SUBJECT TO THE [COMPLETE] JURISDICTION THEREOF: SALVAGING THE ORIGINAL MEANING OF THE CITIZENSHIP CLAUSE

AMY SWEARER*

ABSTRACT

Scholars today generally presume that all individuals born on United States soil are United States citizens, under a theory that the Fourteenth Amendment mandates a universal birthright citizenship in the nature of the English common law's jus soli. While it is indeed clear that the Constitution recognizes that citizenship is the birthright of certain U.S.-born individuals, both textualist and originalist analyses of the Citizenship Clause substantially undermine assertions that birthright citizenship must be applied universally to all persons born on U.S. soil, regardless of the immigration status of the parents. The framers and ratifiers of the Fourteenth Amendment had a distinct understanding of the Citizenship Clause's jurisdictional element that is incompatible with true jus soli. The Clause's purpose was to ensure that there would no longer exist in the United States a class of persons relegated to perpetual noncitizen status on the basis of race, despite not owing allegiance to any other foreign or tribal power. This more limited application of birthright citizenship was adopted by the earliest commentaries on and Supreme Court assessments of the amendment. Supreme Court precedent itself extends only to the premise that the U.S.-born children of lawfully present, permanently domiciled aliens are citizens even where the parents are excluded from naturalization. This limited premise is consistent with the Amendment's purpose of foreclosing the possibility that the United States would create generations of permanent resident noncitizens who nevertheless owe permanent and undivided allegiance to the United States. To the extent the Supreme Court appears to have adopted common law's jus soli, the "American" jus soli must be understood as a less rigid version than its English counterpart, reformed to make it consistent with the Amendment's original purpose and scope. This indeed appears to have been the Court's intent with its principal decision regarding birthright citizenship in United States v. Wong

Kim Ark. Finally, while United States naturalization law no longer risks the creation of lawful resident classes held perpetually to noncitizen status, immigrant aliens—unlike illegal or nonimmigrant aliens—are subject to the complete jurisdiction of the United States for purposes of birthright citizenship.

INTRODUCTION

President Donald Trump has brought to the forefront of the American consciousness a conversation that had long been brewing beneath the surface among certain scholars, namely, whether the Fourteenth Amendment's Citizenship Clause mandates that all persons born on U.S. soil are U.S. citizens, regardless of the immigration status of the parents. This heretofore largely unquestioned premise is known colloquially as universal birthright citizenship and has been the policy of the United States government for over a century, even as some scholars and politicians have made waves in asserting that this policy is unnecessary under the Fourteenth Amendment and incentivizes unlawful immigration.[1] Calls to restrict the granting of birthright citizenship so as to exclude the children of illegal or nonpermanent resident aliens have taken on a new force in recent decades, as the growing costs of illegal immigration have continued to weigh heavily on U.S. taxpayers.[2] The explosive rise of the "birth tourism"

* Legal Policy Analyst at the Edwin Meese III Center for Legal and Judicial Studies. J.D., University of Nebraska College of Law.

1. *See generally* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 3–6 (1985) (arguing that the Fourteenth Amendment does not mandate birthright citizenship for the U.S.-born children of illegal aliens, and that enacting policies consistent with this understanding can ameliorate various problems associated with unlawful immigration); Edward Erler, *Birthright Citizenship and the Constitution*, HERITAGE FOUND. (Dec. 1, 2005), https://perma.cc/KS9Z-N5YV ("[S]ome believe that Congress could exercise its Section 5 powers to prevent the children of illegal aliens from automatically becoming citizens of the United States."); John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUND.: LEGAL MEMORANDUM NO. 18, at 1 (Mar. 30, 2006), https://perma.cc/4HNX-BFNS (arguing that the position that birth on U.S. soil alone is enough to gain citizenship is incompatible with the text and intent of the Citizenship clause); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 8 (2009) ("It appears, therefore, that the Constitution, far from clearly compelling the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant."); Michael Anton, *Citizenship Shouldn't Be A Birthright*, WASH. POST (July 18, 2018), https://perma.cc/S5EY-PEFF ("[T]he entire case for birthright citizenship is based on a deliberate misreading of the 14th amendment.").

2. *See, e.g.*, Press Release, Michael D. Antonovich, L.A. Cty. Supervisor, County Spent Nearly $639 Million in the Past Year to Support Families of Illegal Aliens (Aug. 22, 2014), https://perma.cc/9294-NDQW (detailing the annual costs borne by one California county for the provision of aid and public benefits to illegal immigrants and estimating a total of $629 million in overall taxpayer expenditures on behalf of illegal immigrants in that county); Madeleine Pelner Cosman, Ph.D., Esq., *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 6–8 (2005) (exploring the financial burdens carried by United States hospitals and other medical facilities as a result of unpaid and unreimbursed medical care for illegal aliens); MATTHEW O'BRIEN, SPENCER RALEY & JACK MARTIN, FED'N FOR AM. IMMIGR. REFORM THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON UNITED STATES TAXPAYERS (2017) 1, https://perma.cc/ACN5-HBMN ("[Illegal aliens] also have a severely negative impact on the nation's taxpayers at the local, state, and national levels."); STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD. DEPORTATION VS. THE COST OF LETTING ILLEGAL

industry has only further heightened scrutiny over the practice of universal birthright citizenship.[3] Capitalizing on these concerns, at various times in the lead-up to the 2016 presidential election, then-candidate Trump publicly questioned whether the Fourteenth Amendment mandated universal birthright citizenship and pledged, as part of his first immigration reform plan, to end the practice of automatically treating as citizens the U.S.-born children of illegal aliens.[4] In 2018, during his second year in office, President Trump again raised the possibility of limiting the application of birthright citizenship via executive order.[5]

IMMIGRANTS STAY (2017), https://perma.cc/MV7D-JE24 (estimating an average lifetime net fiscal drain of $65,292 per illegal alien per year, for a total annual fiscal drain of over $746 billion attributable to illegal immigration).

3. "Birth tourism"—sometimes called "maternity tourism"—refers to the practice of pregnant foreign women traveling to the United States for the purpose of giving birth to their child on U.S. soil in order to make him or her a United States citizen. *See* Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y. TIMES (Mar. 28, 2011), https://perma.cc/C8DR-8TTP (noting that "it is impossible to know precisely how widespread 'maternity tourism' is"). These women then return to their native country to raise their U.S.-born children, who often do not again step foot on American soil until they are young adults. An entire industry has cropped up in the last few decades catering to upper class women—particularly in China, Nigeria, and Russia—and espousing the benefits of having a U.S. passport holder in the family, including significantly reduced costs of an American college education. *See* Cynthia McFadden et al., *Birth Tourism Brings Russian Baby Boom to Miami*, NBC NEWS (Jan. 9, 2018, 4:49 PM CST), https://perma.cc/UYT6-PF2X (noting that pregnant Russians often visit Florida to give birth while pregnant Chinese tourists chose to give birth in southern California); Calum MacLeod, *Chinese Flock to USA to Give Birth to U.S. Citizens*, USA TODAY (Apr. 1, 2015, 10:15 AM ET), https://perma.cc/FP33-XD5P (describing how Chinese citizens visit the U.S. to give birth); Keith B. Richburg, *For Many Pregnant Chinese, a U.S. Passport for Babies is a Powerful Lure*, WASH. POST (July 18, 2010), https://perma.cc/3X6M-NTFE (reporting on two Chinese citizens that ran a consulting business for Chinese women wishing to give birth in the U.S.). Although the exact numbers of birth tourist babies born in the United States every year is unknown, some estimates from China alone top 60,000 births with the rate rapidly increasing. *See* Glenn Kessler, *"Birth Tourists" and "Anchor Babies:" What Trump and Bush Got Right*, WASH. POST (Aug. 25, 2015, 2:00 AM CDT), https://perma.cc/68RX-DDDZ (noting that Chinese sources projected 60,000 birth tourists in 2014); *see also* Steven A. Camarota, *There Are Possibly 36,000 Birth Tourists Annually*, CTR. FOR IMMIGR. STUD. (Apr. 28, 2015), https://perma.cc/822V-SEHU (combining Census Bureau and American Community Survey data to estimate that around 36,000 babies were born to foreign women in the United States from July 2011 to July 2012). In short, every year tens of thousands of foreign nationals take advantage of current Executive Branch interpretations of the Fourteenth Amendment's Citizenship Clause in order to reap the benefits of American citizenship, largely without ever assuming the corresponding duties.

4. *Immigration Reform That Will Make America Great Again*, DONALDJTRUMP.COM, https://perma.cc/3GG9-F5TF; *Trump Goes After Bush on Iraq; Bangkok Bombing Manhunt Widens; Deadly Police Shooting Ignites Protests*, CNN: TRANSCRIPTS (Aug. 20, 2015, 4:30 ET), https://perma.cc/6RK5-KCV3; *see* The O'Reilly Factor, *The Post-Debate Blues,*, FOX NEWS (Nov. 11, 2015, 9:37), https://perma.cc/N33J-9VLG (candidate Trump asserting that a constitutional amendment would not be necessary to terminate birthright citizenship); *Trump: Birthright Citizenship Not in the Constitution*, NBC NEWS (Jan. 10, 2016), https://perma.cc/SSG2-NNCB (candidate Trump asserting that birthright citizenship is not guaranteed by the Constitution).

5. Jonathan Swan & Stef W. Kight, *Exclusive: Trump Targeting Birthright Citizenship with*

This article analyzes the legislative and legal history of the Fourteenth Amendment in order to assess the extent to which it mandates birthright citizenship and to determine from textualist and originalist perspectives who is guaranteed birthright citizenship and under what circumstances. The conclusion is certain to be controversial: The Fourteenth Amendment, in its original public meaning and under the most logical construction of Supreme Court precedent, does not mandate that the U.S.-born children of illegal or nonpermanent resident aliens be treated as U.S. citizens as the result of their mere birth on U.S. soil. Part II reviews the Fourteenth Amendment's legislative history, including its connection to the Civil Rights Act of 1866, to determine whom the Reconstruction Congress understood itself to be making citizens of the United States and under what theories of citizenship. Part III analyzes the relevant legal precedent, from the earliest Supreme Court interpretations of the Citizenship Clause to the twentieth century dicta from tangentially related questions, and draws together the most logical reading of the case law in light of the Amendment's original meaning. Finally, Part IV assesses the development of federal immigration and naturalization law, and concludes that, while the law no longer creates generations-long classes of lawful permanent residents who are perpetual noncitizens, aliens classified as "immigrants" are among those envisioned by the Fourteenth Amendment as owing complete allegiance to United States, and their U.S.-born children are United States citizens. Neither those persons classified as illegal aliens or nonimmigrant aliens, however, are sufficiently subject to the jurisdiction of the United States such that their U.S.-born children are necessarily and of constitutional right U.S. citizens.

I. TEXTUALIST AND ORIGINALIST ANALYSES UNDERMINE THE THEORY OF MANDATED UNIVERSAL BIRTHRIGHT CITIZENSHIP

Although the precise meaning of "textualism" and "originalism" is up for debate, no analysis of the Citizenship Clause under any general understanding of these interpretative theories can support the claim of mandated universal birthright citizenship. From the very structure of the text itself, it is clear that

Executive Order, AXIOS (Oct. 30, 2018), https://perma.cc/Z257-773Y; *Trump Doubles Down On Terminating Birthright Citizenship*, AXIOS (Oct. 31, 2018), https://perma.cc/49XM-V5UG.

more is necessary for birthright citizenship than mere birth on U.S. soil. Further, the history, context, and purpose of the Fourteenth Amendment indicate that the Citizenship Clause's jurisdictional element served a unique purpose of not just granting citizenship to the newly freed slaves, but of withholding it from those who were not similarly situated to those freedmen in terms of allegiance owed to the United States. This view of the Clause's original public meaning is supported not only by the Amendment's legislative history but also by the writings of contemporary legal scholars.

A. Textual Analysis Fails to Support Mandatory Universal Birthright Citizenship

A well-established doctrine of legal interpretation posits that legal texts, whether statutes, regulations, or the Constitution, should be read with a presumption against redundancy, unless this reading would lead to absurd results.[6] Indeed, this interpretive canon is deeply embedded in American jurisprudence and is intertwined with a belief that Congress does not use words or clauses that have no meaning. As Chief Justice John Marshall explained in the bedrock case of *Marbury v. Madison*,[7] "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[8] Put another way, every word or phrase or section of a legal text adds something of value to the text's meaning.

Under both this standard principle of interpretation and the most natural reading of the Fourteenth Amendment, the Citizenship Clause indicates that more is required for birthright citizenship than the mere fact of birth within the geographical

6. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 490–91 (1965) ("While this Court has had little occasion to interpret the Ninth Amendment, '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.'" (citation omitted)); Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 562 (1995) ("[T]his Court will avoid a reading which renders some words altogether redundant."); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."(internal quotation marks omitted)); Noel Canning v. NLRB, 705 F.3d 490, 507 (D.C. Cir. 2013) (concluding that a proposed interpretation of the Recess Appointments Clause would "depriv[e a specified] phrase of any force" and therefore "run[] afoul of the principle that every phrase of the Constitution must be given effect").

7. 5 U.S. (1 Cranch) 137 (1803).

8. *Id.* at 174.

boundaries of the United States. The clause reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[9] The phrase "subject to the jurisdiction thereof" is an additional qualification on the preceding phrase "born . . . in the United States" and narrows the application of citizenship to a particular subset of individuals born in the United States—those subject to its jurisdiction. To be "subject to the jurisdiction" of the United States, then, must logically mean something more than being "born in the United States."

That the Citizenship Clause's jurisdiction requirement is more than a reiteration of geographical location is supported by the fact that the jurisdictional requirement was a later addition to the language. When Senator Benjamin Wade (R-Ohio) first proposed adding a definition of citizenship to the proposed amendment, his initial wording was simply, "all persons born in the United States or naturalized by the laws thereof."[10] One week later, Senator Jacob Howard (R-Mich.), responded by introducing a revised definition that included the jurisdictional element in addition to the geographical element.[11] It was this second definition, revised to specifically include "and subject to the jurisdiction thereof," that was adopted into the final version of the Fourteenth Amendment. The addition of this language was presumably intentional, qualifying and limiting the phrase "born in the United States."

But this alone does not provide enough information from which to form a conclusion about who, exactly, is subject to the jurisdiction of the United States for purposes of citizenship. Advocates of universal birthright citizenship have long maintained that this phrase merely adopts the English common-law exclusion of ambassadors and accredited foreign diplomats.[12]

9. U.S. CONST. amend. XIV, § 1.

10. CONG. GLOBE, 39th Cong., 1st Sess. 2768–69 (1866).

11. *Id.* at 2890 (statement of Sen. Howard).

12. *See generally* John Yoo, *Settled Law: Birthright Citizenship and the 14th Amendment*, AM. MIND, https://perma.cc/8YMQ-GNGC (last updated Mar. 18, 2019) (stating that the Fourteenth Amendment's drafting history shows that people subject to a foreign power and Indians not taxed were the only classifications specifically intended to be excluded for purposes of birthright citizenship); Garret Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331, 351 (2010) (stating that the only two groups not subject to the full and complete jurisdiction of the United States were diplomats and Native Americans living under Tribal government); Elizabeth Wydra, *Those Who Deny Birthright Citizenship Get the Constitution Wrong*, WASH. POST (July 20, 2018), https://perma.cc/R8ZK-LAX8 (stating that the Supreme Court has defined "'subject to the jurisdiction ' to carve

Given the dominant understanding of diplomatic relations in the nineteenth century, however, it is unlikely on its face that the jurisdictional limitation was added solely to eliminate from birthright citizenship the children of ambassadors and foreign diplomats. The most prevalent theory of diplomatic immunity at the time was based on the legal fiction of extraterritoriality, wherein ambassadors and diplomats, though literally present on United States soil, were considered to be still living in the sending state, with the diplomat's person and mission comprising an extension of the sending state's territory.[13] As the New York Superior Court stated in 1889, the rule of international law "derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin, and whose sovereign he represents, and within whose territory he, in contemplation of the law, always abides."[14] In other words, the geographical restriction alone

out from the birthright citizenship guarantee only the children of diplomats who are immune from prosecution under U.S. laws").

13. *See, e.g.*, Jeffrey K. Walker, *Fiction Versus Function: The Persistence of "Representative Character" Theory in the Law of Diplomatic Immunity*, *in* THE PSYCHOLOGY OF DIPLOMACY 243, 245 (Harvey J. Langholtz & Chris. E. Stout eds., 2004) ("Based on an extension of the canon law notion that church property and the people occupying it were beyond the criminal and civil reach of temporal rulers, the legal fiction emerged that diplomatic premises (and the people that occupied them) were not within the territory of the receiving state. The idea [of diplomatic extraterritoriality] . . . enjoyed some prominence right through the nineteenth century . . . [and] is still applied occasionally to the armed forces of a state residing in another state's territory . . . ."); James S. Parkhill, *Diplomacy in the Modern World: A Reconsideration of the Bases for Diplomatic Immunity in the Era of High-Tech Communications*, 21 HASTINGS INT'L & COMP. L. REV. 565, 571–72 (1998) ("[The theory of diplomatic extraterritoriality] is premised on the fiction that, for legal purposes, the envoy (and his embassy) remain in the territory of the sending state . . . . According to the theory, all actions performed by the ambassador were considered, legally, to have occurred in the emissary's home state within the control of the home state's laws, police force and judicial system."). This theory of extraterritoriality, while largely abandoned in the modern context as the basis for diplomatic immunity, was espoused by eminent nineteenth century jurists in the United States. *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 138 (1812) ("Whatever may be the principle on which [the immunity of foreign ministers] is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it."); Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 117 (1784) ("All the reasons, which establish the independency and inviolability of the person of a Minister, apply likewise to secure the immunities of his house . . . . [T]o invade [its] freedom is a crime against the State and all other nations. The Comites of a Minister, or those of his train, partake also of his inviolability. The independency of a Minister extends to all his household; these are so connected with him, that they enjoy his privileges and follow his fate.").

14. Wilson v. Blanco, 4 N.Y.S. 714, 714–15 (1889) (concluding later that "[w]hen, therefore, a claim is made against [an ambassador] in the country to which he is sent, for

would suffice to exclude the children of foreign ambassadors, who would not have been considered as born within the geographical limits of the United States in the first place. The jurisdictional clause therefore presumably was not included merely as a means to keep citizenship from children who were already disqualified from it on the basis of being born, in the eyes of well-settled law, outside the United States. But the necessary support for this conclusion must be reached by turning outside of the text and its immediate framework.

B. The Understanding of the Reconstruction Congress is Incompatible with Mandatory Universal Birthright Citizenship

A deeper dive into the history, context, and purpose of the Fourteenth Amendment sheds light on the original meaning[15] of the Citizenship Clause's jurisdictional element. While there are certainly different ways to determine a document's "original meaning,"[16] there can be little doubt that the subjective

payment of a debt incurred by him, the creditor must proceed against him exactly as if he were not resident there, and as if he had not contracted the debt there, and as if he had no property there in his quality of ambassador . . . . [A]s a necessary consequence of the rule of extraterritorial residence, he is always considered as retaining his original domicile, and may be proceeded against in the competent court of his own country, and he cannot set up the plea of absence in the service of the state as a bar to the suit in the domestic form, since the law supposes him still to be present there."). *See also* FRANCIS WHARTON, LL.D., A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW 56 (1872) ("The house of an ambassador, or minister extraordinary, is regarded as part of the territory which he represents. No matter how long he may stay, therefore, in the country to which he is accredited, his domicil is unchanged. This same rule applies to consuls sent out from the state of their domicil to represent such country in a foreign land."); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 147 (2d ed. 1884) ("It is universally agreed that . . . diplomatic agents, when within the country to which they are accredited, possess immunities from local jurisdiction in respect of their persons . . . [and] with respect to their retinue, that these immunities generally carry with them local effects within the dwelling or place occupied by the individuals enjoying them . . . . The relation created by these immunities is usually indicated by the metaphorical term extraterritoriality, the persons and things in enjoyment of them being regarded as detached portions of the state to which they belong, moving about on the surface of the foreign territory and remaining separate from it . . . . Extraterritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law outside the state in which they are.").

15. The concept of "originalism" and all of its complexities is beyond the scope of this article, but suffice it to say that originalists universally agree upon two things: the meaning of each constitutional provision is the same today as it was at the time of its adoption, and this original meaning constrains judicial practice. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013) ("[T]hese two components—that the meaning of the text is historically fixed and that the historical meaning constrains legal meaning—are at the heart of originalist theory.").

16. *See, e.g.*, Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. FAC. PUBLICATIONS & OTHER WORKS 6, 10, 15 (2011), https://perma.cc/9C9N-4UL7 (exploring the three main strains of originalism, including

understandings of the document's framers help inform the determination of the words' legal meaning.[17] In fact, as the Supreme Court itself noted with regard to the Citizenship Clause in particular (as will be expounded upon below), while the subjective intent of individual Congressmen is not controlling of the question, the statements of Congressmen "are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves."[18] What, then, do we find in the debates over the language of the Citizenship Clause? And how does the broader context help inform our understanding of those debates? In short, we find that the men who drafted and ratified the Amendment had a very specific understanding of the language and a very specific purpose for using that language—namely, that they believed that the amendment was largely an effort to make citizens of the newly freed slaves, that citizenship (however derived) ought not to be applied differently to similarly situated individuals on the basis of race, and that those born with divided allegiances were not completely "subject to the jurisdiction" of the United States for purposes of citizenship.

1. The Fourteenth Amendment in Context

There is near-universal consensus that the primary, if not sole, purpose of the Fourteenth Amendment's Citizenship Clause was to authoritatively overrule the Supreme Court's 1856 holding in *Dred Scott v. Sandford*.[19] There, the Court determined that the U.S.-born descendants of African slaves were not citizens within the meaning of the term as used in Article III of the Constitution, and nor could they ever become naturalized United States citizens, even if freed from bondage and made citizens of a particular state.[20] The *Dred Scott* majority reasoned that individuals of black African descent were members of an inferior racial order who were not considered members of the American political body at the time the Constitution was adopted.[21] In so many words, the

Robert Bork's focus on the "original intentions of the framers" theory, Bruce Ackerman's "original understanding of the ratifiers" theory, and Justice Scalia's "original public meaning" theory).

17. *See, e.g.*, Whittington, *supra* note 15, at 382 (expounding upon the significance of such elements as the recorded debates and the progression of the text formulation for interpreting original public understanding).

18. United States v. Wong Kim Ark, 169 U.S. 649, 699 (1898).

19. 60 U.S. 393 (1856).

20. *Id.* at 404–05, 417–18.

21. *Id.*

majority concluded that the United States was created by the descendants of Europeans for their posterity and their posterity alone.[22] Not only that, but the descendants of black Africans were "so far inferior [to the descendants of Europeans], that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[23] The decision, in the words of famed abolitionist Robert Purvis, confirmed that the United States government would continue to view "the colored people" as "nothing but an alien, disenfranchised and degraded class."[24] It was this judicial holding and result that the framers and ratifiers of the Fourteenth Amendment sought to void through the legislative branch.

Of course, overruling *Dred Scott* was but one of several major purposes of the Amendment as a whole.[25] The question of citizenship for the newly freed slaves was just one aspect of a general and much more basic concern for the systematic denial of civil rights to freed slaves and Union supporters in the former Confederate states after the end of the Civil War. The Joint Committee for Reconstruction's[26] in-depth report on the social, political, and legal conditions in the Southern states includes graphic first-hand accounts of the horrific treatment of former slaves, including both forcible attempts to effectively re-enslave them and random, unprovoked killings.[27]

22. *Id.* at 406.

23. *Id.* at 407.

24. *Spirited Meeting of the Colored Citizens of Philadelphia*, LIBERATOR, Apr. 10, 1857, at 59, https://perma.cc/PH58-45HG.

25. *See generally* Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069 (2017) (detailing the many concerns of the 39th Congress, which the author delineates into seven major themes, only a few of which deal directly or indirectly with the question of citizenship).

26. The Joint Committee on Reconstruction had been created at the outset of the 39th Congress to "inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either house of Congress." JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REP. OF THE JOINT COMM. ON RECONSTRUCTION III (1st Sess. 1866). It was composed of fifteen members, nine from the House and six from the Senate. From the House were Reps. Thaddeus Stevens (R-PA), Elihu Washburne (R-IL), Justin Morrill (R-VT), John Bingham (R-OH), Roscoe Conkling (R-NY), George Boutwell (R-MA), Henry Blow (R-MO), Henry Grider (D-KY), and Andrew Jackson Rogers (D-NJ). From the Senate were Sens. James Grimes (R-IA), Jacob Howard (R-MI), George Henry Williams (R-OR), Ira Harris (R-NY), Reverdy Johnson (D-MD), and William Fessenden (R-ME). *Id.* Fessenden was served as Joint Committee Chairman.

27. *See, e.g.*, REPORT OF THE JOINT COMMITTEE, pt. III, at 5, 8 (testimony of Brevet Major General Edward Hatch) (describing "bands of 'regulators' . . . going about the country to see that the negroes worked" and "negroes [being] killed without any provocation at all"); *id.* at 8, 10 (testimony of Brevet Brigadier General George Spencer) (describing murders

In this much more immediate sense, the purpose of the Fourteenth Amendment was to constitutionalize the piece of legislation through which Congress first attempted to rectify the moral atrocity of *Dred Scott* and protect the civil rights of freed slaves—the Civil Rights Act of 1866—which had been passed earlier in the year by the same Congress over President Andrew Johnson's veto. This legislation was intended both to enforce the provisions of the recently ratified Thirteenth Amendment and ensure that the newly freed slaves received the equal protection of the laws, even in states that would rather strip them of any meaningful rights. It also statutorily defined, for the first time in United States history, the parameters of birthright citizenship: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . ."[28]

That the Fourteenth Amendment was drafted and passed in order to place the provisions and protections of the Civil Rights Act beyond the ability of a future Congress to easily repeal it is evidenced by the clear legislative history of both the Act and the Amendment and cannot be seriously doubted. There were, at the time of the Civil Rights Act's passage, doubts by even some of its proponents as to its constitutionality.[29] These doubts were serious

and incarceration for trivial offenses, and concluding that armed militias were "enforcing upon the negroes a species of slavery; making them work for a nominal price for whoever they choose").

28. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

29. One of the most prominent concerns was that the Constitution did not empower Congress to declare the freed slaves "citizens" through legislation alone. Senator Peter Van Winkle (R-WV), for example, argued that the common law of England was not adopted into the Constitution, and those of African descent were not citizens by birth—nor could they "be made citizens by incidentally calling them such in an act of Congress." CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866) (statement of Sen. Van Winkle). Van Winkle continued:

> I do not think that the clause that is proposed to be introduced into this bill, providing that persons of African descent are and shall be hereafter citizens of this country, is sufficient to do it. If they are not, as seems to be admitted on all hands, at this time citizens of the United States, they must be got in under some authority of the Constitution.

Id. at 498. But Van Winkle understood the Constitution to give Congress merely the authority to naturalize foreigners, not to make citizens of native-born individuals who were not otherwise citizens by birth. *Id.* Senator Edgar Cowan (R-Penn.) had similar reservations about the ability of Congress to statutorily define citizenship for native-born noncitizens, noting that he was willing to vote for an amendment to Constitution, but that the Civil Rights Act itself was insufficient. *Id.* at 500 (statement of Sen. Cowan). Along these same lines, Senator Reverdy Johnson (D-Mary.)—who believed "that it is very desirable that [the proposed statutory definition of citizenship] should be given"—asserted a corresponding belief that the *Dred Scott* decision rendered the definition to "no avail" and that "the object [of citizenship for the freed slave] can only be safely and surely attained by an amendment

enough to cause President Johnson to exercise his veto power, at least in part, because he believed Congress lacked the constitutional authority to displace state laws that discriminated on the basis of race, to place limits on how states could legislate under the general police power, or to subjugate the state judiciaries to federal law.[30] Congress ultimately overrode the President's veto, but it was clear to many in the Republican majority that a constitutional amendment would be needed to give the Civil Rights Act a solid foundation on which to survive future legal challenges. In this context, the Joint Committee on Reconstruction took on the task of drafting what would become the Fourteenth Amendment. The connections between *Dred Scott*, the Civil Rights Act, and the new amendment were repeatedly and clearly drawn throughout the congressional debates, though perhaps nowhere as clearly as by Rep. George F. Miller (R-Penn) in his January 19, 1867, speech before the House regarding the Amendment:

> The first section thereof makes all persons born or naturalized in the United States and subject to the jurisdiction thereof citizens, and also prohibits any State from making or enforcing any law which shall abridge the rights of citizens, etc. This is in effect ingrafting the civil rights bill and affording to all adequate protection, which is so just that I cannot see how any objection can be seriously interposed, unless it is by those whose consciences have been seared with the rebel doctrine that "a negro has no rights which a white man is bound to respect."[31]

This connection and context are necessary to help inform us of the meaning and purpose of the Citizenship Clause, according to those who drafted it.

2. Two Types of "Jurisdiction"

Some proponents of universal birthright citizenship have argued that the Citizenship Clause does not distinguish between

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of the Constitution." *Id.* at 504 (statement of Sen. Johnson).

30. *See, e.g., id.* at 1680 (President Johnson Veto Message to Senate).

31. CONG. GLOBE, 39th Cong., 1st Sess. App. 82 (1867) (statement of Rep. Miller); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Howard) (stating that the Fourteenth Amendment was drafted and introduced because the Joint Committee "desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin, who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters"); *id.* at 504 (statement of Sen. Johnson) (connecting the purpose of the Civil Rights Bill with that of overturning *Dred Scott*, and arguing that a constitutional amendment would be needed to accomplish this).

the immigration statuses of the U.S.-born child's parents.[32] They insist that children born to alien parents are "subject to the jurisdiction" of the United States because, like children born to citizen parents, they must obey U.S. law, pays taxes on income earned in the U.S., and can be removed from their homes by government officials.[33] In support of this, some legal commentators argue that the Fourteenth Amendment drew on pre-existing legal terminology when drafting the Citizenship Clause, and that antebellum discourse and legal sources routinely demonstrate that the term "jurisdiction" originally meant mere "sovereign authority."[34] In other words, these proponents assert that to be "subject to the jurisdiction" of the United States is a very barebones requirement, dependent upon such factors as whether the individual is, in that moment, subject to certain U.S. laws or taxes, or otherwise liable to the United States' sovereign authority in any basic sense such that the United States government can lawfully exert control over the individual.

This construal of the Citizenship Clause's jurisdictional element is fundamentally flawed not only because it violates the interpretative rule against redundancy—virtually every individual present on U.S. soil is in some way subject to the basic level of sovereign authority the United States government exerts over its geographical territory, including individuals whose exclusion from birthright citizenship is uncontested[35]—but also because it

32. *See Testimony of J. Richard Cohen, President of the Southern Poverty Law Center, Before the Subcommittee on Immigration and Border Security, Committee. on the Judiciary, U.S. H. of Reps.*, 114th Cong., 1st Sess. 2–3 (Apr. 29, 2015), https://perma.cc/TE8Z-ZJ9T (arguing that the Citizenship Clause does not respect the immigration statuses of the parents of children born in the U.S.).

33. *See* James C. Ho, *Defining "American,"* 9 GREEN BAG 367, 368–69 (2006) (arguing that one who is "subject to the authority of the U.S. government" is "subject to the jurisdiction" of the U.S.); Elizabeth Wydra, *Birthright Citizenship: A Constitutional Guarantee*, AM. CONST. SOC'Y FOR L. & POL'Y (May 2009), at 1,3 https://perma.cc/67YD-EYNX (arguing that "if undocumented aliens or their children commit a crime in the United States, they can be and are punished under U.S. law: they are subject to the jurisdiction of the United States").

34. *See* Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 725–29 (2012) (marshalling evidence from antebellum legal commentators and members of Congress to show that the drafters of the Citizenship Clause equated "jurisdiction" with "sovereign authority").

35. Given that modern international law largely rejects the theory of extraterritoriality, it is even more so the case today that no one physically present in the United States is completely outside the scope of its sovereign power, including ambassadors and their children, who are universally agreed to be not "subject to the jurisdiction" of the United States for purposes of birthright citizenship. While ambassadors and their families certainly enjoy special privileges, the U.S. State Department makes clear that these privileges are neither absolute nor necessarily all-encompassing. *See generally* OFFICE OF FOREIGN

fails to account for the very clear understanding the Amendment's framers and ratifiers had of the two different degrees to which a person could be subject to a country's jurisdiction. The first degree of subjection to a country's jurisdiction was, indeed, correlated with subjection to the country's mere sovereign authority, and it should not be the least bit unusual to find that United States courts most typically referred to this most basic level of jurisdiction. But it is clear that the men who drafted and passed the Citizenship Clause also recognized a second degree of subjection to a country's jurisdiction—a subjection to its "complete" jurisdiction in ways more closely associated with the rights, duties, and deeply rooted natural allegiance inherent to long-term residence in, and meaningful interaction with, a particular society.

MISSIONS, DEP'T OF STATE, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 7–8, https://perma.cc/V9ZA-UTZR [hereinafter DIPLOMATIC AND CONSULAR IMMUNITY]. Ambassadors, diplomats, and their families can be issued traffic citations, and while payment of fines cannot be compelled, these individuals can have their driving privileges revoked. *Id.* at 26–27. Officers who stop them for DUIs are instructed that they "should not permit the individual to continue to drive" even if he or she cannot be criminally prosecuted. *Id.* at 26. Many, but not all, ambassadors and diplomats receive exemptions from various federal and state taxes, but these exemptions do not apply to internet and mail-order purchases, are based on reciprocity agreements with the foreign government, and may be revoked for abuse. *Sales Tax Exemption*, U.S. DEP'T ST.: DIPLOMATIC TAX EXEMPTIONS, https://perma.cc/AV27-3XED. Although ambassadors and other high-ranking diplomats with absolute immunity may not be criminally prosecuted, they may be expelled from the United States. DIPLOMATIC AND CONSULAR IMMUNITY, *supra* note 35, at 7, 10. Nor are they entirely outside the basic jurisdiction of U.S. courts—they may be sued in U.S. civil court

> (a) in connection with real property transactions not conducted on behalf of the mission; (b) in connection with any role they may play as executor for or heir to an estate being distributed in the host country; (c) in connection with the performance of professional or commercial activities outside the scope of their official duties; or (d) in respect of counterclaims on the same subject matter when they have been the initiating party in a suit.

Id. at 8. Even their "absolute immunity" is not a perpetual benefit for acts outside the scope of their official duties, as "criminal immunity expires upon the termination of the diplomatic or consular tour of the individual enjoying immunity. Therefore, obtaining an indictment, information, or arrest warrant could lay the basis for a prosecution at a later date." *Id.* at 23. Finally, the debates and early commentators lump together ambassadors, consuls, and foreign ministers as clearly excluded from birthright citizenship, but the doctrine of diplomatic immunity today applies very differently to these different classes of foreign nationals. Consuls may be arrested and detained for felonies outside the scope of their official acts, and their families enjoy no personal inviolability or jurisdictional immunity. *Id.* at 11–12. Their own type of immunity—"official acts immunity"—is not even a prima facie bar to the exercise of jurisdiction by U.S. courts, but is an affirmative defense to be raised in a U.S. court with presumed subject matter jurisdiction over the crime. *Id.* at 11. If birthright citizenship applies to all individuals subject to the most basic level of U.S. jurisdiction, then quite literally everyone born on American soil is arguably a citizen, and the jurisdictional clause is redundant, contrary to the very clear intentions and original understandings of its framers and ratifiers.

This understanding of a "complete" jurisdiction and allegiance, as opposed to a lesser degree of jurisdiction and allegiance, is evident throughout the debates over the language defining citizenship in both the Civil Rights Act and the Fourteenth Amendment. Congress explicitly considered this distinction and intentionally framed the language of citizenship in a way it that contemporary legal scholars understood as referencing only the higher, complete level of jurisdiction.

This intentional consideration is present from the very beginning. The Civil Rights Act underwent several major revisions concerning its definition of citizenship.[36] Senator Lyman Trumbull, the Chairman of the Committee of the Judiciary and primary drafter of the Act's citizenship language, recalled for his fellow senators the development of what would become the Act's final wording:

> [Senator John Henderson] from Missouri and myself desire to arrive at the same point precisely, and that is to make citizens of everybody born in the United States who owe allegiance to the United States. We cannot make a citizen of the child of a foreign minister who is temporarily residing here. There is a difficulty in

36. Senator Trumbull's initial proposal introducing a citizenship-defining clause utilized language underscoring the bill's primary purpose of protecting the rights of the freed slaves: "That all persons of African descent born in the United States are hereby declared to be citizens of the United States . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866). Almost immediately after debate on the language began, and perhaps as a consequence of Senator Van Winkle's noting that he would submit to the American people the question of citizenship for both the African race and "the races on the Pacific coast," Senator Trumbull withdrew the more restrictive language in favor of broader language: "All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color . . . ." *Id.* at 498. Later, Senator Lane (R-KS) proposed language more specifically excluding tribal Indians, so that the bill would read: "All persons born in the United States, and not subject to any foreign Power or tribal authority, are hereby declared to be citizens of the United States" without distinction of color. *Id.* at 504. When debate resumed the next day, Mr. Lane proposed a different version of that same language that he felt more adequately clarified the noncitizen status of Indians under the specific legal framework of Kansas: "All persons born in the United States, and not subject to any foreign Power, and Indians holding lands in severalty by allotment, are hereby declared to be citizens of the United States," without distinction of color. *Id.* at 522. Senator Ramsey proposed amending the language to "or Indians not admitted to citizenship by the laws of any of the States" in order to accommodate various state frameworks and concerns. *Id.* at 527. Senator Trumbull, also attempting to accommodate various state concerns, then proposed "all persons born in the United States, and not subject to any foreign Power (excluding Indians not taxed[]) are hereby declared to be citizens of the United States, without distinction of color." *Id.* at 527. Finally, the Senate's proposed language regarding "distinction of color" was removed during the process of reconciling proposed language from the House of Representatives, so that the final language read: "All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." *Id.* at 1413.

> framing the amendment [concerning the Act's citizenship clause] so as to make citizens of all the people born in the United States and who owe allegiance to it. I thought that might perhaps be the best form in which to put the [Act's citizenship clause] at one time, "That all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;" but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens, and that that form would not answer.
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> Then it was suggested that we should make citizens of all persons born in the United States not subject to any foreign Power or tribal authority. The objection to that was, that there were Indians not subject to tribal authority who yet were wild and untamed in their habits, who had by some means or other become separated from their tribes and were not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction . . . .
>
> Then it was proposed to adopt the amendment as it now stands, that all persons born in the United States not subject to any foreign Power, excluding Indians not taxed, shall be citizens. What does that phrase "excluding Indians not taxed" mean? . . . It is a constitutional term used by the men who made the Constitution itself to designate, what? To designate a class of persons who were not a part of our population . . . . They are not regarded as a part of our people. The term "Indians not taxed" means Indians not counted in our enumeration of the people of the United States.[37]

37. CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Sen. Trumbull). The fact that Trumbull and others did not immediately recognize the implications of using language that might invoke the common law's *jus soli* is evidence that *jus soli* was not roundly accepted as the quintessential "American" doctrine of citizenship. This is not surprising, given that almost all state constitutions at the time were explicitly based on compact theory, and that state and federal courts often viewed citizenship in light of bonds to a particular community. *See, e.g.*, Risewick v. Davis, 19 Md. 82, 83 (Md. 1862) ("The meaning of the word 'citizen,' in the Act of 1795, ch. 56, is synonymous with '*inhabitant or permanent resident*;' all such are alike entitled to the most enlarged remedial process and protection from summary proceedings, whether native or adopted citizens . . . . If 'residing and doing business in the State' constitute a defendant, at the time he absconds, a citizen in contemplation of our attachment laws, *not* residing and *not* doing business in the State at the time of issuing the attachment, would necessarily bring the defendant within the opposite class of persons described in the Act of 1795 . . . as not being citizens of this State . . . ."); Thomasson v. State, 15 Ind. 449, 451 (Ind. 1860) (referring not to English common law but to Roman Law in analyzing citizenship in the state of Indiana); Campbell v. Wallace, 12 N.H. 362, 371 (N.H. 1841) (holding that there was no evidence that a child's father was an alien at the time of the child's birth, rather than relying on the common law to say simply that the child was born in the United States), Further, the mid- and late-nineteenth century saw a mix of views with respect to how deeply imbedded the common

Senator Trumbull's summary of the Civil Rights Act's citizenship language accurately depicts the changes as directly reflecting an intent to exclude from U.S. citizenship not just the children of foreign ministers but also other "persons temporarily resident" in the United States from whom "a sort of allegiance was due to the country," as well as a particular subset of Indians who had, similarly to temporarily residing foreigners, never been considered as a part of the American people.

The distinction between "a sort of allegiance" due to the United States by temporary residents and a full allegiance owed by permanent residents did not diminish during the effort to constitutionalize the provisions of the Civil Rights Act. Early in the discussions over the scope of the Fourteenth Amendment's Citizenship Clause, Senator Edgar Cowan (D-Penn) reflected on the differing jurisdictional positions between temporary sojourners in America—who would be afforded basic protections under the proposed Amendment's Equal Protection Clause—and the jurisdictional position of citizens, who no one can doubt are subject to the fullest degree of a nation's jurisdiction. Senator Cowan vehemently disagreed with the idea that individuals of Chinese or Roma descent should have the full extent of protection for their civil rights or that their children should be treated as citizens.[38] It is telling, however, that his objection is based entirely upon the race of the parent, and not upon a distinction between levels of allegiance owed to the United States. In fact, he distinguishes these non-white groups from temporary sojourners, and his opposition to the treatment of non-whites as citizens presumes that the non-white individuals are not themselves temporary sojourners:

> Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? Is so, what rights have they? *Have they any more rights than a sojourner in the United States*? If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to murder another man. You cannot commit an assault and battery on him,

law was or was not in the American judicial system. This is evident even in the debates, where various Senators explicitly rely on the Constitution's lack of common law incorporation to insist that the freed slaves were not ipso facto citizens as a result of birth on U.S. soil.

38. CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866) (statement of Sen. Cowan).

> I apprehend. He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word.[39]

In other words, Senator Cowan's argument assumes that the Chinese and Roma immigrants are present in the United States in the same permanent capacity as the European immigrants unquestionably subject to the complete jurisdiction of the United States, but, he believed, that they should not be citizens entirely because they are of Chinese and Roma descent. Senator John Conness (R-CA) immediately (and rightly) defended the Fourteenth Amendment's not making such race-based distinctions and further rebuked Cowan for overexaggerating the "problem" of Chinese immigration.[40] This response—that citizenship would not be withheld from similarly situated immigrants on the basis of race—in no way contradicts the simultaneous view that the Amendment, like the civil rights bill it was to constitutionalize, made distinctions on the basis of complete and incomplete allegiance owed to the United States.

Cowan's concerns were generally ignored as bombastic, and the debate progressed to the more pressing topic of excluding tribal Indians. But far from being pushed aside or corrected, his distinction between degrees of jurisdiction was regularly acknowledged and confirmed. Senator Jacob Howard (R-Mich.), who originally proposed the addition of a jurisdictional element to the Citizenship Clause and spent much of the relevant debate defending the adequacy of its language for purposes of constitutionalizing the Civil Rights Act, soon clarified and endorsed Cowan's intertwining of "complete jurisdiction" with the concept of citizenship:

39. *Id.* at 2890 (emphasis added).

40. *Id.* at 2891–92 (statement of Sen. Conness) ("If my friend from Pennsylvania, who professes to know all about Gypsies and little about Chinese, knew as much of the Chinese and their habits as he professes to do of the Gypsies, . . . he would not be alarmed in our behalf because of the operation of . . . the proposition contained in the civil rights bill, so far as it involves the Chinese and us . . . . But in their habits otherwise, they are a docile, industrious people, and they are now passing from mining into other branches of industry and labor . . . . They are [in these other branches of industry and labor] found to be very valuable laborers, patient and effective . . . . But why all this talk about Gypsies and Chinese? I have lived in the United States for now many a year, and really I have heard more about Gypsies within the last two or three months than I have heard before in my life. It cannot be because they have increased so much of late. It cannot be because they have been felt to be particularly oppressive in this or that locality. It must be that the Gypsy element is to be added to our political agitation, so that hereafter the negro alone shall not claim our entire attention.").

> I concur entirely with the honorable Senator from Illinois, in holding that the word "jurisdiction," as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.[41]

The acceptance of differing levels of allegiance and jurisdiction would continue to be reflected in the debate surrounding Congress's major concern with the Citizenship Clause: whether the language of "subject to the jurisdiction thereof" adequately and clearly excluded from citizenship Native Americans living on tribal lands and maintaining tribal ties. All the Senators with recorded statements on the matter agreed that the intent of the Amendment was to exclude such Indians, but a few Senators raised serious concerns that Senator Howard's language was so broad as to incidentally include them anyway. For example, Senator James R. Doolittle (R-WI) noted that most of the Indians living on reservations were fed and for all practical purposes controlled by the United States Army at the cost of over $1 million a year to the U.S. government, making them "subject to the jurisdiction of the United States" and therefore citizens under the language as it stood.[42] He and others proposed incorporating into the Amendment the language from the Civil Rights Act explicitly excluding from citizenship "Indians not taxed."[43]

At this, Senator William Fessenden (R-ME), chairman of the Joint Committee for Reconstruction, suggested that Senator Trumbull, as Chairman of the Committee on the Judiciary, "who has investigated the civil rights bill so thoroughly," explain his and the committee's view as to whether tribal Indians were "subject to the jurisdiction" of the United States.[44] Trumbull dismissed Doolittle's concerns, stating that the language meant "subject to

41. *Id.* at 2895 (statement of Sen. Howard).

42. *Id.* at 2892 (statement of Sen. Doolittle); *see also id.* at 2893–94 (statement of Sen. Johnson) (advocating in favor of Senator Doolittle's proposed addition of the words "excluding Indians not taxed" because several Senators maintained that without this language, the amendment's exclusion of tribal Indians is unclear).

43. *Id.* at 2890 (statement of Sen. Doolittle) ("I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians. I move, therefore, to amend the amendment—I presume he will have no objection to it—by inserting after the word 'thereof' the words 'excluding Indians not taxed.'"); *id.* at 2893–94 (statement of Sen. Johnson).

44. *Id.* at 2893 (statement of Sen. Fessenden).

the complete jurisdiction thereof" and that "[i]t cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States.'"[45]

As the Senate concluded debate on the Citizenship Clause, Senator George Henry Williams (R-OR), also a member of the Joint Committee on Reconstruction, similarly adopted and explained the view that the Amendment distinguished between complete and incomplete jurisdiction, and therefore already excluded Indians with tribal ties. In so doing, Senator Williams directly contradicts modern assertions that the Citizenship Clause's jurisdictional element only requires a most basic level of subjection to sovereign authority:

> In one sense, all persons born within the geographical limits of the United States are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense. Take the child of an ambassador. In one sense, that child born in the United States is subject to the jurisdiction of the United States, because if that child commits the crime of murder, or commits any other crime against the laws of the country, to a certain extent he is subject to the jurisdiction of the United States, but not in every respect;[46] and so with these Indians. All persons living within a judicial district may be said, in one sense, to be subject to the jurisdiction of the court in that district, but they are not in every sense subject to the jurisdiction of the court until they are brought, by proper process, within the reach of the power of the court. I understand the words here, "subject to the jurisdiction of the United States," to mean fully and completely subject to the jurisdiction of the United States.[47]

In short, the theme throughout the debates was not whether there existed a distinction between complete and partial subjection to United States jurisdiction, but rather whether the distinction was clear and specific enough to exclude from birthright citizenship those Native Americans who, though born in the geographical boundaries of the United States, were not

45. *Id.* (statement of Sen. Trumbull).

46. It is actually highly unlikely that the child would have been prosecuted under U.S. law, but not impossible. Regardless, the fact that Senator Williams erroneously believes children of ambassadors were not completely exempt from criminal jurisdiction in the same way as the ambassador is helpful for understanding his view of differing levels of jurisdiction.

47. *Id.* at 2897 (statement of Sen. Williams).

completely subject to its jurisdiction by virtue of their relation to another sovereign. It was manifestly clear to the members of Congress that one could be "subject to the jurisdiction" of the United States in the most basic sense without being subject to the complete jurisdiction of the United States for purposes of birthright citizenship. While the focus was certainly on the application of this distinction to tribal Indians, it was not limited to them, either.

3. Subject to Complete Jurisdiction as a Lack of Foreign Allegiance

But what does it mean, precisely, to be subject to the complete jurisdiction of the United States and not merely subject to its sovereign authority? The answer to this question is also found in the congressional debates on the Amendment, and it is further implied by the context under which the Amendment was passed. The purpose of the Amendment was to constitutionalize the provisions of the Civil Rights Act, and it is therefore instructive to understand what this same Congress understood about the Act's definition of "not subject to any foreign power," and its relationship to the later Amendment's language of "subject to the jurisdiction" of the United States. The logical conclusion is that Congress understood the phrases as two sides of the same coin, effectively meaning the same thing. Under the Civil Rights Act, those subject to foreign powers were not subject to the complete jurisdiction of the United States under the Amendment, while those subject to the complete jurisdiction of the United States under the Amendment were not subject to any foreign powers under the Civil Rights Act.

Recall again Senator Trumbull's explanation for how and why the language in the Civil Rights Act developed.[48] Its drafters specifically intended to withhold birthright citizenship from those who did not owe a complete, permanent allegiance to the United States and who were not part of the "American people." They understood this category of persons to include Native Americans maintaining tribal allegiances, as well as other individuals whose allegiance to the United States was transient or otherwise limited, like "those temporarily resident" in the country. It is also clear that they understood the newly freed slaves as fundamentally distinct

48. *See supra* note 37 and accompanying text.

in this respect from both tribal Indians and transient aliens. As Rep. John Broomall (R-Penn.) explained in his introduction of the final version of the Civil Rights Act to the House of Representatives, unlike the temporary sojourner and the Native American, the allegiance of the freedmen could not be owed to any government other than that of the United States:

> The first provision of the bill declares that all persons born in the United States and not subject to any foreign Power are citizens of the United States . . . . What is a citizen but a human being who by reason of his being born within the jurisdiction of a Government owes allegiance to that Government? . . . The objection to this part of the bill is that it calls the negro a citizen. And why should it not? Civilized man must of necessity be a citizen somewhere. He must owe allegiance to some Government. There is some spot upon the earth's surface upon which it is possible for him to commit treason. Now, the negro in America is civilized, . . . and of necessity must owe allegiance somewhere. And until the opponents of this measure can point to the foreign Power to which he is subject, the African potentate to whom after five generations of absence he still owes allegiance, I will assume him to be, what the bill calls him, a citizen of the country in which he was born.[49]

Broomall's last few sentences in particular clarify that he presumes the descendants of African slaves to be U.S. citizens only because their allegiance to the United States government is not complicated by an allegiance simultaneously owed to another foreign power. Unlike the tribal Indian who owes partial allegiance to his quasi-foreign tribal government, and unlike the temporary sojourner who has not taken steps to formally break the ties of complete allegiance to the country of his lawful permanent residence, the freed slave had but one natural allegiance—the United States, under whose sovereign power and protection he was born and permanently resident. It could not logically belong elsewhere.

Senator Trumbull's summary of the Civil Rights Act for President Johnson offers another insight into the meaning of complete jurisdiction and allegiance—the importance of domicile as a determining factor. As he explained to the President, the Civil Rights Act "declares 'all persons' born of parents domiciled in the United States . . . to be citizens of the

49. CONG. GLOBE, 39th Cong., 1st Sess. 1262 (1866) (statement of Sen. Broomall).

United States."[50] His paraphrase is consistent with the debates leading up to the bill's passage and the purpose of excluding from citizenship the U.S.-born children of temporary sojourners, who are presumed to be still meaningfully subject to the government of the country to which their parents intended to return.[51]

Then, too, there is the well-documented understanding of citizenship by Rep. John Bingham (R-OH), who is often called "the father of the 14th Amendment" because of his great involvement in its drafting.[52] Consider Bingham's discussion of constitutional citizenship during the drafting of Oregon's 1857 state constitution:

> Who are the citizens of the United States? Sir, they are those, and those only, who owe allegiance to the Government of the United States; not the base [perpetual] allegiance imposed upon the Saxon by the Conqueror, which required him to meditate in solitude and darkness at the sound of the curfew; but the allegiance which requires the citizen not only to obey, but to support and defend, if need be with his life, the Constitution of his country. All free persons born and domiciled within the jurisdiction of the United States, are citizens of the United States from birth . . . .[53]

His understanding of allegiance and domicile as part and parcel with citizenship was documented again in 1862, during debates over emancipation within the District of Columbia:

> Who are *natural-born citizens* but those born within the Republic? Those born within the Republic, whether black or white, are citizens by birth—natural-born citizens . . . . [A]ll other persons born within the Republic, of parents owing allegiance to no other sovereignty, are natural-born citizens.[54]

50. Letter from Sen. Lyman Trumbull to President Andrew Johnson, *in* ANDREW JOHNSON PAPERS, Reel 45, Manuscript Div., Library of Congress, Washington, D.C, Doc. No. 28152.

51. *See also* Justin Lollman, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 VA. L. REV. 455, 471–76 (2015) (detailing evidence that the Civil Rights Act of 1866 was understood to require parental domicile for birthright citizenship for the purpose of precluding birthright citizenship for those born to temporary sojourners, and arguing, that this understanding, though not universally shared, informed the meaning of the Citizenship Clause of the Fourteenth Amendment).

52. *See* Gerard N. Magliocca, *The Father of the 14th Amendment*, N.Y. TIMES: OPINIONATOR (Sept. 17, 2013, 12:29 PM), https://perma.cc/A9TJ-HQ88 (describing Bingham's role in drafting the Fourteenth Amendment); MICHAEL KENT CURTIS, FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE" 361 (2000) (stating that Supreme Court Justice Jugo Black called Bingham "the father of the application of the Bill of Rights to the states" and "the James Madison of the Fourteenth Amendment").

53. CONG. GLOBE, 35th Cong., 2nd Sess. 983 (1859) (statement of Rep. Bingham).

54. CONG. GLOBE, 37th Cong., 2nd Sess. 1639 (1862) (statement of Rep. Bingham).

While the legislative record does not indicate that Bingham specifically or explicitly understood the Fourteenth Amendment's language regarding citizenship to encompass more than mere birth on United States soil, the weight of the evidence is that this was his personal view on constitutional citizenship even prior to the drafting of the Amendment. There are no indications that the Amendment he worked so hard to draft represented a completely different view of birthright citizenship than the one he had so long espoused.

The Fourteenth Amendment was intended, consistent with the Civil Rights Act it constitutionalized, to bestow citizenship upon permanent or long-term residents who did not owe allegiance to another sovereign and were therefore counted as part of the "American people." In defending the Amendment against the effort to include the words "excluding Indians not taxed," which were included in the Act, Senator Howard explained:

> I do not propose to say anything on [the meaning of the amendment] except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion. This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of embassadors [sic] or foreign ministers accredited to the Government of the United States, but will include every other class of persons.[55]

Given that the purpose of the Amendment was to put the protections and rights afforded in the Civil Rights Act beyond the easy reach of a subsequent Congress, the "law of the land already" to which Senator Howard refers is none other than the Civil Rights Act itself.[56] This is incredibly damaging to arguments by universal birthright citizenship advocates that Senator Howard's statement was grammatically ambiguous and that he meant merely that the "foreigners" and "aliens" excluded are those "who belong to the families of ambassadors and foreign ministers

55. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

56. CONG. GLOBE, *supra* note 31 (statement of Sen. Howard); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2891 (statement of Sen. Conness) (explaining that the purpose of the amendment was to put into the Constitution the guarantees of the Civil Rights Act).

accredited to the Government of the United States." The Civil Rights Act, as the "law of the land already," excluded not only the children of ambassadors and foreign ministers but also those foreigners who owed only "a sort of allegiance" as a result of their temporary residence in the country. In this light, the only natural reading—and the reading consistent with the rest of the legislative history—is that Senator Howard effectively said: "This will not, of course, include persons in the United States who are foreigners, aliens[, or those] who belong to the families of ambassadors or foreign ministers."

This reading of Senator Howard's comments as indicating that the Fourteenth Amendment, like the Civil Rights Act, excluded aliens still subject to foreign powers is further buttressed by his later clarifications that the Amendment did not confer citizenship on tribal Indians simply because the federal government exercised significant control over many of the reservations. Whatever the extent of jurisdiction exercise over the tribes, it was not "full and complete . . . in extent and quality as applies to every citizen of the United States."[57]

It was not just Senator Howard who tied the jurisdictional element of the Fourteenth Amendment's Citizenship Clause back to the Civil Rights Act's requirement that citizens not be "subject to any foreign power." Senator Reverdy Johnson (D-Md.), for example, explained that the Constitution as originally ratified clearly allowed for the creation of new citizens, but it did not define who was a citizen or how citizenship of the United States could exist except through citizenship of an individual State. But now, he declared:

> [A]ll that this amendment provides is, that all persons born in the United States and *not subject to some foreign Power*—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision. If there are to be citizens of the United States entitled everywhere to the character of citizens of the United States there should be some certain definition of what citizenship is, what has created the character of citizen as between himself and the United States, and the amendment says that citizenship may depend upon birth, and I know of no better way to give rise to citizenship than the fact of birth within the

57. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard).

> territory of the United States, born of parents who at the time *were subject to the authority* of the United States.[58]

In this way, Senator Johnson, like Senator Howard, connected the Civil Rights Act with the Fourteenth Amendment and recognized that they accomplish the exact same goal of excluding from citizenship those individuals who owed permanent allegiance to a sovereign power other than the United States.[59] Those individuals who were subject to a foreign power under the Civil Rights Act were simultaneously not subject to the full and complete jurisdiction of the United States under the Citizenship Clause.

Senator Trumbull employed similar reasoning to confront the argument that additional language was necessary to exclude "Indians not taxed." After explaining that the Amendment bestowed citizenship only on those subject to the complete jurisdiction of the United States, he clarified that being subject to the complete jurisdiction of the United States meant "[n]ot owing allegiance to anybody else."[60] Because tribal Indians owed a partial allegiance to their tribes, which were considered as quasi-foreign powers, they were not subject to complete jurisdiction of the United States and were therefore not citizens under the Fourteenth Amendment.[61]

The connection between the Civil Rights Act and the Fourteenth Amendment also helps make sense of Senator Conness's rebuke of Senator Cowan for his series of questions about whether the U.S.-born children of Chinese immigrants and Gypsies could possibly be considered citizens. Senator Conness described his position on the Amendment thusly:

> The proposition before us, I will say, Mr. President, relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. *We have declared that by law*; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so.[62]

58. *Id.* at 2893 (statement of Sen. Johnson) (emphasis added).

59. It is also evident that Senator Johnson disagreed with the majority of his fellow senators as to whether tribal Indians were "subject to the jurisdiction" of the United States. Insofar as he argued that being "within the jurisdiction" of the United States was necessarily the same as being "subject to the jurisdiction" of the United States, his interpretation failed to win the day, and the measure to include additional language to that effect was defeated.

60. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull).

61. *Id.* ("It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States.'").

62. *Id.* at 2891 (statement of Sen. Conness) (emphasis added).

Senator Conness plainly invoked the Civil Rights Act as that which they had "declared by law" and were incorporating into the Constitution itself. The constitutional provision stating that those born in the United States and subject to its jurisdiction were citizens was already the law by and through the statutory provision providing that those born in the United States and not subject to any foreign power were citizens. In other words, the U.S.-born children of Chinese immigrants and Gypsies were subject to the complete jurisdiction of the United States because they were already considered as not being subject to any foreign power. The Senator's understanding of the context into which these children were born is of fundamental importance and informs his reasoning for this conclusion—he characterized the Chinese immigrants as generally having no intention of abandoning their allegiance to China or permanently residing in the United States.[63] Those immigrants who did bring their wives and children, then, were not merely temporary sojourners, but rather presumably intended to stay in the country on a long-term or permanent basis and subject themselves and their children to complete U.S. jurisdiction. These children of permanent-resident aliens already fit into the category of citizens envisioned by the Civil Rights Act, and no one would have doubted this reality had they instead been of European descent.

There is one more dilemma regarding the language of the Citizenship Clause which must be addressed—if the Fourteenth Amendment was meant to reiterate the protections of the Civil Rights Act, why did Congress not simply restate the Act's definition of citizenship? Or, as some commentators have posited, if Congress intended "subject to the jurisdiction" to mean something more akin to "owing permanent, undivided

63. *Id.* ("The habits of [Chinese immigrants], and their religion, appear to demand that they all return to their own country at some time or other, either alive or dead. There are, perhaps, in California today about forty thousand Chinese—from forty to forty-five thousand. Those persons return invariably, while others take their places, and, as I before observed, if they do not return alive their bones are carefully gathered up and sent back to the Flowery Land . . . . Another feature connected with them is, that they do not bring their females to our country but in very limited numbers, and rarely ever in connection with families; so that their progeny in California is very small indeed. From the description we have had from the honorable Senator from Pennsylvania of the Gypsies, the progeny of all Mongolians in California is not so formidable in numbers as that of the Gypsies in Pennsylvania. We are not troubled with them at all. Indeed, it is only in exceptional cases that they have children in our State; and therefore the alarming aspect of the application of this provision to California, or any other land to which the Chinese may come as immigrants, is simply a fiction in the brain of persons who deprecate it, and that alone.").

allegiance," why did it not revise the language accordingly?[64] While these questions might initially raise concerns, they are easily answered by a review of the broader context.

The difference in the language can be explained, in large part, by the heated debate over how best to ensure that Native Americans with tribal relations were excluded from citizenship. Senators routinely pointed out, both for the Civil Rights Act and the Fourteenth Amendment, that there were possible problems with using either "not subject to any foreign power" or "Indians not taxed" as the phrase for Indian exclusion. First, the Indian tribes were not technically "foreign powers," even though the federal government often treated them as quasi-foreign powers, and there were also Indians who were subject neither to the authority of a recognized tribe or to the United States.[65] A similar argument about the breadth of "Indians not taxed" was raised alongside concerns that this could reasonably be interpreted as excluding from citizenship poor Indians who had cut tribal ties but were not subject to any sort of property or wealth tax, while incidentally including tribal Indians who may, for whatever reason, be subjected to a state or federal tax.[66] The confusion over whether

64. *See, e.g.*, Yoo, *supra* note 12 (asserting that the drafting history of the Fourteenth Amendment supports universal birthright citizenship because the same Congress that drafted the language of the Civil Rights Act of 1866 declined to use it again for the Amendment, and "[i]f the 14th Amendment's drafters had wanted 'jurisdiction' to exclude children of aliens, they easily could have required citizenship only for those with no 'allegiance to a foreign power'").

65. *See* CONG. GLOBE, 39th Cong., 1st Sess. 506 (1866) (statement of Sen. Johnson) (noting that the Indian tribes "have no sovereign power whatever; they are not a nation in the general acceptation of that term," and therefore the Indians would be citizens since they really weren't subject to any other real government); *id.* at 526 (statement of Sen. Conness) (explaining cases such as the "Digger Indians," who were cut off from all connections to their tribes but placed on public reservations).

66. *See id.* at 571 (statement of Sen. Henderson) ("The Senator will understand me as objecting to the amendment [regarding the citizenship language of the Civil Rights Act excluding "Indians not taxed"] as it now stands. An individual of the Caucasian race, whether he pays a tax in a State or not, is undoubtedly regarded as a citizen of the United States. Why make it obligatory upon the Indian, owing no allegiance to any tribal authority, to pay a tax before he can be regarded as a citizen of the United States?"); *id.* at 2894 (statement of Sen. Trumbull) ("But the Senator wants to insert [into the Fourteenth Amendment] the words, 'excluding Indians not taxed.' I am not willing to make citizenship in this country depend on taxation. I am not willing, if the Senator from Wisconsin is, that the rich Indian residing in the State of New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen."); *id.* at 2895 (statement of Sen. Howard) ("I hope, sir, that [the proposal to insert 'excluding Indians not taxed' into the Fourteenth Amendment] will not be adopted . . . . [A]ll that would remain to be done on the part of any State would be to impose a tax upon the Indians, whether in their tribal condition or otherwise, in order to make them citizens of the United States. Does the honorable Senator from Wisconsin contemplate that? . . . That would be the direct effect of his amendment if it should be adopted. It would, in short, be a naturalization, whenever

the language of the previous Act was the clearest way of excluding tribal Indians was significant enough that measures to reintroduce it into the Amendment failed. In the end, Senator Howard's proposed language of "subject to the jurisdiction thereof" survived under the general consensus that it provided an adequately clear bar for citizenship on the basis of undivided, complete allegiance to the United States government—a bar they understood as excluding both those who owed allegiance to a foreign power and Indians who owed allegiance to tribal governments.[67]

Why, then, not simply use the term "allegiance" instead of "jurisdiction?" Recall, once again, Senator Trumbull's statements on the history of the language of the Civil Rights Act.[68] The use of the term "allegiance" was considered and explicitly rejected because it could have been construed under the English common law as including all those owing "a sort of allegiance," such as temporary sojourners and Indians born within the sovereign dominions of the United States. Under the English common law, "allegiance" was a term of art, and its meaning—as will be discussed in-depth below—was incompatible with the consent-based allegiance understood by the founding generation and envisioned by the Reconstruction Congress as the basis of citizenship. An adequate republican substitute for the feudal concept of "allegiance" was that of "jurisdiction," particularly in the sense intended by Congress: complete subjection to jurisdiction that defines those who are part of the "American people," as opposed to those who are temporary residents or otherwise partially subject to the jurisdiction of another sovereign in a meaningful way.

Finally, and perhaps most importantly, the Civil Rights Act continued to operate as a valid federal law for the next seventy years, codified under section 1992 of the Revised Statutes of the

the States saw fit to impose a tax upon the Indians, of the whole Indian race within the limits of the States.").

67. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull) ("Therefore I think it better to avoid these words and that the language proposed in this constitutional amendment is better than the language in the civil rights bill. The object to be arrived at is the same. I have already replied to the suggestion as to the Indians being subject to our jurisdiction. They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States . . . ."); *id.* at 2895 (statement of Sen. Howard) ("I hope, sir, that this amendment [to insert language regarding "Indians not taxed"] will not be adopted. I regard the language of the section as sufficiently certain and definite.").

68. *See supra* note 37 and accompanying text.

United States, a precursor to the U.S. Code.[69] It was not redacted, stricken, or repealed in various editions of the codified federal law, meaning that the United States effectively had two definitions of "citizenship"—one statutory and one constitutional—coexisting in the same legal framework. As evidenced below, both courts and scholars presumed that these two definitions expressed, if not identical meanings, then certainly compatible or complementary ones. This significantly strengthens the argument that the Civil Rights Act and the Fourteenth Amendment were understood primarily as accomplishing the same purpose, and that those who are "subject to the jurisdiction" of the United States were understood as "not being subject to any foreign power."

C. Contemporary Legal Scholars Indicate Clear Limitations on Birthright Citizenship.

Contemporary legal scholars are often looked to in order to discern a legal text's original public meaning, especially when there is a wide consensus among them as to the text's meaning. A review of legal scholarship in the decades following the ratification of the Fourteenth Amendment provides ample support for the argument that the Citizenship Clause was originally understood, not just by Congress but also by the preeminent legal minds of the day, as referencing a "complete" jurisdiction that would exclude from birthright citizenship a far broader class of aliens than just the foreign ambassadors and ministers of the common law.

Renowned constitutional expositor Thomas Cooley, in his 1880 treatise *The General Principles of Constitutional Law in the United States,* described the importance of the Fourteenth Amendment in terms of its connection "with the earnest and violent controversy which for more than ten years previous to its adoption had agitated the country respecting the status of colored persons."[70] He then explained how the Amendment functioned to correct the decision in *Dred Scott* and wrote regarding the acquisition of citizenship:

69. REVISED STATUTES OF THE UNITED STATES, Tit. 25, § 1992. Section 1992 was repealed by the Nationality Act of 1940, which replaced the original statutory language with a definition nearly mirroring that of the Citizenship Clause. Nationality Act of 1940, Pub. L. No. 76-853, § 201(a), 54 Stat. 1137, 1138. *See also* Andrew Winston, *The Revised Statutes of the United States: Predecessor to the U.S. Code,* LIBRARY CONGRESS (July 2, 2015), https://perma.cc/5QPB-4E6F.

70. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 241 (1880).

> The fourteenth amendment indicates the two methods in which one may become a citizen: *first*, by birth in the United States; and *second*, by naturalization therein. But a citizen by birth must not only be born within the United States, but he must also be subject to the jurisdiction thereof; and by this is meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government. The aboriginal inhabitants of the country may be said to be in this anomalous condition, so long as they preserve their tribal relations and recognize the headship of their chiefs, even when they reside within a State or an organized Territory, and owe a qualified allegiance to the government of the United States. It would obviously be inconsistent with the semi-independent character of such a tribe, and with the obedience yielded by them to their tribal head, that they should be vested with the complete rights, or, on the other hand, charged with the full responsibilities of citizens. But when the tribal relations are dissolved, or when any individual withdraws and makes himself a member of the civilized community, adopting the habits of its people and subjecting himself fully to the jurisdiction, his right to protection in person, property, and privilege becomes as complete as that of any other native-born inhabitant.[71]

In his 1881 book *Treatise on Citizenship*, Alexander Porter Morse even more clearly referenced the dual nature of "jurisdiction" envisioned by the Congress that ratified the Amendment. Before recognizing, like Cooley, that "the purpose of this section [the Fourteenth Amendment] was to establish the citizenship of the negro,"[72] he explained:

> By the laws of the United States all persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States, and of the state wherein they reside. But the word "jurisdiction" must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of [the Fourteenth Amendment]. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent. Political and military rights and duties do not pertain to them.

71. *Id.* at 242–43.

72. ALEXANDER PORTER MORSE, A TREATISE ON CITIZENSHIP, BY BIRTH AND BY NATURALIZATION, WITH REFERENCE TO THE LAW OF NATIONS, ROMAN CIVIL LAW, LAW OF THE UNITED STATES OF AMERICA, AND THE LAW OF FRANCE 248 (1881).

> Persons born in the United States, who have, according to the laws of a foreign country, become subjects or citizens thereof, must be regarded as aliens .... Under this principle [that children follow the condition of their parents], children of aliens, the accident of whose birth occurs in American soil, and minors commorant in the country, are invested with the national character of the parent.[73]
>
> ....
>
> This section [of the Fourteenth Amendment] does not confer citizenship upon persons of foreign birth. The words "subject to the jurisdiction thereof" exclude the children of foreigners tra[n]siently within the United States, as ministers, consuls, or subjects of a foreign nation. This amendment does not include Indians and others not born in and subject to the jurisdiction of the United States; but an Indian, if taxed, after tribal relations have been abandoned, is a citizen.[74]

Francis Wharton, in his 1881 edition of *A Treatise on the Conflict of Laws*, similarly noted that whether a child was citizen under the Fourteenth Amendment "depends upon the question whether the child at its birth [was] 'subject to the jurisdiction of the United States.'"[75] He further explained, in language similar to that seen in the ratification debates, that the Amendment does not mean subjection to mere sovereign authority:

> In one sense[,] [the child of an alien temporarily in the United States is] undoubtedly [subject to the jurisdiction of the United States] .... All foreigners are bound to a local allegiance to the state in which they sojourn. Yet the term "subject to the jurisdiction," as above used, must be construed in the sense in which the term is used in international law as accepted in the United States as well as in Europe. And by this law the children born abroad of American citizens are regarded as citizens of the United States, with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final. The same conditions apply to children born of foreigners in the United States.[76]

Wharton's analysis was distinct from that of Morse above, and Miller below, in that, while he understood there to be two different types of jurisdiction, he argued that both applied to

73. *Id.* at 237–38.
74. *Id.* at 248.
75. WHARTON, *supra* note 14, at 33–34.
76. *Id.* at 34–35.

make the U.S.-born child of temporarily present aliens a "dual citizen" until he or she reached the age of majority.[77] This "election of allegiance at the age of majority" is a hybrid of both common-law *jus soli*—citizenship by birth on the land alone—and consent-based citizenship theory that did not gain traction or garner much support among either the courts or other scholars.[78] It does, however, serve to repudiate any notion that contemporary legal scholars understood the Fourteenth Amendment to have adopted common-law *jus soli*, which would not accommodate an "election" to allegiance.

Similar reflections on the Citizenship Clause and complete jurisdiction were espoused in 1891 by then-recent Supreme Court Justice Samuel Miller, who observed that the U.S.-born children of aliens temporarily residing in the United States are not born subject to its jurisdiction and are not U.S. citizens.[79] This understanding of the law was also touted in a *Columbia Law Times* article that same year,[80] in an 1896 law review article by then-U.S.

77. *Id.* at 35.

78. *See, e.g.*, Ludlam v. Ludlam, 26 N.Y. 356, 377 (N.Y. 1863) (referencing the right to elect one citizenship and repudiate the other upon reaching the age of maturity); State v. Jackson, 65 A. 657, 661 (Vt. 1907) (stating that a dual citizen made the "required" election at the age of majority of "whether he would conserve the citizenship of the United States of that of Canada"); Perkins v. Elg, 307 U.S. 325, 329 (1939) (noting the American policy of requiring a U.S.-born child of foreign nationals who holds dual citizenship and is taken abroad to "elect[] to retain" U.S. citizenship upon maturity and return to the United States to assume the duties of citizenship, or else forfeit U.S. citizenship); 14 C.J.S. *Citizens* § 21 (2018) (stating that under current law, "[a]n American citizen born in the United States who acquires derivative citizenship in another country by virtue of his or her parentage "need not make an election of American citizenship upon attaining his or her majority in order to retain American citizenship where not required to do so by statute").

79. If a stranger or traveller passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction.

Samuel Freeman Miller, LL.D., Naturalization and Citizenship, *in* LECTURES ON THE CONSTITUTION OF THE UNITED STATES 275, 279 (J. C. Bancroft Davis ed., 1893). As with all contemporary scholars, Miller also notes that the Amendment was intended "to put at rest the question of the civil status of the negro." *Id.* at 278.

80. M. A. Lesser, *Citizenship and Franchise*, 4 COLUM. L. TIMES 145, 146 (1891) (approvingly describing the Court's holding in *Elk v. Wilkins*, 112 U.S. 94 (1884), that "[i]ndians are no more 'born within the United States *and* subject to the jurisdiction thereof,' within the meaning of the [Fourteenth] amendment, than the children of foreign subjects, born while the latter transiently sojourn here, or than the children of ambassadors or other public ministers"). Interestingly, Lesser also points out that foreign-born residents evidencing an intention to remain in the United States and become citizens had long been recognized by many states as deserving of special privileges, including the right to vote. *Id.* at 145–46. This effectively shows that "domicile" is in many ways a telltale sign of whether a person owed—or at least was presumed to believe he or she owed—complete allegiance to the United States. *Id.* at 146 n.3 ("The 'residence' here

Chief Justice of Samoa Henry C. Ide,[81] and then again in 1897 by former U.S. Representative and then-ambassador Boyd Winchester.[82] The significant agreement among contemporary legal scholars is further underscored by the opinions of various Executive Branch officials during this same time, including Secretaries of State. For example, in 1885, Secretary Thomas Bayard analyzed the case of a man born in Ohio to German parents who remained domiciled in Germany and who returned with his parents to Germany when he was only two years old. Secretary Bayard instructed that the man should not be considered a United States citizen:

> Richard Greisser was no doubt born in the United States, but he was on his birth "subject to a foreign power" and "not subject to the jurisdiction of the United States." He was not, therefore, under the statute [act of 1860, R. S. § 1992] and the Constitution [XIVth Amendment] a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship.[83]

Earlier that year, then-Secretary Frederick Frelinghuysen had examined the case of Ludwig Hausding, who had been born in the United States to his German father and who returned with his father to Germany while still an infant. Ludwig's father later returned to the United States and became a naturalized citizen, but Ludwig continued to reside in Germany.[84] Ludwig was denied a U.S. passport under these circumstances because, according to

contemplated is one of permanent character—settled, not transient . . . . In laws prescribing qualifications of electors and of office, says Judge Cooley, 'the words "inhabitant," "citizen," and "resident" . . . mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home.' The term 'is applied exclusively to one who lives in a place and has a fixed and legal settlement . . . . This residence is, however, is to be *bona fide*, and not casual or temporary.'" (second and third alterations in original)).

81. Henry C. Ide, *Citizenship by Birth—Another View*, 30 AM. L. REV. 241, 249 (1896) ("[W]here an alien is actually domiciled in [the United States], . . . his original nationality is so far weakened that our institutions ought not to consent that its inanimate shadow shall rest upon his offspring and deprive them of the inherent rights which are theirs by birth [in the United States].").

82. Boyd Winchester, *Citizenship in its International Relation*, 31 AM. L. REV. 504, 504 (1897) ("[The jurisdictional element of the Citizenship Clause] excludes . . . the children of persons passing through or temporarily residing in this country who have not been naturalized, and who claim to owe no allegiance to the government of the United States, and take their children with them when they leave the country.").

83. Letter from Mr. Bayard, Sec'y of State, to Mr. Winchester, Minister to Switz. (Nov. 28, 1885), *in* 3 JOHN BASSETT MOORE, LL.D., A DIGEST OF INTERNATIONAL LAW § 373, at 280 (1906).

84. Letter from Mr. Frelinghuysen, Sec'y of State, to Mr. Kasson, Minister to Ger. (Jan. 15, 1885), *in* 3 JOHN BASSETT MOORE, LL.D., A DIGEST OF INTERNATIONAL LAW § 373, at 278–79 (1906).

the State Department, his claim for citizenship on the basis of his birth alone was insufficient: "[T]he fact of birth [in the United States], under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute."[85] A similar assessment of the law can be seen even five years later in the 1890 opinion of then-Secretary of the Treasury F.A. Reeve regarding the citizenship of a child born to a would-be immigrant who had not "landed" but was awaiting immigration approval.[86] The child was determined not to be a citizen even though he was clearly born on U.S. soil after the mother had been allowed to disembark the ship and receive treatment at a New York hospital.[87]

That other Secretaries of State may have reached somewhat different conclusions merely underscores the fact that the Executive Branch was given significant leeway—perhaps too much—in interpreting how the Citizenship Clause should be applied to circumstances outside of those most common to claims of natural born citizenship and most clearly associated with the Amendment (i.e., descendants of slaves and citizens). It is hardly surprising that President Chester Arthur, in his 1884 State of the Union Address, called on Congress to "clearly define the status of persons born within the United States subject to a foreign power . . . and of minor children of fathers who have declared their intention to become citizens but have failed to perfect their naturalization."[88] Regardless of Executive Branch uncertainty on the subject, however, it is clear that numerous preeminent legal scholars

85. *Id.* at 279.

86. Letter from F.A. Reeve, Acting Solicitor of the Treasury (Mar. 4, 1980), *in* XI DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 113th Sess., No. 74, 6, 47. The Secretary concluded that the child was not a U.S. citizen, making both the child and his mother qualified for removal from the country. He distinguished this case from that of another immigrant women who:

> had not only actually landed, but had resided in this country a considerable time before her child was born; while in the case under consideration the child was born pending an examination as to whether the mother might be permitted to land, should be deported and returned to the country whence she came.

Id. at 47–48.

87. *Id.* ("I am, therefore, of the opinion that the child in controversy born during the temporary removal of the mother from the importing vessel to a lying-in hospital for her own comfort, pending further examination as to whether she belongs to the prohibited class of immigrants, did not become, by reason of its birth, under such circumstances, an American citizen.").

88. Chester A. Arthur, 21st President of the United States, Fourth Annual Message (Dec. 1, 1884), https://perma.cc/8YTE-RHSR.

understood the Citizenship Clause as excluding a broad class of individuals not subject to the complete jurisdiction of the United States. This significant agreement can be best summarized in the general rule outlined in Wharton's *International Law*—the reasoning which excluded tribal Indians from automatic birthright citizenship arguably "would exclude children born in the United States to foreigners here on transient residence, such children not being by the law of nations 'subject to the jurisdiction of the United States.'"[89]

II. SALVAGING ORIGINAL MEANING FROM SUPREME COURT PRECEDENT

It is one thing to know the intents and understandings of those who drafted and ratified the Citizenship Clause, or to see how early scholars analyzed the phrase "subject to the jurisdiction thereof," but what of the first courts to take up the question of citizenship? They, too, like the scholars and politicians in the decades after ratification, expounded upon the meaning of the Fourteenth Amendment in ways entirely inconsistent with the principles of universal birthright citizenship. Beginning with dicta it later solidified, the Supreme Court itself adopted a premise that certain individuals, though born within the geographic confines of the United States, were not United States citizens because of meaningful allegiance owed to another sovereign. And while the Court would appear to wrongly adopt the principle of *jus soli* as the basis for citizenship, it did so in a manner indicating a definition of *jus soli* not inconsistent with the original meaning of the Citizenship Clause. Further, despite the claims of some advocates of universal birthright citizenship, the Court has not expanded its application of citizenship beyond the confines of this "altered" *jus soli.* Precedent, then, can be easily understood as encompassing nothing more than the original public meaning of the Fourteenth Amendment, with citizenship based on both birth and complete allegiance.

A. Post-Ratification Dicta Limited the Application of Birthright Citizenship

In 1872, just six years after the Fourteenth Amendment's ratification, the Supreme Court gave its first insight into the

89. 2 FRANCIS WHARTON, LL.D., A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, 393–94 (2d ed. 1887).

meaning of the Citizenship Clause, describing its purpose and scope in dicta in the *Slaughter-House Cases*.[90] The *Slaughter-House Cases* at their core did not touch upon the question of citizenship but rather dealt with claims under the Fourteenth Amendment's Equal Protection and Privileges or Immunities Clauses.[91] In upholding a New Orleans statute that butchers claimed denied them the equal protection of the law and abridged their privileges or immunities under the Fourteenth Amendment, however, the Court explored the context of the Amendment's drafting and ratification. In so doing, the Court observed: "That [the Fourteenth Amendment's] main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."[92] This first impression of the meaning of the Citizenship Clause is consistent with the natural reading of the legislative history, which leads to the conclusion that those who are still subject to a foreign power are not subject to the complete jurisdiction of the United States. It also vindicates the construction of Senator Howard's statement as consisting of three distinct categories of excluded individuals, and not just those foreigners who are ambassadors and ministers.

Two years after the *Slaughter-House Cases*, the Court in dicta again cast doubt on the notion that the Fourteenth Amendment mandates birthright citizenship for all U.S.-born children of foreigners simply by virtue of their birth in the United States. In *Minor v. Happersett*,[93] the Court was faced with the question of whether the Privileges or Immunities Clause prohibited States from denying suffrage to women.[94] In determining whether the female plaintiff's privileges or immunities as a citizen of the United States were violated, the Court first examined whether she was, indeed, a citizen. It concluded that she was, explaining that while the "Constitution does not, in words, say who shall be

90. *See* 83 U.S. (16 Wall.) 36, 37 (1873) ("The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race . . . .").

91. For a more in-depth background of the *Slaughter-House Cases*, *see generally* Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1 (1998) (discussing the consequences of the *Slaughter-House* decision on the Fourteenth Amendment).

92. *Slaughter-House Cases*, 83 U.S. at 73.

93. 88 U.S. (21 Wall.) 162 (1874).

94. *Id.* at 165.

natural-born citizens," in the common law familiar to the Amendment's framers "it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also."[95] Birthright citizenship was undoubtedly for the children of those who "were natives, or natural-born citizens, as distinguished from aliens or foreigners."[96] But then, in language that directly undercuts modern conclusions by advocates of universal birthright citizenship, the Court recognized doubts as to the validity of claims by some authorities who would "include as citizens children born within the jurisdiction without reference to the citizenship of their parents."[97] The Court ultimately declined to resolve those doubts because the plaintiff was born on U.S. soil to U.S.-citizen parents and was therefore among the class of U.S.-born persons whose citizenship was unquestioned. It is telling, however, that the Court recognized that the majority position among scholars at the time would exclude from citizenship the U.S.-born children of noncitizens and that there were significant doubts as to the validity of the minority position.

Notably, similar reasoning was employed in at least two 1876 international arbitration decisions that considered the citizenship under U.S. law of individuals born in the United States to alien parents only temporarily residing in the country. In *Suarez v. Mexico*, No. 716,[98] an arbitration umpire held that a man's certificate of baptism from the State of New York was insufficient proof of his U.S. citizenship. Adopting the same line of reasoning as the Supreme Court, the arbitrator determined that even if the man could prove he was the same person listed on the certificate, "the mere fact of his having been born at New York [would not] be sufficient evidence of citizenship."[99] This was because "his parents were both aliens at the time of his birth, and it is not shown that they were naturalized or that they or the child remained in the United States."[100] He was therefore born subject

95. *Id.* at 167.
96. *Id.*
97. *Id.* at 167–68.
98. Beniguo Santos Suarez v. Mexico, No. 716, conv. of July 4, 1868, MS Op. VI. 416 (Apr. 22, 1876), *as reported in* 3 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2449 (1898).
99. *Id.*
100. *Id.*

to a foreign power, despite his birth on U.S. soil.[101] A different arbitrator reached a similar conclusion in *Del Barco v. Mexico,* No. 748,[102] where a man was born in the United States to foreign parents but left the U.S. for Mexico with his mother at the age of nineteen. Because his parents were not naturalized in the U.S. before his birth, and because he left the U.S. before the age of twenty-one, the arbitrator determined that he retained the nationality of his parents despite his birth in the U.S.[103] In other words, they and their U.S.-born child remained subject to a foreign power and were not subject to the complete jurisdiction of the United States for purposes of the Citizenship Clause.

B. Elk v. Wilkins *Solidified Dicta Limitations and Original Meaning*

In 1884, the Supreme Court solidified the dicta of the *Slaughterhouse Cases* and *Happersett* in *Elk v. Wilkins,*[104] its first case to directly address the Citizenship Clause. At issue in *Elk* was whether an Indian born into a tribe and never naturalized under federal law automatically became a citizen when he voluntarily severed his tribal relations and took up residence among American citizens in a U.S. state.[105] The Indian, John Elk, argued that he was born in the United States and had surrendered himself to its complete jurisdiction, making him a citizen entitled to vote in the state of his residence. The registrar of Elk's ward, Charles Wilkins, countered that Elk was not a citizen and could not register to vote because he was not, at the time of his birth, subject to the jurisdiction of the United States.

The Court held that Elk was not a citizen under these circumstances and adopted the view of the Amendment's framers and ratifiers that birthright citizenship did not apply to those born subject to United States jurisdiction in only a limited sense. It explained that the Citizenship Clause's jurisdictional element

101. *Id.*

102. Manuel del Barco and Roque de Garate v. Mexico, No. 748, conv. of July 4, 1868, MS. Op. VI. 421 (June 10, 1876), *as reported in* 3 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2449–50 (1898).

103. *Id.* at 2450.

104. 112 U.S. 94 (1884).

105. *Id.* at 99 ("The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution.").

meant "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[106] Further, this direct and immediate allegiance must be owed at the time of the birth, and could not be later acquired absent naturalization.[107] Elk had not been born owing direct and immediate allegiance to the United States because the "members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States."[108]

The Court further delved into the Fourteenth Amendment's legislative history, noting that its main object was to grant citizenship to the freed slaves and to "put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power," were U.S. citizens.[109] It recalled the congressional debates regarding the proposed addition of the phrase "excluding Indians not taxed," and explained—reasonably, in light of those debates—that Indian tribes may not technically be foreign states, but they were certainly "alien nations [and] distinct political communities."[110] In the Court's view, then:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[111]

In analyzing why Indians born into tribal affiliations were not citizens, the *Elk* Court noted as "worthy of remark" the language of the Civil Rights Act of 1866, which declared citizens to be "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed."[112] Thus, it affirmed that

106. *Id.* at 102.
107. *Id.*
108. *Id.* at 99.
109. *Id.* at 101.
110. *Id.* at 99.
111. *Id.* at 102.
112. *Id.* at 103.

the Fourteenth Amendment was intended to constitutionalize the provisions of the Act, including the underlying assumption that those born subject to a foreign power were not "subject to the jurisdiction of the United States" for purposes of the Citizenship Clause.

C. Wong Kim Ark *and the Alleged Adoption of Common-Law* Jus Soli

1. *Wong Kim Ark* in Context

Twelve years after *Elk v. Wilkins*, in 1898, the Supreme Court came the closest it has ever come to directly addressing whether the U.S.-born children of illegal or temporarily present aliens are "subject to the jurisdiction" of the United States for purposes of the Citizenship Clause. In *United States v. Wong Kim Ark*,[113] the Court—now composed of an almost entirely new set of Justices—was faced with a much narrower question of whether the U.S.-born and U.S.-raised son of lawfully present and permanently domiciled Chinese aliens was a citizen from birth.[114] Before assessing the Court's holding and reasoning, it is important to first understand the social, political, and legal context specific to Chinese immigration in the closing decades of the nineteenth century.

Throughout the second half of the nineteenth century, California repeatedly tried to check its growing population of Chinese immigrants by passing increasingly discriminatory legislation against them on the basis of their ethnicity alone.[115] These statutes were often struck down in federal court as violations of U.S. treaty obligations with the Chinese government, and as blatantly unconstitutional discrimination against certain

113. 169 U.S. 649 (1898).

114. *Id.* at 653 ("The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution . . . .").

115. *See generally* David E. Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999) (describing laws passed against Chinese laundries as part of the anti-Chinese movement in the American West); Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353 (1995) (discussing *Yick Wo v. Hopkins* and laws "specifically intended to discourage" Chinese immigrants); Joyce Kuo, *Excluded, Segregated, and Forgotten: A Historical View of the Discrimination of Chinese American in Public Schools*, 5 ASIAN L.J. 181 (1998) (describing the San Francisco School Board's changing positions on excluding Chinese Americans from their schools).

aliens on the basis of race.[116] In 1880, President Rutherford Hayes appointed James B. Angell as his Minister to China and ordered him to negotiate a new treaty, which Angell successfully did.[117] The new treaty allowed for restrictions on the immigration of Chinese laborers,[118] and in 1882, the United States categorically suspended their immigration for a period of ten years and declared Chinese subjects as ineligible for naturalization.[119] The 1882 Exclusion Act was the first broad immigration restriction in U.S. history and introduced to the nation for the first time the concept of unlawful immigration.[120] The Act was renewed in 1892 for another ten year period, and in 1904 the law was indefinitely extended.[121] The Chinese remained ineligible to become naturalized citizens until 1943.[122] The purpose of these restrictions was not just to minimize the growth of the Chinese population in California but also to actively reduce it by disincentivizing their residence in the United States—in large part by denying lawfully present Chinese aliens any means of officially integrating into American society via citizenship.[123]

116. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 358, 363 (1886) (holding that a San Francisco ordinance prohibiting the operation of laundry businesses in wooden buildings without a permit from the Board of Supervisors, which had complete discretion over granting such ordinances, violated the Fourteenth Amendment and U.S. treaty obligations where it was on its face administered in a discriminatory manner against persons of Chinese descent); *In Re* Quong Woo, 13 F. 229, 233 (C.C.D. Cal. 1882) (holding that a San Francisco ordinance requiring a license to operate a laundry within city limits was a guise for discriminatory treatment against Chinese aliens, in violation of U.S. treaty obligation with China); *In Re* Ah Chong, 2 F. 733, 737 (C.C.D. Cal. 1880) (holding that a California statute prohibiting aliens incapable of becoming electors of the state from fishing in state waters "is clearly unconstitutional, and a violation of the treaty [with China] in discriminating against the Chinese and in favor of aliens of the Caucasian race in all other respects similarly situated"); *In Re* Ah Fong, 1 F. Cas. 213, 214 (C.C.D. Cal. 1874) (holding that while California could use its police power to exclude foreigners under certain conditions, it could not discriminate against the citizens of a particular foreign country as a class, namely, Chinese immigrants).

117. *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T ST.: OFF. HISTORIAN, https://perma.cc/V5UB-ACSA.

118. Treaty Between the United States and China, Concerning Immigration, U.S.-China, *ratifications exchanged* Jul. 19, 1881, 22 Stat. 826.

119. Chinese Exclusion Act, ch. 126, §§ 1, 14, 22 Stat. 58, 59, 61 (1882) (repealed 1943).

120. *See Chinese Immigration and the Chinese Exclusion Acts*, *supra* note 117 (stating that the "1882 Act was the first in American history to place broad restrictions on immigration").

121. *Id.*

122. Act of Dec. 17, 1943, Pub. L. 78-199, 57 Stat. 600.

123. Between 1880 and 1920—a period during which America experienced a general immigration boom and the national population doubled from 50 million to 106 million—the Chinese population in the United States decreased from roughly 105,000 to just over 61,000. *Compare* DEP'T OF THE INTERIOR CENSUS OFFICE, STATISTICS OF THE POPULATION OF THE UNITED STATES AT THE TENTH CENSUS 492 (1880), https://perma.cc/FZ2N-5AEX *with*

The initial immigration restriction was compounded in 1888 when Congress passed the Scott Act, which made reentry into the United States impossible even for those Chinese immigrants who had been lawful and long-term U.S. residents with families still lawfully living on U.S. soil.[124] This resulted in an estimated 20,000 U.S.-resident Chinese persons having their reentry certificates voided and remaining barred from reentry.[125] To combat the growing tide of Chinese immigrants illegally entering the United States from Canada and Mexico, laws were passed to make all those of Chinese descent carry a residence card documenting their lawful presence.[126] Although the treaty with China affirmed that all Chinese subjects in the United States "shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation," it excepted the right to become naturalized citizens.[127] For all intents and purposes, long-term resident Chinese immigrants were, similarly to the black population under *Dred Scott*, subjected to a status of permanent alienage in the United States in a manner wholly unlike other classes of immigrants, who could become naturalized citizens and whose children could partake of the benefits of citizenship. Further, this meant the right of expatriation—a right considered inherent and fundamental for all individuals—was effectively stripped from the Chinese in every meaningful sense, because they could not, in the eyes of the U.S. government, throw off their allegiance to China under any circumstances.

It is under this context that the Supreme Court last directly interpreted the Citizenship Clause. Wong Kim Ark was born in San Francisco at some point prior to the enactment of the 1882 Exclusion Law.[128] His parents were lawful Chinese immigrants who, under both the Naturalization Law of 1802 and the Chinese Exclusion Act, were ineligible for naturalization.[129] All parties

WILLIAM S. ROSSITER, BUREAU OF THE CENSUS, INCREASE OF POPULATION IN THE UNITED STATES 1910–1920, at 135–36 (1920).

124. Scott Act of 1888, ch. 1064, 25 Stat. 504 (repealed 1943).

125. XIAOJIAN ZHAO, ASIAN AMERICAN CHRONOLOGY: CHRONOLOGIES OF THE AMERICAN MOSAIC 22 (2009).

126. Geary Act, Pub. L. No. 52-60, 27 Stat. 25 (1892) (repealed 1943).

127. Treaty Between the United States and China, Concerning Immigration, *supra* note 118.

128. United States v. Wong Kim Ark, 169 U.S. 649, 652–53 (1898).

129. *See* Naturalization Law of 1802, ch. 28, § 1, 2 Stat. 153, 153 (limiting naturalization only to free whites); Chinese Exclusion Act, ch. 126, §§ 1, 14, 22 Stat. 58, 59, 61 (1882) (repealed 1943) (suspending the immigration of Chinese citizens and declaring them

agreed that the parents were permanently domiciled U.S. residents, even though they technically remained subjects of the Chinese Emperor.[130] Wong Kim Ark himself was also permanently domiciled in the United States, never claimed to be a Chinese subject, and enjoyed no meaningful connection to China for roughly the first seventeen years of his life.[131]

In 1890, as a young adult, Wong made a temporary visit to China and was readmitted to the United States without incident upon his return.[132] He made a second temporary visit in November 1894, but this time he was detained at the Port of San Francisco when he tried to return home to the United States.[133] Despite Wong's protestations that he was a U.S. citizen, the Collector of Customs determined that Wong was a Chinese subject and denied him permission to enter the United States.[134] For several months while his case was pending in federal court, Wong was confined to various steamships off the California coast.[135]

In 1898, Wong's case worked its way up to the Supreme Court, which granted certiorari to decide one very narrow question—not whether all U.S.-born children of all foreign nationals are U.S. citizens, but whether the U.S.-born child of Chinese subjects who were lawfully present and permanently domiciled in the United States, and not employed in an official capacity by the Chinese government, was a U.S. citizen from birth.[136] The Court held that a child born in the United States under such circumstances was indeed a U.S. citizen and could not be barred from reentry into the United States.[137] The majority's reasoning can be reduced to two separate strains: (1) The Fourteenth Amendment adopted common law *jus soli* principles, and (2) treating the U.S.-born children of Chinese immigrants differently than the U.S.-born children of European immigrants by denying them citizenship under the same circumstances was an affront to the foundational

ineligible for naturalization).

130. *Wong Kim Ark*, 169 U.S. at 652.

131. *Id.*

132. *Id.* at 652, 653.

133. *Id.* at 653.

134. *Id.* at 651.

135. *Id.* at 649. Wong was confined to at least three different steamships over the course of several months leading up to and during his trial. Lillian Cunnigham, *Constitutional Podcast*, NATIONALITY WASH. POST (August 14, 2017), https://perma.cc/T3JY-GSXJ.

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

137. *Id.* at 705.

premises of the Fourteenth Amendment.[138] The bulk of the opinion is dedicated to analyzing citizenship under common law and its applicability in the post-Revolution United States, but, as will be discussed below, the majority was curiously disinterested in the mountain of evidence that the United States rejected the adoption of *jus soli* and failed to account for how any true adoption of *jus soli* was inconsistent with the majority's actual holding. But scattered throughout the analysis, and evident especially in the last section of the majority opinion, is a concurrent and much more forceful argument concerning the sheer unfairness of how principles of citizenship and naturalization were applied to Chinese immigrants when compared to European immigrants.[139] It is this latter argument that remains consistent with the express intent and original public meaning of the Fourteenth Amendment and with Supreme Court precedent, and which must survive into the present day.

2. Adoption of True Common Law *Jus Soli* is Based on False Premises

The *Wong Kim Ark* majority spent a significant number of pages detailing what it perceived to be the continued use of English common law principles for defining citizenship in the United States post-Revolution.[140] Much of the opinion can be summed up, in the Court's own words, thusly: "The same rule [of *jus soli*] was in force in all the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established."[141] Using a select few quotes from the legislative history in which Senators stated that the Citizenship Clause would apply to the children of Chinese immigrants and Gypsies, and not just to Europeans, the Court further concluded that the Fourteenth Amendment also adopted these same common law principles.[142]

138. *Id.* at 694, 702–04.

139. *Id.* at 703–04.

140. For example, pages 654 to 675 of the majority opinion dealt almost exclusively with the application of the common law in the post-Revolution but pre-Fourteenth Amendment United States, while pages 682 through 692 focused largely on showing its continued application through the mid-to-late 19th century.

141. *Id.* at 658.

142. *See id.* at 697–99.

These conclusions, however, are in direct conflict with history. The American Revolution was, by its inherent nature and through its express principles, an effective throwing off of the common law's yoke of *jus soli* and its perpetual allegiance in favor of a consent-based compact theory of government. The common law's *jus soli* and compact theory are fundamentally opposed to each other and cannot exist in tandem. Further, the Fourteenth Amendment was an effort to fully implement the principles of the Revolution, which had not been possible under the specter of slavery—a fact proved by the *Dred Scott* majority's pained mishandling of those principles.

The common law's *jus soli* was an outgrowth of feudalism that developed as the philosophical defense of the divine right of kings. It was officially expounded in 1608 by the esteemed English jurist Sir Edward Coke, who wrote in Calvin's Case of the concept of "natural ligeance" due at birth.[143] As explained by Coke, this is "a true and faithful obedience of the subject due to his Sovereign" as an "incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign."[144] The famed English jurist William Blackstone would further distill the principle, and—like the members of the 39th Congress—differentiate between two levels of allegiance: one "natural" and one "local."[145] Blackstone's "natural allegiance" was "due from all men born within the king's dominions immediately upon their birth. For immediately upon their birth, they are under the king's protection."[146] Further, this allegiance was owed perpetually, and "therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance .... [T]he natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance ...."[147] In this sense, "natural allegiance" was synonymous with "perpetual allegiance." Local allegiance, on the other hand, was "due from an alien, or stranger born, for so long [a] time as he continues within the king's dominion and protection," and was temporary—it ceased to exist after the temporarily resident alien exited the

143. Calvin's Case (1608) 77 Eng. Rep. 377, 385; 7 Co. Rep. 1 a, 7 a.
144. *Id.* at 382, 7 Co. Rep. 4 b.
145. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 328 (William Draper Lewis ed., 1898).
146. *Id.*
147. *Id.*

geographic space of the king's dominion.[148] Blackstone admitted that *jus soli* and perpetual allegiance are an inheritance from the feudal system and derived from the "mutual trust or confidence subsisting between the lord and vassal," but concluded nonetheless that this allegiance "is founded in reason and the nature of government."[149]

These feudal principles, while thoroughly accepted as the basis of English common law, were simply incompatible with the principles underlying the American Revolution, which was as heavily influenced by the likes of Dutch jurists Hugo Grotius[150] and Emer de Vattel,[151] as Blackstone and Coke. In fact, under *jus soli*'s mandated perpetual allegiance, the Revolution would have been philosophically impossible—the very existence of the United States as a sovereign nation necessitated that the Colonists sever their ties of "natural ligeance" to England and compact together for the preservation and protection of their natural rights. This is evident in the very wording of the Declaration of Independence, in which the Founders wrote that "by Authority of the good People of these Colonies," they did "solemnly publish

148. *Id.* at 330.

149. *Id.* at 326.

150. *See, e.g.*, Andrew J. Reck, *Natural Law in American Revolutionary Thought*, 30 REV. METAPHYSICS 686, 688–89 (1977) ("To judge from the citations and quotations to be found in the pamphlets of the American revolution, the philosophers of natural law who most influenced the American revolutionaries were Hugo Grotius, Samuel von Pufendorf, John Locke, and Jean Jacques Burlamaqui. The concept of natural law, definite in outline, was flexibly interpreted by the philosophers themselves, contributing not only an aspect of indeterminateness in regard to detail but also inviting a range of decisive practical applications of which the American revolutionary experience has been the most original and the most lasting."); *id.* at 703 (citing JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED (1764)) (asserting that James Otis paraphrased Grotius).

151. *See* David Armitage, *The Contagion of Sovereignty: Declarations of Independence Since 1776*, 52 S. AFR. HIST. J. 1, 6–7 (2005) (describing the role and influence of Emer de Vattel in the American Revolution); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1972) ("The ideas and writings of the leading secular thinkers of the European Enlightenment—reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts like Montesquieu—were quoted everywhere in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government."); Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395, 395 (1913) ("A century ago not even the name of Grotius himself was more potent in its influence upon questions relating to international law than that of Vattel. Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence of executive officials. It was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration.").

and declare, That they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved."[152] The Declaration is a complete and categorical rejection of *jus soli* and perpetual allegiance and further declares precisely from whence the Colonies derived their authority, contrary to common law, to sever allegiance to England—the consent of the governed. It goes on to assert, counter to the most fundamental premises of the common law, that the people always reserve the right to "alter or abolish" the government that no longer serves the purpose for which it was instituted, namely, the preservation of natural rights of life, liberty, and the pursuit of happiness.[153] These principles of compact theory were roundly adopted by the federal Constitution and by various states into their own constitutions and cannot be said to have "died off" simply to be replaced again by the common law.[154]

152. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). *See also* Reck, *supra* note 150, at 701, 714 ("The patriot pamphleteers of the American Revolution adopted, with all its ambiguities, the natural law philosophy. At the beginning they employed this philosophy, commingled with various forms of fundamental law, such as revealed divine law, the British constitution, the common law, and their own charters, to protest what they regarded as abuses of power by the British government. When independence was imminent and inevitable, the patriot party relied most heavily, if not exclusively, on this philosophy to justify their course of action. Yet the Americans were no passive borrowers; they endeavored to apply their inherited philosophy to a new experience within a wild environment. Their applications had unforeseen consequences, both practical and speculative, which transformed what had been lent to them not simply into novel practices and political institutions, but also into original theories in response to new situations. Their predicament as colonials within a commonwealth which had instituted the principle of self-government in Parliament was unique . . . . American political thought and practice during the period of the American Revolution prove to be no mere copies of inherited European theories."). James Wilson, in his pamphlet *Considerations on the Nature and the Legislative Authority of the British Parliament*, refuted Blackstone with Burlamaqui. JAMES WILSON, CONSIDERATIONS ON THE NATURE AND THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT 3 (1774). And Alexander Hamilton, in *The Farmer Refuted*, instructs the ignorant reader to study Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui. ALEXANDER HAMILTON, THE FARMER REFUTED 5 (1775). *See also* James W. Garner, Book Review, 11 AM. POL. SCI. REV. 142, 142–43 (1917) ("As is well known, the founders of the American nation derived their knowledge of international law mainly from Vattel as they derived their knowledge of the English common law from Blackstone. Vattel, therefore, like Blackstone, was generally found in every American library of note . . . .").

153. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

154. *See, e.g.*, CONN. CONST. art. I, §§ 1–2 ("[A]ll men when they form a social compact, are equal in rights . . . . All political power is inherent in the people, and all free governments are founded on their authority . . . . and they have at all times an undeniable and indefeasible right to alter their form of government . . . ."); MD. CONST., DECLARATION OF RIGHTS, art. 1 ("That all government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole; and they have, at all times, the inalienable right to alter, reform or abolish their Form of Government in such manner as they may deem expedient."); N.H. CONST. pt. I, art. I ("All men are born equally free and independent; Therefore, all government of right originates from the people, is

The major error in Chief Justice Roger Taney's reasoning in *Dred Scott* was not that it adopted the Revolution's compact theory as the basis for citizenship, but that it adopted a distorted version of compact theory based on an inaccurate analysis of historical fact. This deeply flawed implementation was itself a betrayal of the basic principles of the Revolution. Justice Curtis's and Justice McLean's dissents explored these flaws at some length, noting that at the time of ratification, five states had extended the right to vote to black men—making them citizens of their respective states and of the United States generally.[155] While the "Government was not made especially for the colored race," it was undoubtedly the case they were not categorically excluded from it, either.[156] And not only were free black men factually a part of the American body politic from the beginning, but the Constitution itself was crafted in such a way that "it was not doubted by any intelligent person that its tendencies would greatly ameliorate" the conditions of all black Americans, chiefly by leading to a natural decline of the slave system inherited by the states as the consequence of England's imposition of it on the Colonies.[157]

The Civil Rights Act and Fourteenth Amendment were not measures to reinstate the *jus soli* of pre-Revolution common law as a means of overturning *Dred Scott*, but rather they were measures designed to more fully institute the principles of the Revolution—in other words, to apply them, at long last, to the freed slaves and their descendants in the same manner they had long been applied to those of European descent. Consider, for

founded in consent, and instituted for the general good."); KY. CONST. of 1792, art. XII, §§ 1–2 ("That all men when they form a social compact, are equal . . . . [And t]hat all power is inherent in the people, and all free governments are founded on their authority . . . . For the advancement of these ends, [the people] have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper."); ARK. CONST. of 1836, art. II, §§ 1–2 ("That all free men when they form a social compact are equal and have certain inherent and indefeasible rights . . . . That all power is inherent in the people . . . . For the advancement of these ends, they have, at all times an unqualified right to alter reform or abolish their government in such manner as they may think proper."); TEX. CONST. of 1845, art. I, §§ 1–2 ("All political power is inherent in the people, . . . and they have at all times the unalienable right to alter, reform, or abolish their form of government, in such manner as they may think expedient. All freemen, when they form a social compact, have equal rights . . . ."); OR. CONST., art. I, § 1 ("We declare that all men, when they form a social compact are equal in right; that all power is inherent in the people, and all free governments are founded on their authority . . . and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.").

155. Dred Scott v. Sandford, 60 U.S. (10 How.) 393, 582 (1857) (Curtis, J., dissenting).

156. *Id.* at 537 (McLean, J., dissenting).

157. *Id.* at 537–38.

example, the words of then-Speaker of the House Schuyler Colfax predicting the ratification of the Fourteenth Amendment after its passage by Congress:

> [I]t's going to be the gem of the Constitution, when it is placed there, as it will be, by [the] American people. I will tell you why I love it. It is because it is the Declaration of Independence placed immutably and forever in our Constitution. What does the Declaration of Independence say?—[T]hat baptismal vow that our fathers took upon their lips when this Republic of ours was born into the family of nations. It says that all men are created equal, and are endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness; *and that to secure these rights governments were instituted among men.* That's the paramount object of government, to secure the right of all men to their equality before the law. So said our fathers at the beginning of the Revolution. So say their sons to-day, in this Constitutional Amendment . . . .[158]

This is a direct reference to the consent-based social compact as the foundation of just government, itself a complete rejection of the common law's *jus soli* and perpetual allegiance. The disdain for common law principles related to citizenship and nationality are even more clearly seen in the debates over the passage of the Expatriation Act of 1868, which show that Congress's general attitude on the heels of the Fourteenth Amendment's ratification was to reject *jus soli*'s "accident of birth" and perpetual allegiance as the basis for citizenship. Rep. George W. Woodward (D-Penn), called the common law's view of citizenship an "indefensible feudal doctrine of indefeasible allegiance."[159] Similarly, Rep. Alexander Bailey (R-NY) denounced "the slavish feudal doctrine of perpetual allegiance."[160] It was the Expatriation Act's principal sponsor Rep. Frederick Woodbridge (R-VT), however, who provided the most damning denunciation:

> [The doctrine of perpetual allegiance] is based upon the feudal systems under which there were no free citizens . . . . [A]nd the individual man [had] no personal rights; and it was from this

158. Schuyler Colfax, Speaker, House of Reps., Necessity of the Constitutional Amendment (Aug. 7, 1866), *in* CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA AND KENTUCKY 14 (1866).

159. CONG. GLOBE, 40th Cong., 2nd Sess. 868 (1868) (statement of Rep. Woodward).

160. *Id.* at 967 (statement of Rep. Bailey).

> source and system that Blackstone derived his idea of indefeasible and perpetual allegiance to the English Crown.
>
> . . . .
>
> [T]he old feudal doctrine stated by Blackstone and adopted as a part of the common law of England, that once a citizen by the accident of birth expatriation under any circumstances less than the consent of the sovereign is an impossibility. The doctrine . . . is not only at war with the theory of our institutions, but is equally at war with every principle of justice and of sound public law.[161]

The long legislative history of both the Founding Congress and the Reconstruction Congress thus evidences a clear and categorical rejection of *jus soli* in favor of a social compact theory based on consent and the protection of natural rights. Any adoption by the *Wong Kim Ark* majority of true *jus soli* as the basis of U.S. citizenship under the Constitution should be rejected as stunning in its absurdity. Moreover, reliance on *Wong Kim Ark* to support the proposition that the Fourteenth Amendment's concept of jurisdiction or allegiance is a reflection of *jus soli* is sorely misplaced. It is the exact opposite of what Congress intended to accomplish with the Fourteenth Amendment, and fears that later jurists would confuse its concepts with that of the common law were quite literally why its drafters kept revising the language.

It is hardly surprising, then, that the *Wong Kim Ark* majority brusquely dismisses any judicial, legislative, or scholarly authority that might present problems for its conclusion about the adoption of true *jus soli*. The majority barely addressed the legislative history, except to note without context Senator Cowan's remarks that the Fourteenth Amendment's Citizenship Clause would be applied equally to all U.S.-born children, regardless of the race of the parents. It refused to address, however, the rest of the debates, which evidence that the equal application of citizenship regardless of race did not equate to the universal application of citizenship regardless of whether the parents were subject to the complete jurisdiction of the United States. The most egregious example of this intentional neglect, however, is the majority's dismissal of the *Slaughter-House* dicta by claiming that Justice Samuel Miller, who authored the *Slaughter-*

161. *Id.* at 1130–31 (statement of Rep. Woodbridge).

House opinion, was merely being imprecise with his language.[162] But by 1898, it was clear that then-Justice Miller had absolutely meant that children of temporary residents were not subject to the complete jurisdiction of the United States, because he explicitly clarified this in his *Constitutional Law* treatise.[163]

3. *Wong Kim Ark* and "Limited" *Jus Soli*

The true anomaly of *Wong Kim Ark* is that, despite the majority's in-depth analysis and apparent adoption of common law *jus soli* as the basis of U.S. citizenship, the narrow holding undermines the reasoning used to get there. Under a true application of *jus soli*, the Court's analysis and holding would have been quite simple: "Wong Kim Ark was born on United States soil. His parents are not ambassadors or foreign ministers. He is therefore a citizen of the United States." Factors like permanent domicile and lawful presence ought to be irrelevant, as the majority itself noted in its reference to then-Secretary of State Daniel Webster's Report to the President of Thrasher's Case in 1851.[164] There, Webster said that common law allegiance attaches "independently of a residence with intention to continue such a residence, [and] independently of any domiciliation."[165] Pure *jus soli* simply does not recognize domicile or lawful presence as relevant to the determination of allegiance.[166]

But this was not, in fact, the Court's conclusion. Indeed, the majority went out of its way to limit its application of *jus soli* to the specific instances of permanent domicile and lawful presence, and seemed to tie those two factors into its conception of *jus soli*:

> The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children *here born of resident aliens* . . . . The Amendment, in clear words and in manifest intent, includes the

162. United States v. Wong Kim Ark, 169 U.S. 649, 678 (1898) (alleging that Justice Miller's analysis of the jurisdictional element "was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase, is apparent from its classing foreign ministers and consuls together").

163. Miller, *supra* note 79, at 279.

164. *Wong Kim Ark*, 169 U.S. at 693–94.

165. Memorandum from Daniel Webster, Sec'y of State, to the President of the U.S. (Dec. 23, 1851) *in* 6 THE WORKS OF DANIEL WEBSTER 521, 526 (1853).

166. *Id.*

> children born, within the territory of the United States, of all other persons, of whatever race or color, *domiciled within the United States.* Every citizen or subject of another country, *while domiciled here,* is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.
>
> . . . .
>
> Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, *so long as they are permitted by the United States to reside here,* and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States.[167]

The inclusion of lawful presence and permanent domicile, despite a previous analysis of their irrelevance under traditional English common law, heavily implies that the Court considered the factors as highly relevant to (1) its view of the common law as adopted in post-Revolution America; (2) its view of the extent to which the common law informed the determination of U.S. citizenship; or (3) its unwillingness to adopt and apply the full extent of pure *jus soli* in light of the Fourteenth Amendment's legislative history and original meaning. As the following section will show, it is likely that the *Wong Kim Ark* majority considered a combination of those three things to be significant to its analysis and conclusion.

The importance of domicile, in particular, to the *Wong Kim Ark* majority's conclusion cannot be overstated, as it appears to be an intentional response to points raised by the dissenting opinion that, insofar as some jurists adopted some version of common law *jus soli* in post-Revolution United States, this version was not nearly as rigid as the English common law. The American version of common law citizenship, Chief Justice Melville Fuller explained in dissent, "did not recognize allegiance as indelible, and [] it did recognize an essential difference between birth during temporary, and birth during permanent, residence."[168] Further, whatever the use of common law principles to presumptively deem U.S.-born children citizens, "this was not so when they were born of aliens whose residence was merely temporary, either in fact, or in point

167. *Wong Kim Ark*, 169 U.S. at 693–94 (emphasis added).
168. *Id.* at 729 (Fuller, J., dissenting).

of law."[169] Revealingly, the very American jurists upon whom the majority relied for its determination that the Constitution adopted the common law view of citizenship are the same jurists that the dissent references for support of this "limited adopted" premise. For example, the majority points to William Edward Hall and Justice Joseph Story for the presumption of citizenship for U.S.-born children, but Hall's exposition of temporary allegiance underscores its rejection by the Fourteenth Amendment as a basis for citizenship, while Story limits his presumption to reasonably exclude the children of temporary sojourners.[170] Further, the role of domicile in the rights and duties afforded to certain aliens had been of key importance in several previous Supreme Court cases involving Chinese immigrants in particular.[171] *Wong Kim Ark* appears, in the end, to adopt a revised version of *jus soli* that limits citizenship to the same class of individuals envisioned by the Amendment's framers.

4. "Limited" *Jus Soli* as the Sensible Salvation of the Citizenship Clause's Original Meaning

Wong Kim Ark may have revolved around the Citizenship Clause, but it was fundamentally about fairness and equal treatment before the law without regard to race or national origin. Insofar as the *Wong Kim Ark* majority rested its holding on the premise that the Constitution forbids the unequal treatment of certain domiciled aliens on the basis of race, such that the

169. *Id.*

170. Hall reasoned that a person traveling for a time in a foreign country (presumably meaning one not "domiciled" in the foreign country and intending to return to his native country) cannot wholly escape his legal relations to his native country: "He may for many purposes be temporarily under the control of another sovereign than his own, and he may be bound to yield to a foreign government a large measure of obedience; but his own state still possesses a right to his allegiance; he is still an integral part of the national community." WILLIAM EDWARD HALL,M.A., A TREATISE ON THE FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN 2 (1894). The temporary sojourner is, therefore, the precise type of person who, though present in the United States, still owes allegiance to a foreign power and is not part of the "American people." Story more pointedly stated: "A reasonable qualification [of the rule of citizenship by virtue of birth on U.S. soil] would seem to be, that it should not apply to the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business." JOSEPH STORY, LL.D., COMMENTARIES ON THE CONFLICT OF LAWS 48 (1834).

171. *See, e.g.*, Lau Ow Bew v. United States, 144 U.S. 47, 61–62 (1892) ("By general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such person stand by reason of their domicile of choice, or commercial domicile, is to be presumed . . . .").

children of the disfavored race can never become citizens, it is correct and entirely consistent with the Fourteenth Amendment.[172] The Court well understood that the unequal treatment of the children of Chinese immigrants, simply because they were not the children of European immigrants, was an affront to the Fourteenth Amendment and would plausibly allow Congress to render the amendment ineffective by passing discriminatory legislation regarding naturalization.[173] Further, that reality would undermine the natural, unalienable right of expatriation as applied to the Chinese.

It would not have been unprecedented for the Court, in this context and for the purpose of furthering the basic principles of the Fourteenth Amendment, to adopt a limited conception of *jus soli* as a sort of compromised construction of how the Civil Rights Act interacted with the Citizenship Clause. In fact, this was precisely the route taken by the New Jersey Supreme Court just three years prior to *Wong Kim Ark*, and it was to this opinion that the *Wong Kim Ark* majority pointed as one of the "foregoing considerations and authorities irresistibly lead[ing]" it to the conclusion that "[t]he [Fourteenth Amendment], in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, *domiciled within the United States.*"[174]

The opinion by the New Jersey Supreme Court in *Benny v. O'Brien*,[175] therefore, can help make sense of the *Wong Kim Ark* majority's language limiting the meaning of *jus soli* under the Fourteenth Amendment. *Benny* presented facts similar to those in *Wong Kim Ark*, but for a man of European descent. Allan Benny was born in New York to Scottish immigrant parents who had resided in the United States for twelve years.[176] Benny lived

172. *Wong Kim Ark*, 169 U.S. at 694 ("To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.").

173. *Id.* at 703–04 ("If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment.").

174. *Id.* at 693 (emphasis added).

175. 32 A. 696 (N.J. 1895).

176. *Id.* at 697.

continuously in New York, and had voted in every election since the time he turned twenty-one years old.[177] Although his father declared his intent to become a citizen, he had not actually gone through the official process for naturalization.[178] The question presented was "whether a person born in this country of alien parents, who, prior to his birth, had their domicile here, is a citizen of the United States."[179]

Like the *Wong Kim Ark* majority would do three years later, the *Benny* court analyzed prominent cases in state and federal courts that appeared to adopt common law *jus soli* as the basis of American citizenship, including the Chancery Court of New York. But unlike the *Wong Kim Ark* majority, the *Benny* court noted that these decisions were rendered prior to the ratification of the Fourteenth Amendment and the United States Supreme Court's decision in *Elk v. Wilkins.*[180] The *Benny* court then tried to make sense of *Look Tin Sing*[181]—a recent federal circuit court decision presenting similar facts and appearing to adopt *jus soli*—in light

177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *In re Look Tin Sing*, 21 F. 905 (C.C.D. Ca. 1884), was a circuit court decision based on similar facts to *Wong Kim Ark*, in which the Circuit Court for the District of California reached a very similar conclusion as the Supreme Court and for similar reasons. Look Tin Sing was born in California to Chinese parents who had been domiciled in the United States, and he himself resided permanently in California for the first twenty years of his life. He took a trip to China with the intention of returning to his home in California, but was refused re-entry because he did not have a proper immigration certificate. Sing argued that he was a natural-born citizen and therefore did not need an immigration certificate to enter the United States. Like the Supreme Court would later do in *Wong Kim Ark*, the circuit court iterated the ruling of the common law's *jus soli.* Unlike the Supreme Court, however, Justice Field noted that the common law doctrine had been altered in very important respects—namely, that perpetual allegiance no longer prevails, and that United States law has "always proceeded upon the theory that any one can change his home and allegiance without the consent of his government; and we adopt as citizens those belonging to our race who, coming from other lands, manifest attachment to our institutions, and desire to be incorporated with us." *Id.* at 907. Even though the treaties between the United States and China forbade the naturalization of Chinese subjects, they recognized "the right of man to change his home and allegiance" as "inherent and inalienable." *Id.* In Field's view:

> [w]ith this explanation of the meaning of the words in the [F]ourteenth [A]mendment, 'subject to the jurisdiction thereof,' it is evident that they do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship, and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.

Id. at 908–09. In other words, even though his parents could not become citizens, they had effectively done everything otherwise required of them to throw off their allegiance to China and subject themselves in allegiance to the United States, as was their inherent right. He was born, therefore, to parents who owed allegiance to the United States, and could not have been said rationally to owe allegiance to any foreign power.

of *Elk v. Wilkins* and the purpose of the Fourteenth Amendment and drew a conclusion that these three things could be understood as being consistent with each other. The court started with the language of the Civil Rights Act and the Fourteenth Amendment, noting that, when read together, they imply "instances in which the right to citizenship does not attach by reason of birth in this country."[182] The *Benny* court then connected the two as enforcing the same instance of exclusion, principally, where a person was not born subject to the United States under the Fourteenth Amendment by virtue of having been born subject to a foreign power under the Civil Rights Act.[183] In determining whether Allan Benny was "subject to any foreign power," the court reasoned that Congress could not have intended—and would never now concede—that the phrase should be construed in such a way as to exclude from citizenship the children and grandchildren of all European immigrants who had not themselves become naturalized.[184] Rather, it looked to the purpose of the Fourteenth Amendment, which was "intended to bring all races, without distinction of color, within the rule which, prior to that time pertained to the white race."[185] Given this purpose, and in light of *Wilkins* and federal circuit court rulings in cases with similar fact patterns, the New Jersey Supreme Court concluded:

> Persons intended to be excepted are only those born in this country of foreign parents who are temporarily traveling here, and children born of persons resident here in the diplomatic service of foreign governments. Such children are, in theory, born within the allegiance of the sovereign power to which they belong, or which their parents represent. The object of the [F]ourteenth [A]mendment, as is well known, was to confer upon the colored race the right of citizenship. It, however, gave to the colored people no right superior to that granted to the white race. The ancestors of all the colored people then in the United States were of foreign birth, and could not have been naturalized, or in any way have become entitled to the right of citizenship. The colored people were no more subject to the jurisdiction of the United States by reason of their birth here than were the white children born in this country of parents who were not citizens. The same rule must be applied to both races,

182. *Benny*, 32 A. at 697.
183. *Id.*
184. *Id.*
185. *Id.* at 698.

> and unless the general rule, that when the parents are domiciled here birth establishes the right to citizenship is accepted, the [F]ourteenth [A]mendment has failed to accomplish its purpose and the colored people are not citizens. The [F]ourteenth [A]mendment, by the language, "all persons born in the United States and subject to the jurisdiction thereof," was intended to bring all races, without distinction of color, within the rule which prior to that time pertained to the white race.[186]

Like the freed slaves, Benny was born in the United States to permanently domiciled and lawfully present noncitizen parents. He had never been domiciled anywhere else and had no meaningful attachment to another sovereign such that his allegiance was divided between the United States and another foreign power. As it had been for the freed slaves, the fact of lawful parental domicile at the time of Benny's birth was dispositive of whether he was "subject to any foreign power" and therefore not "subject to the jurisdiction" of the United States for purposes of citizenship. In short, there was simply nowhere else where Benny could have been said to naturally owe his allegiance. The *Wong Kim Ark* majority's reliance on *Benny* as an interpretive aid makes it even more logically probable that it intentionally limited the meaning and application of *jus soli* in order to remain consistent with the original purpose of the amendment. What, then, of the Court's reference to "lawfully present" domiciled aliens? This, too, evidences a purposeful attempt to limit the nature of the common law as adopted for purposes of citizenship.

While the Supreme Court has not taken up another case directly involving questions under the Citizenship Clause, it did appear in 1920 to again limit the scope of *jus soli* to those permanently domiciled in the United States. In *Kwock Jan Fat v. White,*[187] the Court was presented with a question of whether an individual seeking reentry into the United States on a claim of U.S. citizenship had been afforded fair procedures for determining whether he lied about his identity.[188] The petitioner claimed that he was the son of permanently domiciled residents of the United States, while the Government claimed that he was born in China and emigrated with his Chinese-merchant father as a boy.[189] Citing *Wong Kim Ark* for support, the Court noted that

186. *Id.*
187. 253 U.S. 454 (1920)
188. *Id.* at 456–57.
189. *Id.* at 455–56.

neither of the parties "disputed that if petitioner is the son of Kwock Tuck Lee and his wife, Tom Ying Shee, he was born to them when they were permanently domiciled in the United States, is a citizen thereof, and is entitled to admission to the country."[190] The Court therefore indicated that the precedent set in *Wong Kim Ark* was limited to permanently domiciled residents.

There is additional support for the premise that *Wong Kim Ark* should be construed narrowly and understood as adopting a revised version of *jus soli* that extended only to cover precisely those individuals who were subject to the complete jurisdiction of the United States—namely, the U.S.-born children of citizens and of lawfully present and permanently domiciled aliens. This support is found in the writings of several prominent constitutional- and international-law scholars in the years following the opinion in *Wong Kim Ark*, who similarly concluded that this was the most logical reading of the opinion. In fact, a comment in the *Yale Law Journal*, in the immediate aftermath of *Wong Kim Ark*, acknowledged that the Court failed to adopt the fullest extent of *jus soli* and instead invoked an Americanized common law that upheld the right of expatriation and made allegiance dependent upon permanent domicile as opposed to mere temporary presence.[191] Revered scholars and legal treatises would continue to assert well into the next decade that *Wong Kim Ark*, when read in tandem with *Elk v. Wilkins* and the purpose of the Fourteenth Amendment, created a hybrid version of common law *jus soli* that did not bestow birthright citizenship on the children of nonpermanent or unlawfully present aliens.[192] Even by

190. *Id.* at 457.

191. Comment, 7 YALE L.J. 365, 367 (1898) ("But the English rule emphatically denies the right to change one's allegiance; while the United States has always upheld the right of expatriation. Moreover, in this country, the alien must be permanently domiciled, while in Great Britain birth during a mere temporary sojourn is sufficient to render the child a British subject.").

192. *See, e.g.*, HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 634 (3d ed. 1910) ("This jurisdiction 'must at the time be both actual and exclusive.' . . . So if a stranger or traveler passing through the country, or temporarily residing here, but who has not himself been naturalized and who claims to owe no allegiance to our government, has a child born here, who goes out of the country with his father, such child is not a citizen of the United States, because he was not subject to its jurisdiction. But the children, born within the United States, of permanently resident aliens, who are not diplomatic agents or otherwise within the excepted classes, are citizens. And this is true even where the parents belong to a race of persons (such as the Chinese) who cannot acquire citizenship for themselves by naturalization."); HANNIS TAYLOR, LL.D., A TREATISE ON INTERNATIONAL PUBLIC LAW 220 (1901) ("It appears, therefore, that children born in the United States to foreigners here on transient residence are not citizens, because by the law of nations they were not at the time of their birth 'subject to the jurisdiction.'");

1921, Richard W. Flournoy Jr., writing for the *Yale Law Journal*, was forced to concede that *Wong Kim Ark* "did not directly decide the precise point that persons born in the United States of aliens who are mere sojourners or transients are citizens of this country, since in each of these cases the parents were domiciled in the United States."[193] Flournoy further noted that his conclusion—that children born under such circumstances are citizens—was at odds with the conclusions of renowned scholars in constitutional law.[194]

There are, then, a number of concepts that must be tied together into a coherent theory of citizenship as delineated by Congress, explained by the Court, and informed by context. The Fourteenth Amendment was meant to ensure that there would not be a generations-long class of perpetual noncitizen permanent-resident aliens based on race. Congress intended to exclude those who owed meaningful allegiance to a foreign power and who were not part of the American people because they had not effectively exercised their natural right of expatriation.

Chinese immigrants were, based on race, excluded from fully exercising their right of expatriation. Those who permanently resided in the United States were as fully subject to its jurisdiction as allowed under federal law and would have been permitted to become citizens had they been of European descent. This race-based exclusion was an affront to the Fourteenth Amendment and excluding their children from citizenship would have again created a class of perpetual noncitizens similar in status to the freed slaves. Further, the U.S.-born children of these immigrants did not owe a meaningful allegiance to China any more than

WILLIAM EDWARD HALL, M.A., A TREATISE ON INTERNATIONAL LAW 224–25, 227 (5th ed. 1904) ("The persons as to whose nationality no room for difference of opinion exists are in the main those who have been born within a state territory of parents belonging to the community, and whose [connection] with their state has not been severed through any act done by it or by themselves . . . . The persons as to whose nationality a difference of legal theory is possible are children born of the subjects of one power within the territory of another . . . . In the United States it would seem that the children of foreigners in transient residence are not citizens . . . ."); 1 JOHN WESTLAKE, K.C., LL.D., INTERNATIONAL LAW 219–20 (1904) ("The true conclusions from these data appear to be that when the father has domiciled himself in the Union he has exercised the right of expatriation claimed for him by congress, and that his children afterwards born there are not subject to any foreign power within the meaning of section 1992 but are subject to the jurisdiction of the United States within the meaning of the [F]ourteenth [A]mendment, therefore are citizens; but that when the father at the time of the birth is in the Union for a transient purpose his children born within it have his nationality, and probably without being allowed an option in favour of that of the United States. And these conclusions appear to be in accordance with the practice of the United States executive department.").

193. Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 Yale L.J. 545, 552 (1921).

194. *Id.*

similarly situated children of Scotch or German parents. The Court intentionally crafted a flexible common law *jus soli* that declined distinctions based on race even as it limited its application only to those U.S.-born children actually anticipated by the Amendment's framers as owing complete allegiance to the United States.

D. The Supreme Court Has Not Expanded the Application of Wong Kim Ark

In the 120 years since *Wong Kim Ark,* the Supreme Court has not directly returned to the question of who is or is not a citizen for purposes of birthright citizenship under the Fourteenth Amendment. Many prominent advocates for universal birthright citizenship, however, point to three cases that they claim show the Court has extended its holding in *Wong Kim Ark* to cover the U.S.-born children of illegal and nonpermanent resident aliens. Taking these cases one at a time, it becomes clear that the Court has not actually done this and that those who offer interpretations to the contrary make a number of erroneous assumptions about the Court's reasoning in both *Wong Kim Ark* and the more recent cases.

1. *Plyler v. Doe*

In 1981, the Supreme Court held in *Plyler v. Doe*[195] that a Texas statute violated the Equal Protection Clause of the Fourteenth Amendment by withholding state funds from local school districts for the education of children who were not "legally admitted" into the United States and by authorizing local school districts to deny enrollment to such children.[196] The Court reaffirmed that illegal aliens were "persons" protected by the Fourteenth Amendment's Due Process Clause, and concluded that they were also "within the jurisdiction" of the state for purposes of the Equal Protection Clause.[197] It reasoned that the phrase "within its jurisdiction" extends the protection to "anyone, citizen or stranger, who *is* subject to the laws of a State," and "reaches into every corner of a State's territory."[198] While this case in and of itself did not deal with the Fourteenth Amendment's Citizenship Clause, universal

195. 457 U.S. 202 (1982).
196. *Id.*
197. *Id.* at 210–214.
198. *Id.* at 215.

birthright citizenship advocates point to a footnote in that opinion containing dicta that invoked the Court's decision in *Wong Kim Ark*:

> [Justice Horace Gray] further noted that it was "impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the States of the Union are not 'subject to the jurisdiction of the United States.'"
>
> Justice Gray concluded that "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.[199]

This language is dicta referring to dicta. Further, the footnote assumes that the *Wong Kim Ark* Court could foresee the extensive development of the Equal Protection Clause, which is highly implausible. It is far more likely that the same Court that decided *Plessy v. Ferguson*[200] just two years earlier had a very different (and more limited) conception of the Fourteenth Amendment generally and the Equal Protection Clause in particular.[201] In fact, given that Justice Stephen Field's concurrence in *Wong Wing v. United States*,[202] also just two years earlier, tied the Equal Protection

199. *Id.* at 211 n.10 (citations omitted) (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 687, 693 (1898)).

200. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

201. The earliest Supreme Court decisions regarding the Fourteenth Amendment did not stray far from the implication of the *Slaughter-House Cases* that the Equal Protection Clause was fundamentally meant to eliminate racial distinctions before the law, and not much more. *Plessy* involved a Louisiana statute mandating that "white" and "colored" railroad passengers be provided "equal but separate accommodations." *Id.* at 540. The Court held that the statute did not violate the Equal Protection Clause because:

> [t]he object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544.

202. 163 U.S. 228 (1896).

Clause to lawful domicile, it is most likely that that the Court in *Wong Kim Ark* only intended to adopt this reasoning insofar as it related to lawful domiciliaries (i.e., both the Citizenship Clause and Equal Protection Clause exclude those who are not permanent or lawful residents).[203]

The *Plyler* footnote also ignores that the *Wong Kim Ark* Court, as noted above, appears to have expressly limited the adoption of *jus soli* principles to the U.S.-born children of lawfully present, permanently domiciled aliens. While the *Plyler* footnote refers to "one early commentator" writing fourteen years after the *Wong Kim Ark* decision as support for the majority's assertion that the Citizenship Clause does not distinguish between lawful resident aliens and unlawful aliens,[204] the use of one authority does not negate the fact that other more contemporaneous authorities reached very different conclusions on the extent to which *jus soli* applied post-*Wong Kim Ark*. Further, if the *Wong Kim Ark* majority was wrong about the historical adoption of *jus soli* in the United States, any conclusion that the Equal Protection Clause adopted the same jurisdictional element as the erroneously interpreted Citizenship Clause would be based on a flawed supposition. Such flawed reasoning would not become any more correct just because a later Court cited it approvingly in dicta.

Finally, assuming that the plain understanding is that the two jurisdictional clauses entail two different levels of being subject to the jurisdiction of the United States, this distinction is entirely consistent with the legislative history of the Citizenship Clause. As explained in section II(B)(2) of this Article, the Congress that passed the Fourteenth Amendment understood that even temporary sojourners were in a limited way "subject to the jurisdiction" of the United States such that they must obey its laws and are to receive equal treatment under those laws. To read the Citizenship Clause and the Equal Protection Clause as referencing,

203. This is particularly true with respect to domicile. The *Plyler* majority also relies on *Wong Wing*, which repeatedly referred to domicile—even in the portion of Justice Field's concurrence directly quoted by the *Plyler* majority in the subsequent footnote. *Plyler*, 457 U.S. at 212 n.11 ("A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.") (quoting Wong Wing v. United States, 163 U.S. 228, 242–43 (1846) (Field, J., concurring in part and dissenting in part)). Justice Field's opinion appears to assume the open question of whether nondomiciled or unlawfully present aliens were owed the same amount of protection as citizens and domiciled aliens.

204. 457 U.S. at 211 n.10 (referring to the 1912 analysis of Clement Bouvé).

respectively, the complete and basic levels of jurisdiction is not only logical based on their different grammatical structure, but entirely consistent with congressional intent.

2. *INS v. Rios-Pineda*

A second case to which advocates of universal birthright citizenship point is *INS v. Rios-Pineda*,[205] which was decided four years after *Plyler*. The case dealt with a question of whether the Attorney General had abused his statutory discretion under § 244(a)(1) of the Immigration and Nationality Act by refusing to reopen a hearing to suspend the deportation of an illegal immigrant couple who argued that deportation would cause undue hardship to their U.S.-born children.[206] Advocates point out that the Court assumed that the U.S.-born children of these illegal immigrants were, indeed, United States citizens by virtue of their birth on U.S. soil. For example, the Court recounted that "[b]y [the time INS instituted deportation proceedings against respondents], respondent wife had given birth to a child, who, born in the United States, was a citizen of this country."[207]

This is far from dispositive. The question before the Court was not whether the U.S.-born child was a citizen, nor would the Court have reasonably addressed that question absent a challenge by the Government to that effect. But the Government, acting under its own interpretation that the U.S.-born child was a citizen under *Wong Kim Ark*, did not raise this challenge. Further, the Government had presumably already treated the child as a U.S. citizen, granting her a Social Security number and instructing the Bureau of Immigration to treat her accordingly. She was, for all intents and purposes, a citizen in the eyes of the Government, at least at that time, regardless of whether that grant of citizenship was mandated by the Fourteenth Amendment. But this does not answer the underlying questions of whether that de facto grant of citizenship to that individual and subsequent treatment was mandated by the Fourteenth Amendment, and whether future administrations are barred from giving effect to a narrower interpretation of the Citizenship Clause for individuals whom it has not already treated as citizens.

205. 471 U.S. 444 (1985).
206. *Id.* at 445–46.
207. *Id.* at 446.

3. *Hamdi v. Rumsfeld*

That the Court might not address the underlying substance of citizenship claims when the Government's argument effectively presumes citizenship is seen in the final case commonly pointed to by advocates of universal birthright citizenship, *Hamdi v. Rumsfeld*.[208] Like in *Rios-Pineda*, the question before the Court was not one of the petitioner's citizenship, which was presumed to exist given that the Government did not challenge it. The petitioner in the case, Yaser Esam Hamdi, was born in Louisiana in 1980 to Saudi Arabian parents while his father was on a temporary work visa.[209] They returned to Saudi Arabia when Hamdi was still a toddler, and he did not set foot on American soil until two decades later—after he had been captured by American forces while fighting for the Taliban.[210] From the moment the military found out he had been born on American soil, it presumed he was a citizen and did not contest the claim.[211] The only questions raised were whether the Executive Branch "has the authority to detain citizens who qualify as 'enemy combatants'" and "what process is constitutionally due to a citizen who disputes his enemy-combatant status."[212]

Once again, this case stands only for the proposition that the Supreme Court will not delve into the question of the citizenship of a litigant when it is presumed by the Government to exist and when the Government has effectively treated that individual as a citizen for all relevant purposes. As with *Rios-Pineda*, the Government's presumption has no bearing on the underlying question of whether that administrative decision is mandated by the Fourteenth Amendment, or whether the Government may subsequently adopt a narrower interpretation of the Citizenship Clause as it applies to individuals whom the Government has not treated as presumed citizens.

208. 542 U.S. 507 (2004).

209. Frances Stead Sellers, *A Citizen on Paper Has No Weight*, WASH. POST (Jan. 19, 2003), https://perma.cc/Z9NC-LXUE.

210. *Id.*

211. *See* Matthew Dolan, *American-born Taliban Fighter Jailed in Norfolk*, THE VIRGINIAN-PILOT (Apr. 6, 2002), https://perma.cc/M2KA-438J (reporting that once the military learned of the possibility of Hamdi being an American citizen, it made the decision to return him to the United States). Further, the Government's response brief to the Supreme Court referred to Hamdi as a "presumed American citizen," and that military obtained records that the Saudi national "was born in Baton Rouge, Louisiana, and therefore might be a United States citizen." Brief for the Respondents at 5, 9, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).

212. *Hamdi*, 542 U.S. at 516, 524.

III. THE "LIMITED" *JUS SOLI* FRAMEWORK APPLIED TO MODERN IMMIGRATION CONTEXTS

The United States's immigration and nationality laws no longer create de facto classes of permanent-resident aliens who are perpetually precluded from naturalization on the basis of national origin or race. Instead, current laws recognize three general classes of foreign nationals, classified based on the lawfully permitted length and nature of their stay in the country: (1) immigrant aliens, also known as permanent-resident aliens or "green card holders"; (2) nonimmigrant aliens whose permitted length of stay is dependent upon the type of visa they acquire; and (3) illegal aliens. A closer look at these three classes of aliens shows that only permanent-resident aliens resemble that class of foreign nationals examined by the Court in *Wong Kim Ark*, while nonimmigrant and illegal aliens fall outside the parameters of the Court's "flexible common law" test for determining who is subject to the complete jurisdiction of the United States for purposes of birthright citizenship.

As explained by Senator Howard, those who are subject to the "complete jurisdiction" of the United States are those who are subject to "the same jurisdiction in extent and quality as applies to every citizen of the United States now."[213] The *Wong Kim Ark* majority's flexible common law approach is consistent with Senator Howard's premise, and together they form a fairly coherent view of complete allegiance: those we treat as more than mere foreigners, who are adopted in a meaningful way into the fabric of American political life, who owe the same types of duties and enjoy the same types of rights as citizens even if they are not themselves citizens. In short, that is precisely the position of permanent-resident aliens.

Beyond the obvious fact that permanent-resident aliens fit neatly into the two factors so important to *Wong Kim Ark*—they are permanently domiciled and lawfully present—they are also, in the eyes of the United States government, a fundamentally unique class of noncitizens. Becoming a permanent-resident alien is, in many respects, the equivalent of declaring an intention to become a United States citizen in the eighteenth and nineteenth centuries. Unlike nonimmigrant and illegal aliens, permanent-resident aliens become eligible for naturalization after five years,

213. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (statement of Sen. Howard).

and, in fact, in most cases an alien cannot become a naturalized U.S. citizen without first becoming a permanent-resident alien.[214] Because this is effectively the first step toward citizenship, permanent-resident aliens are subject to rights and duties more similar to U.S. nationals (who, by statutory definition, owe their permanent allegiance to the United States)[215] than to nonimmigrant and illegal aliens. In fact, permanent-resident aliens admitted to the U.S. as refugees when they were under the age of eighteen have the exact same rights as a U.S. national, because they are considered to have lost their prior country of permanent residence and cannot be deported under international law.

Permanent-resident aliens, like U.S. citizens and nationals, must register for the selective service[216] and pay taxes on their worldwide income.[217] Unlike other classes of aliens, they are eligible for many federal jobs[218] and can receive federal benefits under qualifying circumstances (typically based on length of residency).[219] They can purchase and possess firearms subject

214. *See generally Path to U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/XR6J-4ETR (last updated Apr. 17, 2019) (stating that a permanent resident must be a Green Card holder for at least five years); *Chapter 2 – Becoming a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGR. SERVS: POL'Y MANUAL, VOLUME 12 - CITIZENSHIP AND NATURALIZATION, PART A, https://perma.cc/2C37-63D6 (last updated Nov. 6, 2019). The rare exception to this rule is for individuals who enlisted in the United States military while physically present in the geographic United States, and served at least one year of active duty service during a designated period of hostility. U.S. CITIZENSHIP & IMMIGRATION SERVICES, A GUIDE TO NATURALIZATION 18–21, https://perma.cc/8TZV-R63E.

215. 8 U.S.C. §1101(a)(22) (2012) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."); *see also id.* §1101(a)(21) ("The term 'national' means a person owing permanent allegiance to a state.").

216. *Immigrants and Dual Nationals*, SELECTIVE SERV. SYS., https://perma.cc/EFC6-6PRY.

217. *Introduction to Residency Under U.S. Tax Law*, IRS, https://perma.cc/MQ7T-TKHC (last updated Apr. 18, 2019). While the controlling principle for resident aliens is that they are taxed on their worldwide income in the same manner as U.S. citizens, nonresident aliens are taxed only on income derived from sources within the United States or effectively connected with a U.S. trade or business. *Id.*

218. Executive Order 11935 mandates that only U.S. citizens and U.S. nationals may be permitted to hold competitive civil service jobs, and that noncitizen or non-nationals may only be hired in the absence of qualified citizens and then only in a limited capacity. *Employment of Non-Citizens*, USAJOBS, https://perma.cc/62UE-5CRH. Some major federal agencies, however—including the Federal Bureau of Investigation, the United States Postal Service, and the Tennessee Valley Authority are exempted from the order and may use federal funds to hire noncitizens. *Id.* The catch, however, is that the Appropriations Act only allows those federal funds to be used for the hiring of lawful permanent residents. *Id.* The effect of this legal framework is to open up hundreds of thousands of federal jobs to lawful permanent residents, but not to nonimmigrant or illegal aliens.

219. *Fact Sheet: Immigrants and Public Benefits*, NAT'L IMMIGR. F. (Aug. 21, 2018), https://perma.cc/DK3F-9VHX. On the federal level, lawful permanent residents become

only to the same requirements as citizens, effectively raising them—and not illegal or nonimmigrant aliens—to the status of "the people" of the United States for whom the right to keep and bear arms shall not be infringed.[220] Permanent-resident aliens may set up their own small businesses without obtaining entrepreneurial visas. They can sponsor permanent residency for certain relatives.[221] They may leave and reenter the United States with relative freedom,[222] and children born abroad to traveling

eligible for federally funded public benefits after having resided in the United States for five years as lawful permanent residents or after having worked in the United States under a visa for forty quarters. *Id.* These benefits include, among other things, Medicaid, the Children's Health Insurance Program (CHIP), Supplemental Nutrition Assistance Program (SNAP), Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), health care subsidies under the Affordable Care Act, access to the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and public ("Section 8") housing. *Id.*; *Mapping Public Benefits for Immigrants in the States*, PEW (Sept. 24, 2014), https://perma.cc/X3TM-2633.

220. Illegal aliens are categorically prohibited under federal law from purchasing or possessing firearms, while nonimmigrant aliens must apply for temporary purpose-specific permits in order to purchase or possess firearms. *See* 18 U.S.C. § 922(g)(5)(A)–(B) (2012) (making it a crime for anyone illegally in the United States to purchase, possess, or transport a firearm) ; *id.* § 922(y)(2)–(4); (providing that nonimmigrant aliens lawfully admitted must apply for a waiver from the requirements of § 922(g)(5)); *May a Nonimmigrant Alien Who Has Been Admitted to the United States Under a Nonimmigrant Visa Possess a Firearm or Ammunition in the United States?*, ATF: BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://perma.cc/8UKH-67HM (last updated June 7, 2016). Even to rent firearms for use at a shooting range, nonimmigrant aliens must first obtain a state hunting license or fall within one of the limited exceptions under § 922(y). *Can an Alien Who Enters the United States on a Nonimmigrant Alien Visa Rent a Firearm for Lawful Hunting or Sporting Purposes While in the United States?*, ATF: BUREAU ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, https://perma.cc/YS7M-3DHC (last updated Sept. 15, 2015).

221. *Family of Green Card Holders (Permanent Residents)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://perma.cc/2QE4-U4VX (last updated July 14, 2015).

222. Lawful permanent residents who leave the United States for less than one year need only present their Permanent Resident Card for re-entry, while lawful permanent residents who plan on being abroad for more than a year must apply for a reentry permit and file an Application to Preserve Residence for Naturalization Purposes so as not to have their continuous residency requirement disrupted for future citizenship. *International Travel as a Permanent Resident*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://perma.cc/4TVE-84VN (last updated Jan. 11, 2018). Lawful permanent residents who are absent for more than two years can no longer rely on their green card or re-entry permit, but may be eligible to apply for a Returning Resident immigrant visa. *Returning Resident Visas*, U.S. DEP'T ST.: BUREAU CONSULAR AFF., https://perma.cc/X4UA-WK9E. Further evidence of the importance of lawful permanent residency for purposes of international travel was seen after President Trump's series of Executive Orders temporarily barring re-entry to the United States for aliens from certain countries. While the initial orders did not exempt returning lawful permanent residents, subsequent court battles led to later orders explicitly exempting them from the re-entry prohibition. *See* Ariane de Vogue, Eli Watkins & Alanne Orjoux, *Judges Temporarily Block Part of Trump's Immigration Order, WH Stands by it*, CNN: POLITICS (Jan. 29, 2017, 12:17 PM), https://perma.cc/BF2A-XAEX (reporting on a New York federal district court's granting a nationwide stay of the travel ban and a Massachusetts federal district court's issuance of a temporary restraining order to prevent the Administration from removing individuals lawfully present in the U.S.); *Trump's Executive Order: Who Does Travel Ban Affect?*, BBC NEWS:

permanent-resident aliens are permitted to immigrate to the U.S. without first obtaining a visa.[223] Like U.S. citizens and nationals, lawful permanent residents are eligible for the Transportation Security Administration's Pre-Check Program for expedited security processing, and the U.S. Customs and Border Protection even groups lawful permanent-residents with citizens for purposes of providing online travel information.[224] Perhaps most significantly, like U.S. citizens and nationals, the United States government may choose to afford basic levels of consular protection to certain lawful permanent-resident aliens—something it would never consider doing for U.S.-residing illegal or nonimmigrant aliens abroad.[225]

The idea that aliens acquire rights and duties to make them more like de facto citizens on the basis of developing significant legal and voluntary connections to American society is well founded in constitutional jurisprudence. In many respects, permanent-resident aliens have been viewed by the courts as more or less the equivalent of earlier classes of aliens who had declared their intent to become citizens. Just as the Supreme Court in 1923 noted that "the rights, privileges and duties of . . . alien declarants differ substantially from those of nondeclarants,"[226] subsequent Supreme Court decisions have continued to distinguish between the rights and duties of lawful permanent-residents and those of nonimmigrant and illegal aliens.[227] Further, the Supreme Court

U.S. & CANADA (Feb. 10, 2017), https://perma.cc/5U6H-T92L (describing the Trump Administration's evolving treatment of Green Card holders under the travel ban).

223. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 201.2-3, https://perma.cc/58AS-Z8PZ.

224. *Applying for TSA Pre ✓ Who Can Apply for TSA Pre ✓*, TRANSP. SECURITY ADMIN., https://perma.cc/KV7Q-2MT9; *For U.S. Citizens/Lawful Permanent Residents*, CUSTOMS AND BORDER PATROL, https://perma.cc/Q7P2-DX7Q (last modified Aug. 23, 2018).

225. The State Department's Foreign Affairs Manual notes that lawful permanent residents generally are not entitled to U.S. consular emergency or protective services, but may request guidance for proceeding with such protections for Lawful Permanent Residents with "exceptionally close and strong ties to the United States" when "overriding humanitarian and compassionate grounds exist." U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 7 FAM 012(c), https://perma.cc/2VQD-KHPC. Conversely, "persons with no ties or allegiance to the United States"—presumably nonimmigrant and illegal alien residents travelling outside the United States—"may not be provided emergency or protective services except under the most extraordinary circumstances, and then only with the prior approval of the [State] Department." *Id.* at 7 FAM 012(d).

226. Terrace v. Thompson, 263 U.S. 197, 218 (1923).

227. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of

in 1892 effectively held that even the foreign-born child of a permanently domiciled alien who had declared his intention to become a U.S. citizen but may not actually have become one was not himself subject to any foreign power, and therefore became a citizen via Nebraska's admission to the Union.[228] This distinction has even carried into levels of scrutiny afforded to the various immigrant classes for Equal Protection lawsuits, with only lawful permanent-residents receiving strict scrutiny review.[229] Most

intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guarantees—such as the due process of law of the Fourteenth Amendment." (citations omitted)). As the *Eisentrager* Court later notes, the Selective Service Act of 1948 "exempt[ed] aliens who have not formally declared their intention to become citizens from military training, service and registration." *Id.* at 773. Today, that exemption applies to nonimmigrant and illegal aliens, but not to immigrant aliens—who are effectively the class of individuals presumed to have an intent to become citizens. *Immigrants and Dual Nationals*, *supra* note 216.

228. Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 178 (1892). The Court noted regarding the foreign-born children of aliens: "Clearly, minors acquire an inchoate status by the declaration of intention on the part of their parents [to become United States citizens]." *Id.* Although it spoke in terms of the theory of election—since overtaken by the general acceptance of dual nationality—it also recognized that the parental declaration "initiated" for the foreign-born child an allegiance to the United States which he must later accept or reject. *Id.* Nor did the son lose this status if the father failed to perfect his naturalization, but could insist that he himself was now subject to the United States and "insist upon the benefit of his father's act." *Id.* at 179.

229. *See, e.g.*, LeClerc v. Webb, 419 F.3d 405, 416–417 (5th Cir. 2005) ("Beginning in 1971, the Court has applied some variation of strict scrutiny to invalidate state laws affecting 'resident aliens' or 'permanent resident aliens.' The Court has never applied strict scrutiny to a state law affecting any other alienage classifications, *e.g.*, illegal aliens, the children of illegal aliens, or nonimmigrant aliens. In such cases, the Court has either foregone Equal Protection analysis or has applied a modified rational basis review. In the latter case, *Plyler*, the Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens. Yet, while adopting a *sui generis* level of rational basis review, the Court acknowledged that the immigration status of the affected class of aliens precluded use of either intermediate or strict scrutiny review . . . . The Court has uniformly focused on two conditions particular to resident alien status in justifying strict scrutiny review of state laws affecting resident aliens: (1) the inability of resident aliens to exert political power in their own interest given their status as virtual citizens; and (2) the similarity of resident aliens and citizens." (citations omitted)); League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 533 (6th Cir. 2007) (adopting the reasoning of *LeClerc* and reiterating that "[p]ermanent resident aliens are similarly situated to citizens in economic, social, and civic conditions as well. Like citizens, they pay taxes, support the economy, serve in the armed forces, and are entitled to reside permanently in the United States. Temporary resident aliens, on the other hand, are admitted to the United States only for the duration of their authorized status, are not permitted to serve in the U.S. military, are subject to strict employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits." (citations omitted)). Of particular note, the Fifth Circuit in *LeClerc* also recognized that "[n]onimmigrant aliens may, of course, qualify for anti-discrimination protection based upon race, sex, national origin and religious adherence, just as they may otherwise enjoy the benefits of American law. But their lack of legal capacity, unlike that of immigrant aliens, is tied to their temporary

importantly, the Supreme Court has recognized the relationship between permanent residence in the United States and the strength of a person's claim to equal treatment as de facto citizens.[230] In fact, in upholding a federal law limiting Medicare Part B eligibility to lawful permanent-residents who had resided in the United States for at least five years, the Court linked together illegal aliens and temporary visitors with resident diplomats and "unfriendly agent[s]" of hostile foreign powers, noting that none of those individuals "can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests."[231]

Even the *Plyler* majority recognized that illegal aliens in particular are granted fewer and less robust constitutional protections than are citizens and lawful residents.[232] As the Second Circuit has noted, illegal aliens by their very nature constitute a distinct class of aliens with "little commitment to this nation's political institutions," and are likely to "maintain no permanent address in this country, elude detection through an assumed

connection to this country." *LeClerc*, 49 F.3d at 417 (footnotes omitted). In other words, their temporary subjection to U.S. law entitled to them to the basic protections of that law, but this temporary subjection also created a markedly different relationship to the American people than that of citizens and permanent-resident aliens—the exact type of distinction envisioned under the original meaning of the Citizenship Clause.

230. *See, e.g.*, *Eisentrager*, 339 U.S. at 770 ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the county creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of his intent to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guarantees—such as the due process of law of the Fourteenth Amendment."); Mathews v. Diaz, 426 U.S. 67, 83 (1976) ("We may assume that the five-year line drawn by Congress [for the reception of public benefits] is longer than necessary to protect the fiscal integrity of the program. We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not." (footnotes omitted); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains permanent admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

231. *Diaz*, 426 U.S. at 80.

232. For example, the *Plyler* majority stated that unlawful status is not constitutionally irrelevant, rejected "undocumented aliens" as a suspect class, and acknowledged that illegal aliens have been "denied benefits that our society makes available to citizens and lawful residents." Plyler v. Doe, 457 U.S. 202, 218–20, 219 n.19 (1982).

identity, and—already living outside the law—resort to illegal activities to maintain a livelihood."[233] They have, quite literally, made a deliberate decision *not* to subject themselves to U.S. law, thereby showing "little commitment to this nation's political institutions."[234] They have no right to remain as residents, and are, in fact, under constant threat of expulsion from the land. Their very presence is an affront to and in violation of United States sovereignty—much like that of invading armies under the common law.

It may be questioned whether it was wise policy to allow lawful permanent-residents to retain their original nationality indefinitely, but the fact remains that the U.S. government treats this class of aliens as part of the "American people" in a manner distinct from the treatment received by nonimmigrant and illegal aliens.

It appears, then, that immigrant aliens are indeed a class of individuals who, though not yet fully naturalized, have taken sufficient steps toward breaking their bonds of allegiance with their native countries such that they are considered a part of the "American people" who are subject to the complete jurisdiction of the United States. They presumably intend to remain in the United States and solidify their bonds with the country, and they are subject to almost identical rights and duties as are U.S. citizens and nationals.

IV. CONCLUSION

Under any standard of originalism—original intent, original meaning of the ratifiers, or original public meaning—it is clear that the Citizenship Clause restricted birthright citizenship to the U.S.-born children of those individuals who were subject to the complete jurisdiction of the United States. Working in tandem with the Civil Rights Act of 1866 and its later codification as section 1992 of the Revised Statutes of the United States, the Fourteenth Amendment bestowed citizenship upon the newly freed slaves and those who were similarly situated to them in terms of their relationship to the "American people," irrespective of race. This relationship entailed a complete subjection to United

233. United States v. Toner, 728 F.2d 115, 128–29 (2d Cir. 1984) (citation omitted). The Fifth Circuit later approvingly quoted the Second Circuit in this regard. United States v. Portillo-Munoz, 643 F.3d 437, 441 (5th Cir. 2011).

234. *Toner*, 728 F.2d at 129 (citation omitted).

States jurisdiction, which in turn meant not being meaningfully subject to any foreign power or owing only a temporary allegiance to the United States. The relative strength of allegiance to the United States was presumed dependent upon lawful domicile.

Insofar as the Supreme Court has adopted common law *jus soli* as the underlying theory of United States citizenship, it appears to have limited its application to lawfully present and permanently domiciled aliens—some dicta in more recent tangentially related cases notwithstanding. This "limited" *jus soli* can most logically be understood as a purposeful preservation of the original purpose and meaning of the Citizenship Clause, even if true *jus soli* is incompatible with other fundamental principles underlying the Constitution. Although United States immigration and naturalization laws no longer risk the creation of generations-long classes of permanent resident noncitizens who are not truly subject to any foreign power, the modern immigration framework treats immigrant aliens as de facto citizens who are part of the "American people." This treatment places them, for all meaningful respects, under the complete jurisdiction of the United States for purposes of birthright citizenship. Nonimmigrant and illegal aliens, however, are not similarly considered part of the American people, are not subject to the complete jurisdiction of the United States, and are therefore not entitled to birthright citizenship under the Constitution.