was adopted to extend citizenship to slaves immediately following the Civil War,<sup>46</sup> overturning the Supreme Court’s *Dred Scott* decision.<sup>47</sup> The clause reads in full: “All persons born or naturalized in the United States and subject to the jurisdiction

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42. *Id.* See also Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1425 (2009):

Reproductive justice requires a state that provides a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, healthcare, including but not limited to abortion services, prenatal care, support in childbirth and postpartum, support for breastfeeding mothers, early childcare for infants and toddlers, income support for parents who stay home to care for young babies, and high quality public education for school age children.

*Id.*

43. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 28–29 (2006) (“The U.S. Constitution as ratified did not define the citizenry, probably because it was assumed that the English common law rule of *jus soli* would continue.”).

44. *Id.* at 29; Kirkland, *supra* note 20, at 199 (noting that the U.S. currently grants citizenship through both methods).

45. LÓPEZ, *supra* note 43, at 29.

46. Dorothy Roberts, *Who May Give Birth to Citizens? Reproduction, Eugenics, and Immigration*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 205, 207 (Juan F. Perea ed., 1997).

47. See *Scott v. Sandford*, 60 U.S. 393, 417 (1856) (“And this power granted to Congress . . . is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.”).

thereof, are citizens of the United States and of the State wherein they reside.’<sup>48</sup>

Birthright citizenship appears to have a straightforward definition, and the Fourteenth Amendment was intended to prevent “the reemergence of a hereditary caste of subordinated citizens.”<sup>49</sup> However, the meaning of terms in the citizenship clause continues to be debated, and the caste system that slavery and *Dred Scott* perpetuated did not disappear quickly or easily. Following the ratification of the Amendment, when citizenship clearly extended to newly freed slaves, the clause’s boundaries were widely contested. For example, despite the Fourteenth Amendment, Native Americans were denied citizenship in *Elk v. Wilkins*<sup>50</sup> and did not gain full, unrestricted birthright citizenship until the Nationality Act of 1940 specifically provided citizenship “to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe” born on U.S. soil.<sup>51</sup>

Chinese immigrant laborers constituted another important group targeted as non-citizens. In the 1880s, exclusion laws limiting Chinese immigration became more and more restrictive.<sup>52</sup> The Supreme Court upheld these laws in a series of cases.<sup>53</sup> In refusing to “review federal immigration statutes for compliance with substantive constitutional restraints,” the Court established the plenary power doctrine in immigration.<sup>54</sup> This doctrine holds that the political branches of the federal government have almost complete control over immigration law,<sup>55</sup> thereby legitimizing the government’s unabashedly racist rationale for the exclusion laws.<sup>56</sup>

48. U.S. CONST. amend. XIV, § 1.

49. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT’L L. 237, 248 (1994).

50. 112 U.S. 94, 103 (1884).

51. LÓPEZ, *supra* note 43, at 29–30 (quoting *United States v. Thind*, 261 U.S. 204, 211 (1922)). As López notes, “[t]hus, the basic law of citizenship, that a person born here is a citizen here, did not include all racial minorities until 1940.” *Id.* at 30. For more background information, see Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment’s Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 466–69 (2008).

52. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1065–66 (1994) (describing the progression of laws intended to keep the “undesirable” Asians out of the U.S.).

53. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (deeming the exclusion laws “not questions for judicial determination” but rather the sole province of the political branches); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (“Chinese laborers . . . continue to be aliens . . . and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest.”).

54. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).

55. *Id.* (“In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.”).

56. One senator described the need for Chinese exclusion by saying that “it is very well ascertained that those people have no appreciation of [republican] government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding it or of carrying it out. . . .” CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866). The Chinese were called “utter

The next Section will discuss the Supreme Court's eventual decision to provide the American-born children of Chinese immigrants with automatic citizenship. It will then parse the intricacies of the Court's decision with an eye toward answering the central legal question: do the Constitution and Supreme Court jurisprudence require birthright citizenship for the children of undocumented immigrants, the so-called "anchor babies" at the heart of today's citizenship controversy?

1. *Wong Kim Ark and the Extension of Birthright Citizenship.*

It was not until 1898 that the Supreme Court bypassed the plenary power doctrine and intervened to enforce the Fourteenth Amendment's application to Chinese immigrants in *United States v. Wong Kim Ark*.<sup>57</sup> Wong Kim Ark was born in San Francisco in 1873 to parents of Chinese ancestry who had been lawfully admitted to the U.S.<sup>58</sup> In 1890, he left California for a short visit to China and was admitted to the United States later that year without incident.<sup>59</sup> In 1894, he left on another short visit; upon his return in 1895, he was denied permission to land on "the sole ground that he was not a citizen of the United States."<sup>60</sup> If Wong were found to be a noncitizen, the Chinese Exclusion Acts<sup>61</sup> would block his entry.<sup>62</sup>

In his writ of habeas corpus, Wong argued that, as a native-born citizen, he had "always subjected himself to the jurisdiction and dominion of the United States, and had been taxed, recognized and treated as a citizen of the United States."<sup>63</sup> U.S. District Attorney Henry S. Foote argued instead that Chinese Americans born in the U.S. could not be considered citizens because their parents were not and could never be citizens.<sup>64</sup> In the opinion of the U.S. government, "Wong had been made a citizen only 'by accident of birth' on American soil, but his 'education and political affiliations' remained 'entirely alien.'"<sup>65</sup> In other words, birthright citizenship did not apply to him.

Justice Gray, writing for the majority, decided against the government and found that Wong was indeed a citizen:

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heathens, treacherous, sensual, cowardly and cruel." Henry George, *The Chinese in California*, N.Y. TRIB., May 1, 1869, at 1, 2.

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

58. *Id.* at 652.

59. ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943*, at 103 (2003).

60. *Wong Kim Ark*, 169 U.S. at 653.

61. The Chinese Exclusion Acts prohibited "persons of the Chinese race, and especially Chinese laborers, from coming into the United State." *Id.*

62. *Id.*

63. LEE, *supra* note 59, at 103-04 (quoting Petition for Writ of Habeas Corpus on Behalf of Petitioner, *In re Wong Kim Ark*, 71 F. 382 (N.D. Cal. 1896) (No. 11,198)).

64. *Id.* at 104-05.

65. *Id.* at 105 (quoting Brief on Behalf of the United States at 5, *In re Wong Kim Ark*, 71 F. 382 (No. 11,198)).

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States.<sup>66</sup>

Justice Gray did more than acknowledge Wong's citizenship, however. He interpreted the Fourteenth Amendment broadly, holding that "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."<sup>67</sup>

This interpretation of the term "jurisdiction" within the Fourteenth Amendment has been extremely important to the arguments of birthright citizenship opponents.<sup>68</sup> Peter H. Schuck and Rogers Smith wrote the foundational modern scholarly work advocating the limitation of birthright citizenship to the children of citizens and lawful permanent residents.<sup>69</sup> They argue that the authors of the Fourteenth Amendment intended that "the existence of full and reciprocal obligations of individual allegiance and governmental power and protection . . . [is] the crucial element needed to satisfy the jurisdiction requirement and qualify one for birthright citizenship under the clause."<sup>70</sup> Because "[t]he jurisdiction requirement's conjunctive form . . . clearly suggests that it was meant to narrow the scope of the birthright citizenship principle under the clause,"<sup>71</sup> Schuck and Smith argue for a "consensual" model of citizenship, meaning, among other things, that children of undocumented immigrants and non-immigrants would not gain citizenship automatically upon birth on U.S. soil.<sup>72</sup> They argue that these children "have never received the nation's *consent* to their permanent residence within it."<sup>73</sup>

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66. *Wong Kim Ark*, 169 U.S. at 693.

67. *Id.*

68. See, e.g., Michael Sandler, *Toward a More Perfect Definition of "Citizen,"* CQ WKLY., Feb. 13, 2006, at 388 (citing John C. Eastman, a constitutional law professor at Chapman University, who posits that the Supreme Court "misread" the jurisdiction clause of the Fourteenth Amendment in *Wong Kim Ark*).

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

70. *Id.* at 83.

71. *Id.* at 76.

72. *Id.* at 118.

73. *Id.* (emphasis added).

Most constitutional scholars counter, however, that although the citizenship clause and its jurisdictional requirement may have been ambiguous when it was adopted, *Wong Kim Ark* clarified that all children born within the U.S. are subject to its jurisdiction and are therefore citizens, regardless of their parents' status.<sup>74</sup> Thus, "deportable aliens are subject to the jurisdiction of the United States—that is what makes them deportable, and often subject to criminal punishment as well."<sup>75</sup> Justice Gray's definition of "jurisdiction" within the Fourteenth Amendment continues to garner widespread scholarly support. However, his decision left several questions unanswered and left open possible avenues of attack by birthright citizenship opponents.

## 2. *The Meaning of "[B]orn . . . in the United States."*

The first potential loophole identified by scholars is what "born . . . in the United States"<sup>76</sup> encompasses. Although the definition at first may appear obvious, confusion over the last century suggests that this issue, left unaddressed by the Supreme Court in *Wong Kim Ark*, is at least as contentious as the definition of "jurisdiction." The first site of contention was Ellis Island, despite the island's unquestionable status as U.S. territory. In January 1892, the New York newspaper *The World* reported that Elise Anderson, the first child born on the island, would be deported:

About noon the population [of Ellis Island] was increased by the birth of a wee Swedish maiden. It is the first birth in the new immigrant nation. . . . The mother of the child is a young woman who arrived two weeks ago. She was not allowed to land, but, being ill when she arrived, she was detained at the Ellis Island hospital.

Although little Elise was born under the Stars and Stripes she cannot claim the grand inheritance of being an American citizen. Under the ruling of the Treasury Department a child born of a mother who is not officially landed is not under the law recognized as being born on American soil.<sup>77</sup>

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74. See, e.g., Sandler, *supra* note 68 ("Jack M. Balkin, a constitutional law professor at Yale University, said that even though the original understanding of the amendment may be ambiguous, the *Wong Kim* decision offered clarity."). Lucas Guttentag, director of the American Civil Liberties Union's Immigrants' Rights Project, agrees, viewing any legislative attempt to challenge the birthright clause as "a far-fetched, fundamentally misguided and unconstitutional proposal." "Birthright Citizenship" Debate Set to Begin, MSNBC.COM (Dec. 26, 2005), <http://www.msnbc.msn.com/id/10609068>.

75. *Children Born in the U.S. to Illegal Alien Parents: J. Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 9 (1995) (statement of Gerald L. Neuman, Professor of Law, Harvard Law School).

76. U.S. CONST. amend. XIV, § 1.

77. *First Birth at Ellis Island: But Baby Must Go to Sweden Soon as Mamma is Well*, THE WORLD, Jan. 20, 1892, at 1. Elise's mother was probably excluded because she was likely to become a public charge. See *Emma Anderson's Child*, N.Y. TIMES, Jan. 20, 1892, at 8 ("In spite of



It is particularly interesting to note that *The World* referred to Ellis Island as a “new immigrant nation,” separate from the United States both physically and legally.

This conception of Ellis Island continued into the first part of the twentieth century, when some legal scholars questioned whether children born to noncitizen parents awaiting admission on Ellis Island were perhaps themselves noncitizens<sup>78</sup> because the Supreme Court considered Ellis Island to be technically outside the U.S. border.<sup>79</sup> In other words, because presence on Ellis Island did not suffice for admission to the U.S., “the fiction that the parents were not within the United States but were still at the frontier would be utilized” to exclude children born on the island.<sup>80</sup> Further demonstrating that American citizenship and identity have been sources of anxiety throughout the country’s history, one scholar wondered in 1945 about the citizenship status of children born to World War II refugees in a refugee camp in upstate New York.<sup>81</sup> The Immigration and Nationality Act of 1952 did not “attempt to settle the problem[ ]”.<sup>82</sup>

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this baby’s being born on American soil she will probably be a Swedish subject all her life, or at least till she grows up, as Col. Weber has determined to send the mother and baby back to Sweden, as the mother is nearly destitute.”). I could find no information on the Treasury Department ruling referenced in *The World* article. However, it appears that that ruling had been recalled by 1906, when the Chicago Daily Tribune reported that a baby born on the ferry between Ellis Island and the Battery was “an American boy.” *Puzzle on Ellis Island: Officials May Have to Decide Whether Child Born in America Can Be Deported*, CHI. DAILY TRIB., Mar. 19, 1906, at 5. The story in the *Tribune*, however, is no less curious: although the boy’s citizenship status is not questioned in the article, the newspaper does indicate that the circumstances of the child’s birth might nonetheless make him eligible for deportation. The boy’s father, living in Brooklyn, came to pick up the mother at the ferry and falsely claimed to be her husband. The report continues, “[The mother] probably will be deported. If the child lives there will be some question as to whether an American born boy can be deported as a party to a fraud alleged to have been practiced to make him an American.” *Id.*

78. See, e.g., Note, *Citizenship By Birth*, 41 HARV. L. REV. 643, 645 (1928) (acknowledging the Supreme Court’s contemplation of legal aliens, but concluding that the “spirit of the constitutional provision can be achieved only by a rule which accepts as citizens all persons born within the territorial limits of the United States”); *The Nationality Act of 1940*, 54 HARV. L. REV. 860, 861 (1941) (“The Constitution purports to grant citizenship to all persons born in the United States; while the Act delimits geographically the applicability of the principle of citizenship *jure soli*, it makes no attempt to clarify shadowy areas within these limits. A child born at Ellis Island to alien parents awaiting admission to this country apparently will remain an alien.”).

79. See *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (calling Ellis Island the “boundary line”); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (“The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate.”).

80. *The Nationality Act of 1940*, *supra* note 78, at 861 n.8 (citing *Kaplan* and *Ju Toy*).

81. Albert G. D. Levy, *Acquisition of Nationality in the Emergency Refugee Shelter*, 39 AM. J. INT’L L. 13 (1945) (asking whether children born in the Emergency Refugee Shelter at Fort Ontario will acquire American citizenship *jure soli*). Levy argued that under U.S. law the children should obtain citizenship at birth, but to be certain, he suggested that the problem would be simplified if pregnant women gave birth in hospitals outside Shelter limits. *Id.* at 19.

82. *Developments in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643, 704 (1953).

However, a memorandum reveals that the U.S. Department of State appeared willing to consider children born on Ellis Island citizens as early as 1930:

The only possible ground for holding that Ona Laszas [born at Ellis Island] was not born a citizen of the United States, under the provision of the Fourteenth Amendment to the Constitution, is that her alien mother was never admitted into the United States . . . as an immigrant. It is clear, however, that when the child was born, the mother was physically present on territory of the United States, so that the child was born in the United States. It only remains to be determined whether the child was born “subject to the jurisdiction thereof.” . . . In rendering the opinion of the court in [*Wong Kim Ark*], Mr. Justice Gray explained the meaning of the phrase, “subject to the jurisdiction thereof” by saying in effect that its object was to except from the general rule cases of children born in the United States to alien parents who were at the time immune from the jurisdiction of the United States. . . .

It does not appear that the mother of Ona Laszas belonged to any one of the classes of aliens referred to by Mr. Justice Gray as enjoying immunity from the jurisdiction of the United States. . . . If she had committed a murder or any other criminal offense while she was on the island, there seems to be no question but that she would have been subject to prosecution and punishment under the laws of this country.<sup>83</sup>

This memorandum weakened any claims that children born at the so-called “frontier” were not citizens, but as an administrative ruling it does not have the precedential value of a Supreme Court decision on the subject. It therefore seems possible that if opponents of birthright citizenship fail in their legislative attempts to limit birthright citizenship to children of at least one citizen or permanent resident—or if their efforts are overturned by the Supreme Court—targeting the citizenship of children born in immigration detention centers will be their next point of attack. For example, children born today in immigration detention centers, probably the closest contemporary analog to Ellis or Angel Islands, are now citizens at birth,<sup>84</sup> but it is not clear that the Constitution requires this interpretation. The Department of State could, therefore, alter its consular affairs policies if it chose. If this happens, ICE will have even more

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83. *Id.* at 18–19 (quoting Memorandum from the Office of the Solicitor of the Dep’t of State (Feb. 6, 1930)).

84. 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, CONSULAR AFFAIRS, ACQUISITION AND RETENTION OF CITIZENSHIP AND NATIONALITY § 1111(d)(2)(b) (2009):

A child born in an immigration detention center physically located in the United States is considered to have been born in the United States and be subject to its jurisdiction. This is so even if the child’s parents have not been legally admitted to the United States and, for immigration purposes, may be viewed as not being in the United States.

*Id.*

incentive to target pregnant women and detain them until they give birth. Although it is now assumed that all children born at Ellis Island, Angel Island, and in U.S. immigration detention centers are citizens at birth, the Supreme Court has not overruled the decisions that have historically led scholars to question these children's citizenship status.<sup>85</sup>

### 3. *Citizenship for the Children of Undocumented Immigrants.*

The Supreme Court in *Wong Kim Ark* left one other major question unanswered. The Court noted that birthright citizenship applied to children of "resident aliens," but it did not discuss the citizenship of children of undocumented immigrants, leaving open the possibility that the Court meant to implicitly exclude the children of undocumented immigrants from birthright citizenship.<sup>86</sup> It is likely that the court merely meant to deny birthright citizenship to the children of temporary visitors, but the decision does not make this explicit. However, because there was no concept of "illegal" or undocumented immigration in the nineteenth or early twentieth centuries,<sup>87</sup> it is not surprising that the Court failed to mention the citizenship status of the children of undocumented immigrants. Even now, though, with the notion of "illegal immigration" firmly entrenched, the Court has not yet specifically ruled that birthright citizenship applies also to the children of undocumented immigrants.<sup>88</sup> It has noted that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."<sup>89</sup>

Despite this language, opponents of granting birthright citizenship to the children of undocumented immigrants continue to insist that the birthright citizenship clause of the Fourteenth Amendment only applies to the children of documented immigrants.<sup>90</sup> This distinction between documented and

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85. See *Kaplan v. Tod*, 267 U.S. 228, 230 (1925); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905).

86. See *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

87. For a detailed discussion, see the discussion *infra* Part II.C.

88. See Michael Robert W. Houston, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693, 717 (2000) (noting the uncertain scope of the Fourteenth Amendment, given that the Supreme Court has never clarified the status of children born to undocumented immigrants).

89. *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982) (citing C. BOUVÉ, A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 425-27 (1912)). Schuck and Smith called this Supreme Court interpretation of jurisdiction "especially problematic" and "relegated to *dictum* in a footnote that took the form of a deeply flawed syllogism." SCHUCK & SMITH, *supra* note 69, at 102-03.

90. See, e.g., John C. Eastman, Commentary, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 967 (2008) (favoring a narrow reading of the *Wong Kim Ark* decision, noting that his parents were in this country both legally and permanently, and so in that case "it was not a surprise" that the Court would confer citizenship on

undocumented status is crucial to their arguments that immigration must be done “the right way,”<sup>91</sup> and it demonstrates the ways in which their animosity has become deeply gendered.<sup>92</sup> Before I discuss how the controversy is ultimately informed by racist, nativist, and sexist conceptions of what it means to be American, it is necessary to describe the modern political debate around citizenship.

*B. Modern Conservative Attempts to Eliminate Birthright Citizenship.*

Perhaps not surprisingly, the discussion of the meaning and future of the birthright citizenship clause of the Fourteenth Amendment has not remained limited to the scholarly realm. The contention that the Constitution does not require birthright citizenship for the children of undocumented immigrants is the basis for two pieces of legislation introduced in the 2011 session of the U.S. House of Representatives,<sup>93</sup> both of which are rooted in xenophobic and gendered ideas about immigrants and citizenship that I discuss below in Part I.C and Part II. The first proposed bill, the Loophole Elimination and Verification Enforcement Act (“LEAVE”) Act, was introduced by Representative Gary Miller of California “to remove the incentives and loopholes that encourage illegal aliens to come to the United States to live and work, provide additional resources to local law enforcement and Federal border and immigration officers, and for other purposes.”<sup>94</sup> It would achieve this by, among other things, amending the INA to limit birthright citizenship to children born “of parents, one of whom is—(1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the Armed Forces.”<sup>95</sup> This bill therefore would have the effect of denying citizenship to children born

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them); Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 513 (1999) (“[Because] the alien parents involved in that case were in lawful status . . . [,] its holding does not cover the children of illegal aliens [and] any statement in the opinion which is broad enough to cover them is dictum.”); Peter H. Schuck, Op-Ed, *Birthright of a Nation*, N.Y. TIMES (Aug. 13, 2010), [http://www.nytimes.com/2010/08/14/opinion/14schuck.html?\\_r=1&scp=1&sq=Birthright%20of%20a%20Nation%20By%20Peter%20H.%20Schuck%20&st=cse](http://www.nytimes.com/2010/08/14/opinion/14schuck.html?_r=1&scp=1&sq=Birthright%20of%20a%20Nation%20By%20Peter%20H.%20Schuck%20&st=cse) (noting that at the floor debate for the citizenship clause, Congress did not discuss the status of children of illegal immigrants).

91. See *infra* Part I.C.

92. See *infra* Part III.A.

93. LEAVE Act, H.R. 1196, 112th Cong. (2011). The Birthright Citizenship Act of 2011 was introduced in both the House and the Senate simultaneously, with the same language. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011); Birthright Citizenship Act of 2011, S. 723, 112th Cong. (2011).

94. H.R. 1196.

95. *Id.* § 301(b). The military does not allow undocumented immigrants to enlist, so it is hard to imagine that many children would be affected by the third provision. See Julia Preston, *U.S. Military Will Offer Path to Citizenship*, N.Y. TIMES (Feb. 14, 2009), <http://www.nytimes.com/2009/02/15/us/15immig.html?pagewanted=all> (discussing the military's recruitment of immigrants with temporary visas and emphasizing that the military will continue not to allow undocumented immigrants to enlist).

in this country to two undocumented parents<sup>96</sup>—if, of course, the Supreme Court upheld it. The bill currently has seven cosponsors and has been referred to many House committees and subcommittees for review.<sup>97</sup>

The second bill, the Citizenship Act of 2011, was introduced by Representative Steve King of Iowa and Senator David Vitter of Louisiana with the goal of “amend[ing] section 301 of the Immigration and Nationality Act to clarify those classes of individuals born in the United States who are nationals and citizens of the United States at birth.”<sup>98</sup> The relevant language is identical to that in the LEAVE Act.<sup>99</sup> The House bill has eighty cosponsors and was referred to the Judiciary Committee’s Subcommittee on Immigration and Policy Enforcement.<sup>100</sup> The Senate bill has four cosponsors and was referred to the Judiciary Committee.<sup>101</sup>

Although previous congressional efforts at repealing birthright citizenship have failed, the Republican takeover of the House of Representatives in the 2010 elections leaves birthright citizenship more vulnerable than ever.<sup>102</sup> A recent report estimated that 130 Republicans in Congress, including eighteen senators, were in favor of abolishing birthright citizenship even before the 2010 elections.<sup>103</sup> The power shift in Washington therefore makes attacks on birthright citizenship more than mere speculation, and, as I argue below, these legislative efforts create an atmosphere in which attacks on women of color and their reproductive capacities are even more likely.

Furthermore, recent changes in countries with formerly-entrenched birthright citizenship polices indicate that this legislative action may be more than an idle threat should the U.S. follow this global trend. Canada, the only other remaining Western democracy with unconditional citizenship through *jus soli*, has been debating birthright citizenship since the mid-1990s; proponents of *jus soli* fear that Canada is moving “toward more nationalistic and ethnically-defined identities.”<sup>104</sup> It appears that a concern—one shared by U.S. conservatives—over abuse of the process of obtaining citizenship grounds the

96. H.R. 1196 § 301(b).

97. H.R. 1196.

98. H.R. 140; S. 723.

99. See H.R. 140 § 2(b); H.R. 1196.

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

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

102. See Rob Hotakainen, “*Birthright Citizenship*” Will Be Target of House GOP Majority, McCLATCHY WASH. D.C. NEWS BUREAU (Nov. 18, 2010), <http://www.mcclatchydc.com/2010/11/18/103946/birthright-citizenship-will-be.html> (reporting that an attempt to overturn birthright citizenship would be one of the first acts of the new Republican Congress).

103. Scott Keyes, *REPORT: 130 Republicans in Congress Want to Consider Ending Birthright Citizenship*, THINKPROGRESS (Oct. 26, 2010, 2:25 p.m.), <http://thinkprogress.org/2010/10/26/gop-birthright-citizenship>.

104. Sarah Buhler, *Babies as Bargaining Chips? In Defence of Birthright Citizenship in Canada*, 17 J.L. & SOC. POL’Y 87, 100 (2002).

debate in Canada. The Canadian Standing Committee on Citizenship and Immigration recommended that birthright citizenship only adhere to the children of at least one citizen parent, worrying that “some women may be coming to Canada as visitors solely for the purpose of having their babies on Canadian soil, thereby ensuring Canadian citizenship for their children.”<sup>105</sup> Australia severely restricted birthright citizenship in 1986 after decades of unrestricted *jus soli*, in a similar effort to prevent “abuse of citizenship to gain an immigration advantage.”<sup>106</sup> Ireland, which was the last country in Europe to provide “unrestricted territorial birthright citizenship to people born within its borders,”<sup>107</sup> abolished constitutionally enshrined birthright citizenship by overwhelming referendum in 2004.<sup>108</sup> Ireland now bestows birthright citizenship only on children born to at least one citizen parent.<sup>109</sup> New Zealand followed suit in 2005.<sup>110</sup> Other countries worldwide have also restricted birthright citizenship recently.<sup>111</sup> These moves, particularly in Canada and Australia, appear to be motivated by impetuses similar to those undergirding the conservative attack on birthright citizenship in the U.S., so these other countries’ successful adoption of nativist restrictions render the threat to birthright citizenship here more concrete and immediate.

Yale Law School Professor Peter Schuck, a long-time opponent of granting birthright citizenship to the children of visitors and undocumented immigrants,<sup>112</sup> suggests that the U.S. should follow Great Britain’s lead<sup>113</sup> and

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105. *Id.* at 96 (quoting STANDING COMM. ON CITIZENSHIP AND IMMIGRATION, PUB. WORKS AND GOV’T SERV. CAN., CANADIAN CITIZENSHIP: A SENSE OF BELONGING 17 (1994)).

106. Amanda Colvin, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS U. L.J. 219, 236–37 (2008) (quoting Kim Rubenstein, *Citizenship and the Centenary: Inclusion and Exclusion in 20th Century Australia*, 24 MELB. U. L. REV. 576, 588–89 (2000)).

107. Ireland’s constitutional provision was similar in language and breadth to the Fourteenth Amendment:

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland.

IR. CONST., 1937, art. 2.

108. J.M. Mancini & Graham Finlay, “*Citizenship Matters*”: *Lessons from the Irish Citizenship Referendum*, 60 AM. Q. 575, 575, 578 (2008). *See also* Irish Nationality and Citizenship Act, 2004 (Act No. 38/2004) (Ir.) (limiting birthright citizenship to children with at least one Irish or British citizen parent, with few exceptions).

109. Mancini & Finlay, *supra* note 108, at 579 (quoting IR. CONST., 2004, art. 9).

110. *See* Citizenship Amendment Act 2005 (N.Z.) (limiting birthright citizenship to children with at least one New Zealand citizen or permanent-resident parent).

111. Italy, Malta, Australia, India, and South Africa have all abolished or further restricted birthright citizenship in the last twenty-five years. *See* Mancini & Finlay, *supra* note 108, at 578 (admitting that Germany introduced important reforms tending toward *jus soli* in 1999, but finding that these reforms do not reflect a general European trend).

112. *See* SCHUCK & SMITH, *supra* note 69, at 116–17 (stating that their opposition to birthright citizenship rests on historical, consistency, and policy grounds).

113. The same policy applies in Australia. *See Nationality and Citizenship Act 1948* (Cth) § 10(2)(b) (Austl.).

allow citizenship only when children born of one or more undocumented parents have remained in the country for ten years.<sup>114</sup> Schuck believes that this solution would better balance the “strongly competing values” of not “punishing children for their parents’ crimes”<sup>115</sup> while conditioning citizenship on a “‘genuine connection’ to American society.”<sup>116</sup> However, several scholars have pointed out that these approaches to birthright citizenship in other countries “can be seen to work toward ‘freezing’ the nation in time by curtailing the access of ‘new’ ethnic and racial groups.”<sup>117</sup> This inclination represents an attempt to define the national community as descendants of the founders without accounting for changing demographics and circumstances.<sup>118</sup>

Because so many other countries with *jus soli* policies have recently succeeded in eliminating or restricting birthright citizenship, and because these policy shifts stemmed from similar nativist concerns and legal analyses, it is helpful to view the U.S. congressional attacks on birthright citizenship in light of this international zeitgeist. Former Representative Nathan Deal and his supporters argue that bills like the LEAVE Act and the Citizenship Act of 2011 would withstand constitutional challenge because the “14th Amendment wording was never meant to automatically give citizenship to babies born to illegal immigrants.”<sup>119</sup> Another birthright citizenship opponent called the bill “a sensible, overdue measure that closes a clause that was never meant to be a loophole.”<sup>120</sup> Seventh Circuit Judge Richard Posner agrees, writing, “A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it.”<sup>121</sup> At the very

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114. Schuck, *Birthright of a Nation*, *supra* note 90.

115. This concept is not original to Schuck; it is prominently displayed in *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (taking into account the costs to “innocent” undocumented children when assessing a Texas law barring these children from public schools).

116. Schuck, *Birthright of a Nation*, *supra* note 90.

117. Mancini & Finlay, *supra* note 108, at 581.

118. Brook Thomas, *China Men*, *United States v. Wong Kim Ark*, and the *Question of Citizenship*, 50 AM. Q. 689, 705 (2008).

119. See *Nathan Deal*, *Georgia Lawmaker, Wants to End “Birthright Citizenship,”* HUFFINGTON POST (May 26, 2009 8:00 AM), [http://www.huffingtonpost.com/2009/05/26/nathan-deal-georgia-lawma\\_n\\_207485.html](http://www.huffingtonpost.com/2009/05/26/nathan-deal-georgia-lawma_n_207485.html) [hereinafter *Nathan Deal*] (paraphrasing Deal’s arguments). For a rebuttal to this claim, see GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996). Neuman convincingly points out that, although the importation of slaves was outlawed in 1808, the “shameful practice” continued—to the tune of at least tens of thousands. *Id.* at 178–79. These imported slaves were undoubtedly considered “illegal immigrants” in the nineteenth century and would be considered so today. *Id.* at 179. “Illegally imported slaves are not mentioned in the debates [surrounding the adoption of the Fourteenth Amendment], but the framers made it clear that guaranteeing citizenship to *all* native-born blacks was their central purpose.” *Id.* He continues, “no one, including Schuck and Smith, has ever suggested that the Fourteenth Amendment was intended to cover *fewer* of the former slaves. This necessary conclusion cannot be reconciled with the consensual reading of the citizenship clause.” *Id.*

120. *Nathan Deal*, *supra* note 119 (quoting Bob Dane, spokesperson for the Federation for American Immigration Reform).

121. *Oforji v. Ashcroft*, 354 F.3d 609, 621 (Posner, J., concurring) (citing SCHUCK & SMITH,

least, conservative scholars argue, “[b]ecause the Supreme Court has not addressed th[e] issue [of granting citizenship to the children of undocumented immigrants] directly, it would be entirely appropriate and desirable for Congress to first test the constitutionality of such a legislative definition before resorting to a constitutional amendment.”<sup>122</sup>

Many conservative politicians seem to welcome a Supreme Court fight over the citizenship status of children born to undocumented immigrants. Legislators from five states—Pennsylvania, Arizona, South Carolina, Georgia, and Oklahoma—intend to introduce state legislation limiting federal citizenship to the children of citizens and lawful permanent residents.<sup>123</sup> “The group fully expects any laws that pass to be immediately challenged on constitutional grounds—and wants the issue to go to the Supreme Court.”<sup>124</sup> Furthermore, Arizona has been working on its own bill to limit birthright citizenship. State Senator Russell Pearce, who was also responsible for S.B. 1070,<sup>125</sup> was joined by other Republican senators to pass the bill through committee, but the Arizona Senate ultimately rejected it.<sup>126</sup> The bill was intended “to set up a possible U.S. Supreme Court case on the issue,”<sup>127</sup> and it seems unlikely that Arizona will give up on the issue completely.

*supra* note 69, at 116–17).

122. Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, 7 STAN. L. & POL’Y REV. 127, 130 (1996).

123. See Rachel Slajda, *State Officials Pushing Legislative Fight To Stop “Anchor Babies,”* TALKING POINTS MEMO (Jan. 6, 2011, 12:38 PM), [http://tpmmuckraker.talkingpointsmemo.com/2011/01/the\\_new\\_immigration\\_battlefield\\_the\\_constitution.php](http://tpmmuckraker.talkingpointsmemo.com/2011/01/the_new_immigration_battlefield_the_constitution.php).

124. *Id.*

125. Arizona passed the controversial Support Our Law Enforcement and Safe Neighborhoods Act, known as S.B. 1070, in April 2010. See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, April 24, 2010, at A1. The Obama administration filed suit to overturn the law, and Federal District Court Judge Susan Bolton has issued a preliminary injunction against sections of the law that “called for police officers to check a person’s immigration status while enforcing other laws and required immigrants to prove that they were authorized to be in the country or risk state charges.” See Randal C. Archibold, *Judge Blocks Arizona’s Law on Immigrants*, N.Y. TIMES, July 29, 2010, at A1. Civil rights groups have also filed suit, claiming that the “extreme law . . . invites the racial profiling of people of color, violates the First Amendment and interferes with federal law.” Press Release, ACLU, ACLU And Civil Rights Groups File Legal Challenge To Arizona Racial Profiling Law (May 17, 2010), available at <http://www.aclu.org/immigrants-rights-racial-justice/aclu-and-civil-rights-groups-file-legal-challenge-arizona-racial-pr>.

126. *Sweeping Immigration and Birthright Citizenship Bills Pass Arizona Senate Committee*, FOX NEWS LATINO (Feb. 23, 2011), <http://latino.foxnews.com/latino/politics/2011/02/23/immigration-birthright-citizenship-bills-pass-arizona-senate-committee/>. See Daniel González, *Birthright Citizenship Ban Could Hamper U.S. Military Recruiting*, ARIZ. REPUBLIC (Mar. 23, 2011), <http://www.azcentral.com/arizonarepublic/news/articles/2011/03/23/20110323birthright-citizenship-us-troops.html> (noting that the birthright citizenship bill would deprive the military of a substantial number of recruits).

127. *Sweeping Immigration and Birthright Citizenship Bills Pass Arizona Senate Committee*, *supra* note 126.



Politicians have also suggested a constitutional amendment that would bar birthright citizenship for the children of undocumented immigrants, circumventing the question of whether a statute would be upheld by the Supreme Court.<sup>128</sup> Senator Lindsey Graham in particular wants to pursue the amendment route, and he has found support among many Senate Republicans.<sup>129</sup> According to Senator Graham, “Birthright citizenship . . . is a mistake. . . . We should change our Constitution and say if you come here illegally and you have a child, that child’s automatically not a citizen.”<sup>130</sup>

Not all Republicans agree with Senator Graham, however. Michael Gerson, a former high-level staffer for President George W. Bush, says that Graham “has either taken leave of his senses or of his principles.”<sup>131</sup> “After years of being a lonely voice of Republican sanity on immigration, Graham has decided to embrace the supreme symbol of nativism—changing the Fourteenth Amendment to restrict American citizenship.”<sup>132</sup> Mr. Gerson’s characterization is an accurate description of the motives and symbolism inherent in the conservative attack on birthright citizenship, to which this Article turns next.

### C. *Racism, Nativism, and Attacks on Birthright Citizenship.*

The rhetoric surrounding birthright citizenship legislation is clearly calculated to inflame anti-immigrant sentiment and, more specifically, the racism and sexism of nativist voters and activists. Even the most innocuous-seeming comments contain covert nativism and racism. Politicians speak of their own ancestors immigrating to the U.S. “the right way,” as Senator John Kyl of Arizona did in describing his Dutch grandparents’ journey to Nebraska as one made through “frugality . . . hard work, grit, honesty. They would be very upset about people who didn’t do it the right way.”<sup>133</sup>

But as historian Mai Ngai points out, “[s]uch comparisons between past and present miss a crucial point. There were so few restrictions on immigration in the 19th and early 20th centuries that there was no such thing as ‘illegal immigration.’”<sup>134</sup> It was comparatively easy for western Europeans to naturalize because most historical limits on immigration were race-based: Chinese

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128. See, e.g., Alexander Bolton, *Political Momentum Grows for Revoking Birthright Citizenship*, THE HILL (Aug. 1, 2010), <http://thehill.com/homenews/senate/112047-political-momentum-grows-for-revoking-birthright-citizenship>.

129. See *id.*; Andy Barr, *Graham Eyes “Birthright Citizenship,”* POLITICO (July 29, 2010, 8:19 AM), <http://www.politico.com/news/stories/0710/40395.html> (quoting Sen. Lindsey Graham on the possibility of introducing a constitutional amendment).

130. Barr, *supra* note 129.

131. Bolton, *supra* note 128 (quoting Michael Gerson).

132. *Id.*

133. Mae M. Ngai, *How Grandma Got Legal: Today’s Immigrants Aren’t Like Our Ancestors, Some Say. U.S. History Says Otherwise*, L.A. TIMES, May 16, 2006, at B13, available at <http://articles.latimes.com/2006/may/16/opinion/oe-ngai16> (quoting Senator John Kyl).

134. *Id.*

immigrants in the nineteenth century were excluded for “racial unassimilability”<sup>135</sup> and southern and eastern Europeans were discriminated against as the “degraded races” of Europe.<sup>136</sup> In 1924, the Johnson-Reed Immigration Act established numerical limits on how many immigrants could enter the country each year, restricting the immigration of individuals from some ethnic groups and countries much more strictly than others.<sup>137</sup> As Bill Ong Hing notes, “the discussion of who is and who is not American, who can and cannot become American, goes beyond the technicalities of citizenship and residency requirements; it strikes at the very heart of our nation’s long and troubled legacy of race relations.”<sup>138</sup> Therefore, even seemingly innocent comments about ancestors immigrating “the right way” are tinged with racial implications.

Some politicians, however, do not restrict their comments to their own personal background, thereby making their nativism—and, specifically, their discomfort with Latino immigrants—more explicit. Senator Graham, for example, speaking of his intent to introduce a constitutional amendment limiting citizenship to children born of citizens and lawful permanent residents, claimed that he wants to be “fair” and “humane” but regrets that “there seems to be no system to deal with stopping 20 million 20 years from now.”<sup>139</sup> It is hard not to wonder, “twenty million more *what?*” Perhaps Senator Graham would respond that he simply desires to limit the number of immigrants. However, the context in which he was quoted suggests that he wants to limit “the children of immigrants,”<sup>140</sup> or, more specifically, “thousands of people . . . coming across the Arizona/Texas border for the express purpose of having a child in an American hospital so that child will become an American citizen.”<sup>141</sup> In other words, Senator Graham does not want twenty million more *Latinos* twenty years from now.

While politicians may be careful to couch their language in racially-neutral language, conservative advocates and activists are not. When columnist Ruben Navarrette took a controversial stance on an immigration issue, “a reader called [him] a ‘dirty Latino’ who needs to get ‘back to Mexico.’”<sup>142</sup> Another reader called him an “anchor baby,” highlighting the reproductive justice issues at

135. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 202 (2004) (noting that the Chinese exclusion laws “generated the nation’s first illegal aliens as well as the first alien citizens”).

136. *Id.* at 19.

137. *Id.* at 3.

138. BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 3 (1997).

139. Barr, *supra* note 129 (quoting statements Senator Graham made during an interview with Fox News).

140. *See id.*

141. *On the Record w/ Greta Van Susteren: Special Guest: Senator Lindsey Graham* (Fox News television broadcast Aug. 3, 2010).

142. Ruben Navarrette, *Hate in the Immigration Debate*, REAL CLEAR POLITICS (July 29, 2007), [http://www.realclearpolitics.com/articles/2007/07/hate\\_in\\_the\\_immigration\\_debate.html](http://www.realclearpolitics.com/articles/2007/07/hate_in_the_immigration_debate.html).

play.<sup>143</sup> Anti-immigrant groups like the Council of Conservative Citizens (“CCC”) regularly publish racist material on their websites, including a column that claimed the result of immigration and intermarriage would be “a slimy brown mass of glop.”<sup>144</sup> The Federation for American Immigration Reform (“FAIR”) is linked to the Pioneer Fund, a foundation “dedicated to ‘human race betterment.’”<sup>145</sup> Jim Gilchrist of The Minuteman Project, a group of private individuals who have tasked themselves with monitoring the U.S. border with Mexico, writes that “[w]ithout intervention by the people who comprise the very fabric of this country, its successors will inherit a tangle of rancorous, unassimilated, squabbling cultures with no cohesive bond.”<sup>146</sup> In other words, if white citizens fail to act, Mexican immigrants will tear the U.S. apart. He continues, “[m]ulticulturalism and diversity are commendable goals. But they are selfish and aimless agendas of blind social engineers when not accompanied with ‘assimilation’ into the host country.”<sup>147</sup>

This focus on assimilation begs the question, “[t]o what does one assimilate in modern America?”<sup>148</sup> Conservative Harvard professor Samuel P. Huntington suggests that, although the answer may have been clear in 1900—“assimilation meant Americanization”—the situation was more complicated by 2000.<sup>149</sup> He argues that today, many political and economic elites<sup>150</sup> do not feel comfortable in preaching Americanization and prefer “a doctrine of diversity and the equal validity of all cultures in America”<sup>151</sup>—in other words, just what Gilchrist dislikes. Huntington suggests that although activists like Gilchrist may be correct that “Latin American immigrants, particularly from Mexico, and their descendants have been slower in approximating American norms,”<sup>152</sup> few modern political leaders currently call for Americanization or find it

143. *Id.*

144. *Sharks in the Mainstream: Racism Underlies “Conservative” Group*, INTELLIGENCE REP., (S. Poverty Law Ctr., Montgomery, Ala.), Winter 1999, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/1999/winter/sharks-in-the-mainstream?page=0,1>.

145. Roberts, *supra* note 46, at 214.

146. Jim Gilchrist, *An Essay By Jim Gilchrist*, 22 GEO. IMMIGR. L.J. 415, 426 (2008).

147. *Id.* at 427.

148. SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 199 (2004) (quoting Nathan Glazer and Daniel Patrick Moynihan).

149. *Id.*

150. Huntington uses this term in a derogatory manner, writing that “[t]he emergence of a global economy and global corporations plus the ability to form transnational coalitions to promote reforms on a global basis (women’s rights, the environment, land mines, human rights, small arms) led many elites to develop supranational identities and to downgrade their national identities.” *Id.* at 14. He describes “elites” as being in charge of an “unrepresentative democracy” and pits the “elites vs. the public.” *Id.* at 324–25.

151. *Id.* at 199.

152. *Id.* at 188. See also *id.* at 230–43 (discussing in more depth the theory that Mexican immigrants lag in terms of immigration).

desirable.<sup>153</sup>

Focusing on Mexican immigration, Huntington therefore introduces a thought experiment, illustrating the “centrality of Mexico for immigration and assimilation in America”.<sup>154</sup> If immigration from Mexico<sup>155</sup> stopped completely, the “inflow of immigrants would again become highly diverse, which would increase incentives for all immigrants to learn English and absorb American culture.”<sup>156</sup> Huntington then arrives at a conclusion similar to Senator Graham’s dread of “20 million [more] 20 years from now.”<sup>157</sup> If immigration from Mexico stopped completely, Huntington reasons, “[t]he possibility of a de facto split between a predominantly Spanish-speaking America and English-speaking America would disappear, and with it a major potential threat to the cultural and possibly political integrity of the United States.”<sup>158</sup>

In other words, according to conservative activists and scholars, Latino immigrants threaten to cleave the country in two. Ultimately, this fear is focused on the bodies of women of color, whose supposed heightened fertility<sup>159</sup> is thought to threaten the white, male, national body.

### III.

#### THE ATTACK ON BIRTHRIGHT CITIZENSHIP AS AN ATTACK ON WOMEN OF COLOR

Nativism and racism are intricately connected to sexism and, ultimately, an attempt to control female immigrants’ bodies and reproductive capacity. Contrary to Professor Huntington’s views, “[a] radical program of Americanization would really be un-American” because Americanization has “connotations of racism, sexism, class domination, religious intolerance, and ethnic purity” based in “the bad old ethnocentric past.”<sup>160</sup> Several factors have caused nativism to be gendered, including the identification of the national body with the female body and certain immigration and other policies that have disadvantaged female immigrants. This Part will discuss each factor and then turn to the ramifications of gendering nativism and racism. It will conclude by analyzing the apparent disconnect between the attack on birthright citizenship and anti-abortion activism, a divide best explained by conservative desire to restrict female immigrants’ access to reproductive justice.

153. *See id.* at 200–01 (quoting a sociologist as stating that nobody advocates “Americanizing” new immigrants).

154. *Id.* at 243.

155. *Id.* It is worth noting here that Huntington envisions eliminating all immigration from Mexico, not only undocumented immigration.

156. *Id.*

157. Barr, *supra* note 129.

158. Huntington, *supra* note 148, at 243.

159. Huang, *supra* note 18, at 400.

160. Huntington, *supra* note 148, at 200 (quoting political theorist Michael Walzer and sociologist Dennis Wrong).

A. *Gendering Nativism and Its Ramifications for the Birthright Citizenship Debate.*

The first factor that has contributed to the gendering of nativism is the purported threat that immigrant women's reproductive capacity poses to the nation itself. Although all immigrants are by definition outsiders, immigrant women have the unique ability to reproduce more outsiders,<sup>161</sup> which is particularly threatening because in many contexts the national and human body are often viewed as one and the same.<sup>162</sup> Likewise, "[a]s reproducers of the next generation of national citizens, women have been viewed as crucial boundary-markers in gendered nationhood."<sup>163</sup> Barbara Ellen Smith and Jamie Winders convincingly suggest that the female immigrant body is more threatening than the male one.<sup>164</sup> "While the labouring immigrant body coded as male and temporary is 'ghost-like' and fleetingly present on worksites in construction, landscaping and other sectors . . . , the reproducing immigrant body coded as female and permanent is difficult to contain, lingering in . . . public—but, nonetheless, domestic—spaces."<sup>165</sup> Explicitly connecting this threat to proposals to overturn birthright citizenship, Smith and Winders write, the "biologically reproducing female literally multiplies the immigrant threat, transgressing legal, cultural, sexual and racial boundaries by producing citizens out of her 'illegal', 'alien' body."<sup>166</sup> Any attempt to control immigrant women's reproduction must be seen as an attempt to control who may contribute to the national body.

Second, immigration and welfare policies have played a role in gendering racism and nativism. Immigrants are disproportionately women, and women are disproportionately undocumented because the 1986 Immigration Reform and Control Act ("IRCA") was more likely to legalize the status of male undocumented immigrants.<sup>167</sup> Similarly, a large part of anti-immigrant sentiment

161. See, e.g., ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 79 (2005) ("Women of color are particularly threatening, as they have the ability to reproduce the next generations of communities of color. Consequently, it is not surprising that control over the reproductive abilities of women of color has come to be seen as a 'national security' issue for the U.S.").

162. See, e.g., De Hart, *supra* note 36, at 144 ("[M]any people throughout history[] saw the human body as a metaphor for the national body.").

163. Sarah Radcliffe, *Embodying National Identities: Mestizo Men and White Women in Ecuadorian Racial-National Imaginaries*, 24 TRANSACTIONS INST. BRIT. GEOGRAPHERS 213, 215 (1999) (discussing the Latin American context in particular but suggesting broader implications outside of Latin America).

164. See Barbara Ellen Smith & Jamie Winders, "We're Here to Stay": *Economic Restructuring, Latino Migration and Place-Making in the US South*, 33 TRANSACTIONS INST. BRIT. GEOGRAPHERS 60, 66 (2008) (discussing how male and female immigrant bodies are viewed differently, with female immigrant bodies being more permanent, visible, and harder to ignore).

165. *Id.* (emphasis omitted).

166. *Id.*

167. Syd Lindsley, *The Gendered Assault on Immigrants*, in POLICING THE NATIONAL BODY: RACE, GENDER, AND CRIMINALIZATION 175, 177–78 (Jael Silliman & Anannya Bhattacharjee eds., 2002) (describing this gender bias as the result of many factors, including provisions that excluded

focuses on the purported economic drain on public benefits, and women with children are the primary beneficiaries of the social safety net. The Professional Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) makes all undocumented immigrants<sup>168</sup> almost entirely ineligible for these benefits, but anti-immigrant rhetoric ignores this fact and continues to blame immigrant women and children for budget shortfalls.<sup>169</sup> We should see these attacks as an indirect “attempt to regulate and control immigrant women’s mothering.”<sup>170</sup>

This denigration of immigrant women’s mothering is even more explicit when tied to birthright citizenship. Mexican American and Mexican immigrant women have long been viewed as “lacking moral and cultur[al] refinement and thus, unfit to mother U.S. citizens.”<sup>171</sup> To demonstrate this, scholar Mary Romero examines the Mothers Against Illegal Aliens’ (“MAIA”) “dehumanizing construction of immigrant women as unworthy mothers.”<sup>172</sup> MAIA claims that immigrant women are “crossing our border to ‘steal’ the American Dream by giving birth” and “are producing and utilizing children as hostages until demands for citizenship are met.”<sup>173</sup> Casting immigrant women in such an unfavorable light only serves to highlight the conservative effort to “reproduc[e] a narrow definition of national identity—one that is mono-lingual English, white, and middle-class”<sup>174</sup> by demeaning the claims women of color have to motherhood and to their own bodies.

A recent immigration controversy highlights the very real dangers to pregnant undocumented immigrants that kind of rhetoric engenders. In July 2010, the names of 1,300 suspected undocumented immigrants were sent to police departments and media in Utah by the fictitious group “Concerned Citizens of the United States.”<sup>175</sup> The list included addresses, phone numbers,

anyone likely to become a “public charge;” excluded, from IRCA’s amnesty program, immigrants who worked in professions staffed primarily by women; required immigrants attempting to qualify for IRCA benefits to bring identification documents that are primarily held by men, and targeted the (primarily female) recipients of the Aid to Families with Dependent Children (AFDC)).

168. PRWORA even bars documented immigrants from accessing food stamps and allows individual states to bar documented immigrants from accessing benefits provided by Temporary Assistance for Needy Families. *Id.* at 185.

169. *Id.* (quoting former California governor Pete Wilson as saying that the state should not fund prenatal care for all women, “whether they are citizens or not”).

170. *Id.*

171. Mary Romero, “Go After the Women”: Mothers Against Illegal Aliens’ Campaign Against Mexican Immigrant Women and Their Children, 83 *IND. L.J.* 1355, 1366 (2008).

172. *Id.* at 1374.

173. *Id.* at 1374–75.

174. *Id.* at 1389.

175. Dennis Romboy, *Immigration List Probe Moving Slowly But Not on Back Burner*, *AG Says*, *DESERET NEWS* (Oct. 24, 2010), <http://www.deseretnews.com/article/700076073/Immigration-list-probe-moving-slowly-but-not-on-back-burner-AG-says.html>.

health information, and birthdays.<sup>176</sup> Ominously, it also included the due dates of pregnant women and the names and Social Security numbers of children,<sup>177</sup> at least some of whom were undoubtedly U.S. citizens.

The attack on birthright citizenship as an attack on women of color is often coupled with images of violence. Barbara Coe, founder and head of the California Coalition for Immigration Reform and a member of the CCC,<sup>178</sup> has called birthright citizenship “invasion by birth canal.”<sup>179</sup> This image—women of color’s reproductive organs being used as a weapon of war—perfectly captures what David Morales means when he writes:

[I]f it were possible to uncover Americans’ collective unconscious, the paradigmatic vision of “illegal” immigration would surely feature a Mexican woman, brown-skinned and *mestiza*, nine-months pregnant, crossing the Rio Grande under cover of night. Such an image captures the full scope of the terror bound up with “illegal” immigration: the sneaking nocturnal setting lends the tableaux the requisite feeling of legal breach (of trespass onto sovereign property) while also emphasizing the defenselessness of the border, which is barely a “border” at all, just a river, like any other, that happens to mark a boundary. . . . That the immigrant herself is gendered as the “weaker sex” reinforces our sense that immigrants are dependent on us. That the woman is also literally burdened with a growing child represents the perpetual burden that We the People will bear once she and her pre-citizen fetus take residence in the United States. Her brown skin reflects our long-standing fear of cultural and genetic miscegenation.<sup>180</sup>

Arizona State Senator Pearce has circulated an e-mail that exploits this analogy further. To describe the logic behind a bill aimed at the children of undocumented immigrants, Senator Pearce quotes Al Garza, a Minuteman: “If 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.”<sup>181</sup> Likewise, Dan Stein of FAIR has warned that Asians and Hispanics are engaged in “competitive breeding.”<sup>182</sup> “Anchor

176. *Id.*

177. *Id.*

178. According to the Southern Poverty Law Center, the Council of Conservative Citizens is “a white supremacist group that has described black people as a ‘retrograde species of humanity.’” *Intelligence Files: Barbara Coe*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/profiles/barbara-coe> (last visited Nov. 18, 2010).

179. Teresa Watanabe, *Activists Push Ballot Initiative to End State Benefits for Illegal Immigrants and Their U.S.-born Children*, L.A. TIMES (July 13, 2009), available at <http://articles.latimes.com/2009/jul/13/local/me-illegal-immigration13>.

180. Morales, *supra* note 34, at 69–70.

181. Robin Templeton, *Baby Baiting*, THE NATION, Aug. 16/23, 2010, at 20, available at <http://www.thenation.com/article/38035/baby-baiting>.

182. *Tell Congress, “Don’t Meet with FAIR!”*, AMERICA’S VOICE, <http://americasvoiceonline.org/page/content/fightfair> (last visited Nov. 18, 2010) (quoting Dan

babies” have also been described as a terrorist weapon.<sup>183</sup> Of course, the war-themed rhetoric is no coincidence. “[C]hildren of invading armies” have long been thought to be an exception to the citizenship clause of the Fourteenth Amendment.<sup>184</sup> Talk of an “invading army” “lends itself perfectly to the kinds of xenophobic sound bites that whip up support for anti-immigrant laws.”<sup>185</sup>

Writer Jen Quraishi points out another way in which the language surrounding “anchor babies” reveals deep animosity toward women. She focuses on the word “drop,” used, for example, by Senator Graham in explaining his interest in a constitutional amendment limiting birthright citizenship: “They come here to drop a child. It’s called ‘drop and leave.’”<sup>186</sup> In other contexts, sailors drop anchors and animals “drop” foals or calves when they give birth.<sup>187</sup> Comparing women, especially women of color, to animals is not unique to discussions of immigration.<sup>188</sup> But in this context, the comparison serves as one more example of how the debate over birthright citizenship is, in fact, a debate over women of color and their right to control their reproduction. This debate extends beyond birthright citizenship to abortion, another area in which conservatives attempt to proscribe immigrant women’s reproductive autonomy.

#### B. *The Anti-Abortion Foundation of Attacks on Birthright Citizenship.*

The desire to limit birthright citizenship and the desire to limit access to abortion, viewpoints often held by the same conservative politicians and activists, appear to be mutually exclusive.<sup>189</sup> Simply put, it is difficult to

Stein, FAIR’s director).

183. See Steve Benen, *Beware of Terrorist Babies*, WASH. MONTHLY (June 26, 2010), [http://washingtonmonthly.com/archives/individual/2010\\_06/024454.php](http://washingtonmonthly.com/archives/individual/2010_06/024454.php) (quoting Representative Louie Gohmert, who claimed that a retired FBI agent told him that terrorist cells overseas would send pregnant women to the United States to have babies who would be “raised and coddled as future terrorists”).

184. Templeton, *supra* note 181.

185. *Id.*

186. Jen Quraishi, *Sexism in the Immigration, Birthright Debates*, MOTHER JONES (Aug. 4, 2010), <http://motherjones.com/mojo/2010/08/birthright-citizenship-sexism-drop-babies>.

187. *Id.*

188. See, e.g., Gwen Sharp, *Comparing Women of Color and Animals*, SOCIOLOGICAL IMAGES (Jan. 25, 2009, 12:39 PM), <http://thesocietypages.org/socimages/2009/01/25/comparing-women-of-color-and-animals> (noting that women of color are frequently photographed with or posed as animals in magazines, which reifies the ugly stereotype that non-white women are unable to control their aggressive, “animal” sexuality).

189. The National Latina Institute for Reproductive Health identifies this tension, noting that: Many of the individuals who want to criminalize immigrants are the same ones who support restrictions on women’s access to abortion and family planning services. These policy-makers are constantly restricting access to reproductive health services for women and immigrants. Moreover, anti-immigrant advocates typically use anti-choice language when discussing policies related to immigrant women and their ‘unborn citizen babies.’

*How is Immigration a Matter of Reproductive Justice?*, NAT’L LATINA INST. FOR REPROD. HEALTH 2,



understand how an anti-immigrant, anti-abortion activist or politician can argue that fetal life is sacred and that birth control and abortion access should be restricted while simultaneously advocating anti-immigrant policies that make the decision to raise a child virtually impossible. In order to reconcile these two viewpoints, it is helpful to consider three ways in which conservatives have approached the apparent tension. The first group ignores “anchor babies” and focuses on the purported relationship between abortion and immigration. The second group prioritizes anti-abortion views, and the final group prioritizes anti-immigrant and anti-“anchor baby” policies. All three, however, are connected by two key concepts: the attempt to control the reproductive rights of immigrant women of color and the ultimate contempt for the women’s children.

The first group of conservatives, by focusing on abortion and undocumented immigration and ignoring birthright citizenship in particular, seemingly reconcile this tension by arguing that “abortion is partly to blame [for undocumented immigration] because it is causing a shortage of American workers.”<sup>190</sup> Missouri State Representative Ed Emery explains, “If you kill 44 million of your potential workers, it’s not too surprising we would be desperate for workers.”<sup>191</sup> Anti-immigration and anti-abortion activism thus can go hand in hand.

But when “anchor babies” enter the analysis, the picture gets complicated. An example is useful in illustrating this tension: Myrna Dick, a pregnant Mexican immigrant who was detained in 2004 and charged with lying to gain entry to the U.S., was spared from removal for a time, after a Missouri federal district court judge handed down a temporary injunction based on the Unborn Victims of Violence Act, writing, “[i]f this child is an American citizen, we can’t send his mother back until he is born.”<sup>192</sup> The judge’s explicit acknowledgment that a fetus can be an “American citizen”—and blocking the pregnant woman’s removal because of it—is a powerful example of an anti-abortion stance coming into conflict with anti-immigrant sentiment and winning, albeit temporarily. The judge clearly prioritized his anti-abortion views over the immigration laws that would otherwise have required the removal of Dick and her “American” fetus. After Dick’s son was born, ICE again attempted to remove her and the courts approved removal.<sup>193</sup> Her citizen husband and son soon joined her in Mexico rather than be separated, emphasizing that while concern for her “American”

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<http://latinainstitute.org/sites/default/files/publications/how%20is%20immigration%20a%20matter%20of%20reproductive%20justice.pdf> (last visited Jan. 8, 2012).

190. See David A. Lieb, *Panel Links Abortion to Immigration*, DENVER POST (Nov. 14, 2006), [http://www.denverpost.com/immigration/ci\\_4653893](http://www.denverpost.com/immigration/ci_4653893).

191. *Id.*

192. Joyce Howard Price, *Deportation Blocked, Fetus “American,”* WASHINGTON TIMES, May 29, 2004, at A3 (quoting Senior U.S. District Judge Scott O. Wright for the Western District of Missouri); SARA DUBOW, *OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA* 1 (2011) (“Some recent examples illustrate how the fetus is currently imagined as part of the body politic, a citizen recognized and protected by the state.”).

193. Garance Burke, *Mother Gives Birth, Faces Deportation*, L.A. TIMES (Apr. 23, 2006), <http://articles.latimes.com/2006/apr/23/news/adna-deport23>.

fetus was sufficient to keep Myrna Dick in the U.S. throughout the pregnancy, that concern did not extend to concern for the child or the family.<sup>194</sup> This story demonstrates what can happen when anti-abortion sentiment takes precedence over anti-immigration views, and it further demonstrates how both are ultimately focused on controlling women's bodies but lack concern for women, children, and families.

Finally, other conservatives prioritize their opposition to undocumented immigration and "anchor babies" over their opposition to abortion. Nebraska, for example, "a staunchly anti-abortion state," is "wrestl[ing] with an issue that pits its signature conviction against another belief—that illegal immigrants should not receive tax-supported services. . . . Should Nebraska pay for prenatal care for the unborn children of illegal immigrants?"<sup>195</sup> Many people who are normally both anti-abortion and anti-immigrant have been sent into turmoil attempting to answer this question.<sup>196</sup> University of Nebraska Professor John Hibbing notes, "What makes this fascinating is the usual conservative confluence of anti-immigration and pro-life is being pulled apart. People are having to make a choice on those things. . . . I don't think we've ever had to pick before."<sup>197</sup> Anti-abortion Governor Dave Heineman's opposition to the bill led to its withdrawal.<sup>198</sup> Heineman's anti-immigrant views trumped his anti-abortion ones, and he argued that "[t]he key issue . . . is whether illegal immigrants should be receiving taxpayer-funded benefits." Likewise, anonymous commentators on political blogs have posted comments that reveal their prioritization:

Amazing that it needs to be explained . . . that illegals having babies here so that they can be US citizens will lead to an army of terrorists that are impossible to track because they will blend right in with the rest of the lib[eral] crowd. Even though I am strongly pro-life I would support laws to require abortion of anchor babies to prevent this nightmare from becoming a reality.<sup>199</sup>

Nebraska's proposed legislation forced its residents and politicians to choose between "the abortion of anchor babies" and an "army of terrorists." There, the governor and many others saw abortion as the lesser of two evils. Again, however, their decision was based on policies that attempt to control immigrant women's access to reproductive justice but disregard—or demonstrate absolute hostility toward—women, children, and families.

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194. *Deported Woman Adjusts to Life in Mexico*, KMBC.COM (Nov. 6, 2006), <http://www.kmbc.com/news/10253520/detail.html>.

195. DeeDee Correll, *In Nebraska, Issues of Immigration and Abortion Collide*, L.A. TIMES (Mar. 22, 2010), <http://articles.latimes.com/2010/mar/22/nation/la-na-nebraska22-2010mar22>.

196. *Id.*

197. *Id.*

198. *Id.*

199. Louie Gohmert for POTUS, *Comment to Anchor Baby Nation*, POLIPUNDIT (Aug. 14, 2010, 7:16 AM), <http://polipundit.com/?p=25525>.

Superficially, there seems to be a disconnect between anti-abortion advocacy and “requir[ing] abortion of anchor babies.” However, the confused racist logic becomes clearer after considering that central to both anti-abortion and anti-immigrant views is the ultimate goal of controlling the reproduction of immigrant women of color.<sup>200</sup>

#### IV.

#### PREGNANT WOMEN IN IMMIGRATION DETENTION CENTERS

Conservative rhetoric and imagery surrounding the birthright citizenship debate have deep roots in nativism and racism. More specifically, talk of “anchor babies” and the “invasion by birth canal” shows how the debate plays out on the bodies of immigrant women of color. Control of these women’s reproductive capacities is central to the conservative attack on immigrant women of color, and this attack has influenced the actions and policies of ICE. Nowhere is this clearer than in immigration detention centers. ICE’s immigration detention center policy is designed to prevent this “invasion by birth canal.” Immigration detention centers are an important site for studying ICE’s attempt to control pregnant immigrant women’s reproduction for two main reasons. First, ICE’s actions in detaining women in these centers, and the conditions of the centers themselves, may forecast what will happen on an even larger scale if conservatives are successful in denying citizenship to children born there.<sup>201</sup> Second, and more crucially, the debate over birthright citizenship can most clearly be seen in the tension ICE faces when considering the fate of pregnant women held in detention. As discussed below in Section B, ICE’s mandate requires that all detainees be ready for removal at all times, so ICE is unlikely to grant pregnant women release for humanitarian reasons. However, because ICE cannot detain citizens, it is legally complicated for pregnant women to give birth in ICE custody. ICE’s best solution, then, is to deport pregnant women before they can give birth, with profound implications for the women’s access to reproductive justice and the children’s citizenship status.

This Part begins by describing how detention centers work and the conditions that women, in particular, face when ICE detains them. It then goes on to describe in more detail the tension ICE faces, using the federal prison system as a comparison.

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200. Not all anti-abortion activists feel similarly to the Nebraska commentators; indeed, the Somos Republicans—a Latino group—have strongly denounced the “new evil that is rising in the form of men attacking precious American-born children and their mothers.” The I-Team, *Somos Republicans Launch Stop the Defamation of Babies Campaign*, SOMOS REPUBLICANS (Oct. 26, 2010), <http://somosrepublicans.com/2010/10/somos-republicans-launch-stop-the-defamation-of-babies-campaign>. Nonetheless, the tension between restrictions on birthright citizenship and views on abortion is clear, and racial and gender biases play an important role in both.

201. For a discussion of whether children born on Ellis Island, Angel Island, or immigration detention centers are constitutionally required to be considered citizens, see *infra* Part I.A.2

A. *Women's Experiences and Conditions in Immigration Detention Centers.*

Immigration detention centers, where undocumented immigrants are taken and held prior to removal, are plagued with inadequate healthcare and support for women in general and pregnant women in particular. To understand the implications of the birthright citizenship debate on women in these centers, it is important to understand the ins and outs of immigration detention itself.<sup>202</sup> "Immigration detention is the fastest growing form of incarceration in the United States,"<sup>203</sup> yet there is remarkably little academic scholarship on the subject. Professor Nina Rabin recently conducted a comprehensive study of women in Arizona immigration detention centers, which provides insight into the lives of women in these centers across the country.<sup>204</sup>

Immigrants may be placed in detention centers at two stages of their cases: first, after ICE has begun removal proceedings but while the outcomes of their cases are still being determined; and second, if ordered deported, while ICE makes arrangements for their physical removal from the United States.<sup>205</sup> This entire process can take days or even years, "depending on the degree of complexity of their removal proceedings, travel arrangements, and whether they or the government choose to pursue all available appeals."<sup>206</sup> There are two additional reasons why immigrants are commonly placed in detention.<sup>207</sup> An immigrant may be placed in detention after being convicted of a crime in the U.S. and serving his or her sentence.<sup>208</sup> An immigrant may also be placed in detention for a civil violation of the immigration laws, including attempting to enter the U.S. without proper documentation or being found within the U.S.

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202. There are immigration detention facilities deserving of scrutiny that fall outside of the scope of this Article, such as those run by Customs and Border Protection ("CBP"), an agency whose immigration mandate is limited to control at the border. CBP operates under the Department of Homeland Security ("DHS") with "a priority mission of keeping terrorists and their weapons out of the U.S. [and] responsibility for securing and facilitating trade and travel while enforcing . . . immigration and drug laws." *About CBP*, CBP.GOV, <http://www.cbp.gov/xp/cgov/about> (last visited Sept. 22, 2011). For more information on the harsh treatment of pregnant women in CBP custody and detention, see NO MORE DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER 12-14 (2008) (discussing, for example, several pregnant women denied food and water and one denied medical care after falling and experiencing pregnancy complications).

203. Rabin, *supra* note 39, at 698.

204. *Id.* at 697 (finding that roughly 300 women are detained in Arizona, representing approximately 10 percent of the total population detained in the state, and noting that Arizona provides a revealing place to study detention practices and policies that are applied nationally).

205. *Id.* at 699.

206. *Id.*

207. *Id.*

208. *Id.* The article also notes that "[t]he list of deportable offenses has been vastly expanded in recent years to include virtually all criminal convictions, including misdemeanor non-violent theft offenses such as shoplifting and minor drug offenses." *Id.*

without such documentation.<sup>209</sup>

In 1996, when Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),<sup>210</sup> the number of immigrants in detention skyrocketed.<sup>211</sup> “IIRIRA mandates detention for broad categories of noncitizens, including virtually any noncitizen with a criminal conviction and arriving aliens who lack proper documentation.”<sup>212</sup> Women’s detention as a percentage of the total detained population has increased since IIRIRA was enacted as well, from 7 percent in 2001 to 10 percent in 2008.<sup>213</sup> Female detainees are not always isolated from other prison populations; they may be placed with male immigrant detainees or with male or female criminal detainees.<sup>214</sup>

Even when women are separated from other detained populations, immigration detention centers are operated like prisons. The confinement conditions in the T. Don Hutto Residential Center, a private immigration detention center in Texas that used to be a prison,<sup>215</sup> sparked an ACLU lawsuit after it housed women with their children in violation of the “1997 court settlement [with the ACLU] that established minimum standards and conditions for the housing and release of all minors in federal immigration custody.”<sup>216</sup> The center now houses only women. Although ICE “touts Hutto as a flagship facility, emblematic of its commitment to reform,” detainees have filed numerous complaints against guards at the Hutto facility for sexual assault.<sup>217</sup>

Women’s growing presence in immigration detention centers is caused by a

209. *Id.*

210. Pub. L. No. 104-208, 110 Stat. 3009.

211. See Rabin, *supra* note 39, at 696 (“[I]n 1996, the government had the capacity to detain 8600 [immigrants] per day. Today, that number has nearly quadrupled, with 33,400 people in detention on any given day.”).

212. *Id.* at 700 (footnote omitted).

213. *Id.* at 696–97.

214. *Id.* at 697. For information on the four main types of facilities in which ICE houses immigration detainees, see *id.* at 703–04.

215. Margaret Talbot, *The Lost Children*, THE NEW YORKER (Mar. 3, 2008), [http://www.newyorker.com/reporting/2008/03/03/080303fa\\_fact\\_talbot?currentPage=all](http://www.newyorker.com/reporting/2008/03/03/080303fa_fact_talbot?currentPage=all).

216. See Press Release, ACLU, ACLU Challenges Prison-Like Conditions at Hutto Detention Center (Mar. 6, 2007), available at <http://www.aclu.org/immigrants-rights-racial-justice/aclu-challenges-prison-conditions-hutto-detention-center> (discussing ACLU’s settlement of cases filed after Hutto violated numerous provisions of a 1997 settlement, *Flores v. Meese*).

217. See Press Release, ACLU, Sexual Abuse of Female Detainees at Hutto Highlights Ongoing Failure of Immigration Detention System, Says ACLU (Aug. 20, 2010), available at <http://www.aclu.org/immigrants-rights-prisoners-rights/sexual-abuse-female-detainees-hutto-highlights-ongoing-failure-im> [hereinafter ACLU, Sexual Abuse] (stating that an employee at the T. Don Hutto detention center was charged with sexually abusing numerous female detainees); Catherine Traywick, *Sexual Assault and Abuse Rampant in America’s Immigration Detention Centers*, CAMPUS PROGRESS (Oct. 18, 2010), [http://campusprogress.org/articles/sexual\\_assault\\_and\\_abuse\\_rampant\\_in\\_americas\\_immigration\\_detention\\_cen](http://campusprogress.org/articles/sexual_assault_and_abuse_rampant_in_americas_immigration_detention_cen) (stating that while that employee has been charged with several sexual assaults, no one knows exactly how many women he assaulted before their deportation or release).

combination of factors, including “increased prosecution of immigration violations, workplace raids, and harsh sentencing for drug offenses.”<sup>218</sup> Increasing numbers of female prisoners and immigrant detainees have pushed to the forefront their unique needs. Some central differences include women’s mental health and medical needs (including pregnancy), large numbers of physical or sexual abuse survivors, primary care-giving responsibility, non-violent criminal backgrounds, and staff opinions that women are “inconvenient and difficult to work with in a system designed to supervise the behavior of men.”<sup>219</sup>

Nevertheless, detention protocols have not kept up with the growing female population; in the 2000 Detention Standards, only four of thirty-eight standards applied specifically to gender-related needs.<sup>220</sup> Two apply to pregnant women in particular: they must be given regular food, and force may be used on pregnant women only in special circumstances.<sup>221</sup> The 2008 Detention Standards added additional requirements, including pregnancy testing, pregnancy management services, and thorough healthcare screenings on arrival.<sup>222</sup> Although the 2008 Detention Standards therefore improve upon previous versions, it remains unclear whether ICE is following these new standards.<sup>223</sup> According to a Human Rights Watch Report, ICE contends that all pregnant women in detention receive care from off-site obstetrical specialists, despite evidence to the contrary.<sup>224</sup> Two centers in Texas did provide off-site care, but some women in Arizona report

218. Rabin, *supra* note 39, at 702.

219. *Id.* at 703 (quoting BARBARA BLOOM, BARBARA OWEN, STEPHANIE COVINGTON & MYRNA RAEDER, NAT’L INST. OF CORR., GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 24 (2003)).

220. *Id.* at 708. Rabin explains the gender-specific standards:

The standard entitled ‘Admission and Release’ addresses the appropriate personal hygiene supplies that female detainees may and may not receive in detention. The ‘Hold Rooms’ standard specifies that pregnant women in holding cells must be given regular access to food. The standard regarding transportation specifically requires that female detainees be provided with alternate means of transportation for trips lasting over six hours and instructs transporting officers to avoid the use of restraints on female detainees unless there are exceptional circumstances. Finally, the ‘Use of Force’ standard states that pregnant detainees present special considerations.

*Id.* When Rabin conducted her research, the 2000 Detention Standards were in place. *Id.* at 708, n.61.

221. *Id.*

222. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS: MEDICAL CARE 2, 11, 18 (2008), available at [http://www.ice.gov/doclib/dro/detention-standards/pdf/medical\\_care.pdf](http://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf).

223. See Angela Morehouse, *Changes in the Wind: How Increased Detention Rates, New Medical Care Standards, and ICE Policy Shifts Alter the Debate on Immigrant Detainee Healthcare*, 5 INTERCULTURAL HUM. RTS. L. REV. 187, 189 (2010) (discussing the challenge of determining whether ICE and other detention officers are adhering to 2008 Standards).

224. See HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION 52–53 (2009) (describing discrepancies in care between and among different facilities).

that they were denied care of any kind.<sup>225</sup> Giselle M. reported:

When I went to get a sonogram [before being detained] the doctor found a cyst and wanted to monitor every two to three weeks because it kept growing, growing to the size of a golf ball. It could erupt and hurt me or the baby. I was a first time mom, I didn't know what to expect. I told them [at the detention center] this is what is going on and I need to see a doctor. I would go every time with my little paper. They would say, "Go ahead, put [in] a request." But they never took me once. They never got back to me.<sup>226</sup>

Another story highlights both "the government's unbending use of detention with little regard for individual circumstances including the detainees' health care needs, and the failure of the facilities to appropriately respond to the needs of pregnant detainees."<sup>227</sup> When Ana, an immigrant from Mexico who came to the U.S. as an infant, was seventeen, she was charged with receiving stolen property.<sup>228</sup> Several years later, after she became engaged to a citizen, she was convicted and served a short jail term.<sup>229</sup> After she married and was six months pregnant, she was sent to Florence, a detention center in Arizona, in shackles.<sup>230</sup>

Ana, her attorney, and her doctor all alerted ICE of her pregnancy but she remained in detention. Prior to her detention, her doctor instructed her to have periodic monitoring of a cyst in her ovary in order to ensure that it did not grow to a size that would endanger her and the fetus. Yet despite repeated written and verbal requests, Ana never received a sonogram while in detention.<sup>231</sup>

Other examples of such treatment include three detainees who suffered miscarriages during their detention but were nonetheless kept detained for several more months, even though their attorneys reported that they were not given adequate care after the miscarriages.<sup>232</sup> Because women who give birth in custody are often separated from their newborns,<sup>233</sup> if their requests for breast pumps are denied, these women have to express milk manually and may be unable to continue breastfeeding when they are reunited with their children.<sup>234</sup>

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225. *Id.*

226. *Id.* at 53.

227. Rabin, *supra* note 39, at 716.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See id.* at 717 (stating that one of three women who reported miscarriages to the Florence Immigrant and Refugee Rights Project ("FIRRP") while detained spent a further eight months in detention even after FIRRP began advocating for her release). Indeed, one woman "requested a doctor and received only sanitary pads to deal with the bleeding." *Id.* at 717 n.91.

233. This is because ICE cannot detain American citizens. *See infra* note 253 and accompanying text.

234. Rabin, *supra* note 39, at 717.

The 2008 Detention Standards are also notable for what they fail to address, including access to emergency contraception, shackling during childbirth, and, especially, abortion services.<sup>235</sup> Information surrounding these issues is even less accessible and, therefore, almost entirely anecdotal, but ICE spokesperson Cori Bassett reports that during fiscal years 2008 and 2009, “no detainee has had a pregnancy terminated while in ICE custody.”<sup>236</sup> This does not mean that women in immigration detention centers do not desire abortion services, however—especially given that a significant number of women detained after attempting to cross the border without documentation have been raped during the course of their journey.<sup>237</sup> Sexual assault counselor Elia Alvarado says that half of the women she worked with who had been impregnated after being raped inquired into abortion options, but Alvarado was not able to help them.<sup>238</sup> This lack of access to abortion services, especially for women whose pregnancies resulted from their arduous journeys and the U.S.’s restrictive border policies, is simply another example of how anti-immigrant policies impinge on women’s access to reproductive justice. Medical policy for the detention centers says that funding for abortions is “not covered but can be requested in the event of an emergency situation,”<sup>239</sup> with “emergency situation[s]” presumably defined by ICE and not the woman in question.

Although there is only limited information about the pregnancy care that women in ICE detention receive, anecdotal evidence makes clear that ICE is not meeting its responsibility to provide adequate healthcare to the women immigrants it detains.<sup>240</sup> To explain why this may be and what the implications are for immigrant women’s reproductive justice, it is useful to compare pregnant women’s experiences in the federal prison system to their experiences in ICE

235. See ACLU, *Improving Access to Reproductive Healthcare for Women in Immigration Detention*, WOMEN’S REFUGEE COMMISSION 2 (June 18, 2009), [http://www.womensrefugeecommission.org/docs/aclu\\_brief\\_on\\_reproductive\\_health\\_care\\_in\\_ice\\_detention.pdf](http://www.womensrefugeecommission.org/docs/aclu_brief_on_reproductive_health_care_in_ice_detention.pdf) (noting that this failure means that ICE detention standards fall below constitutional and other federal minimum constitutional requirements).

236. Kevin Sieff, *Access Denied: Countless Women are Sexually Assaulted as They Attempt to Immigrate into the United States. What Happens to Their Reproductive Rights When They Wind Up in U.S. Custody?*, TEX. OBSERVER (Feb. 19, 2009), <http://www.texasobserver.org/archives/item/15571-2963-access-denied-countless-women-are-sexually-assaulted-as-they-attempt-to-immigrate-into-the-united-states-what-happens-to-their-reproductive-rights-when-they-wind-up-in-us-custody>.

237. See *id.* (noting that women preparing to immigrate to the United States are told to take birth control pills, dress as men, and otherwise prepare for the large possibility of being raped on their journey).

238. *Id.*

239. *Id.* (quoting DIV. OF IMMIGRATION HEALTH SERVS., U.S. DEP’T OF HEALTH AND HUMAN SERVS., *DETAINEE COVERED SERVICE PACKAGE* (2009)).

240. See Darryl Fears, *3 Jailed Immigrants Die in a Month: Medical Mistreatment Alleged, Federal Agency Denies Claims*, WASH. POST (Aug. 15, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/14/AR2007081401690.html> (noting deaths of pregnant women in ICE detention and describing allegations of medical mistreatment).



custody. This comparison highlights the tensions ICE faces when it is faced with the need to fulfill its mission on the one hand and the prohibition on detaining U.S. citizens on the other.

*B. ICE Detention and the Removal of Pregnant Immigrants: A Comparison to the Federal Prison System.*

Contrasting the federal prison system to immigration detention centers accomplishes two tasks. Most obviously, it demonstrates that one federal agency has better responded to its detainees' medical needs. Less obviously but far more importantly, comparing the missions of each agency reveals a deeper insight: ICE's mission and legal constraints may be leading to the detention and quick removal of pregnant women in greater numbers than would otherwise be the case.

In comparison to ICE's position on abortion services, pregnant women in federal prison—which is not known for its exemplary medical care either—automatically receive counseling to help them decide whether to terminate their pregnancy and, if they wish to seek an abortion, the clinical director must arrange it.<sup>241</sup> Additionally, women in federal prison “may receive an elective abortion at Bureau expense if the pregnancy is the result of rape.”<sup>242</sup> Spokesperson Bassett says that if abortion is not necessary to save the life of the woman, “a woman can request to terminate her pregnancy. Requests are reviewed on a case-by-case basis. . . . ICE will not restrict women's access to terminate the pregnancy . . . and will provide transportation to and from the facility.”<sup>243</sup> However, immigration attorneys and local abortion providers say that the policy is not put into practice and that abortion is essentially unavailable to pregnant detainees.<sup>244</sup>

This comparison to federal prison treatment shows how restrictive the conditions are for women confined in immigration detention centers, but there is a more profound implication. Bassett refuses to explain why the policies of ICE and the Federal Bureau of Prisons (“FBP”) differ, saying that it is “not appropriate for ICE to comment on the policy of the Bureau of Prisons.”<sup>245</sup> However, Kevin Sieff suggests that the answer may be found in the differing missions of the two institutions<sup>246</sup> and even the differing goals of criminal and immigration law. The criminal justice system “seeks to prevent and address

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241. *Id.*

242. HUMAN RIGHTS WATCH, *supra* note 224, at 54.

243. Sieff, *supra* note 236.

244. *Id.* See generally Alexandria Walden, *Abortion Rights for ICE Detainees: Evaluating Constitutional Challenges to Restrictions on the Right to Abortion for Women in ICE Detention*, 43 U.S.F. L. REV. 979 (2009) (evaluating possible constitutional challenges to the ICE policy).

245. Sieff, *supra* note 236.

246. See *id.* (discussing divergent policies, with ICE's policy being partly to keep detainees ready for deportation).

harm to individuals and society from violence or fraud or evil motive,”<sup>247</sup> but has also traditionally sought to rehabilitate offenders and recognizes that “while there are some who must be completely segregated from society, there are many instances in which segregation does more harm than good.”<sup>248</sup> Immigration law, on the other hand, aims to “determine[] who may cross the border and reside here, and who must leave.”<sup>249</sup> Therefore, ICE’s primary mission is to focus on controlling membership and presence inside the U.S., which comes at the expense of the well-being of individual immigrants.

A close look at the language of these institutional bodies’ missions makes this difference explicit. FBP’s mission statement says that it aims “to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.”<sup>250</sup> On the other hand, ICE says that its

primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. The agency has an annual budget of more than \$5.7 billion dollars [sic], primarily devoted to its two principal operating components—Homeland Security Investigations (HSI) and Enforcement and Removal Operations (ERO).<sup>251</sup>

The different roles doctors play at these facilities perhaps most markedly illustrates the impact of these divergent missions. Some doctors employed by ICE worry that the health division’s mission of “keeping the detainee medically ready for deportation” at all times results in a deviation below the “U.S. legal standard of care.”<sup>252</sup> Although doctors at federal prisons need not worry that minor surgeries like abortion will interfere with FBP’s mission, doctors who work for ICE are torn between their duty to provide adequate medical care and their duty to keep women ready for removal at all times.

Beyond access to health care, only limited information is available on how

247. Juliet Strumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379 (2006).

248. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* vii (1967).

249. Strumpf, *supra* note 247, at 379.

250. *Mission and Vision of the Bureau of Prisons*, FED. BUREAU OF PRISONS <http://www.bop.gov/about/mission.jsp> (last visited Sept. 16, 2011).

251. *ICE Overview: Mission*, IMMIGRATION AND CUSTOMS ENFORCEMENT (emphasis added), <http://www.ice.gov/about/overview> (select “Mission” bar) (last visited Sept. 16, 2011).

252. Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, the Detainees in Their Care Often Pay a Heavy Cost*, WASH. POST, May 11, 2008, at A1, available at [http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc\\_day1\\_printer.html](http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_day1_printer.html).

pregnancy shapes the treatment of women in ICE custody. Anecdotal evidence suggests, however, that ICE wants to keep pregnant women detained until they are removed and wants to remove them as quickly as possible. However, if a noncitizen woman gives birth while in custody, ICE has to navigate uncertain legal terrain: the child will be a citizen, and ICE cannot detain citizens.<sup>253</sup> ICE then must decide whether to release both the mother and the baby for humanitarian reasons or release only the baby, either to family members in the U.S. or to foster care. For example, Arizona attorneys have “reported that the government routinely fights their efforts to get pregnant detainees released on bond,”<sup>254</sup> even appealing immigration judges’ rulings granting bond to the Board of Immigration Appeals (“BIA”), as was done in Ana’s case.<sup>255</sup> This action illustrates ICE’s commitment to keeping undocumented immigrants

253. 7 U.S. DEP’T OF STATE, *supra* note 84, at § 1111(d)(2)(b):

A child born in an immigration detention center physically located in the United States is considered to have been born in the United States and be subject to its jurisdiction.

This is so even if the child’s parents have not been legally admitted to the United States and, for immigration purposes, may be viewed as not being in the United States.

*Id.* For more information on the impact of U.S. immigration policy on citizen children, see generally JAMES D. KREMER, KATHLEEN A. MOCCIO & JOSEPH W. HAMMELL, DORSEY & WHITNEY LLP, SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA’S IMMIGRATION ENFORCEMENT POLICY (2009), *available at* [http://www.dorsey.com/files/upload/DorseyProBono\\_SeveringLifeline\\_web.pdf](http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf); INT’L HUMAN RIGHTS LAW CLINIC, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY, AND DIVERSITY, & IMMIGRATION LAW CLINIC, IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), *available at* [www.law.ucdavis.edu/news/images/childsbestinterest.pdf](http://www.law.ucdavis.edu/news/images/childsbestinterest.pdf). The latter report found that approximately 88,000 legal permanent residents with citizen children were deported between 1997 and 2007, the majority for misdemeanors. *Id.* at 4. Often, children have no choice but to leave with their parents, and so, as Representative José Serrano notes, “we are de facto deporting American citizens.” Templeton, *supra* note 181. For a shocking example of the Border Patrol’s willingness to split up a family, see Adam Liptak, *Family Fight, Border Patrol Raid, Baby Deported*, N.Y. TIMES (Sept. 20, 2010), <http://www.nytimes.com/2010/09/21/us/21bar.html?hp> (describing Border Patrol’s deportation of baby Rosa, a U.S. citizen, along with her undocumented father, despite her citizen mother’s efforts to stop her daughter’s deportation. Mother and child were not reunited for three years. An agent testified that keeping the father and daughter overnight, long enough for a U.S. court to halt the deportation, would have involved “a tremendous amount of money,” defined by the border portal agent as “[w]ell over \$200 plus”); see also Scott MacKay, *Immigrant Loses Children After Abuse*, PROVIDENCE J., July 20, 2008, at B1 (describing a case where the Rhode Island Department of Children, Youth, and Families put two children, one a U.S. citizen, in foster care and deported the mother where the court believed that the mother and her extended family could not protect the children from the children’s abusive father in Mexico).

254. Rabin, *supra* note 39, at 717. It is not clear if the rate of bond denial differs if the immigrant is pregnant.

255. *Id.* at 716 (stating that after an immigration judge granted Ana bond, ICE appealed that decision). In 2006, Arizona voters passed a law denying undocumented immigrants who had been arrested for any criminal offense, no matter how minor, the right to post bail. Valeria Fernández, *Pregnant and Shackled: Hard Labor for Arizona’s Immigrants*, NEW AM. MEDIA, Jan. 26, 2010, *available at* [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=bc96e9bf40ad9ac97a78dbal65ea2448](http://news.newamericamedia.org/news/view_article.html?article_id=bc96e9bf40ad9ac97a78dbal65ea2448).

“ready for deportation” at all times.<sup>256</sup> One woman at a detention center in Tacoma, Washington, reports that two pregnant women were taken to the emergency room with chains on their feet and hands:

The guards blatantly stated that they didn’t care that these women were pregnant or sick. A guard told them flat out, “You will be deported to your country.” And one of the women asked, “In this condition that I am in? I will not be able to travel like this.” The guard cruelly responded, “It doesn’t matter; you have to leave this country regardless if [sic] the doctor says that you can’t travel.”<sup>257</sup>

Unlike the Federal Bureau of Prisons, ICE must carefully navigate between competing interests, such as its mission to remove undocumented immigrants as quickly as possible, its reluctance to issue humanitarian release to pregnant women, and the messy legal issues that arise when a child is born in ICE custody, which can result in draconian treatment of pregnant immigrants. The debate over birthright citizenship exists at the intersection of ICE’s competing mandates, and a comparison of ICE and FBP reveals what an examination of ICE’s policies alone cannot: ICE’s mission and legal constraints may hasten the detention and removal of pregnant women. Because ICE’s mission mandates that pregnant women be ready for removal at all times, ICE is unlikely to issue a bond or humanitarian release. But because ICE cannot detain citizen children and may be reluctant to involve itself with child placement issues, it is in ICE’s interest to allow pregnant women to leave detention. The only option that allows ICE to meet its multiple objectives is to remove pregnant women before they give birth, denying the women reproductive autonomy and denying the children the citizenship that would otherwise be their birthright.

## V.

### ICE’S TARGETING OF BIRTHRIGHT CITIZENSHIP, PREGNANCY, AND WOMEN’S BODIES

Understanding the history of the citizenship clause of the Fourteenth Amendment, the political assault on the bodies and reproductive autonomy of women of color, and ICE detention of pregnant women helps us put Tian Xiao Zhang’s question into context: “Why the immigration was [sic] in a rush to send a pregnant woman back to China?”<sup>258</sup> ICE is designed to control the membership of the American “imagined community,” which is directly at odds with undocumented immigrant women’s access to reproductive justice. The evidence that ICE uses immigration regulation to control this reproductive justice is backed up through both anecdotal reports and numerical support.

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256. See Priest & Goldstein, *supra* note 252.

257. *Speaking Out: Pregnant Women Denied Care*, DETENTION WATCH NETWORK (June 19, 2008), <http://www.detentionwatchnetwork.org/node/2191>.

258. Gammage, *supra* note 1.

A disproportionate number of women in ICE custody are pregnant. Statistics on pregnant women in ICE custody are difficult to locate. However, according to an agency spokesperson, of the 10,653 women detained by ICE in 2008, 965 were pregnant.<sup>259</sup> The U.S. Census Bureau indicates that there are approximately 155,652,000 women in the United States,<sup>260</sup> and there are approximately six million pregnancies per year.<sup>261</sup> These imprecise data indicate that, although fewer than four percent of women in the general population are pregnant, over nine percent of women in ICE detention are pregnant. This discrepancy could be caused by a wide variety of factors—higher rates of pregnancy for immigrant women, for example, or age differences between detained women and non-detained women—but, at the very least, there seems to be a correlation between pregnancy and ICE detention.<sup>262</sup> Even more significantly, only three percent of women in federal prison—a population likely more similar demographically to women in immigration detention than women in the general population<sup>263</sup>—are pregnant.<sup>264</sup>

History supports the implications suggested by the numbers. In the nineteenth and early twentieth centuries, women who were visibly pregnant when seeking admission to the United States were often deemed inadmissible because they were thought likely to become public charges.<sup>265</sup> In fact, unmarried pregnant women were automatically presumed to be public charges.<sup>266</sup> Poverty,

259. Sieff, *supra* note 236.

260. See *State & County QuickFacts*, U.S. CENSUS BUREAU (Aug. 16, 2010), <http://quickfacts.census.gov/qfd/states/00000.html> (stating that approximately 50.7% of the estimated 308,745,538 people in the United States are women).

261. *Statistics on Pregnancy*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/main/statistics.html> (last visited Nov. 13, 2010).

262. According to the Pew Hispanic Center:

Unauthorized immigrants comprise slightly more than 4% of the adult population of the U.S., but because they are relatively young and have high birthrates, their children make up a much larger share of both the newborn population (8%) and the child population (7% of those younger than age 18) in this country.

PASSEL & TAYLOR, *supra* note 27, at 1. However, the discrepancy between pregnant women in and out of immigration detention centers is larger than the discrepancy between the children of immigrants and the children of non-immigrants that the report describes.

263. See, e.g., BARBARA BLOOM, BARBARA OWEN, STEPHANIE COVINGTON & MYRNA RAEDER, GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 13-14 (2002), available at <http://www.nicic.org/pubs/2003/018017.pdf>. (noting that female offenders, like female immigrants, are “disproportionately women of color, low-income, uneducated, and unskilled, with sporadic employment histories.”).

264. Sieff, *supra* note 236.

265. See MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965, at 91 (2005) (stating that visibly pregnant women were often labeled “likely to become a public charge,” and that most immigrants refused entry from 1895 until the end of World War I were denied admission for this reason).

266. EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 5 (2002) (quoting ANN LAURA STOLER, RACE AND THE EDUCATION OF DESIRE: FOUCAULT’S *HISTORY OF SEXUALITY* AND THE COLONIAL ORDER OF THINGS (1995)) (stating that there was a presumptive rule that a visibly pregnant woman was a public charge).

therefore, was “used to reinforce immigration laws regulating traditional gender roles and historic race and ethnic prejudices.”<sup>267</sup> Immigration officials, who had wide latitude in deciding whom to admit, believed that “women who seemed to flout traditional strictures against premarital sex . . . were not only morally questionable but economically at risk as well.”<sup>268</sup> One official noted, “I am opposed to the admission to this country of all such persons as come here to hide their shame.”<sup>269</sup> This reluctance to admit—or rush to deport—pregnant women has not diminished with time. The Department of Homeland Security has a list of frequently asked questions; one is, “Can I visit the U.S. while pregnant and what are the risks involved?”<sup>270</sup> The answer explains that, while such entrance is not prohibited, it is left up to the “discretion” of the border officer, who might decide that the woman is likely to become a ward of the state.<sup>271</sup> It concludes, “Coming to the U.S. for the purpose of child birth is not a valid reason for travel.”<sup>272</sup> Clearly, U.S. officials still worry about pregnant women becoming a public charge or ward of the government, and they adjust their admissions procedures accordingly.

Furthermore, stories of pregnant women arrested, detained, and often deported by ICE abound.<sup>273</sup> ICE may have targeted Myrna Dick, the woman whose removal was temporarily halted by a federal judge when she was pregnant, precisely because she was pregnant.<sup>274</sup> Ms. Dick’s parents brought her from Mexico to the U.S. for medical care when she was a child and the family then overstayed their visas.<sup>275</sup> Although most of her family was granted permanent residency under the Immigration Reform and Control Act, Ms. Dick was not.<sup>276</sup> She left the U.S. in 1998 for her grandmother’s funeral and returned via coyotes<sup>277</sup> who abandoned her in the desert for hours, until border patrol

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267. GARDNER, *supra* note 265, at 91.

268. *Id.* at 91–92.

269. *Id.* at 92 (citation omitted).

270. *Visit the U.S. While Pregnant and the Risks Involved*, U.S. CUSTOMS & BORDER PROTECTION (Oct. 20, 2004), [https://help.cbp.gov/app/answers/detail/a\\_id/882/~/visit-the-u.s.-while-pregnant-and-the-risks-involved](https://help.cbp.gov/app/answers/detail/a_id/882/~/visit-the-u.s.-while-pregnant-and-the-risks-involved).

271. *Id.*

272. *Id.*

273. Although there is no evidence that the Concerned Citizens of the United States are affiliated with the government, the group’s release of the names of 1,300 suspected undocumented immigrants is simply another example of conservatives’ harassment of pregnant immigrants. The list’s cover letter made the connection between birthright citizenship and removal clear, saying, “Some of the women on the list are pregnant . . . And steps should be taken for immediate deportation.” David Wright, Bonnie McLean & Jessica Hopper, *Leaking of List of Illegal Immigrants in Utah Terrifies Latino Community*, ABC NEWS (July 15, 2010), <http://abcnews.go.com/WN/leaking-list-1300-purported-illegal-immigrants-living-utah/story?id=11166203>.

274. *See* Burke, *supra* note 193 (describing how when Dick went to renew her work visa while pregnant, she was ordered deported).

275. *Id.*

276. *Id.*

277. A coyote is a guide informally hired by immigrants who wish to cross the Rio Grande.

agents found her.<sup>278</sup> She was allowed to enter, but there is dispute about whether her entrance was based on false identification, a deportable offense.<sup>279</sup> In 2002, she met and married Brady Dick, who filed for lawful permanent resident status on her behalf.<sup>280</sup> In 2004, three months after she become pregnant, she attempted to renew her work visa and was taken into custody.<sup>281</sup> Despite suffering from morning sickness, she was shackled to the floor of a bus while ICE transferred her to their Kansas City detention facility.<sup>282</sup> Although there is no direct evidence that ICE targeted Ms. Dick because she was pregnant, the timing is suspicious.

In Roswell, New Mexico, a five-months-pregnant teenager was arrested at school for a traffic violation, put in ICE detention, and deported days later.<sup>283</sup> Despite ICE regulations that instruct agents not to arrest pregnant women or carry out arrests in schools, an undocumented woman who was eight months pregnant was arrested in Oakland, California, at her daughter's school.<sup>284</sup> A Ukrainian woman was deported while pregnant; her family believes this was to ensure she "didn't have the opportunity to have a safe delivery in the U.S."<sup>285</sup> In a Nashville suburb, Juana Villegas, who was nine months pregnant, was arrested for a routine traffic violation, turned over to ICE, and released six days later, after she had given birth in shackles.<sup>286</sup> She is appealing her detention order, but the Court of Appeals for the Sixth Circuit has declined to review it.<sup>287</sup> The Davidson County Sheriff's Office has defended its actions, saying the story has been sensationalized and that "[a]ny one [sic] in any correction [sic] facility in the country would be treated similarly."<sup>288</sup>

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See Sieff, *supra* note 236.

278. See Burke, *supra* note 193 (stating that smugglers led her and another woman through the sand for hours, and they were found by border patrol agents on a deserted hill).

279. *Id.* There is also dispute about whether people like Ms. Dick were supposed to be covered by the act that made false claim to citizenship a deportable offense. Even Kris W. Kobach, a conservative scholar who helped Arizona draft S.B. 1070, says that the statute was never intended to be applied years after the fact to non-criminal immigrants. Kobach claims, "They're taking the statute out of context . . . Her claim is that they've got the wrong person. And there are enough valid questions that Myrna Dick is raising that her case should be reconsidered." *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. Jacques, *supra* note 19.

284. *Pregnant Mother's Arrest at School Sparks Outrage*, *supra* note 19.

285. Dave Bennion, *I'm a U.S. Citizen and my Wife Was Deported*, IMMIGRANT RIGHTS (July 10, 2009), [http://immigration.change.org/blog/view/im\\_a\\_us\\_citizen\\_and\\_my\\_wife\\_was\\_deported](http://immigration.change.org/blog/view/im_a_us_citizen_and_my_wife_was_deported). This case is peculiar because, as the author points out, the husband is a U.S. citizen and can petition for citizenship even if the child is born in the Ukraine. *Id.*

286. Preston, *Immigrant, Pregnant, Is Jailed Under Pact*, *supra* note 19. "Elliott Ozment, Mrs. Villegas's lawyer, said driving without a license is a misdemeanor in Tennessee that police officers generally handle with a citation, not an arrest." *Id.*

287. Echegaray, *supra* note 19.

288. *Sheriff's Office Defends Treatment of Woman Who Gave Birth While in Custody*, NASHVILLE CITY PAPER (July 23, 2008, 1:09 AM), <http://nashvillecitypaper.com/content/city->

Many of these arrests, including Ms. Villegas's, are based on the ICE 287(g)<sup>289</sup> program, which "allows a state and local law enforcement entity to enter into a partnership with ICE, under a joint Memorandum of Agreement (MOA), in order to receive delegated authority for immigration enforcement within their jurisdictions."<sup>290</sup> In other words, 287(g) allows police departments to check arrestees' immigration status and detain them; if their presence cannot be documented, they are turned over to ICE.<sup>291</sup> A Nashville lawyer complained that the 287(g) program has been "operat[ing] so broadly that we are getting pregnant women arrested for simple driving offenses, and we're not getting rid of the robbers and gang members."<sup>292</sup> Nevertheless, the use of section 287(g) continues to grow<sup>293</sup> and, as it does, it seems reasonable to expect the number of pregnant women targeted, arrested, and deported for minor offenses and traffic violations to grow as well. This, in combination with the increase in workplace raids and other law enforcement actions that disproportionately impact women,<sup>294</sup> suggests that ICE's ability to control women's reproductive autonomy will increase as these trends continue.

Although more research is required, history, anecdotes, and statistics tell an important and worrying story. A disproportionate number of pregnant, undocumented immigrants are being arrested, detained, and deported; like Zhen Xing Jiang, they are told that they will "have to have [their] babies" outside the United States.<sup>295</sup> The conservative attack on birthright citizenship has not escaped ICE. Indeed, the data suggest that ICE has taken the heightened rhetoric of certain conservative organizations and media organizations to heart and is focusing its deportation efforts on the women who give birth to these "anchor babies." Agents have wide discretion to focus their enforcement strategies on any population they wish. Recent ICE policies and initiatives, especially 287(g), add to the likelihood that their discretion will increasingly be used to target pregnant women of color.

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news/sheriff-s-office-defends-treatment-woman-who-gave-birth-while-custody.

289. 8 U.S.C. 1357(g) (2006). The name comes from INA § 287(g), which was added to the INA by IIRIRA in 1996 but not utilized by any state or local government until Alabama signed the first Memorandum of Agreement in 2003. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, IMMIGRATION AND CUSTOMS ENFORCEMENT [hereinafter ICE, *Fact Sheet*], <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Nov. 21, 2010).

290. ICE, *Fact Sheet*, *supra* note 289.

291. See Preston, *Immigrant, Pregnant, Is Jailed Under Pact*, *supra* note 19 (stating that Mrs. Villegas would never have been detained without the 287(g) agreement). For more information on how 287(g) functions, see ICE, *Fact Sheet*, *supra* note 289.

292. *Sheriff's Office*, *supra* note 288.

293. See ICE, *Fact Sheet*, *supra* note 289 (stating that the first MOA was signed in 2003 and that ICE currently has 287(g) agreements with 69 law enforcement agencies in 24 states).

294. See Rabin, *supra* note 39, at 702 (describing several factors that have led more women to be detained for violations of immigration law).

295. *Police Brutality*, *supra* note 6.



## VI.

## CONCLUSION: A CALL TO PROTECT BIRTHRIGHT JUSTICE

This Article argues that the attack on birthright citizenship, which is a proxy for a direct attack on the reproductive justice of women of color, influences ICE's actions in arresting, detaining, and removing undocumented immigrants. Anti-immigrant sentiment is increasingly focused on controlling women of color's reproductive capacity or, as anti-immigrant activists call it, countering the "invasion by birth canal."<sup>296</sup> The assault on birthright citizenship provides an ideal opportunity for conservatives to advance their opposition to several issues at once, including immigration and reproductive justice, especially as practiced by women of color. Pregnancy coupled with undocumented status has become a red flag, which is inexorably linked with the growing controversy over birthright citizenship. The nativism, racism, and sexism that underlie this country's immigration laws continue to encourage the targeting of pregnant non-citizens.

The bodies of pregnant immigrant women are attacked from all sides today, from conservative activists, commentators, and politicians to federal immigration policy's enforcement arm, ICE. Those who oppose birthright citizenship fear that pregnant immigrants of color will produce the next generation of citizens, creating the reproductive cycle Samuel Huntington warns against when he discusses a "de facto split" between white and Latino America.<sup>297</sup> Given the stakes involved for both conservative groups and immigrants and their allies, the latter can no longer afford to rely solely on the Fourteenth Amendment and the birthright citizenship clause. If we are to protect birthright justice for the next generation of immigrant families, we must recognize and actively work to counter ICE's ability to target pregnant immigrant women for detention and removal, and, at the very least, ensure their access to health services while in custody. If we do not, the protection of birthright citizenship may become no more than illusory.

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296. Watanabe, *supra* note 179.

297. See Huntington, *supra* note 148, at 243.

