THE SOCIAL CLIMATE OF THE BIRTHRIGHT MOVEMENT IN THE UNITED STATES

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This paper explores the social and political context of the birthright movement in the United States, which since 1993 has prompted anti-immigration activists to introduce congressional legislation that would deny citizenship to U.S.-born children whose parents are undocumented or are non-permanent legal residents. Furthermore, the paper examines the U.S. Justice Department's opposition to the birthright legislation, and chronicles the counter response of Latinos to anti-immigration social movements. It is argued that Mexican Americans and Asian Americans have been the target of the legislation.

Key Words: birthright citizenship, immigration, cultural citizenship, undocumented, state of necessity

There is no denying that many U.S. citizens perceive undocumented immigration to the United States from Latin America, specifically from Mexico, as a national problem. The question, however, which many Americans disagree upon, is whether U.S. law should be reformed and the U.S.-born children of undocumented immigrants be denied birthright citizenship. Proponents of ending birthright citizenship argue that this would be an effective manner of reducing undocumented immigration, while critics argue that this is not the best way to deal with the problem, as the U.S. Constitution would have to be revised and a long-standing Republican tradition that has defined America would undergo transformation.

The aim of this article is to chronicle the birthright debate in the United States and examine its social and political context. By employing Giorgio Agamben's theoretical argument concerning "the state of exception" (2005), I argue

that since 1993, when the first birthright resolution was introduced within U.S. Congress, only a small number of representatives attempted to make an exception in citizenship law. Their aim was to decitizenize Mexican American children who, in their view, had illicitly obtained U.S. citizenship. Over the years, this minority opinion within Congress has grown and gained popular support, manifesting itself in the birthright movement.[1] The rationale for making an exception in citizenship law and excluding those U.S.-born children whose parents are undocumented or are not permanent legal residents is regarded to be a political necessity. In these cases, advocates of birthright reform argue that the suspension of the Fourteenth Amendment is indispensible for the economic and political welfare of the nation (Smith 2009; Romero 2008). Agamben calls invoking or implementing this process of exclusion a "state of necessity (24)." An exception in the law is invoked when a state of emergency requires discriminatory action against those who endanger the nation. Agamben adds that for a state of necessity to be employed it is crucial to vilify the targeted population, otherwise, if the policy is implemented without adequate proof, the state can be destabilized, as those who are marked to be excluded become victims, and this undermines the morality and legitimacy of the state. This paper will, therefore, explore the claims of necessity used to justify making an exception in citizenship law, as well as the counterarguments used in defense of retaining birthright citizenship. I will provide evidence that Latinos and Asians are the specific groups targeted by this legislation. Before chronicling the birthright movement and its proponents' claims of necessity, I first turn to the concept of cultural citizenship to explore why the political membership of some groups is undervalued in society, and is vulnerable to interpretation and legal redefinition.

Who Deserves to Be a U.S. Citizen?

In their writings on cultural citizenship, Renato Rosaldo (1994) and Aiwha Ong (1996) advanced groundbreaking interpretations on how political membership in

a nation-state is ascribed, gained, and practiced in everyday life. In 1994, Rosaldo introduced the concept of cultural citizenship, calling on anthropologists to re-theorize citizenship beyond its legal definition and to explore how elites and non-elites shape the state and make demands upon it. His aim was to argue that ethnic minority groups, who culturally and racially differ from majority Anglo American cultures, have the right to express their cultural differences without being treated or suspected of being un-American. Rosaldo's initial analysis was influenced by the writings of British scholar Paul Gilroy (1987) who explored why blacks, regardless of citizenship status, were denied the right to participate in British society as equals, or enjoy the fruits of birthright membership.

Writing in 1996, Aiwha Ong disagreed with Rosaldo's humanist perspective and critiqued his work for being divorced from public opinion. Instead, Ong advanced her own take on cultural citizenship, which came to eclipse the popularity of Rosado's political treatise within some anthropological and cultural studies circles. Ong centered her analysis on the concepts of "self-making" and "being-made." She agreed with Rosaldo that citizenship must be defined beyond its juridical meaning. However, cultural citizenship was not solely about one's desire to belong or about the moral politics of equality. According to Ong, in the United States there is a cultural prestige system that determines the respect and opportunities that individuals and racial groups are accorded. That prestige system is structured on a binary history of black-white relations. At the group level, due to racial stereotypes, African Americans enjoy the least social prestige, whereas whites (non-Latinos) are accorded the highest prestige. The close or distant association with blacks and whites determines the status of other nonwhite groups. At the individual level one's position in that cultural strata depends on who you are—"self-making"—and how society perceives you, defined as "being made" (738). To Ong, cultural citizenship,

therefore, is about how individuals navigate entry into the top tiers of American society by using their cultural prestige to gain acceptance and respect. To move upward, Ong also argues, juridical U.S. citizenship was unnecessary. Asians holding temporary student or investor visas were cited as the case in point. These types of groups are treated with respect, regardless that they are not U.S. citizens, because they are valued for their education, their middle or upper-class status, and their receptive incorporation of white forms of social comportment.

1n 1997, Rosaldo, writing with William Flores, without directly naming Ong as the theorist whom they disagreed with, politely stated that some writings on cultural citizenship had taken on the vantage point of the elite and reproduced dominant group ideologies that treated subordinate groups as a problem and blamed them for their inability to be recognized as equal citizens. Rosaldo and Flores also made a daring reference about undocumented Latinos during a period when the conservative media was accusing undocumented Mexicans of invading America.[3] They argued that social class should not determine the value and respect people enjoy in society. For them, cultural citizenship was about a process used by Latinos and other subordinate groups to gain full political membership and make demands upon the state.

Similar to how Rosaldo, over the years, expanded his analysis of cultural citizenship, Ong also complicated her theorizing in later writings. Cultural citizenship had morphed into flexible citizenship, and by 2006, into the neoliberal citizen theorized within a global context. Furthermore, rather than focusing on minority and majority U.S. groups, Ong politicized her analysis and used it to explain why wealthy foreigners, without changing their nationality, can often enjoy more political rights than the citizenry of their host country (Ong 2006). She argues that those who are wealthy have the

economic means and possess the cultural capital to gain entry, buy acceptance, and move as they please. The popularity of Ong's writings influenced many cultural studies scholars to focus on agency (self-making), yet it also resurrected a counter-critique that opposed treating social class mobility as the main theoretical construct to understand stratification and hierarchy in the United States (Lipsitz 2006). Scholars such as Mary Romero (2008) have argued that in theory and practice social class arguments are often employed to mask racist beliefs and biases against the poor. Using the case of anti-immigrant organizations in Arizona, Romero explores how middle-class white women cast cultural and social class failures upon Latinos to invalidate their political stance against racist immigration policies. Nativist women specifically employ images of Mexican-origin mothers as being lawbreaking, foreign, and ignorant to prove that all people of Mexican descent are socialized to be morally flawed and thus undeserving of U.S. citizenship.

While I concur with Ong that wealth can sometimes buy non-citizens of color acceptance, Romero's analysis of how Mexican Americans of all social classes are demonized questions the efficacy of reducing citizenship to social class and rendering political membership as something elusive that can be easily negotiated in the United States. The birthright movement is such an example, as it exemplifies the limits with which wealth endows a person of color, and illustrates that racial ideologies can lead persons of different social classes to be treated the same. Currently, poor Latinos and economically advantaged Asians are viewed by large numbers of birthers advocates to be endangering the economic welfare of the nation, and these advocates are demanding that the state make an exception in citizenship law. Taking Giorgio Agamben's (2005) research as a cautionary reminder that social class did not protect wealthy Jews during the Nazi era, it is likely that today the state may formalize popular opinion if the accused can be demonized, and if coalitions between diverse groups are not formed.

The Principal of Law: Jus Solis

Since 1993, twelve congressional resolutions have been introduced that are designed specifically to restrict U.S. citizenship to children born to U.S. citizens and to legal residents (Smith 2009)[3]. In addition, at least eleven other resolutions affirming similar positions have been appended to immigration or housing legislation. Although all of the resolutions have failed, over the years congressional support has been increasing. Initially, only a handful of representatives supported birthright reform, yet today three resolutions, which are under committee review, have garnered eighty-seven congressional co-sponsors and are supported by a large number of state legislators. The intended subjects of the resolutions have been Latinos and Asians, specifically undocumented Mexican families who are perceived to be the main problem.

So, what is the body of law that allows children born on U.S. soil the right to claim U.S. citizenship, when their parents are foreign-born and in many cases entered without authorization? To address this, I begin with a summary of the philosophical principal that has shaped the nation's political membership, and then turn to the evolving arguments presented in Congress in favor of and opposed to making an exception in U.S. birthright citizenship law.

Birthright citizenship in the United States is based on the principle of *ju solis* (Dellinger 1995), a legal philosophy adopted from English common law and practiced in the United States since its inception as an English colony. Since then, people born on U.S. soil have been considered citizens of the nation and under the state's jurisdiction. A critical moment in the affirmation of the *ju solis* principle followed the constitutional reforms enacted at the end of the U.S. Civil War, when Congress moved to extend citizenship to African Americans (Houston 2000). The Fourteenth Amendment was passed by Congress to

create a uniform citizenship law and the principle of *ju solis* was affirmed, acknowledging that with the exception of Native Americans, all people born on U.S. soil were citizens. The amendment also stipulated that people naturalized were citizens.

Although U.S. Congress ratified the Fourteenth Amendment, some state governments chose to interpret its passage as only applicable to whites and blacks (Menchaca 2011). Because the federal courts across the country also interpreted the Fourteenth Amendment differently, the U.S. Supreme Court was forced to offer a uniform resolution on the *ju solis* clause of the Fourteenth Amendment when a case from California involving an American-born Chinese male reached the justices. After returning from a vacation in China, Wong Kim Ark was denied entry into the Port of San Francisco on the basis that he was part of the foreign-born population excluded from entering the United Statues under the Chinese Exclusion Acts. In *U.S. v. Wong Kim Ark* (1898), the court upheld the principle of *ju solis*, and ruled that people born on American soil were citizens and could not be treated under any of the alien categories. The justices also ruled that children born to immigrants did not acquire their parents' legal status.[4] Thus, from that point on, the *Wong Kim Ark* decision affirmed the principle of *ju solis* and has prevented U.S. Congress from arbitrarily changing the meaning of birthright citizenship.

Cultural Terms as Mechanisms of Control

Since 1790 the term 'alien' has been used under immigration law to distinguish the foreign-born from the U.S. citizen.[5] Succeeding immigration and naturalization acts appended the modifiers enemy, unlawful, temporary, and deportable, to the term alien as a means of distinguishing immigrants who were eligible to become U.S. citizens or permanent legal residents from those who were not. Following the *Wong Kim Ark* decision, the main terms to differentiate

the legal status of U.S. residents remained alien and citizen. In 1917, the term non-immigrant was introduced to designate the status of temporary residents.

In the late 1980s the metaphor 'illegal' became part of popular nativist discourses to evoke images that Latinos were foreigners and had entered the United States unlawfully. Legal scholar Patricia Culliton-Gonzáles (2012) proposes that following the publication of Peter Schuck and Rogers Smith's legal text in 1985, *Citizenship Without Consent: Illegal Aliens in the American Polity*, the term 'illegal' became a legitimate and acceptable term within congressional debates. Congressional members who favored reducing legal immigration to the United States and who supported the birthright movement used it as an effective psychological and cultural mechanism to demonize Latinos. In 1996, although previously the term had been used solely in congressional debates rather than in textual policy, Congress began to use it in three immigration legislative acts in reference to state mandated policies. In the "Antiterrorism and Effective Death Penalty Act" (AEDPA) section 479 labels criminals as illegal aliens. Under the "Personal Responsibility and Work Opportunity Reconciliation Act" (PRWORA), section 411d describes those ineligible for federal social services as illegal aliens. And in the "Illegal Immigration Reform and Immigrant Responsibility Act" (IIRIRA), the concept of illegality was adopted in its title, and section 329 referred to incarcerated criminals as illegal aliens. Likewise, section 502 described undocumented people who had obtained a driver's license illegal aliens. Thus, in 1996 'illegal alien' became codified as an acceptable legal concept.

Currently within academic circles there is a global social movement to stop the usage of the term illegal due to its dehumanizing nature (Schroever et al. 2008). Academics who endorse the movement generally only employ the term to

describe and critique those who endorse its usage. In the United States, Latino activists have recently begun a political campaign to end the use of the term within the government and the public media.

Congressional Resolutions to Overturn *Ju Solis*: A State of Necessity

In modern times, congressional resolutions to denationalize and decitizenize certain groups of U.S.-born residents began in California during the early 1990s when an anti-immigrant social movement targeting Mexicans gained massive popularity. During this period, the Mexican-origin population boomed in California. It had doubled in ten years and the overwhelming growth was attributed to legal and undocumented immigration. In 1990, of the 13,393,208 people of Mexican descent residing in the United States, 6,118,996 lived in California and 40 percent were foreign-born (U.S. Census 1993, 5; 1992, 222). For some individuals, the numerical size of the foreign-born Mexican population was alarming as it coincided with a period when California was experiencing a severe recession. In 1992, for the first time in history, California's share of the national income declined, its income growth was less than 2 percent, unemployment was high at 9.4 percent, and manufacturing jobs were leaving the state (Hill 1993, 2–4). And, as Agamben posits, when a crisis erupts a state of necessity is often invoked targeting vulnerable populations. To lessen the impact of the crisis, immigration reform activists called upon the state to pass legislation to discourage unauthorized immigration. Reforming the principle of *ju solis* became a popular discourse, regardless of its exclusionary constitutional implication, as a state of necessity required bold measures during tough times.

In 1993, Governor Pete Wilson called on American citizens to help him end the economic crisis that undocumented aliens had created in California (*Harvard Law Review* 1994). He charged that "illegals" were a financial drain on the

state's social service budgets, specifically on the schools and county hospitals (Wilson 1993, 12A). He alleged that the thousands of undocumented women who were giving birth cost the state millions of dollars. These mothers were characterized as immoral and economic parasites because they did not have funds to pay for their hospital stay and worst of all, they were having babies for the sole purpose of adjusting their unlawful status (Inda 2007). Allegedly, undocumented mothers and their children posed a financial burden because their children must be schooled and given free health care. This financial assessment was based on studies commissioned by the state government (Wood 1999, 494; *Congressional Record* 1993, H1006). These studies also projected that about 50 percent of the "citizen children" would eventually apply for food stamps. Governor Wilson urged his supporters to take action and stop the illegal invasion of California. To do so, he and his supporters argued that birthright citizenship must end.

Governor Wilson justified the suspension of U.S. law by demonizing Mexican American children and blaming them for the actions the government must take. By invoking a state of necessity against the vilified, Agamben argues, those who propose to exclude justify their actions against the powerless. Wilson projected that his plan would result in reducing undocumented migration, the costs of welfare dependents would decline, and the children and their mothers would be deported. In general, the birthright legislation would result in state financial relief. That year, Governor Wilson, working together with California Congressman Ethan Gallegly, authored legislation to rescind the citizenship status of people born to undocumented mothers (*Harvard Law Review* 1994). On March 3, 1993, Congressman Gallegly introduced House Resolution 129, "The Citizenship Reform Act of 1993," and did not find it necessary to occlude his position that Mexicans were the prime targets of his legislation. He stated:

> Mr. Speaker, as indispensable parts of my package of proposals for curbing illegal immigration, I introduce today, two bills dealing with the issue of automatic birthright citizenship. Both are aimed at ending the practice prevalent along the border for pregnant alien women to cross illegally into the United States for the purpose of obtaining, at taxpayers' expense, free medical care during their pregnancy, and free delivery of their babies in public hospitals, and then enabling those children to be declared American citizens at birth, with all the rights, privileges, and benefits available to citizens of the United States. (*Congressional Record* 1993, H1005)

Gallegly then argued that annulling the citizenship of some people would not violate any democratic principle because our Founding Fathers never imagined our present reality, and they surely never intended to give citizenship to the floods of "illegal aliens" entering the country (Ibid H1006). He believed that in our modern times citizenship must be determined by congressional legislation based on the beliefs of the citizenry and not by Constitutional case law. The principle of *ju solis* was an archaic system of law that, he opined, needed to be reformed by amending the U.S. Constitution. To fulfill his mandate, two revisions were needed. First, section one of the Fourteenth Amendment would be revised in order to rescind the legal principle of *ju solis*. New language would be inserted, declaring that the U.S.-born children of undocumented alien mothers were not citizens (Ibid H1006). This proposal was carefully worded to not repeal the legal rights of the U.S.-born children of permanent legal immigrants and those who had been authorized to live in the United States under temporary visas. The targets were Mexican American and other Latina/o American children. He also advanced a second proposal giving Congress, rather than the courts, the power to interpret the meaning of the Fourteenth Amendment, as it was well known that *U.S. v. Wong Kim Ark*

entrusted the federal government with the obligation to protect the legal rights of all its citizens, including the despised and the poor.

To Gallegly's disappointment, few colleagues in Congress supported his resolution. Most representatives concurred that regulating unauthorized immigration was imperative, but to do so, it was unnecessary to change the U.S. Constitution (Houston 2000).

Following the failed initiative, the supporters of birthright legislation in California reconstituted their plan to reduce undocumented migration by launching a social movement called "Save Our State" (SOS). In 1994, Governor Wilson and members of SOS put into action their new plan by placing Proposition 187 before the voters (Rodriguez 2007). The referendum was creative as its aim was to make California a hostile place for undocumented immigrants, and through this strategy, reduce unauthorized immigration. The initiative also marked the start of attempts by the states to pass state legislation to regulate immigration, which is a power the U.S. Constitution only allocated to the federal government. If Proposition 187 passed, undocumented immigrants would be disqualified from receiving any type of state funded social service, including schooling and medical care. Proposition 187 also required police officers, teachers, and health care workers to turn in any person whom they suspected were undocumented.

When the SOS Movement began, some Mexican Americans supported the social service exclusionary provision of the initiative, as it was not directed toward the legal or native-born populations. Approximately 23 percent of Mexican-origin people voted for the proposition (Rodriguez 2007, 243). However, after its passage, it became clear that the proposition merely masked general ill feelings against people of Mexican descent.

For many Mexican Americans and Latina/o American political activists who worked to defeat Proposition 187, the results of the election were unexpected: 63 percent of whites voted in favor of it, while 47 percent of Asians and African Americans also endorsed it (Saito 1998, 102). Latina/o activists anticipated that many whites and African Americans would be on the side of SOS, yet the fact that many Asian Americans voted in support of it was an unpleasant shock. Latina/o activists projected that Asian Americans would vote against the proposition because of the high percentage of immigrants within their ethnic populations and therefore would be empathetic toward Latinas/os. In the United States, nearly two-thirds of Asian-descent groups are foreign-born (Feagin and Booher Feagin 2003). Activists, however, underestimated how social class differences would divide groups with common immigration histories.

Although later the U.S. 9th District Court ruled most measures of Proposition 187 as unconstitutional and would not be implemented, Mexican-origin people and other Latina/o groups responded by seeking relief through the ballot box. Mexican American political activists launched several campaigns to register voters and elect candidates who would put an end to the anti-Latina/o immigrant social movement. Between 1994 to the late 1990s, Latinas/os registered to vote in large numbers, with an annual net growth increase of around 347.6 thousand new voters (Ochoa 2008, 5). In the case of Mexican-origin voters, the number of registered voters increased by 44 percent. The growth was nationwide, but largely attributed to Mexican-origin voters in California. Likewise, the number of Mexican immigrants naturalizing increased, and by 1996 Mexico became the leading country of origin for immigrants granted U.S. citizenship (Menchaca 2011, 301).

In California, for the anti-immigrant political activists who had earnestly worked to pass Proposition 187, the Latina/o political reaction was unexpected. This miscalculation influenced SOS activists to regroup and seek a solution

to the electoral backlash they had unintentionally provoked. To do so, the birthright debate was resuscitated. The main aim became to purify the vote by preventing the U.S.-born children of undocumented mothers from becoming citizens. In this way, people who were hostile toward the goals of SOS would not be able to vote in future elections. This was an opportune time to introduce birthright legislation as Congress was preparing to reform immigration law in anticipation of the effects of Mexico's economic crisis.

Excluding the Children of Temporary Workers from U.S. Citizenship

In 1994, after the United States and Mexico enacted the North American Free Trade Agreement (NAFTA), Mexico's economy suffered a devastating shock when the markets were deregulated and businesses unable to compete in the global market went bankrupt (General Accounting Office 1996). To help Mexico, the U.S. government issued and guaranteed a series of loans amounting to forty billion dollars. Although the plan was controversial, U.S. Congress endorsed it since failure to do so would affect the economy. Trade with Mexico would decline and lead to the loss of 700,000 U.S. jobs. The Immigration and Naturalization Service had also projected that if the Mexican economy was not stabilized, a 30 percent increase in undocumented immigration was expected.

While the Mexican economy recovered, several plans to control unauthorized immigration were debated in U.S. Congress; among them was the reintroduction of a birthright resolution. Congressman Brian Bilbray of California had reworked Gallegly's earlier resolution and included new arguments advanced by SOS activists. In 1995, during the 104th Congressional Session, Bilbray introduced H.R. 1363, or what was called the "Citizenship Reform Act of 1995" (*Congressional Record* 1995, H4031). It was co-sponsored by twenty-nine congressional members and expanded to affect the children born to mothers on temporary visas. This legislation was designed to not

solely affect undocumented Latina/o families, but also those who entered on temporary visas (employment and tourist visas). The legislation, if passed, would disproportionately affect Latinas/os and Asians. While the exact reason Bilbray chose to include other types of legal residents in the legislation is uncertain, what is clear is that in 1995 the Immigration and Naturalization Service reported that the national origin of people entering the United States on non-agricultural employment visas had shifted from Europe to Asia. Prior to the mid-1990s the majority of H1-B (professional and highly talented) and H2-B (professional and skilled) visas were issued to Europeans, but by the mid-1990s this pattern changed and half were issued to Asian petitioners, specifically from China, India, the Philippines, South Korea, and Bangladesh (U.S. INS 1991, 105–7; 1997, 120–7). Based on U.S. law, individuals hired to perform professional or skilled occupations are allowed to bring their families. This policy has given H1-B and H2-B visa holders the opportunity to live with their families and have children in the United States. Although it is uncertain if the shift in the racial makeup of the new temporary work force influenced Congressman Bilbray to expand his birthright legislation to other groups, this is a significant and relevant event that cannot be dismissed.

When Congressman Bilbray and his co-sponsors introduced the new birthright legislation they also attempted to bypass the constitutional process to amend the U.S. Constitution, as they were aware that it would be difficult to obtain the states' approval. Under H.R. 1363, Bilbray proposed that the Fourteenth Amendment could be revised by an administrative order of Congress and did not need the ratification of the states. Congress could do this by amending the Immigration and Nationality Act (INA), a power given to Congress by the U.S. Constitution. He proposed that because naturalization law delineates which immigrants qualify for citizenship, Congress could revise naturalization law and insert language to define how immigrants and their children acquire U.S.

citizenship. In this way, birthright citizenship could be nullified. According to Bilbray, once the INA was revised, the Fourteenth Amendment would automatically have to be amended to create a uniform citizenship law (Houston 2000). On March 30, 1995, U.S. Congress debated H.R. 1363. It read: "A bill to amend the Immigration and Naturalization Act to deny citizenship at birth to children born in the U.S. of parents who are not citizens or permanent resident aliens" (*Congressional Record* 1995, H4031). At the close of the debate, matters were unresolved, and the resolution was sent to the House Judiciary Committee for further study.

In the meantime, the Justice Department issued the opinion that H.R. 1363 was unconstitutional. Once again the Justice Department opposed the resolution, as it had in 1993 when Congressman Gallegly introduced the first version. Walter Dellinger, assistant attorney general, argued to the House Judiciary Committee that the resolution violated the U.S. Constitution on several grounds (Dellinger 1995). Dellinger conceded that Congress had the power to amend the Fourteenth Amendment and exclude groups from U.S. citizenship. He stated, however, that Congress must follow the legal procedure outlined in the U.S. Constitution. Two-thirds of Congress must support a constitutional revision and three-fourths of the states must ratify the reform. The U.S. Constitution could not be revised by amending immigration and naturalization law nor by administrative action withdrawing the U.S Supreme Court's interpretation of the Fourteenth Amendment.

Dellinger added that without revising the Fourteenth Amendment the U.S. Supreme Court's interpretation of *ju solis* could not be arbitrarily changed, just as in 1898 when the justices had ruled in *U.S. v. Wong Kim Ark* that U.S.-born persons did not acquire the citizenship status of their alien parents. For over a century, the courts and attorneys general had consistently applied this

meaning of *ju solis* and congressmen must follow constitutional law to change its interpretation. Dellinger then addressed another legal argument that had been presented by Bilbray and his supporters. Dellinger disagreed that children of undocumented parents could be excluded from U.S. citizenship on the basis that they were not "subject to the jurisdiction of the state." Dellinger responded that under *U.S. v. Wong Kim Ark* only alien enemies, children born in foreign ships, and diplomats and their children were not "subject to the jurisdiction of the state" and only they could be denied citizenship (Dellinger 1995, 2). Children of undocumented parents could not be considered enemies of the state, nor placed under the other excluded categories merely on the nature of their birth. Bilbray's supporters had argued that children of undocumented parents were hostile toward the state since their families lived under the shadow of the law and such types of people could be treated as alien enemies (Wood 1999; House of Representatives 1997; Drimmer 1995).

Following the Department of Justice's report, U.S. Congress failed to pass H.R. 1363 and instead chose to regulate immigration through other means by passing the "Illegal Immigration Reform and Immigrant Responsibility Act" (IIRIRA) of 1996. Bilbray had been unable to convince enough congressmen to pass legislation to make an exception in citizenship law, as his arguments did not prove that a national crisis existed, or what Agamben calls a "state of necessity." Suspending the rule of law in this case, and passing policies that outwardly discriminated against specific groups, could not be justified since the nation was not under attack and therefore invoking a natural law of preservation was unreasonable. Congress, however, did concur that immigration reform was necessary. Policies to reduce undocumented immigration were passed, as well as legislation affecting employment visas. Latin American and Asian immigrants were overwhelmingly affected since the majority of petitioners came from these

regions. For example, in 1996, 33 percent of legal immigration came from Asia and 37 percent from Latin America and the Caribbean (U.S. INS 1997, 20). Congress also chose to change its legal responsibility toward immigrants and deny non-citizens government benefits. A person's cultural prestige, or what Aihwa Ong called cultural citizenship, could not be employed to bypass the congressional mandate.

To discourage unauthorized immigration, specifically from Mexico, Congress increased the funding of border security along the U.S.-Mexico border. Additionally, to discourage working-class immigrants from sponsoring relatives wishing to enter the United States, Congress tightened the requirement for an affidavit of support, making the affidavit a legally binding contract to provide financial support. This would require sponsors to pay for all government benefits used by their relatives, with the exception of public schooling, emergency services, and soup kitchens. Basically Congress was no longer responsible for the social welfare of incoming immigrants. Likewise, Congress passed legislation diminishing its responsibility to permanent legal residents who had not applied for U.S. citizenship. With the exception of senior citizens who had worked in the United States for at least ten years, such types of people were no longer eligible to receive unemployment and disability insurance, collect social security, and benefit from other federal programs. Congress also tightened its purse strings in regard to the benefits foreign students enjoyed, clearly delineating that non-citizens were ineligible to receive free public education. Foreign students on F-1 visas were now required to pay for their education if they attended public schools. This provision disproportionately affected Asians; in 1996, 58 percent of foreign students attending U.S. schools came from Asia, with the highest percentages from Japan, Korea, China (Taiwan and the People's Republic of China), and India (Congressional Research Service 2008; U.S. INS 1997, Part 4). This provision also applied to students who had parents with expired work permits.

Although the above reforms mainly affected middle- and working-class families, Congress also chose to pass policies to maintain closer surveillance of all immigrants holding work permits, regardless of a person's social status. Under IIRIRA, new policies were implemented to keep track of the movement of temporary workers when they left and entered the United States and procedures to investigate employment visa fraud were instituted. The government suspected that many petitioners submitted false academic credentials, with India posing the largest problem (General Accounting Office 2000, 19). By 1999, this policy change led to the disqualification of 45 percent of the employment-based applicants from India.

Congress also made it more difficult for temporary workers already living legally in the United States to adjust their status to permanent legal residency. This affected all nationalities, but critically impacted those from China, India, and the Philippines, as these countries had the highest backlog in employment-immigration petitions (Papademetriou et al. 2009). Congress reduced the number of employment visas used to gain permanent residency by 32 percent (U.S. INS 1997, 20). Hong Kong was among the most severely impacted regions. Congress revised Hong Kong's special status, reducing its number of permanent legal residency admissions. Prior to IIRIRA, on an annual basis Hong Kong was allowed 10,000 additional permanent immigrant visas beyond its numerical limit.

In general, IIRIRA instituted juridical and symbolic boundaries between citizens and non-citizens, as well as made permanent legal residency more difficult to obtain, yet Congress chose not to include any birthright policy. Immigration was considered a problem, but it was not the crisis that birthright proponents had portrayed. People born on U.S. soil, regardless of the conditions of their birth, were not denied U.S. citizenship.

"Alien Enemies" and the New "State of Necessity" Discursive Technique

Regardless of the failure of H.R. 1363, the supporters of birthright legislation continued to introduce more resolutions within Congress. The wording of the resolutions, however, changed back and forth from trying to amend the immigration and naturalization laws to pushing forward a resolution to amend the U.S. Constitution. Some of the resolutions also added other stipulations, such as requiring permanent residency of immigrants if their children were to be granted U.S. citizenship, or exempting children of the undocumented if one parent was in active military duty. All of the resolutions failed to pass. Since 2010, a new discursive technique has been employed to prove that birthright reform was essential to the welfare of the nation. A new nativist metaphor, 'terror babies,' was introduced within Congress to fuel the proposal that some U.S.-born children of undocumented parents should be classified as alien enemies and denied U.S. citizenship. Since 1995, advocates of birthright legislation had argued that children born to undocumented parents could be treated as enemies of the state because they were hostile toward U.S. deportation laws (Drimmer 1995). This argument, however, was not credible because the presumed population was mainly Mexican American youth whose parents did not come from hostile or enemy nations. In other words, undocumented Mexicans were viewed as an economic problem, but not a political threat.

In 2010 two discourses were merged to garner support for birthright reform. The traditional argument alleging undocumented Latinas/os threatened the economic and political welfare of the nation was reintroduced and remained unchanged. However, it was now combined with the allegation that birth tourism from Asia and the Middle East created a national security threat. The discourse against birth tourism charged that enemies of the state entered the country as tourists and spouses of temporary workers with the sole purpose of

having American-born babies. Terrorist groups or foreign governments allegedly financed this practice. Proponents of this mode of discourse called these U.S.-born children terror babies and charged that after their birth they were raised abroad, taught to harbor hatred toward Western cultures, and eventually trained to return as terrorists or spies. In 2010, several leading Republican congressman called for congressional hearings to investigate birth tourism and its association with the making of terror babies (Adler 2010). Representative Louis Gohmert (R-Tex.) became the most outspoken advocate of birthright reform, appearing on several national talk shows, warning the public that a sinister terrorist plot was currently unfolding (*The Washington Independent* 2010). Critics, however, questioned Gohmert's statements. In CNN's news program *Anderson Cooper 360º*, Anderson Cooper came out as the most forceful critic. He provocatively raised the question whether birthright supporters were actually trying to attack Mexican undocumented migration by bundling the Mexican problem with an Al-Qaeda crisis (CNN, 2010).

Although on national television, Rep. Gohmert chose not to reveal his sources, and therefore lost some credibility. Senator Lindsey Graham gave legitimacy to the terror baby theory when he appeared on Fox's *On the Record w/Greta Van Sustern*, proposing that to avert a security crisis a Twenty-eighth Amendment was needed to stop automatic birthright citizenship (*Huffington Post,* 2010; *The Economist* 2010). Sen. Graham, however, was much more concerned with the economic difficulties Mexicans caused, which he identified as an anchor baby problem. Senator Mitch McConnell also validated the terror baby conspiracy when he announced that congressional hearings would be held after Republicans won the House and Senate in the November 2010 elections (*The Washington Independent* 2010). When this scenario did not materialize, and Republicans lost the Senate to Democrats, the call for congressional hearings lost ground.

Nonetheless, instead of giving up the fight, congressional members favoring birthright reform sought support from the state governments. On January 5, 2011, they met in Washington D.C. with legislators from forty states and discussed ways Congress or the U.S. Supreme Court could be convinced to reform the *ju solis* principle of the Fourteenth Amendment (Ramos 2011; Vedantam 2011). To enact the needed reforms, a compact was established. State legislators were to introduce resolutions using state laws to regulate immigration. One resolution would require state citizenship to receive any state service or entitlement. It would stipulate that state citizenship is denied to the children of residents whose parents were either undocumented, non-permanent legal residents or temporary workers. Although it was acknowledged that this was possibly unconstitutional, the legislators believed their resolutions would easily pass and become the basis of legal challenges to federal law. The intent of the resolutions was to pressure the U.S. Supreme Court to revisit the *U.S. v. Wong Kim Ark* ruling and clarify which type of U.S.-born people are excluded from citizenship. Legislators also believed that their initiatives would stimulate a nationwide revolt against birthright citizenship and force Congress to reform the law. The momentum to pass birthright reform was prime as the political debate over Arizona's S.B. 1070 had aroused many citizens to support legislation giving the states the right to pass laws regulating undocumented immigration. National polls throughout the country indicated that the majority of those surveyed supported granting police officers the right to ask "suspect aliens" about their citizenship status, and if found to be undocumented, turning them over to immigration officers.

In 2011, two studies on children born to non-immigrant parents offered contrasting data on the birthright debate. A study by the Center for Immigration Studies (CIS) confirmed the economic problems Latina/o "anchor babies" created

and supported the claim that children born to tourists and temporary workers posed a national security threat (Reasoner 2011, 1; 7). The CIS study estimated that on an annual basis, 200,000 children were born to foreign women admitted on tourists or employment visas, and approximately 400,000 to undocumented workers. Allegedly, some of the Chinese and Muslim visitors were antagonistic toward the United States and were associated with terrorist organizations. The PEW Hispanic Center, on the other hand, offered alternate estimates and concluded that it was improbable to determine the number of children born to tourists since this type of data was non-existent. PEW, using census data, instead proposed that on an annual basis 350,000 to 400,000 children were born to families who entered the United States unlawfully or held expired visas (Passel and Cohn 2011, 3). Sixty-one percent of the parents entered before 2004, 30 percent from 2004 to 2007, with only 9 percent having entered between 2008 and 2010. The latter finding contested the hypothesis that most unauthorized immigrants who had U.S.-born children were recent arrivals. This served to challenge the terror baby conspiracy as most undocumented parents were characterized as long-term economic migrants, rather than temporary visitors with ulterior motives. The National Center for Health Statistics also raised doubts on the CIS estimate of children born to tourists since less than 8,000 such babies are born annually in birthing centers (Schecter 2011).

In 2011, three birthright reform resolutions were introduced in Congress: H.R. 140, H.R. 1196, S. 723. They once again failed to gain enough support to pass. Bundling the terror baby discourse with the Mexican economic security problem proved insufficient cause for Congress to take action. Likewise, although around twenty-one state legislatures tried to pass some type of state citizenship law, they were unsuccessful (NCLS 2011). Only in Arizona did one resolution gain senate approval, but failed when it reached the house.

The Birthright Movement and the Economy: Why a Crisis?

David Harvey's (2006) conclusions in "Neo-Liberalism and the Restoration of Class Power" appropriately summarize the political context of the emergence and development of the birthright movement. According to Harvey, the United States, like many nations, since the early 1990s has shifted toward a neoliberal mode of governmentality by expecting of its citizenry self-reliance and expecting its poor to make fewer demands upon the state. Across the world immigration continues to flow, and under a neoliberal state the poor, the ordinary, and those who require economic assistance from the state are unwanted or only given temporary entry. Only the rich, the extraordinary brilliant professionals, artists, and athletes are sought after and encouraged to join the citizenry. In the United States, the birthright movement is an outcome of this philosophy of governmentality. A manifestation also prompted by the fear of an economy that fails to grow, is unable to produce the needed jobs, and is plagued by the debt caused by the Iraq and Afghanistan wars. To pay for its debts and to stimulate the economy, the stark reality that the U.S. government must borrow money from China is an unwelcome change. For those who worry that they will not have the same mobility as earlier generations, slowing down immigration and converting the politically vulnerable into noncitizens for the purpose of making them less competitive in the labor market is an effective way to stop the downward spiral of their financial insecurity. However, as Agamben (2005) argues, a nation is composed of competing interests and many elected officials, regardless if they disagree with the demands of the marginalized, do not favor abandoning vulnerable populations, for they acknowledge that when an exception in the law is made to discriminate against one group, the practice of making exceptions can become the rule of governmentality. In 1995, Assistant General Attorney Dellinger's conclusions on birthright citizenship exemplified this point as he proposed that the political power of one group is ineffective in altering the U.S. Constitution, for legal protocol

must be followed. Birth on U.S. soil is a fundamental right protected by the U.S. Constitution that cannot be arbitrarily changed when one group believes another group is undeserving of U.S. citizenship.

In closing, although I endorse the democratic position the U.S. Justice Department has taken in the debate over birthright citizenship, I concur with Mary Romero (2008) that Latinas/os must be cautious because nativist groups will continue to promote their agenda to politically disenfranchise those who have different visions of America's future. With the reelection of President Barack Obama in 2012, a new phase in American politics has begun, and although he is supportive of passing legislation that will legalize the status of undocumented families, Latinas/os must work with other groups to enact positive changes in immigration law and in other areas of social life.

Notes

[1] Among the organizations supporting ending birthright citizenship include: Federation of American Immigrant Reform, Center for Immigration Studies, American Immigration Control Foundation, Council of Conservative Citizens, NumbersUSA, the Social Contract Press, The National Alliance, Americans for Immigration Control and Federal Immigration Enforcement Coalition. National surveys conducted by the Rasmussen Reports also found that in 2010 58 percent of respondents support ending birthright citizenship, and 51 percent in 2012. (Rasmussen Reports 2010, 2012—By 2012: 51% support ending birthright citizenship, 41% are against such a proposal, and others undecided. He reports that, "41% Think a Child Born in the U.S. to an Illegal Immigrant Should be a Citizen, December 18, www.rasmussenreports.com, and Rasmussen Reports. 2010. "Most Oppose Citizenship for Children of Illegal Aliens," August 13, www.rasmussenreports.com.)

[2] Rosaldo and Flores (1997) argue that during the mid-1990s nativist discourses succeeded and culminated in the passage of laws to end affirmative action, the passage of restrictive immigration laws, the implementation of English-only state policies, the birthright movement surge, and the passage of California's Proposition 187.

[3] See http://www.thomas.gov/ for a review of birthright citizenship acts.

[4] Only Native Americans were excluded from the Wong Kim Ark ruling due to the practice that U.S. tribes were governed by separate congressional laws (Menchaca 2011).

[5] See: http://www.dhs.gov/ for immigration and naturalization acts and their subsequent revisions.

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