Testimony of Charles J. Cooper

on

" 'Subject to the Jurisdiction Thereof': Birthright Citizenship and the Fourteenth Amendment"

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of

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Good morning Chairman Roy and Members of the Subcommittee. Thank you for inviting me to participate in today's hearing entitled, " 'Subject to the Jurisdiction Thereof': Birthright Citizenship and the Fourteenth Amendment."[1] I am honored to share with you my thoughts on the subject of today's hearing, the Citizenship Clause of Section 1 of the Fourteenth Amendment. That Clause provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

More specifically, the purpose of today's hearing is to explore the meaning of six words of the Citizenship Clause—"and subject to the jurisdiction thereof"—which make clear that not all persons born in the United States are constitutionally entitled to the precious privilege of American citizenship. Only those persons who are born on American soil and are at the time of their birth "subject to the jurisdiction" of the United States become citizens under the Fourteenth Amendment. These words are thus among the most important in the Constitution, for their meaning determines whom among those born in the

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United States are entitled to birthright citizenship and thus to the freedoms, opportunities, protection, and duties that come with it.

The debate over the scope of the Citizenship Clause turns largely on the meaning of "jurisdiction"—"a word of many, too many, meanings." *Wilkins v. United States*, 598 U.S. 152, 156–57 (2023) (internal quotation marks omitted). Those who read the Citizenship Clause to guarantee essentially universal birthright citizenship argue that anyone who is "required to obey U.S. laws" is "subject to the jurisdiction" of the United States. James C. Ho, *Defining "American,"* 9 GREEN BAG 367, 368–69 (2006); *see, e.g.,* Elizabeth Wydra, *Birthright Citizenship: A Constitutional Guarantee*, AM. CONST. SOC'Y L. & POL'Y, 1, 3 (2009) https://perma.cc/67YD-EYNX. That view grants citizenship essentially to anyone born within our borders, whether here legally or illegally, fleetingly or permanently. Those who understand the Clause to require a stronger connection between the person born on United States soil and the American body politic (including, as discussed below, the Framers and supporters of the Citizenship Clause in the 39th Congress) interpret "jurisdiction" in its "full and complete" sense, requiring a reciprocal political bond between the newborn and the sovereign defined by the "allegiance" owed by the new citizen in return for the "protection" of the sovereign.

The recurring debate over the scope of the Clause has divided government

officials, scholars, and judges since the Fourteenth Amendment became part of the Constitution in 1868. That debate came roaring back to life on Inauguration Day, January 20, 2025, when President Trump signed Executive Order 14160, entitled "Protecting the Meaning and Value of American Citizenship." 90 Fed Reg. 8449 (January 29, 2025).

President Trump's Executive Order rejects the Executive Branch's longstanding view that the Citizenship Clause guarantees birthright citizenship to all "children born in the United States of aliens" except for "children born in the United States of foreign diplomats" and "members of Indian tribes." Legislation Denying Citizenship at Birth to Certain Children Born in the United States, 19 OP. O.L.C. 340, 342 (1995). Instead, the order interprets the Citizenship Clause to grant birthright citizenship only to the children of citizens and of aliens who are lawful permanent residents.[2] The order thus excludes from natural-born citizenship the children of aliens whose presence in the country is illegal and the children of aliens who have been permitted by law to enter the country on a temporary basis. *See* 90 Fed. Reg. at 8449. I believe that President Trump's interpretation of the Clause is correct, and clearly so, despite the

[2] Specifically, the executive order denies birthright citizenship to persons born in the United States whose mothers are in the country either unlawfully or lawfully but only temporarily and whose fathers are not citizens or lawful permanent residents at the time of the child's birth. 90 Fed. Reg. at 8449.

government’s decades-long (but erroneous) practice of recognizing essentially universal birthright citizenship.

The Executive Order’s interpretation of the Citizenship Clause is supported by the provision’s text, structure, and history, as well as by common sense. But before turning to these traditional indicia of the Clause’s original public meaning, we must first address the notion that, as a District Court judge recently ruled in preliminarily enjoining implementation of the order, the Supreme Court’s 1898 decision in *Wong Kim Ark v. United States*, 169 U.S. 649 (1898), “resolved any debate about ... the meaning of ‘subject to the jurisdiction thereof’... [and] forecloses the President's interpretation of the Citizenship Clause.” *Casa, Inc. v. Trump*, __ F. Supp. 3d __, 2025 WL 408636, at * 6 (D. Md. Feb. 5, 2025) (quoting *Wong Kim Ark*, 169 U.S. at 654). The *Wong Kim Ark* case had nothing to do with the children of illegal aliens or aliens lawfully but temporarily admitted to the country.

The plaintiff in *Wong Kim Ark* was born in California to Chinese parents who were lawful permanent residents domiciled in that state. Upon returning from a temporary visit to China, he was denied reentry under the Chinese Exclusion Act, which barred aliens “of the Chinese race, and especially Chinese laborers, from coming into the United States.” *Wong Kim Ark*, 169 U.S. at 653. The plaintiff argued that he was a natural-born United States citizen and

therefore not subject to exclusion under the Act. The Supreme Court was especially careful to frame the "single question" presented, which it repeated verbatim *twice* in the opinion, as follows:

> [W]hether 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.

Id. at 653, 705 (emphasis added). The Court held that this "question must be answered in the affirmative." *Id.* at 705. The holding of the case was thus confined, by its own terms, to the birthright citizenship of children born in the United States to *lawful permanent residents*. And it was the plaintiff's own lawful permanent domicile in the United States, inherited from his parents, that gave rise to the duty of allegiance that he owed to the country where he was born and where he would be raised by his parents. This much seems clear from the *Wong Kim Ark* Court's "irresistibl[e] conclusions" that

> [t]he fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, *in the allegiance and under the protection of the country*, including all children here born of *resident* aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns and their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes *owing direct allegiance to their several tribes*.

Id. at 693 (emphases added). For a person born within the territory of the United States to be "subject to the jurisdiction thereof," it appears from this passage that the person must at birth owe a sufficiently direct duty of allegiance to the sovereign in return for the sovereign's reciprocal obligation of protection. The child of members of an Indian tribe who owe direct allegiance to their tribe does not qualify, although clearly born in the United States.

Nor do the children of aliens who are here illegally, at least not under any common sense understanding of the Citizenship Clause. A hypothetical scenario that alters the facts of *Wong Kim Ark* will help bring the point into sharper focus. Suppose that the plaintiff in *Wong Kim Ark* had been born in California to parents who had entered the United States in violation of the Chinese Exclusion Act and were thus subject to criminal prosecution and deportation upon discovery. The "single issue" presented under these facts would be framed something like this:

> 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 and who entered and have remained in the United States in violation of our laws prohibiting the same, and who thus owe no allegiance to our country, becomes at the time of his birth a citizen of the United States.

I submit that it is implausible in the extreme that the *Wong Kim Ark* Court would have answered this question "in the affirmative."

To be sure, there is dicta in the Court's opinion to the effect that any person who is born in the United States and who is not within any of the four

"exceptions" identified by the Court is entitled to birthright citizenship. *See Wong Kim Ark*, 169 U.S. at 682, 693. But that dicta is not binding and, more fundamentally, is wrong. The holding of the Court—that a child born here to lawful permanent residents domiciled in this country is a citizen at birth—is correct, as the text, structure, and history of the Citizenship Clause demonstrate.

I. The Text of the Citizenship Clause

If "subject to the jurisdiction" of the United States means nothing more than the duty of obedience to "the laws of the United States," then why didn't the Framers of the Clause just say "subject to the laws of the United States"? Doing so would have been quite natural given that this straightforward, unambiguous phrase is used in both Article III and Article VI. And if this is all that "subject to the jurisdiction thereof" was understood to mean, why did the Framers of the Clause add the phrase to "born in the United States," which standing alone necessarily implies amenability to the government's sovereign regulatory authority? *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible."). It is no answer to say that the inclusion of "subject to the jurisdiction thereof" was necessary to ensure that the Clause did not eliminate the four exceptions to universal birthright citizenship identified by the *Wong Kim Ark* Court. Those exceptions (save for the exception

for children of Tribal Indians) were not found by the Court to be implicit in the Clause as a result of a careful exegesis of the original public meaning of "subject to the jurisdiction thereof," but rather were forced on the Clause on the theory that they were incorporated from our country's common-law traditions.

Apart from these threshold textual problems with universal birthright citizenship, advocates of that interpretation necessarily must read into the Clause qualifications that simply have no basis in its text, structure, and history. Start with the word whose meaning is the center of debate: "jurisdiction." The most natural reading of the Citizenship Clause is that it requires a person to be subject to the "full and complete" jurisdiction of the United States. This is in keeping with the standard canon that "[g]eneral words (like all words, general or not) are to be accorded their full and fair scope." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF JUDICIAL TEXTS 101 (2012). This means that they are "not to be arbitrarily limited" to only a subset of their natural meaning. *Id.* An example of this canon at work in a closely analogous context is the Supreme Court's construction of the Executive Vesting Clause, which provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Interpreting the phrase "[t]he executive Power" in accordance with the general-terms canon, the Supreme Court has explained that "all of it" is vested in the President. *Seila Law LLC v.*

CFPB, 591 U.S. 197, 203 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1). In other words, the full and complete executive power is what the Constitution means by vesting in the President "[t]he executive Power." This is in contrast to the Legislative Vesting Clause, which vests only "the legislative Powers herein granted" in Congress. U.S. Const. art. I, § 1.

Thus, when the Framers of the Citizenship Clause used the term "jurisdiction," standard tools of interpretation presume that they meant the *full and complete* jurisdiction of the United States, which requires more than just one's physical presence in the Country that creates a temporary duty of "submission and obedience" to our laws. *Fleming v. Page*, 50 U.S. 603, 615–16 (1850) (describing the "temporary allegiance" owed by "foreigners and enemies" while on land controlled by the United States). No, it requires a person to owe a "direct and immediate allegiance" to the sovereign. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884); *see also* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (1880). In other words, "jurisdiction" encompassed not only the power to enforce laws, but also the concept of "political jurisdiction" as described in *Elk*, 112 U.S at 102 (citizenship attaches at birth only to those "*completely* subject to" our country's "*political* jurisdiction.") (emphases added). A plain-meaning reading of "jurisdiction," in accordance with the general-terms canon, thus is not satisfied

by a fleeting exercise of the purely regulatory jurisdiction that attaches even to the "temporary and local allegiance" owed by an alien here only temporarily. *The Schooner Exch. v. McFaddon,* 11 U. S. 116, 144 (1812); *see* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 48, at 48 (1834). Again, had the Framers of the Citizenship Clause intended to extend birthright citizenship to any person amenable to Congress' regulatory "jurisdiction," surely it would not have chosen words so ill-suited to its purpose. At a minimum, it could have used a qualifier like "subject to the jurisdiction thereof *to any extent*." Yet it chose not to do so.

Those who owe a "direct and immediate allegiance" sufficient to establish the "political jurisdiction" of the United States obviously include citizens and their children. But this category also includes children born here to persons who have lawfully established permanent residence. Such lawful permanent residents, although not full members of the political community, have sufficient ties to establish a permanent domicile, which is deeply tied to the concept of allegiance. *Wong Kim Ark*., 169 U.S. at 692 ([W]hen the parents are domiciled here birth establishes the right to citizenship."). That person's child would inherit his father's permanent domicile and thus become American by birth. The children of persons who were merely in the country temporarily are not subject to the full and complete jurisdiction of the United States because, although their parents

owe "submission and obedience" to the laws, *Flemming*, 50 U.S. at 615-16, and were thus "subject in some respect or degree to the jurisdiction of the United States," *Elk*, 112 U.S. at 102, their presence only created an inherently "temporary and local allegiance." *The Schooner Exch.*, 11 U.S. at 144. In any event, no reasonable understanding of the concept of the allegiance/protection bond between citizen and sovereign can be stretched to include a person born in the United States to illegal aliens, who are at pains to evade discovery by our government because, although bound like anyone else on American soil to comply with our laws, their very presence here is in intentional defiance of them. They owe no genuine allegiance to the United States.

Although the general-terms canon of construction, like all such canons, is defeasible by the context in which a term is used, *see* Scalia & Garner, *supra*, at 59, the rest of the Citizenship Clause's text also points in the same direction: A person born in the United States must be "completely subject to [its] political jurisdiction, and owing [it] direct and immediate allegiance" to be constitutionally entitled to citizenship at birth. *Elk*, 112 U.S. at 102.

The text surrounding the phrase "subject to the jurisdiction thereof" supports the Executive Order's "complete-jurisdiction" interpretation and defeats the "regulatory-jurisdiction" one. Given that legal enactments are read as a "harmonious whole," *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012)

(internal quotation marks omitted), the surrounding text provides strong evidence that the Citizenship Clause requires full and complete jurisdiction, *see* Scalia & Garner, *supra*, at 180.

Begin with the Citizenship Clause's statement providing that persons born in the United States and meeting the jurisdictional requirements for citizenship shall be a "citizen[] of the United States and of the State wherein they *reside*." U.S. CONST. amend. XIV, § 1, cl. 1 (emphasis added). The Clause clearly presumes that persons granted birthright citizenship "reside" in a state.

To "reside" meant the same thing in 1868 as it means today: the place where one lives, where he is "domiciled." JOHN TRAYNOR, LATIN PHRASES AND MAXIMS 295–96 (1861) (equating domicile and residence); VINE W. KINGSLEY, RECONSTRUCTION IN AMERICA 24 (1865) (same). And it is clear that the "residence" contemplated by the Framers of the Clause is the place where one lives both permanently and legally. Nineteenth-century law recognized that a nation could "prescribe[] a certain form, whereby a stranger shall be admitted to establish his domicile therein." ROBERT PHILLIMORE, 4 COMMENTARIES UPON INTERNATIONAL LAW 218-222 (1889) (discussing the difference between *de facto* and *de jure* domicile); *The Georgia*, 74 U.S. 32, 41 (1868) (describing Phillimore's commentaries "on international law" as "learned and most valuable"). Thus, when a country refused domicile to a person, it followed

obviously, that he could not legally establish his domicile in the country. After all, the very idea of a domicile requires the consent of both parties—allegiance from the person seeking domicile in return for the sovereign's protection—and a person whose very presence flouts the law has not demonstrated allegiance to the sovereign in any capacity. *See* Robert G. Natelson & Andrew T. Hyman, *The Constitution, Invasion, Immigration, and the War Powers of States*, 13 BR. J. AM. LEG. STUDIES 1, 29 & n.182 (2024). It was understood even in England, with its expansive doctrine of *jus soli*, that an alien cannot "pay any Allegiance to any other Society, unless he be afterwards received into it." *See* MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 80 (5th ed. 1786). Lord Coke, ruling under the doctrine of *jus soli*, recognized a similar point by stating that a requirement of birthright citizenship was "the parents be under the actual obedience of the King." *Calvin's Case* (1608), 77 Eng. Rep. 377, 399; 7 Co. Rep. 1, 18b (K.B.). Illegal aliens have not been "received" into the United States, Bacon, *supra*, at 80, and they are certainly not under "actual obedience" to it, *Calvin's Case*, 77 Eng. Rep at 399.

The Framers of the Fourteenth Amendment were well aware, of course, that our nation was founded on the self-evident truth that governments "deriv[e] their just powers from the consent of the governed," THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), and that mutual consent was required to

establish the allegiance/protection bond necessary to make a citizen. It would thus make no sense that children born here to temporary visitors and illegal aliens, neither of whom have been permanently "received" into the country, are citizens under the Citizenship Clause. *See generally* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). By permitting a foreigner to visit our country, the sovereign has not consented to let that person establish a permanent relationship with the body politic, much less that person's child. It has only consented to that person obtaining a "local" allegiance in return for temporary protection. *The Schooner Exch*., 11 U.S. at 144. The case against the birthright citizenship of the children of illegal immigrants is ever clearer. The United States, far from consenting to their presence, has prohibited it, and thus has clearly not consented to the reciprocal duties of allegiance and protection that make for a citizen. *See* Bacon, *supra*, at 80.

The Citizenship Clause's presumption that persons entitled to citizenship by birth "reside" in a "state" is thus important evidence that "jurisdiction" means full and complete jurisdiction requiring an allegiance/protection bond between citizen and sovereign. Persons who have legally and permanently domiciled themselves in a state, and necessarily the country in which that state exists, have established a "direct and immediate" allegiance to their new home. *Elk*, 112 U.S. at 102. This allegiance is passed on to their child through the inherited domicile

and trumps any residual allegiance that the parents or child may owe extraterritorially to their native country. Thus, their children become citizens by birth. Under this interpretation, all the pieces of the Citizenship Clause fit together.

Other provisions of the Fourteenth Amendment confirm that "subject to the jurisdiction thereof" in the Citizenship Clause means "full and complete" jurisdiction. U.S. CONST. amend. XIV, § 1, cl. 1. The Equal Protection Clause, for instance, invokes the regulatory jurisdiction of each state by using the territorial phrase "within its jurisdiction." *Id.* ("nor deny to any person within its jurisdiction the equal protection of the laws"). Although both clauses use the word "jurisdiction," their textual difference explains the difference in meaning. When Congress simply meant its power to enforce the laws, it used the term "within," which carries a spatial or territorial connotation, *see Within*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("In the limits or compass of; not beyond."), not the phrase "subject to." Thus, members of Indian tribes are entitled to the equal protection of the laws, *United States v. Antelope*, 430 U.S. 641, 647-650 (1977), even though they are not constitutionally entitled to citizenship at birth, *Elk*, 112 U.S. at 102. Indeed, even illegal aliens "within [the] jurisdiction" of a state are entitled to the "equal protection of the laws." *Plyer v. Doe*, 457 U.S. 202, 210 (1982) (cleaned up). The

presumption that "a material variation in terms suggests a variation in meaning" demonstrates that the Equal Protection Clause's coverage of persons "within [the] jurisdiction" of a state sweeps broader than the Citizenship Clause's use of the different phrase "subject to the jurisdiction" of the United States. Scalia & Garner, *supra*, at 170; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–16 (2001).

Finally, the constitutional structure as a whole casts grave doubt that children born in America to mere temporary visitors or illegal aliens are constitutionally entitled to natural-born citizenship. *See* Scalia & Garner, *supra*, at 167 (Whole Text Canon). Although the Constitution treats natural-born and naturalized citizens the same in almost every respect, it makes an exception for eligibility to serve as President of the United States. Only a natural-born citizen can serve as the President. U.S. CONST. art. II, § 1, cl. 5. This exception to the general rule of equal citizenship was viewed as necessary to ensure that the President would have the utmost allegiance to the United States. As explained by Justice Story in his Commentaries on the Constitution, the requirement of natural citizenship "cuts off all chances for ambitious foreigners" and "interposes a barrier against those corrupt interferences of foreign governments in executive elections." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473 (1833). It would be odd in the extreme for the

Constitution to allow a person born to foreign visitors who owe no permanent allegiance to the United States (and who may even be avowed enemies of the country) and who promptly return to and raise their child in their native country, to become President while denying the same opportunity to a person who is brought to America as an infant, is naturalized the moment he turns 18, and serves in our military. The framers of the Fourteenth Amendment did not create a Constitution that disqualifies, for example, Senator Bernie Moreno from serving as President, but permits an American-born terrorist like Yaser Hamdi to seek and serve (even theoretically) in that office. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *cf. also id.* at 554 (Scalia, J., dissenting) (referring to Hamdi as "a *presumed* American citizen" (emphasis added)).

I. The History of the Citizenship Clause

The history of the Citizenship Clause confirms what the text states: birthright citizenship is guaranteed only to persons whose parents are subject to the full and complete jurisdiction of the United States and thus owe to our country the allegiance that comes with it. The relevant legislative history begins with the passage of the Civil Rights Act of 1866 over the veto of President Johnson. The 1866 Act was a charter of freedom for the newly freed slaves. It guaranteed property rights, contract rights, and equal treatment under the laws and, most importantly for this case, contained a citizenship provision establishing "[t]hat 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." Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

The problem with the 1866 Act was twofold. First, it was unclear in the Constitution (as even its proponents acknowledged) where Congress received the power to enact it. *See McDonald v. City of Chicago*, 561 U.S. 742, 775 & n.24 (2010) (plurality op.); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982). Second, because it was ordinary legislation, it could be repealed by a future Congress. And given President Johnson's earlier veto, there was a risk of future resistance.

To solve these issues, Congress proposed and the states ratified the Fourteenth Amendment to the Constitution, which gave the Civil Rights Act of 1866 firm constitutional footing and ensured that the Act's principles would not be subject to legislative repeal or revision. Given this history, "it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866." *McDonald*, 561 U.S. at 775 (plurality op.).

The Civil Rights Act of 1866 thus gives critical insight into the meaning of the Citizenship Clause, which imported it into the Constitution. The Act, importantly and explicitly, excluded from birthright citizenship American-born

persons "subject to any foreign power." Civil Rights Act of 1866 § 1. The phrase "not subject to any foreign power," would have precluded, at a minimum, the birthright citizenship of children of temporary visitors or illegal aliens because the child's parents would continue to owe their permanent and dominant allegiance to the foreign country where they (and therefore their child) were permanently and legitimately domiciled. *Cf.* Michael D. Ramsey, *The Original Meaning of "Natural Born,"* 20 U. Pa. J. Const. L. 199, 213–26 (2017) (explaining that children of noncitizens would ordinarily be claimed as citizens by the parents' country of citizenship). Thus, interpreting the Act and Fourteenth Amendment in harmony, children who are subject to a foreign power are not entitled to birthright citizenship as a matter of both statutory and constitutional law.

But under the regulatory-jurisdiction view, the Fourteenth Amendment made the Civil Rights Act of 1866 *unconstitutional*. If the 1866 Act contains an allegiance requirement that the Citizenship Clause does not, then the former is unconstitutional with respect to persons who are consequently denied birthright citizenship on the basis of allegiance. The same Congress that passed the Civil Rights Act did not make that piece of landmark legislation unconstitutional two months later in the amendment designed to "incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Hurd v. Hodge*, 334 U.S. 24, 32 (1948).

There is no evidence in the debates over the Citizenship Clause that the 39th Congress had a sudden change of heart about the scope of the 1866 Act's citizenship provision that explained the change in language and evinces a change in meaning. The evidence shows instead that Congress replaced the language of the 1866 Act because it had generated uncertainty about the status of Indians, not because it was intended to broaden the scope of birthright citizenship from that established by the Act. Senator Trumbull, who introduced the language in the 1866 Act, "admitted difficulty in finding the right language to express his intent and proposed or considered various formulations before settling on the one ultimately adopted." Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L. REV. 405, 452–53 n.229 (2020) (citing CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Senator Trumbull)). Indeed, he initially considered the phrase "that persons born in the United States, and owing allegiance thereto" shall be citizens. CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Senator Trumbull). But he later realized that even persons "temporarily resident" owe a temporary, local allegiance to the country in the form of a duty to follow the laws, and this language would thus make them citizens, a result that no Senator participating in the recorded debate supported. *Id.* Thus Trumbull settled upon the language of the 1866 Act: "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."

Senator Howard, who drafted the Citizenship Clause of the Fourteenth Amendment and was "not fully satisfied with Trumbull's" language in the 1866 Act, Ramsey, *Originalism and Birthright Citizenship*, *supra*, at 452–53 n.229, used the phrase "subject to the jurisdiction thereof" in lieu of the phrase "not subject to any foreign power, excluding Indians not taxed." This change in language was not meant to change the meaning of Act's requirements for birthright citizenship, but rather to deal with concerns about the phrase, "Indians not taxed." Senator Trumbull himself and other supporters of the Clause objected to including the phrase "Indians not taxed" because it might be construed to apply differently to the children of rich and poor assimilated Indians living off reservations, creating a type of caste system where the children of rich Indians (who paid taxes) would obtain citizenship at birth but the children of poor Indians (who paid no taxes) would be excluded. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statement of Senator Trumbull) ("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 Senator Hendricks) (arguing for a literal interpretation of the phrase "not taxed"); *id.* at 574 (statement of Senator Henderson) (raising concerns that the

phrase "not taxed" will be interpreted too broadly).

The rest of the legislative history of the Fourteenth Amendment further proves that the 39th Congress harbored no intention of straying from what it had enacted two months prior. That is, it intended to retain the allegiance requirement that was clear from the face of the Civil Rights Act of 1866. For instance, Senator John Conness from California, a major proponent of the Amendment, explained that the purpose of the Fourteenth Amendment was to "incorporate" the 1866 Act into the "fundamental instrument of the nation." CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). Other prominent Senators made similar remarks, confirming that the purpose of the Citizenship Clause was to constitutionalize the 1866 Act and not to expand citizenship by birth to persons subject to a foreign power. *See Hurd*, 334 U.S. at 32 n.12 (citing statements). As Senator Howard explained, "[t]he 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." CONG. GLOBE, 39th Cong. 1st Sess. 2891 (1866). (emphasis added). Senator Trumbull, the author of the 1866 Act, agreed that the goal was to constitutionalize the Act, not expand it. As he explained, "[i]t is only those persons who come *completely* within our jurisdiction, who are subject to our laws, that we think of making citizens." *Id.* (emphasis added).

We thus have the author of the 1866 Act (Trumbull), the author of the

Citizenship Clause (Howard), and one of the foremost defenders in the Senate of that Clause (Conness), all agreeing that the differing language of Citizenship Clause of the Fourteenth Amendment and the Citizenship Clause of the Civil Rights Act of 1866 means the same thing.

That these statements were primarily made in the context of debating the citizenship status of Indians makes them especially probative because of the close regulatory analogy between Indians and temporary foreign visitors. Tribal Indians born within the territory of the United States owed primary allegiance to their tribes. *See* Ramsey, *Originalism and Birthright Citizenship*, *supra*, at 451. Despite their primary allegiance to their tribes, there was no doubt that they could be charged with crimes, *United States v. Kagama*, 118 U.S. 375, 379–85 (1886), and even though the federal government elected not to interfere with tribal affairs, it had "plenary" jurisdiction to do so, *see Winton v. Amos*, 255 U.S. 373, 391 (1921); *United States v. Holliday*, 70 U.S. 407, 416–18 (1866). Congress's decision to allow tribal government to exist at all was simply a matter of legislative grace. Despite the plenary authority over tribes, Senator Trumbull commented that "they are not subject to our jurisdiction." CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866). Such a statement would make no sense if the Citizenship Clause referenced only regulatory jurisdiction.

The congressional debates thus make clear that having Indian blood was not

the reason that the children of Tribal Indians were not granted citizenship by birth. It was their allegiance to their tribe that was incompatible with granting birthright citizenship to their children. But if an Indian left his reservation, established a permanent domicile within a state, and assimilated into the body politic, his children would then be entitled to citizenship at birth. As the renowned constitutional scholar and Chief Justice of the Michigan Supreme Court Thomas Cooley explained, if "tribal relations are dissolved" between the Indian and the tribe, and "the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community" his children become citizens at birth. Cooley, *supra*, at 243.

The debate in the 39th Congress over the citizenship status of the children of Chinese immigrants permanently domiciled in California and "Gypsies" in Pennsylvania is similarly revealing. Senator Edgar Cowan of Pennsylvania opposed the Citizenship Clause because he worried that it would prohibit Pennsylvania from removing Gypsies from its territory and enable California to be overrun by Chinese-immigrant laborers. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866) (statement of Senator Cowan). California Senator Conness responded with partial agreement, stating that the Citizenship Clause would make no distinctions based on race, and thus the children of persons of Chinese descent

in California and of Gypsies in Pennsylvania would not be excluded from birthright citizenship based on their race. *Id.* at 2891-92. And he made his view clear that the children of Chinese immigrants who had established their permanent domicile in California would be subject to the full and complete jurisdiction of the United States and their children would be entitled to citizenship at birth. *Id.*

In sum, the statutory and legislative history of the Citizenship Clause teach at least three things about the Clause. First, the Clause was designed to constitutionalize the citizenship provision of the Civil Rights Act of 1866, not to broaden the scope of birthright citizenship. Second, the phrasing used in the 1866 Act was changed to better reflect the status of members of Indian tribes within our country, which was a primary concern of the Framers. Third, the purpose of the Clause was to eradicate racial discrimination in birthright citizenship. What the statutory and legislative history do *not* show—what that history refutes—is that the simple obligation of virtually all persons on United States soil to follow United States laws was sufficient to grant one's American-born child citizenship. To the contrary, a person must, at a minimum, owe the primary allegiance to the United States that comes with establishing one's lawful permanent domicile in this country to entitle the person's children to birthright citizenship. And aliens who are present in the United States temporarily or illegally do not qualify.

II. *Elk:* The Supreme Court's Early Interpretation of the Citizenship

Clause

The Supreme Court's interpretation of the Citizenship Clause in *Elk v. Wilkins*, 112 U.S. 94 (1884), also supports what the Clause's text and history make clear. As the Supreme Court has consistently explained, early interpretations of constitutional text are usually strong evidence of that text's public meaning. *United States v. Alabama Great Southern R. Co.*, 142 U.S. 615, 621 (1892); *see Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 390 n.3 (2024).

The Supreme Court in *Elk* explained that the Clause requires a person to be at birth "not merely subject in some respect or degree" to the jurisdiction of the United States but to be "completely subject to the[] political jurisdiction, and owing the[United States] direct and immediate allegiance." *Id.* at 102. Thus, in *Elk*, an Indian born on a reservation to Tribal parents did not have a valid claim to citizenship by birth. Despite being born within the territory of the United States, he was born "owing immediate allegiance," like his parents, to his tribe. *Id.*; *Cf. Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C.J.) (explaining the status of Indian Tribes). *Elk* is thus essential in understanding the original public meaning of the Citizenship Clause and is, unlike the dicta in *Wonk Kim Ark,* a binding precedent of the Court.

III. The Purpose of the Citizenship Clause

As explained above, the primary purpose of the Citizenship Clause was to

constitutionalize the citizenship provision of the Civil Rights Act of 1866 and, in turn, entitle freed slaves who were born in the United States and their children to constitutionally protected citizenship. Requiring full and complete jurisdiction over persons born in the United States achieves this purpose.

If a former slave was born within the United States to enslaved parents, he was subject to the jurisdiction of the United States at the time and was therefore entitled under the Clause to citizenship once he became free. Although born into bondage, the children of slaves, like the slaves themselves, owed allegiance to the government in which they were domiciled and not to the country from which they were torn. *See Dred Scott v. Sandford*, 60 U.S. 393, 531 (1857) (McLean, J., dissenting); *see also id.* at 573 (Curtis, J., dissenting) (same); *id.* at 420 (majority opinion) (same). If a slave was freed, the question whether he was thereafter a citizen turned on whether he would have been a citizen had he been born free. *See id.* at 573 (Curtis, J., dissenting). Thus, a slave born in the United States owed an allegiance to the United States, and upon receiving his freedom, became a citizen.

Perhaps just as important is the fact that slaves born in the United States never owed any allegiance to a foreign power while enslaved or thereafter. Their only plausible allegiances were to their master and this country. Thus, they would clearly fall within the text of the Civil Rights Act of 1866. And because the 1866 Act and the Citizenship Clause of the Fourteenth Amendment mean the same

thing, they would also fall within the Fourteenth Amendment. The Citizenship Clause thus accomplished its mission of granting natural-born citizenship status to freed slaves born in the United States.

Some scholars who favor the regulatory-jurisdiction interpretation of the Citizenship Clause point to the existence of illegally imported slaves after the slave trade was banned in 1808, *see* An Act to prohibit the importation of slaves, 2 Stat. 426 (1807) (effective on Jan. 1, 1808), as a basis for rejecting the complete-jurisdiction interpretation, *see generally* Gabriel Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021). Their logic is that because some slaves were illegally trafficked into the country after 1808, and because there was no indication that the children of these persons were denied citizenship, the complete jurisdiction interpretation must be wrong. *Id.* But surely there is a fundamental difference between slaves illegally brought against their will into this country by the criminal acts of their captors and aliens voluntarily and knowingly violating our laws by illegally entering the country or illegally overstaying their permission to be present in our country. Although a slave's captor broke the law smuggling him into the country, the slave himself did not violate the law. Thus, they had not rejected obedience to our laws by the act of entering the country illegally. Additionally, just like the children of slaves who entered the

country before the prohibition on the slave trade, slaves in the country illegally were not "subject to any foreign power" within the meaning of the Civil Rights Act of 1866. And because that Act, again, carries the same meaning as the Citizenship Clause, the children of illegally imported slaves would be entitled to citizenship under any reading of the Citizenship Clause.

The complete-jurisdiction reading of the Citizenship Clause would not, of course, make natural-born citizens of slaves born outside of the United States and then smuggled into the country. But that fact is irrelevant because *no* interpretation of the Citizenship Clause would make persons born outside of the United States citizens.

IV. Conclusion

As outlined above, I believe that the complete-jurisdiction interpretation of the Citizenship Clause is compelled by its text, structure, and history and by common sense. The notion that those who Framed and ratified the Citizenship Clause would have been indifferent to the modern practices of "birth tourism" and illegal immigration if these practices had been in existence in their day is simply preposterous. They would have framed the Clause, I believe, to unambiguously ensure that birthright citizenship was not granted to the children of aliens whose presence in the United Sates was illegal or lawful but temporary. As it happens, the meaning of words they used, while not explicitly anticipating

these problems, achieved the same result. Accordingly, President Trump's Executive Order, in my opinion, is constitutional.