The Law of Soil across Two Lands: A Comparative Analysis of Birthright Citizenship in India and the United States of America

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Abstract

The law of soil has somehow been made a superior category in both USA and India, due to the connotations of an older, closer association of citizens with the nation-state. The conception of BRC is closely linked to the idea of the original political community of a nation-state. This article has asserted by way of the comparative analysis of BRC in America and India, the importance of historical, social, political and cultural factors upon the development of a legal framework of BRC in these nations.

Keywords: *Birthright Citizenship, Comparative Study, USA, India*

I. Introduction

In January 2025, President Trump signed an executive order ('EO') on his first day of office which aimed at ending birthright citizenship ('BRC') for children born to undocumented migrants or persons with temporary status in the United States of America ('USA').[2] The President's justification for this order was in line with his campaign promise of spearheading the largest domestic deportation effort in the USA. They also line up with his anti-immigration position in his previous term as president, wherein he stated that the BRC regime in the USA was '*frankly ridiculous*' in the context of preventing illegal migration and vowed to abolish the same in his first term as President.[3] However what he was not able

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[2] *Protecting The Meaning And Value Of American Citizenship*, Executive Order, (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship/

[3]Patrick Lyons, *The Court Changes the Game*, N.Y. TIMES (August 23, 2019), https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html

to do in his first term, he has attempted to do in his second. This action remains an attempt because the effects of the order have been halted by several federal courts.[4] Given that BRC in the USA is being hotly debated, in context of this contemporary discourse on, it is worth reflecting on BRC as it operates conceptually and in practice in citizenship regimes. Therefore, this article will compare how BRC is applied in the citizenship regimes of the USA and India.

This article has been divided into four parts. The first part shall discuss BRC as a conception, as well as the various debates that surround it. The second part shall discuss BRC in the Indian context, and examine how it is informed by the effects of historical events and case law. The third part shall look at the BRC in USA, by examining the legal history and current structure of laws dealing with BRC. The fourth part shall embark on a comparative analysis of the legal features of BRC in both nation-states and discuss the various themes and debates.

II. Birthright Citizenship: Concepts and Debates

President Trump refers to a narrow meaning of BRC,[5] in that he referred to that particular form of BRC which acts as a '*magnet for illegal immigration.'*[6]According to President Trump, this policy is one that is taken advantage of by immigrant mothers who journey to the USA, for the sole purpose of giving birth on American soil, to a child who would then be deemed an American citizen due to her place of birth.[7]

This aspect of BRC relates to the operation of the principle of *jus soli* (law of the soil), wherein one derives the citizenship status or nationality from the nation-

[4] Melissa Quinn, *4th Federal Judge Blocks Trump's Birthright Citizenship Executive Order,* CBS NEWS (February 13, 2025), https://www.cbsnews.com/news/trump-birthright-citizenship-order-judge-blocks/

[5] Heather Horn, *Birthright Citizenship Wasn't Born in America,* THE ATLANTIC, (September 1, 2015), https://www.theatlantic.com/international/archive/2015/09/birthright-citizenship-donald-trump-england/403159/

[6] *Id.*

[7] *Id.*

state upon those territory/territories they were born in.[8] In general, BRC implies the citizenship granted to an individual by dint of their circumstances of their birth.[9] Thus, it is what Brubaker describes as acquisition of citizenship by ascription.[10] Citizenship by ascription then, may be governed by *jus soli* (law of the soil) or *jus sanguinis* (law of blood) principles, depending on the political framework of the nation-state in question.[11] Here *jus soli* is based upon the territorial connection of the individual with the place of birth,[12] however *jus sanguinis* is citizenship derived from either the connection to a citizen of the nation-state through descent or by birth.[13] Thus, there is no element of territorial connection in case of *jus sanguinis*.[14] For the sake of simplicity, the paper shall use the terms 'BRC' and '*jus soli'* synonymously.

The principle of *jus soli* can be traced back to the exposition of perpetual allegiance[15] in the early English decision rendered in *Calvin's case (1608)*[16] and was thus associated with the ideals of indissoluble fealty to one's sovereign. This fealty was in exchange for territorial protections extended by the sovereign to the citizen.[17]According to Eisgruber (1997), the motivations of a nation-state with *jus soli* principles has been to retain manpower- the perceived wellspring of martial and sovereign power in feudal contexts.[18] In contrast, the French principle

[8]*Birthright Citizenship Law and Legal Definition,* US LEGAL, https://definitions.uslegal.com/b/birthright-citizenship/
[9]*Id.*
[10] ROGER BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 21, 31-32, Harvard University Press (1st ed 1998).
[11] *Id.*

[12]US LEGAL, *supra note 7.*
[13]*Jus Sanguinis,* IN A DICTIONARY OF LAW, OXFORD REFERENCE https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100027515
[14] *Id.*
[15] Christopher Eisgruber, *Birthright Citizenship and the Constitution,* N.Y.U. L. REV., (April 1997), https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-72-1-Eisgruber_0.pdf
[16] Calvin v. Smith, 77 Eng. Rep. 377, (K.B. 1608).
[17] LYONS, *supra* note 2.
[18] EISGRUBER*, supra* note 14.

of *jus sanguinis* as embodied in the *Code Napoléon, 1804*[19] was characterized by an ethnic or descent based citizenship. The French values of citizenship were based on a more active citizenry, who participated in political life, and were bound not by the older notions of 'passive' citizenship based on territorial, feudal ties.[20] Traditionally speaking, acquisition of citizenship by descent or blood, that is *jus sanguinis*, is perceived as characteristic of civil law jurisdictions such as France and Germany while, acquisition by territorial birth is similarly viewed as distinctive in common law jurisdictions such as the United Kingdom and Australia.[21]

The case for BRC is largely based on administrative convenience, and the prioritization of a clear assignment of citizenship status upon persons at the earliest opportunity.[22] However, such a system is also criticised, as Brubaker (1998) notes, for being opposed to '*individual consent*,' which remains one of the cornerstones of liberal democracy.[23]

Blood or soil?

Despite the seemingly disparate notions of BRC and *jus sanguinis* principles, in practice, most nation-states have a combination of *jus soli* and *jus sanguinis* principles.[24] To be specific, most countries proceed with a fundamental rule of determination of citizenship at birth (*jus soli* for the USA and the UK),[25] which may be based on blood or descent, or territory. The other corresponding system may be combined or applied with the fundamental rule or in particular contexts.[26]

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[19] Patrick Weil, *Nationalities and Citizenships: the Lessons of the French Experience for Germany and Europe* IN CITIZENSHIP, NATIONALITY AND MIGRATION IN EUROPE, https://doi.org/10.4324/9780203435014 (David Cesarani, Mary Fulbrook eds., 2002) (1997)

[20] *Id.*

[21] Gerard de Groot, Oliver Wonk, *Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding Ius Sanguinis and Ius Soli,* 65 NETHERLANDS INTERNATIONAL LAW REVIEW, 74, 78, (2008), https://doi.org/10.1007/s40802-018-0118-5

[22]BRUBAKER, *supra* note 9.

[23] IN A DICTIONARY OF LAW, OXFORD REFERENCE, *supra* note 12.

[24] *Id.*

[25]*Citizenship,* BRITANNICA, https://www.britannica.com/topic/citizenship#ref22254

[26]*Id.*

As noted by Price, "*no nation relies exclusively on one of these principles to determine who is a natural-born subject or citizen*."[27] However the absolute practice of *jus soli* or BRC does exists in a few nations, with the USA being one of them.[28] Despite President Trump's efforts, given that BRC is enshrined in the US Constitution this system is likely to continue. However, in addition to citizenship ascribed through BRC, USA also follows the system of ascribed citizenship by birth or descent, in the case of children born overseas to American citizens (*jus sanguinis).*[29] India on the other hand, has a narrow form of BRC, wherein the conditions for acquisition of citizenship are shaped by territorial presence coupled with various timelines based on which one's citizenship is ascribed.[30]

'Degrees of citizenship'

In case of both USA and India, the legal conception of BRC emerges as a by-product of various socio-cultural issues, and political questions. This is because membership in a nation-state evokes feelings of national pride and patriotism, which help maintain the construct of the nation-state. In other words, BRC may evoke stronger feelings of linkage due to tangible connection of the person with the territory of a nation-state. However, given the effects of globalization, refugee crises and other factors, there has been a mass migration of persons, refugees and others into other nation-states.[31] According to a study, the number of persons living outside the country of their birth increased by 83 percent between 1990 to 2020.[32] This migration often causes changes in the membership

[27] Polly J. Price, *Natural Law And Birthright Citizenship In Calvin's Case (1608),* 9 YALE J.L. & HUMAN., 73, (1997), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/7701/06_9YaleJL_Human 73_1997_.pdf?sequence=2

[28] *Birthright Citizenship Around the World,* THE LIBRARY OF CONGRESS, https://www.loc.gov/law/help/birthright-citizenship/global.php#_edn70

[29] *Id.*

[30] Sections 3-4, the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).

[31] *Europe and Right Wing-Nationalism: A Country By Country Guide,* THE BBC, (October 13, 2019), https://www.bbc.com/news/world-europe-36130006

[32] Stephanie Kramer, Yunping Tong, *Global Migration Change 1990-2020, IN The Religious Composition of the World's Migrants,* PEW RESEARCH CENTER, 22, (August, 2024), https://www.pewresearch.org/wp-

of a political community. In this context, the original demographic may feel their national cultures and traditions merging with the cultures of immigrants, which often leads to a reactionary desire to protect the 'original' cultural values that characterize a nation-state.[33] This may be affected through attempts to revert to older methods of closure, whether it be legal or social, in order to justify that within the formal status of citizen, exist '*different degrees of citizenship*.'[34]

It is arguable that the provisions of BRC as well as the constitutional debates leading up to their enshrinement in a nation-state's citizenship regime can create a hierarchy within citizens. The implication then, is that there are citizens of a nation-state who are seen to be naturally affiliated with the nation-state construct, and thus are entitled by way of this status as a 'first degree' citizen. The best example of a natural affiliation with a nation-state is often an individual's circumstances of birth vis-à-vis that country. Thus, the general idea of legitimacy that accrues to a birthright claim, whether it is a birthright to an inheritance, an estate and so on, highlights the moral entitlement that accompanies the same. The same idea applies in the legal concept of birthright citizenship.

III. Birthright Citizenship in India.

As of now, there is neither unconditional BRC or conditional BRC offered in India.[35] Citizenship as a legislative subject is listed under the List I of the Seventh Schedule of the *Indian Constitution, 1950* ('COI') and is therefore under the jurisdiction of the Union Parliament.[36] The citizenship and nationality laws in India comprise a framework of constitutional provisions[37] and national laws. The COI provides for citizenship status for domiciled individuals at the time of commencement of the Constitution,[38] subject to certain conditions of territorial

content/uploads/sites/20/2024/08/PR_2024.08.19_religious-composition-migrants_report.pdf

[33] THE BBC, *supra* note 30.

[34]Ayelet Shachar, *Whose Republic: Citizenship and Membership in the Israeli Polity,* 13 GEO. IMMIGR. L.J., (1999).

[35]THE LIBRARY OF CONGRESS, *supra* at note 27.

[36] INDIA CONST. Entry 17, the Central List.

[37] INDIA CONST. arts 5-8.

[38] INDIA CONST. arts 5.

birth,[39] citizenship of parents'[40] and also contains certain exceptions to the general rule embodied in Article 5 of the COI, with special reference to patterns of migrations of various communities into and out of India.[41]

Such fragmentations in the citizenship rights of persons, along with complicated time limits were formulated based on mass migrations due to the partition of undivided India in 1949.[42] However, Part II of the COI does not mention any definition of the term 'citizen,'and thus the determination of questions relating to citizenship are done based on both constitutional provisions and provisions of the *Citizenship Act, 1955,* ('CA, 1955') among other relevant laws.[43] The CA, 1955, deals with the acquisition and determination of citizenship. Thus, within India, one can acquire citizenship by birth,[44] descent,[45] registration,[46] and naturalization.[47]

Historical development of citizenship and nationality laws

While India does not have an unrestricted *jus soli* principle in citizenship determination, this was by original design. The question of who '*the people of India*' really were, and on what basis would they be constituted, was an issue that first came up in 1946, when the Constituent Assembly of India ('Assembly') first met.[48]As Chatterji (2012) notes, the draft provisions on citizenship was originally based on *jus soli* notions of citizenship.[49] According to the proposed clause, "*every person born in the Union or naturalised*

[39] INDIA CONST. art. 5, cl.(a)
[40] INDIA CONST. art. 5, cl.(b)
[41] INDIA CONST. arts 6-8.

[42]*The Partition,* THE PARTITION MUSEUM, https://www.partitionmuseum.org/partition-of-india/
[43] Lal Babu Hussain v. Electoral Registration Officer, 1955 A.I.R. 1955 S.C. 1189 (India).
[44] Section 3, the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).
[45] Section 4, the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).
[46] Section 5, the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).
[47] Section 6, the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).
[48]Joya Chatterji, *South Asian Histories Of Citizenship, 1946—1970*, 55 THE HISTORICAL JOURNAL, (December 2012), 1049, 1071, https://www.jstor.org/stable/23352190
[49] *Id.*

according to its laws and subject to the jurisdiction thereof shall be a citizen of the Union."[50] The constitutional debates revealed that certain members felt that such a form of citizenship was more 'democratic' and 'civilized' than the more ethnic or racial model that prevailed in continental Europe, that is *jus sanguinis.*[51]

However, certain members of the Assembly were not in favour of this conception and for such persons, the fact of Indian ethnicity was seen as a legitimate basis for citizenship.[52] Dr. Rajendra Prasad questioned the status of foreign-born children in India[53] while others mentioned that the status of children of Indian citizens abroad was also uncertain.[54] At the time, it seemed as if such issues, while pertinent, could be resolved through future debate. The tone and context of such debates became even more relevant in the background of a limited partition of undivided India in 1947.[55] Questions of citizenship began to conflate with that of religion and ethnic affiliation, with non-Muslims being seen as being entitled to Indian citizenship,[56] and the citizenship question remained open even after India claimed independence in the latter half of 1947. This was because of the mass migration, both voluntary and forced, and widespread communal violence across Hindu, Muslim and Sikh communities who found themselves on the right or wrong side of the new border portioning colonial India.[57]

Further, the plight of stranded non-Muslim refugees in Pakistan and non-Hindu refugees in India led to an implicit understanding among the fledgling Indian and

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[50] *Constituent Assembly of India: Debates,* 12, Faridabad, 1947-51, (CAID), III, 417 *AS CITED IN* Joya Chatterji, *South Asian Histories Of Citizenship, 1946—1970*, 55 THE HISTORICAL JOURNAL, (December 2012), 1049, 1071, https://www.jstor.org/stable/23352190

[51] K. M. Munshi's speech in defence of Clause 3 on 29 April 1947, *Constituent Assembly of India: Debates,* 12, Faridabad, 1947-51, (CAID), III, 417 *AS CITED IN* Joya Chatterji, *South Asian Histories Of Citizenship, 1946—1970*, 55 THE HISTORICAL JOURNAL, (December 2012), 1049, 1071, https://www.jstor.org/stable/23352190

[52] *Id.*

[53] CHATTERJI, *supra* note 49.

[54] *Id.*

[55] The Partition Museum, *supra* note 41.

[56] Neerja G. Jayal, *Faith-Based Citizenship,* THE INDIA FORUM, October 1, 2019 https://www.theindiaforum.in/sites/default/files/pdf/2019/11/01/faith-based-citizenship.pdf

[57] *Id.*

Pakistani high Commissions to help the same,[58] out of no other claim apart from ethno-cultural linkage, rather than citizenship proper. Thus, the conception of an a BRC model of citizenship based on territory was impacted by the fragmentation of the territorial limits of a nation-state and the influence of ethnic, cultural and religious identities.

Two decisions rendered by the Supreme Court of India ('SCI') and the Karnataka High Court provide some more context to debates on citizenship and immigration in independent India.

In Sarbananda Sonowal vs Union Of India (2005),[59] the question was whether citizenship determination processes under framework of the *Illegal Migrants (Determination By Tribunals) Act, 1983* ('the IMDTA')[60] was interfering with the process of identification and deportation of illegal immigrants in Assam.[61] The Tribunals under this Act ('IMDTTs') were established with the stated object to provide for fair determination of whether a person be an illegal migrant.[62] This framework was markedly different from the system of Foreigner Tribunals ('FT') set up under the *Foreigners Act, 1946* and the *Foreigners* (*Tribunal) Order, 1964.* Due to the relatively less strict procedures and greater protections afforded to the accused under the IMDA framework, the petitioners argued that the IMDTA regime was unconstitutional. The respondents however maintained that the IMDTA regime provided protections that were fair and reasonable. Ultimately, the SCI decided in favour of the petitioners and struck down the impugned IMDTA as unconstitutional.[63]

The significance of this ruling was the rationale of the court. The SCI held that the rules under the IMDTA were too stringent to engender sufficient conviction rates for the huge influx of illegal immigrants in the state.[64] The point highlighted by the court regarding mass migration reflects the mindset of citizens who

[58]JAYAL, *supra* note 55.
[59]Sarbananda Sonowal vs Union Of India & Anr, 2005 A.I.R. S.C. 2920 (India).
[60]Sarbananda Sonowal vs Union Of India & Anr, 2005 A.I.R. S.C. 2920 (India).
[61]Sarbananda Sonowal vs Union Of India & Anr, 2005 A.I.R. S.C. 2920 (India).
[62]Illegal Migrants (Determination By Tribunals) Act, 1983, Act No. 39, Acts of Parliament (India).
[63]Sarbananda Sonowal vs Union Of India & Anr, 2005 A.I.R. S.C. 2920 (India).
[64]Para 46, Sarbananda Sonowal vs Union Of India & Anr, 2005 A.I.R. S.C. 2920 (India).

perceive themselves to be more deserving of the protection of the state as against those deemed as outsiders or others.

In *Tenzin Cheophag Ling Rinpoche v. Union of India,*[65] the petitioner who was of Tibetan origin, prayed that the Regional Passport Office be mandated to provide a passport to him. The authorities here declined the request of the petitioner to possess a password on the grounds that he was of a child of Tibetan nationals, was of Tibetan nationality and "*cannot be automatically treated*" as an Indian citizen.[66] However, since he was born in 1985 and before the 1987 amendment which required that both citizens had to Indian citizens- he was in fact a citizen as affirmed by the court. Section 3 (1) (a) of the CA, 1955 holds that the every person born within India on or after 26 January 1950 to 1 July 1987 is an Indian citizen. Therefore, this provision provides for automatic citizenship for a child born on Indian soil- regardless of the status of her parents. However, what is of note here is the High Court's reprimand to the Passport authorities. The court stated that the grounds of refusal by the authorities was not maintainable and that "*certainly the petitioner…would be entitled to claim the status of an Indian citizen by birth.*"[67] The significance of this decision to our discussion is how the state authorities exercised informal methods of closure. As mentioned earlier, despite citizenship in India contained in formal terms such as the constitution and statute, they did not prevent the petitioner from being threatened with informal forms of closure.

IV. Birthright Citizenship in USA

The USA follows an unconditional model of BRC[68] such that a child born on American soil becomes an American citizen, regardless of the parents' citizenship status, through the *jus soli* rule.[69] Additionally, citizenship at birth is

[65]2013 SCC Online Kar 5932.
[66]Para 5, 2013 SCC Online Kar 5932
[67]Para 12, 2013 SCC Online Kar 5932.
[68]LAW LIBRARY OF CONGRESS, supra note 27.
[69]*Basic Questions on US Citizenship and Naturalization*, CONGRESSIONAL RESEARCH SERVICES REPORT FOR CONGRESS, Library of Congress, Order Code 92-246, American Law Division, (March 2,1992), https://www.everycrsreport.com/files/19920303_92-246_41ba2eaba60fd2f282e02be4b638d80c2841a994.pdf

also conferred on the basis of blood ties that is through *jus sanguinis* principles.[70] The exception to this broad rule operates for certain categories of persons, such as children of diplomats or other state executives[71] born on US soil, as they are adjudged to be beyond the jurisdiction of the US government. The fundamental *jus soli* rule stems from Clause 1 of the 14th Amendment[72] of the US Constitution ('USC'), also known as the Citizenship Clause ('CC').[73] The CC succinctly puts forth this rule:

> *"[a]ll 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*."[74]

As explained by a Congressional Research Service (CRS) Report, the CC is the citizenship principle that is enshrined in the USC, which is supplemented by other federal legislations that expand or limit this constitutional grant of BRC.[75] For instance, the *Immigration and Nationality Act of 1962* ('INA') further grants BRC to children born in the USA to a member of an Eskimo, Indian or other aboriginal tribes.[76] The INA also confers BRC to children born in certain offshore territories that are subject to the US jurisdiction.[77]

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[70]*Id.*

[71]Christopher Eisgruber, *Birthright Citizenship and the Constitution,* N.Y.U. L. REV., (April 1997), https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-72-1-Eisgruber_0.pdf

[72]U.S. CONST. amend. XIV, cl 1. (USA)

[73]Alexandra M. Wyatt, *Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate,* CONGRESSIONAL RESEARCH SERVICES REPORT FOR CONGRESS, (October 10, 2015), https://fas.org/sgp/crs/misc/R44251.pdf

[74]U.S. CONST. amend. XIV, cl 1. (USA)

[75]CONGRESSIONAL RESEARCH SERVICES REPORT FOR CONGRESS, *supra* note 68.

[76]Immigration and Nationality Act of 1962, 8 U.S.C. 1153. (USA)

[77]CONGRESSIONAL RESEARCH SERVICES REPORT FOR CONGRESS, *supra* note 68

Historical development of citizenship and nationality laws

As Blackman remarks, "*the US Constitution…was a flawed charter*."[78] The racial discrimination against former African slaves continued despite the passage of the 13th Amendment[79] (1856) to the USC, which abolished slavery in the USA. The most damning example of the failure of the USC in protecting the rights of its country's residents was illustrated in the landmark case of *Dred Scott v. Sandford* (1856).[80] Therein, the plaintiff who was an erstwhile African slave, brought a case against his owners in order to affirm his status as a freeman. He argued for his freeman status on grounds that the owner-family had migrated to a state where slavery had been outlawed.[81] However, when the suit reached the US Supreme Court ('USSC') through appeal, the court ruled against the plaintiff. The court asserted that Scott was indeed a slave and thus could not bring any legal claim in a court of law.[82] The relevant aspect of this case in the context of BRC was that the rationale of the court was that African people, whether slaves or free persons, were not envisaged as *"...member[s] of the political community formed and brought into existence by the Constitution."*[83] Following this controversial and racially charged judgment,[84] the 14th Amendment was introduced in 1868 to nullify the *Dred Scott* decision. This paved the way for the inclusion of former slaves within the fold of American citizenship.[85] It is important to note that the interpretation of the *Civil Rights Act of 1866* ('CRA'), was further modified by the wording of the CC. This was because the

[78]Josh Blackman, *Birthright Citizenship is a Constitutional Mandate,* THE CATO INSTITUTE, October 31, 2018 https://www.cato.org/publications/commentary/birthright-citizenship-constitutional-mandate

[79]U.S. CONST. amend. XIII (USA)

[80]Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). (USA)

[81]Andrew R. Arthur, *Birthright Citizenship: An Overview,* CENTRE FOR IMMIGRATION STUDIES, November 2018, https://cis.org/Report/Birthright-Citizenship-Overview.

[82]*Id.*

[83]Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). (USA)

[84]Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). (USA)

[85]Dara Lind, *Birthright Citizenship: Explained,* VOX, October 30 2018), https://www.vox.com/2018/7/23/17595754/birthright-citizenship-trump-14th-amendment-executive-order

corresponding phrase in the CRA stated that citizenship was granted to "*all persons born in the United States and not subject to any foreign power.*"[86] This was in contrast to the broader phrase '*subject to the jurisdiction*'[87] in the CC.

The interpretation of this broader phrase was to figure in a number of judgments to follow, which also clarified the adoption of this unrestricted *jus soli* principle in USA. Two USSC cases in this regard, that is *United States v. Wong Kim Ark* (1898)[88]and *Elk v. Wilkins* (1884).[89] -figured heavily in debates on the CC. In the former case, the citizenship status of a child (Wong Kim Ark) born of Chinese nationals in USA was challenged on the grounds that the defendant, Wong Kim Ark, was subject to Chinese laws through his parents, and thus was beyond the jurisdiction of the US, as required under the CC. However, the USSC held that a child born in the USA to resident aliens would be a US citizen by birth regardless of the citizenship status of the parents. It is to be noted that some scholars argue that since the statements of the USSC in the Wong Kim Ark decision relating to BRC were not of material connection with its holding, the CC could not be construed to be so liberal that it conferred citizenship upon the children of illegal immigrants.[90] In the Elk case, the USSC had held that by dint of membership in a recognized Native American (Indian) tribe, an individual would not be a US citizen as his allegiance was to a political community that was not completely subject to US jurisdiction.[91]

It is interesting to note that the questions of political community and allegiance to the government were interrogated in the above two cases, with the defining similarity being that such questions arose in the context of racial and ethnic minorities. As Brubaker (1998) notes, despite citizenship being a formal, abstract conception, formal methods of closure may correspond with extant informal forms of closure.[92] This ties in with the apparent notion among abstract legal institutions such as the USSC as well, that certain ethnic or religious communities

[86]Civil Rights Act of 1866, 14 Stat. 27.
[87]U.S. CONST. amend. XIV, cl 1. (USA)
[88]Wong Kim Ark, 169 U.S. 649 (1898).
[89]Elk v. Wilkins, 112 U.S. 94 (1884).
[90]WYATT, *supra* note 72.
[91]*Id.*
[92]BRUBAKER, *supra* note 9.

to a political community of a nation-state, are outsiders "*negatively and residually.*"[93] As Brubaker (1998) puts it, "*they are excluded not because of what they are but because of what they are not.*"[94] Thus, inherent in the discussion of BRC is an examination of the "*explicit, formally articulated criteria*"[95] positive characteristics that presuppose political membership in a nation-state, as well as the interrogation of the formal and inform structures that inform the negative characteristics that identify the residual construction of the 'outsider'.[96]

V. Comparative Analysis

Having discussed the citizenship frameworks of India and the USA, as well as certain key events in the legal history of these nation-states, this section shall compare the two jurisdictions. The analysis shall be based on a comparison of primary legal or constitutional provisions relating to BRC in the two jurisdictions, that is, Section 3 of the CA, 1955 in case of India; and the CC of the 14th Amendment[97] to the USC, in case of the USA. This formal comparison will be supplemented by points of similarities and contrasts between the two jurisdictions, with respect to the political and legal histories of the principle of BRC.

Comparison of legal history and engagement with minority rights'

As for the Indian context, BRC is governed by Section 3 of the CA, 1955. This particular section has gone through a series of amendments from the time of its original enactment, the relevant ones being the 1987 Amendment and the 2004 Amendment.[98] Section 3 of the CA, 1955, it stands at present, holds that the following categories of persons are citizens by birth-

[93] *Id*.
[94] *Id.*

[95] BRUBAKER, *supra* note 9, 29.
[96] *Id*.
[97] WYATT, *supra* note 72.
[98] Abhishek Atrey, *Framework and Challenges to the Citizenship (Amendment) Act and the National Register of Citizens*, INDIA LEGAL, (January 6, 2020)

- every person born within India on or after 26 January 1950 to 1 July 1987;[99]
- every person born within India on or after 1 July 1987 to 3 December, 2004 and either of his parents is a citizen of India at time of his birth;[100]
- every person born after 3 December 2004, wherein both his parents are Indian citizens,[101] or one of his parents is an Indian citizen, while the other parent is not an illegal immigrant.[102]

Thus, we see that the fundamental rule here is a *jus sanguinis* principle, while certain aspects of BRC exist in terms of territorial connection. There is an obvious difference then, with the operation of the absolute BRC rule in the USA.

Abhishek (2020) notes that the nature of BRC conferred by Section 3 of the CA, 1955 was modified "*as and when* [the] *Indian Government* face[d] new *problems*."[103] Such problems faced included for instance, the mass migration of Bengali refugees into Assam during the 1947 Partition, as well as the burgeoning political turmoil in Assam, which reached a peak in 1983 with the Nellie massacre.

Such events necessitated changes to the citizenship framework, especially with respect to BRC framework, which was seen as important arenas to reflect changes in state policy in response to political and cultural upheavals. However, the concept of protection of the integrity of political communities can be traced back to the communal rhetoric of Constituent Assembly Members of India wherein non-Muslim migrants were termed as 'refugees' as opposed to Muslim migrants being termed 'migrants'.[104] Thus, questions of loyalty and allegiance were seen as more aligned with the idea of descent or *jus sanguinis* rather than the broad approach of *jus soli* as was enshrined in the CA, 1955 in its original

https://www.indialegallive.com/did-you-know-facts-about-news/perspective-news/framework-and-challenges-to-caa-and-nrc/

[99]Section 3 (1)(a), the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).

[100]Section 3 (1)(b), the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).

[101]Section 3 (1)(c)(i), the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).

[102] Section 3 (1)(c)(ii), the Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).

[103]ATREY, *supra* note 97.

[104]JAYAL, *supra* note 55.

form. According to Jayal (2019), this shift from 'soil to blood' that is, from a BRC principle to a descent principle of citizenship implied that the Indian citizenship construct took on a ethnonational aspect.

Having said that, it is important to note that both Indian and the USA do share certain similarities with respect to the origin of the *jus soli* rule. As mentioned in an earlier section, *jus soli* is a common law concept, exported by the British to its colonies. Thus, the ideas of loyalty and subject hood were part of the original fabric of both India and the USA, prior to the two nations' independence from their British colonial rulers. Thereafter, both nations addressed their citizenship laws, rules and amendments to address the burning issues at the time.

For the USA, the important concerns remained the status of resident minorities, especially prior to abolition of slavery and even after, which included the black community, Asian communities, Native Americans, citizens of US territories and others. The abolition of slavery and the inclusion of racial minorities into a political society not equipped or prepared to accommodate such differences, necessitated the legal order to cement the loyalties of such persons. This was done by way of the CC of the 14th Amendment of the USC. However, the rhetoric of the debate on jurisdiction over persons, especially in case of *Wong Kim Ark,*[105] illustrated the slippage between the racial construction of citizenship and legal subjecthood, in that despite the relatively simple wording of the CC, the Chinese nationality of Wong Kim Ark's parents still invited suspicions as to the loyalty of the same, and whether he was then truly subject to the jurisdiction of the US government or not.

Comparison of Contemporary Issues

For India, the concerns informing changes in citizenship laws relating to BRC, related to the loyalties of non-Hindu refugees and Muslim migrants, as mirroring the complicated position of belonging and entitlement post-Partition, necessitated clear boundaries for citizenship, from a *jus sanguinis* perspective, which if not for any other reason, was because apart from religious identity, that the so-called 'other' in India, the Muslim, was "*historically and organically Indian.*"[106] This was not so for the racial minorities in the USA, where clear racial

[105]Wong Kim Ark, 169 U.S. 649 (1898).
[106]JAYAL, *supra* note 55.

lines were drawn between the original White Christian immigrants from Europe, as against other communities.

However, in both Indian and US contexts, the anxiety about the other, whether it be the Muslim (in either context) or the black person, continues to inform the direction of nationalism and political discourse. For instance, the construction of the black man in the 1915 American movie, *Birth of a Nation,* directly led to the revival of the Ku Klux Klan ('KKK'), a violent, white supremacist organization.[107] As mentioned earlier, President Trump's proposal to abolish BRC in the USA is another form of a revival of a similar form of hyper-nationalism as may be observed in the ideology of the KKK[108] which heavily prioritizes a narrow form of BRC, that is much against the spirit of the CC.[109] However, it must be noted that the EO issued by Trump specifically decries the judgment of Dredd Scott as 'shameful', stating that the decision "*…misinterpreted the Constitution as permanently excluding people of African descent from eligibility for United States citizenship solely based on their race*."[110]

This insider/outsider paradigm shows up in the Indian context in light of the introduction of the *Citizenship Amendment Act, 2019* which according to Jayal (2019), implies a shift from inclusive, civic idea of nationalism to a narrow, ethnocultural conception of citizenship.[111] Under the 2019 Amendment, the naturalization process for religious minorities from certain neighbouring countries is held to be six years, rather than the usual eleven years required. While the minorities included within this Amendment include the Hindu, Buddhist, Christian, Sikh, Parsi faiths- Muslim persons are notably excluded from this list.[112]Similar forms of Islamophobia, largely out of tensions arising from the Twin Tower Attacks in September 2001, are evidenced in formal and informal

[107]Alexis Clark, *How 'The Birth of A Nation' Revived the Ku Klux Klan, HISTORY*, (July 29, 2019), https://www.history.com/news/kkk-birth-of-a-nation-film
[108]*Id.*
[109]HORN, *supra* note 4.
[110]EXECUTIVE ORDER, *supra* note 1.
[111]JAYAL, *supra* note 55.
[112]ATREY, *supra* note 97.

practices in the USA.[113] For instance, the ban on visas from Muslim countries by Trump is illustrative of this.[114] Thus, in both India and the USA, there exists either a racial or ethnoreligious other, whose loyalties are seen as suspect for multiple reasons and thus, BRC granted them is viewed as undesirable. This construction and characterization of undesirables, may be seen in political rhetoric of presence of hyper nationalistic parties in both USA[115] and India.[116]

VI. Conclusion

The law of soil has somehow been made a superior category in both USA and India, due to the connotations of an older, closer association of citizens with the nation-state. The conception of BRC is closely linked to the idea of the original political community of a nation-state. The status and extent of political participation of individuals in the modern nation-states, and in India and American specifically, is influenced by the status-label of citizenship- which functions as a seed for future expansion of existing rights along with the potential creation of additional rights through political institutions. Political participation is an important concern in any discussion on BRC, as it is informed by the notions of a foundational political community. This in turn influences the legal discourse on BRC by way of political positions on nationality and citizenship, ethnicity and loyalty to native jurisdictions. This article has asserted by way of the comparative analysis of BRC in America and India, the importance of historical, social, political and cultural factors upon the development of a legal framework of BRC in these nations. Both the legal regimes approached the principle of BRC in their

[113]*Sanctioned Bias: Racial Profiling Since 9/11,* THE AMERICAN CIVIL LIBERTIES UNION REPORT, (February 26, 2004), https://www.aclu.org/report/racial-profiling-911-report

[114]Stef W. Kight, *The Evolution of Trump's Muslim Ban,* AXIOS, (February 10, 2020), https://www.axios.com/trump-muslim-travel-ban-immigration-6ce8554f-05bd-467b-b3c2-ea4876f7773a.html

[115]Jennifer Rubin, *Republicans: Your Racism is Showing,* THE WASHINGON POST, (October 20, 2020), https://www.washingtonpost.com/opinions/2020/10/19/republicans-your-racism-is-showing/

[116]Christophe Jaffrelot, *The Fate of Secularism in India,* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, (April 4, 2019), https://carnegieendowment.org/2019/04/04/fate-of-secularism-in-india-pub-78689

own way, informed by their particular histories and conflicts. It is to be seen the direction BRC provisions in both nations takes, whether its terms will become narrower or broader in future.