

# LEGAL MEMORANDUM

No. 243 | MAY 14, 2019

## The Original Meaning of the Citizenship Clause and What the Clause Means Today

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### Abstract

*Current policy broadly recognizes almost every child born within the U.S. as a citizen, but the original meaning of the Fourteenth Amendment undermines any claim that universal birthright citizenship is constitutionally mandated. Unlike nonimmigrant and illegal aliens, immigrant aliens enjoy many of the rights and are subjected to many of the duties that are normally reserved for citizens. They have taken a substantial and necessary step toward naturalization that is akin to previous laws regarding declarations of one's intent to naturalize. They alone of the three general categories of aliens (immigrant aliens, nonimmigrant aliens whose permitted length of stay depends on the type of visa they acquire, and illegal aliens) have both lawful and permanent domicile in the United States.*

Who is a United States citizen by birth? For generations, the U.S. government has abided by a policy of treating essentially every child born on U.S. soil as a U.S. citizen, a policy known colloquially as universal birthright citizenship.<sup>1</sup> But is this policy necessarily mandated by the Fourteenth Amendment's Citizenship Clause?

The prevailing academic consensus, consistent with current U.S. policy, appears to be unquestioned acceptance that the Fourteenth Amendment adopted principles of common-law *jus soli*, or citizenship based on the "accident of birth" in the geographic United States. Brewing underneath this surface, however, has been a robust dissenting view that has intermittently made its way to the forefront of the public consciousness.<sup>2</sup> Especially in recent years, a number of factors—such as President Donald Trump's public promises to "end birthright citizenship,"<sup>3</sup> the growing fiscal burden of illegal

### KEY POINTS

- The original public meaning of the Fourteenth Amendment, in its most reasonable interpretation, does not mandate nearly so broad an application of birthright citizenship as U.S. immigration policy bestows today.
- The Citizenship Clause was originally understood as bestowing birthright citizenship on the U.S.-born children of citizens, newly freed slaves, and those situated similarly to them: lawful permanent residents and those who owed an unqualified allegiance to the United States government.
- This congressional understanding is reinforced by contemporaneous legal scholars and the first decades of judicial interpretation regarding the amendment.
- Immigrant aliens owe an allegiance to the United States that is sufficiently unqualified as to render their U.S.-born children necessarily, and of constitutional right, U.S. citizens.
- Neither the U.S.-born children of nonimmigrant aliens nor the U.S.-born children of illegal aliens are entitled, as a matter of constitutional law, to U.S. citizenship by virtue of their birth on U.S. soil.

This paper, in its entirety, can be found at <http://report.heritage.org/lm243>

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immigration,<sup>4</sup> and the explosive rise of the “birth tourism” industry<sup>5</sup>—have coalesced into renewed and ever more forceful calls to reexamine whether current U.S. citizenship policy is consistent with or mandated under the original meaning of the Fourteenth Amendment.<sup>6</sup>

This *Legal Memorandum* explores the legislative and legal history of the Fourteenth Amendment’s Citizenship Clause in order to assess claims that the clause was originally intended to provide for, and should be understood as mandating, universal birthright citizenship for all U.S.-born children, regardless of the immigration status of their parents. The conclusion reached is certain to be controversial and is contrary to the oft-repeated mantras of modern defenders of universal birthright citizenship: The original public meaning of the Fourteenth Amendment, in its most reasonable interpretation, does not mandate nearly so broad an application of birthright citizenship as U.S. immigration policy bestows today. In fact, neither the U.S.-born children of non-immigrant aliens nor the U.S.-born children of illegal aliens are entitled, as a matter of constitutional law, to United States citizenship by virtue of their birth on U.S. soil.

The first section assesses the Fourteenth Amendment’s original meaning by reviewing its legislative history, historical context, and earliest academic interpretations, as well as the initial judicial applications of its principles. It concludes that the Citizenship Clause was originally understood as bestowing birthright citizenship only on the U.S.-born children of citizens, newly freed slaves, and those situated similarly to them—in other words, on lawful permanent residents and those who owed an unqualified allegiance to the United States government.

The second section examines the 1898 Supreme Court opinion in *United States v. Wong Kim Ark*,<sup>7</sup> the last time the Court ruled directly on the issue of birthright citizenship. Although many modern advocates claim that *Wong Kim Ark* definitely settled the question of birthright citizenship for illegal and nonimmigrant aliens and prohibits the government from limiting its application absent a constitutional amendment, there is an alternative interpretation of the case that is much more consistent with the amendment’s original meaning. This interpretation is not a modern twist, but finds its roots in contemporaneous analyses of the opinion.

The third section applies the original meaning of

the Fourteenth Amendment to the modern immigration law context and determines that immigrant aliens, unlike illegal or nonimmigrant aliens, owe an allegiance to the United States that is sufficiently unqualified as to render their U.S.-born children necessarily, and of constitutional right, U.S. citizens.

## Original Meaning of the Citizenship Clause

Even among “originalists” there are different ways of determining the “original meaning” of a constitutional clause. There can be little doubt, however, that originalism of any form demands agreement on 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.<sup>8</sup> For this reason, factors such as the subjective understandings of the Constitution’s Framers help to inform the determination of the words’ legal meaning.

As the Supreme Court has noted regarding the Citizenship Clause in particular, the statements of Congressmen “are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves.”<sup>9</sup> A look at these statements, as reflected in the record of the congressional debates over the Fourteenth Amendment, shows that the men who drafted the text that was subsequently ratified chose very specific language to reflect a very specific purpose. In short, they understood themselves to be creating a framework for birthright citizenship that is much more limited than the modern conception of universal birthright citizenship. This congressional understanding is reinforced by contemporaneous legal scholars and the first decades of judicial interpretation regarding the Amendment, which together fairly present a case for an original meaning of the Citizenship Clause that is far removed from current U.S. policy.

**Context of the Fourteenth Amendment.** In 1857, the Supreme Court issued an opinion in *Dred Scott v. Sandford* holding that the U.S.-born descendants of African slaves were not, and could never become, United States citizens even if they were freed from bondage or made citizens of a particular state.<sup>10</sup> The majority reasoned that individuals of black African descent were not part of the American political body but were instead part of an inferior class with “no rights which the white man was bound to respect.”<sup>11</sup> In short, black people were simply Africans, not African Americans. They and their descendants were a

class of perpetual aliens in a nation in which they were forced to live; future generations were relegated to the status of legal strangers in the land where they would be born and die.

The legislative overturning of this judicial opinion—widely despised in many areas of the country—was one of the major motivations behind the Fourteenth Amendment.<sup>12</sup> The question of citizenship for newly freed slaves was not, however, the only motivation.<sup>13</sup> In the immediate aftermath of the Civil War, there was a much more pervasive and fundamental concern regarding the systematic denial of civil rights by southern states to freedmen and Union supporters.<sup>14</sup> This concern culminated in the Civil Rights Act of 1866, which Congress passed over President Andrew Johnson’s veto.<sup>15</sup> Besides acting as an enforcement mechanism for the recently ratified Thirteenth Amendment and statutorily ensuring that states could not strip the newly freed slaves of any meaningful rights, the act served as Congress’s first effort to undo *Dred Scott*.<sup>16</sup> It statutorily defined for the first time in U.S. 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.”<sup>17</sup>

But this initial legislative attempt to override *Dred Scott* suffered from a significant problem. Many legislators, including some of the act’s proponents, harbored serious doubts as to whether Congress had the constitutional authority to, among other things, override with mere legislation a Supreme Court determination as to the constitutional parameters of citizenship.<sup>18</sup> Moreover, even if these doubts were unfounded, it would be easy enough for a future Congress merely to rescind the legislation and leave the freedmen unprotected again. In order to secure these hard-won rights more effectively and strengthen the legal foundations of the Civil Rights Act, the Joint Committee on Reconstruction undertook the task of drafting what would become the Fourteenth Amendment.<sup>19</sup>

In other words, the Fourteenth Amendment, in the most immediate sense, was the constitutionalization of the protections and rights afforded in the Civil Rights Act. Representative George F. Miller (R-PA) called the proposed amendment the “ingrafting [of] the civil rights bill” into the Constitution and condemned opposition to the amendment as support for *Dred Scott*’s malicious doctrines.<sup>20</sup> The Fourteenth Amendment, therefore, must be understood not as

an override or correction of the Civil Rights Act, as some proponents of universal birthright citizenship contend, but as a reinforcement of it. Their provisions are not contrary to each other, but rather work in tandem—or at the very least are consistent.

The presumption of consistency is further supported by the fact that both the statutory definition and the constitutional definition of citizenship continued to coexist well into the 20th century, and both were relied upon by future courts.<sup>21</sup> This is important for any effort to understand the original meaning of the Fourteenth Amendment’s Citizenship Clause, as it must be presumed that even though its wording is not precisely the same as the wording of the Civil Rights Act’s Citizenship Clause, they must mean essentially the same thing. For this reason, the relevant portions of both the act and the amendment must be analyzed together.

**Original Meaning According to Congress.** The 39th Congress that drafted and passed both the Civil Rights Act and the Fourteenth Amendment had a distinct understanding of what it meant to be “subject to the jurisdiction of the United States” for purposes of birthright citizenship. First, the legislative history makes clear that the drafters of the Citizenship Clause understood there to be two distinct ways in which a person could be subject to the jurisdiction of the United States and that only one of them—complete jurisdiction on par with that experienced by current citizens—was sufficient for purposes of birthright citizenship. In other words, an individual may be subject to some level of United States jurisdiction without his or her U.S.-born child being entitled to birthright citizenship. Second, whether a person was subject to the complete jurisdiction of the United States was a question not of race or ethnicity, but of permanent, undivided allegiance.

*Two Types of Jurisdiction.* Today, advocates of universal birthright citizenship routinely claim that everyone who must obey U.S. law and pay U.S. taxes is “subject to the jurisdiction of the United States” for purposes of the Citizenship Clause.<sup>22</sup> They further argue that this is because the 39th Congress formally adopted the English common law’s principle of *jus soli*—that is, citizenship by virtue of birth on the land alone as opposed to citizenship inherited by bloodline (*jus sanguinis*). This argument fails in a number of respects, including the reality (detailed below) that the American Revolution was grounded in a complete rejection of common-law *jus soli* and its underlying

mandate of perpetual allegiance.

Even more important, however, it is simply not true that Congress intended to make citizens of all children born in the United States, with the limited exceptions of those born to ambassadors or members of invading armies. In fact, Congress debated and revised the language of both the Civil Rights Act and the Fourteenth Amendment in purposeful attempts to clarify that much larger categories of individuals were excluded from birthright citizenship under the Constitution than were excluded under the common law.

Senator Lyman Trumbull (R-IL) was chairman of the Committee on the Judiciary and the primary drafter of the Civil Rights Act's Citizenship Clause.<sup>23</sup> At one point in the debates over the act's language, he recalled for his colleagues the development of what would become the act's final wording regarding citizenship.<sup>24</sup> In doing so, he unambiguously noted that the general desire was to frame the act's definition of citizenship "so as to make citizens of all the people born in the United States and who owe allegiance to it."<sup>25</sup>

Initially, Trumbull and others considered a definition that included "all persons born in the United States and owing allegiance thereto," but they determined that this phrase might inadvertently make citizens of those only "temporarily resident" in the country, from whom "a sort of allegiance was due" under the common law.<sup>26</sup> In order to combat this, Congress settled on including only those born in the United States and "not subject to any foreign power." Then, as a final measure to ensure that Indians who owed allegiance to tribal governments were similarly excluded from birthright citizenship, Congress included the phrase "excluding Indians not taxed."<sup>27</sup> In explaining this provision, Trumbull expressed that this term was a "constitutional term...[t]o designate a class of persons who were not a part of our population" and who "are not regarded as part of our people," similar to those who were present in the country only temporarily or were otherwise subject to a foreign power.<sup>28</sup>

This distinction between levels of allegiance was reinforced in the debates over the language of the Fourteenth Amendment's Citizenship Clause. Here, however, it took the form of distinctions between different levels of being "subject to the jurisdiction" of the United States, between those who were only temporarily or partially subject to U.S. jurisdiction and those who were subject to a complete and permanent U.S. jurisdiction substantially on par with

current citizens.

The distinction was laid early in the debates by one of the amendment's fiercest challengers, Senator Edgar Cowan (D-PA), who vehemently opposed extending citizenship and the protection of civil rights to Chinese or Gypsy immigrants. Proponents of universal birthright citizenship sometimes use subsequent refutations of Cowan's opposition to "prove" that Congress intended citizenship for everyone born in the United States,<sup>29</sup> but it is telling that Cowan's objections were based entirely on the race of the parent and presumed that the nonwhite individuals were not themselves temporary sojourners or subjects of foreign powers: "Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? *Have they any more rights than a sojourner in the United States?*"<sup>30</sup> Cowan then distinguished between the rights and duties of alien foreigners temporarily present in the United States and the rights and duties of citizens.<sup>31</sup>

Senator John Conness (R-CA) immediately and rightly defended the Fourteenth Amendment for not making race-based distinctions and rebuked Cowan's exaggeration of the "problem" of Chinese immigration, but neither he nor any other Senator refuted Cowan's distinction between sojourning aliens and permanent resident aliens.<sup>32</sup> Far from it: Advocates for the amendment regularly acknowledged and confirmed these distinctions. Why? Because the view that birthright citizenship would not be withheld from similarly situated immigrants in no way contradicted the simultaneous view that the amendment, like the Civil Rights Act it was to constitutionalize, distinguished between aliens on the basis of their relationship to the United States.

Senator Jacob Howard (R-MI), who originally proposed adding the Citizenship Clause's jurisdictional language, actually endorsed and clarified the idea that citizenship was intertwined with the degree to which a person was subject to U.S. jurisdiction:

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, 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.<sup>33</sup>

This distinction between differing levels of jurisdiction based on connection to the United States is perhaps nowhere else as apparent as it is in the discussions of how best to exclude tribal Indians from birthright citizenship, which was a primary concern. During these discussions, Senator William Fessenden (R-ME), chairman of the Joint Committee on Reconstruction, invited Senator Trumbull to explain the Judiciary Committee’s view on whether the newly proposed amendment effectively excluded tribal Indians from birthright citizenship in the same way as the Civil Rights Act did.<sup>34</sup> Trumbull unequivocally dismissed concerns that such Indians were “subject to the jurisdiction of the United States,” stating that the language meant “subject to the complete jurisdiction there” 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.’”<sup>35</sup>

Similarly, as the Senate concluded debate on the Citizenship Clause, Senator George Henry Williams (R-OR), also a member of the Joint Committee on Reconstruction, adopted and explained what he believed to be the clear distinction between complete and incomplete jurisdiction. He noted that “[i]n 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.”<sup>36</sup> He compared the tribal Indians to the child of an ambassador, whom he (incorrectly) assumed could be held liable for murder as partially subject to the laws of the United States.<sup>37</sup> Williams then asserted that both are excluded under the amendment because the phrase “subject to the jurisdiction of the United States” means “fully and completely subject to the jurisdiction of the United States.”<sup>38</sup>

*Jurisdiction and Subjection to a Foreign Power.* The distinction between the two levels of jurisdiction underscores the broader connection between the Civil Rights Act and the Fourteenth Amendment and evidences a logical conclusion that Congress understood the amendment’s jurisdictional element to coincide with the act’s element of subjection to a foreign power. In other words, the Civil Rights Act and the Fourteenth Amendment effectively meant the same thing: A person who is subject to a foreign power under the Civil Rights Act is not subject to

the complete jurisdiction of the United States under the amendment, while a person who is subject to the complete jurisdiction of the United States under the amendment is not subject to any foreign power under the Civil Rights Act.

It is unmistakable that Congress considered a person to be subject to the “complete” jurisdiction of the United States for purposes of citizenship only if that person did not simultaneously owe allegiance to another sovereign such that he or she was “subject to a foreign power.” In this way, jurisdiction and allegiance are inextricably and intentionally tied together and provide a framework for determining the confines of birthright citizenship.

Recall Senator Trumbull’s explanation of how and why the language in the Civil Rights Act developed.<sup>39</sup> It was a deliberate effort to withhold birthright citizenship from those who owed less than a permanent, complete allegiance to the United States and who were not part of the “American people.” Those who still owed meaningful allegiance to a foreign sovereign, such as tribal Indians and aliens only temporarily resident in the country, were fundamentally distinct in this regard from the newly freed slaves.

As Representative John Broomall (R-PA) explained while introducing the final version of the Civil Rights Act to the House of Representatives, the freedmen could not possibly be said to owe allegiance to any power but the United States.<sup>40</sup> He reasoned that all men must naturally owe allegiance somewhere, and until opponents of the bill found “the African potentate to whom after five generations of absence [the freed slave] still owes allegiance,” the presumption was that he was a citizen of the country in which he was born.<sup>41</sup> In other words, the presumption of citizenship by birth was rebuttable by a showing of meaningful allegiance owed elsewhere.

Similarly, Senator Reverdy Johnson (D-MD) explained that the Constitution as originally ratified did not define who was a citizen or how U.S. citizenship could exist apart from citizenship of an individual state. Now, under the Fourteenth Amendment, “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 citizens of the United States.”<sup>42</sup> He then concurred with this framework, saying that he knew “of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born to parents who at

the time were subject to the authority of the United States.<sup>243</sup> His words unmistakably tie together the jurisdictional clauses of the Civil Rights Act and the Fourteenth Amendment.

The legislative history is unambiguous: Birthright citizenship was for the freed slaves and those situated similarly to them in terms of their relationship to the United States government—that is, those who were subject to its complete jurisdiction in a manner similar to that of citizens, primarily understood as lacking meaningful ties of allegiance to a foreign power. Another way to understand this is through the premise of “domicile.” The longer a person resided in the United States and developed ties to United States society, the less meaningful was his or her allegiance to any foreign power. In fact, domicile is precisely the way in which Senator Trumbull explained the Civil Rights Act to President Johnson, paraphrasing that the act “declares ‘all persons’ born of parents domiciled in the United States...to be citizens of the United States.”<sup>244</sup>

But if the Civil Rights Act and the Fourteenth Amendment were intended to mean the same thing and grant birthright citizenship under the same contexts, why did the 39th Congress not just use the same language in both? Why change the wording unless it meant to change the meaning? The answer, in large part, is that there was a lack of consensus over how best to ensure that Native Americans with tribal relationships were excluded from citizenship.

During debates on both the Civil Rights Act and the Fourteenth Amendment, several Senators raised concerns that the language—whether “not subject to any foreign power” or “excluding Indians not taxed”—was problematic. The tribes were not technically “foreign powers,” even if the federal government often treated them as quasi-foreign powers.<sup>45</sup> Moreover, the phrase “Indians not taxed” could reasonably be interpreted as excluding Indians who left their tribes but were too poor to be subject to income or property taxes.<sup>46</sup> Worse, some feared that a state or future Congress might subject a tribe to a tax or tax-like payment, thereby inadvertently rendering the entire tribe citizens.<sup>47</sup>

This was quite clearly not what those phrases meant, but Senator Howard’s proposed language of “subject to the jurisdiction thereof” nonetheless won the day under a general consensus that it provided an adequately clear bar for citizenship on the basis of undivided and complete allegiance owed to the United States government. The changed language therefore reflects nothing more than a debate over how to exclude certain classes

of Indians and certainly does not imply that Congress suddenly wished to incorporate common-law *ius soli*.

**Confirmation of Original Meaning.** Echoing the words of Senators Howard and Trumbull, renowned constitutional expositor Thomas Cooley noted in his 1880 treatise *The General Principles of Constitutional Law* that citizenship by birth is acquired only when the child born on U.S. soil is subject to “that full and complete jurisdiction to which citizens generally are subject.”<sup>48</sup> Specifically, this “full and complete jurisdiction” excluded “any qualified and partial jurisdiction, such as may consist with allegiance to some other government.”<sup>49</sup> Native Americans who maintained tribal relationships and recognized the authority of their tribal heads owed only this inadequate, qualified allegiance to the U.S. government and therefore were not U.S. citizens by birth.<sup>50</sup> Importantly, this allegiance remained inadequate for birthright citizenship *even if they later resided within a state or an organized territory*.<sup>51</sup> In short, as long as a person was not “vested with the complete rights, or, on the other hand, charged with the full responsibilities of citizens,” he or she was not “subject to the jurisdiction of the United States” for purposes of birthright citizenship.<sup>52</sup>

In 1881, contemporaneous scholar Alexander Porter Morse similarly reasoned that the U.S.-born children of aliens who are temporarily in the United States or who otherwise continue to recognize an obedience to a foreign sovereign are not U.S. citizens by birth.<sup>53</sup> This is because the children are invested with the national character of their parents, who “are subject to the jurisdiction of the United States only to a limited degree.”<sup>54</sup> Of specific importance to Morse was the fact that these alien parents do not obtain political and military rights in the United States but instead retain them in their respective native countries.<sup>55</sup> Also in 1881, Francis Wharton’s *A Treatise on the Conflict of Laws* payed equal homage to the language found in the ratification debates, concluding that the U.S.-born children of aliens only temporarily present in the United States are bound to a “local allegiance” and nothing more.<sup>56</sup>

This understanding of the Fourteenth Amendment is found in the writings of numerous other legal scholars in the decades immediately following ratification, including, among others, recently retired Supreme Court Justice Samuel Miller, then-U.S. Chief Justice of Samoa Henry C. Ide, and former U.S. Representative and then-ambassador Boyd Winchester.<sup>57</sup> It was expounded upon in the *Columbia Law Times*, the

precursor of the modern *Columbia Law Review*.<sup>58</sup> It was also affirmed by at least two different U.S. Secretaries of State in official instructions regarding how to treat claims of citizenship, as well as by international arbitration courts tasked with determining whether U.S.-born children of aliens temporarily resident in the United States were U.S. citizens under U.S. law.<sup>59</sup>

Nor would this early interpretation of a more limited birthright citizenship remain confined to academia. Rather, it saturated every level of the judicial system, from arbitration decisions to Supreme Court opinions.

Just six years after the Fourteenth Amendment's ratification, the Supreme Court described the purpose and scope of the Citizenship Clause in a way that was fully compatible with both congressional intent and early scholarship. In a decision known as the *Slaughterhouse Cases*, the Court upheld a New Orleans statute that butchers claimed violated various provisions of the Fourteenth Amendment.<sup>60</sup> While the core questions of the case did not touch on citizenship, the Court nevertheless explored the context of the amendment's drafting and expounded:

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.<sup>61</sup>

This first expression of the Court vindicates a construction of the Citizenship Clause that excludes those who are still meaningfully subject to a foreign power and not just those foreigners who are officially employed as ambassadors.

Two years after this dictum in the *Slaughterhouse Cases*, in 1874, the Supreme Court again cast doubt on any notion that the Fourteenth Amendment mandates a universal form of birthright citizenship. In *Minor v. Happersett*, the Court faced the question of whether the Privileges or Immunities Clause prohibited states from denying suffrage to women.<sup>62</sup> In doing so, it noted that the U.S.-born children of citizens were undoubtedly citizens themselves but that there were serious doubts as to the validity of claims by some scholars that the Constitution "include[s] as citizens children born within the jurisdiction without reference to the citizenship of their parents."<sup>63</sup> The *Happersett* Court ultimately declined to resolve those doubts, but their

very presence—as well as the Court's indication that this was a minority view—is extremely telling about the breadth of the consensus regarding the clause's meaning in the decades after ratification.

The Supreme Court first addressed the Citizenship Clause directly in 1884 with its decision in *Elk v. Wilkins*.<sup>64</sup> The petitioner, John Elk, was born into a Native American tribe and owed at birth an allegiance to both the U.S. government and his tribal government. Elk later left his tribal lands and lived in Omaha, Nebraska, for several years, where he attempted to vote in a state election but was denied a ballot on the basis that he was not a U.S. citizen. Elk argued that he was a citizen because he had been born in the United States and became fully subject to its jurisdiction when he unilaterally severed ties with his tribe.<sup>65</sup> The Supreme Court disagreed.

In holding that Elk was not a citizen by birth and could not become one on his own accord without going through the official naturalization process, the Court solidified the dicta and underlying rationale of *Slaughterhouse* and *Happersett*. The *Elk* Court affirmed that the jurisdictional element of the Citizenship Clause meant "not merely subject in some respect of degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."<sup>66</sup> Elk owed immediate allegiance to his tribe at birth and was not a "part of the people of the United States."<sup>67</sup> To become a part of the American people, Elk needed to use the legitimate legal processes of naturalization: He needed the consent of the United States government in order to fully subject himself to U.S. jurisdiction. Moreover, the Court noted as "worthy of remark" the language of the Civil Rights Act of 1866, thus also affirming that the Fourteenth Amendment constitutionalized an underlying principle that those born subject to a foreign power were not "subject to the jurisdiction of the United States" for purposes of the Citizenship Clause.<sup>68</sup>

In short, beginning with the purpose and understanding of the Congress that passed the Fourteenth Amendment and continuing on through the next three decades of legal precedent, there is one clear, consistent original meaning of the Citizenship Clause: Birthright citizenship was limited solely to the U.S.-born children of citizens and those situated similarly to the freed slaves in terms of their relationship to the United States government. U.S.-born children whose parents were subject to a foreign power at the time of

the child's birth were themselves subject to a foreign power. They were therefore simultaneously not subject to the jurisdiction of the United States for purposes of birthright citizenship.

Subjection to a foreign power (or, conversely, being subject to less than complete U.S. jurisdiction) meant owing only a qualified allegiance to the United States. Qualified allegiance could be presumed where the parent was an alien not permanently domiciled in the United States or if the child was a Native American born into a tribe that recognized the legal authority of a tribal entity.

### **Wong Kim Ark**

The Fourteenth Amendment, while limiting birthright citizenship to those who owed an unqualified allegiance to the United States, was also clearly understood as preventing the limitation of citizenship on the basis of race or national origin. After all, the main impetus for the Citizenship Clause was overturning *Dred Scott* and its appalling justifications for the unequal treatment of certain human beings on the basis of race alone. But what if the United States government attempted to exclude individuals from birthright citizenship on the basis of race or national origin through a less overt means? What if the government tried an end run around the Fourteenth Amendment by simply legislating that immigrants of certain races could never cast off their allegiance to their former sovereigns? What if, in the eyes of the law, aliens of a certain national origin could never subject themselves to the complete jurisdiction of the United States regardless of whether they met all of the same criteria—lawful presence, permanent domicile, integration into the fabric of the American people—as required of other immigrants?

This was in fact a legal question that arose in the last decade of the 19th century. *Dred Scott* had been legislatively overridden, but throughout the next half-century, there remained in the United States a group of people who, like the African Americans under *Dred Scott*, were in danger of being cast into a status of permanent alienage. Under federal immigration laws, Chinese immigrants were singled out for disparate treatment on the basis of race.<sup>69</sup> Unlike European immigrants, they were barred from naturalization.<sup>70</sup> Moreover, treaty obligations with China rendered these immigrants perpetual subjects of the Chinese Emperor, regardless of how long they legally resided in the United States.<sup>71</sup>

In this respect, the inherent and fundamental right of expatriation was stripped from these Chinese immigrants in every meaningful sense, as they could not, in the eyes of the United States government, throw off their allegiance to China under any circumstances. Moreover, if it was determined that the U.S.-born children of these immigrants were to be excluded from birthright citizenship and they instead inherited the condition of their parents (that is, Chinese subjects owing only a qualified allegiance to the United States), the condition of alienage would be perpetual: They could not become naturalized citizens, and neither could their children or grandchildren or great-grandchildren.

Beginning in 1882 with passage of the so-called Chinese Exclusion Act, immigration to the United States was categorically suspended for Chinese laborers and miners, effectively ending Chinese immigration to the United States.<sup>72</sup> For the first time in United States history, the concept of “illegal immigration” materialized, at least as the term is understood today.<sup>73</sup> The Exclusion Act and its subsequent renewals were compounded by the 1888 Scott Act, which forbade re-entry into the United States for Chinese immigrants who left the United States even temporarily.<sup>74</sup> An estimated 20,000 Chinese immigrants were barred from returning to the country that had initially allowed them entry and where many had been lawful and long-term residents with families still lawfully residing there.<sup>75</sup>

This is the context in which the Supreme Court last directly interpreted the scope of birthright citizenship, in the 1898 case of *United States v. Wong Kim Ark*.<sup>76</sup> Wong Kim Ark was born in San Francisco at some point before the enactment of the 1882 Exclusion Law, and no one doubted that his parents were lawful Chinese immigrants who were permanently domiciled in the United States.<sup>77</sup> Wong Kim Ark himself was also permanently and legally domiciled in the United States, never claimed to be a Chinese subject, and for the first two decades of his life enjoyed no meaningful connection to China.<sup>78</sup> Under the Exclusion Act, however, Wong Kim Ark's parents were ineligible for naturalization and technically remained subjects of the Chinese Emperor—a status they could not legally change. The question was whether their U.S.-born son—born and raised in the United States by parents who had done everything in their power to submit themselves to the fullest extent of U.S. jurisdiction allowed to Chinese immigrants—was a citizen by birth.<sup>79</sup>

This was also the narrow question on which the Supreme Court granted certiorari: not whether all U.S.-born children of all foreign nationals are U.S. citizens, but whether the U.S.-born child of parents who were lawfully and permanently domiciled in the United States and not employed in an official capacity by the Chinese government was a U.S. citizen by birth.<sup>80</sup> The majority held that he was a citizen by birth and that the U.S. government could not deny him re-entry into the country after a temporary visit abroad.<sup>81</sup> Wong Kim Ark was not an alien whom the government could exclude from immigration for any reason, but an American with a right to return to the country in which he was lawfully and permanently domiciled.

On its face, this conclusion is reasonable and in every way consistent with the original meaning of the Citizenship Clause. Had Wong Kim Ark been the son of non-naturalized but permanently domiciled immigrants from Germany, his citizenship would never have been questioned. The Fourteenth Amendment was drafted, passed, and ratified precisely to ensure that these types of race-based distinctions did not occur in the context of citizenship.

How, then, did *United States v. Wong Kim Ark* become a rallying cry for advocates of universal birthright citizenship, who claim that the decision cemented the principle of citizenship by birth regardless of the legal status of the parents? The answer lies in the reasoning used by the majority to reach that conclusion and in how that reasoning has been interpreted by modern scholars.

In short, the majority opinion consists of a significant number of pages detailing what the Justices perceived to be the continued use of English common-law principles for defining citizenship in the United States post-Revolution. In the Court's own words, "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."<sup>82</sup> The Court further concluded that the Fourteenth Amendment was based on these same common-law principles and based this conclusion largely on a handful of quotes from the legislative history in which Senators indicated that the Citizenship Clause would apply equally to the children of Gypsies and Chinese immigrants.<sup>83</sup>

In general, the consensus among advocates of universal birthright citizenship is that the Court adopted the full extent of English common-law jus

solis as the basis of American citizenship under the Fourteenth Amendment. To the extent that the Civil Rights Act, the legislative history, or judicial precedent appear to contradict this adoption, they are rendered moot. Whatever the initial limitations of the Fourteenth Amendment, the Court has spoken conclusively: The analysis is centered on jus soli, and jus soli must therefore reign supreme absent a constitutional amendment.

But is this the correct or most reasonable way to understand the majority opinion? To be fair, the Court's analysis is in many respects an homage to the English common law of jus soli. There is, however, a much more reasonable interpretation of *Wong Kim Ark* that does not assume the Supreme Court's analysis of the Citizenship Clause to be completely at odds both with its original meaning and with the first decades of legal precedent.

**No Adoption of Jus Soli.** To the extent that the *Wong Kim Ark* majority appears to base its decision on an assumption that true English common-law jus soli continued to exist in the United States after the American Revolution, such a conclusion directly contradicts history. The American Revolution was nothing less than an effective "casting off" of jus soli and its mandated perpetual allegiance in favor of a consent-based compact theory of government. The two principles are fundamentally opposed to each other.

Common-law jus soli was an outgrowth of feudalism and acted as a philosophical defense of the divine right of kings.<sup>84</sup> According to the renowned common-law jurists Sir William Blackstone and Sir Edward Coke, jus soli bound men in "natural allegiance" to the sovereign over whatever geographical kingdom they happened to be born within, and this allegiance was perpetual.<sup>85</sup> It could not be discharged without the consent of the sovereign, regardless of whether a person swore allegiance to another sovereign or left the kingdom permanently.<sup>86</sup> In this sense, "natural allegiance" was synonymous with "perpetual allegiance."

This natural and perpetual allegiance is simply incompatible with the principles underlying the American Revolution, which were as heavily influenced by "continental" jurists like Hugo Grotius<sup>87</sup> and Emer de Vattel<sup>88</sup> as they were by common-law jurists like William Blackstone and Edward Coke.<sup>89</sup> In fact, jus soli's perpetual allegiance would have made the Revolution philosophically impossible, because the very existence of the United States as a sovereign nation necessitated severing ties of "natural allegiance" to King George III.

The Declaration of Independence signaled an unequivocal break from common-law *jus soli* in order for the colonists to compact together for the preservation and protection of their natural rights. In it, the founding generation declared that, on the “Authority of the Good People of these Colonies,” they did “solemnly publish 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.”<sup>90</sup> Counter to the most fundamental premises of common-law *jus soli*, the people always reserve the right to “alter or abolish” the government that no longer serves the purpose for which it was instituted: the preservation of the natural rights of life, liberty, and the pursuit of happiness.

These principles of citizenship, allegiance, and right, so contrary to *jus soli*, did not simply “die off” to be replaced again by the common law, but were roundly adopted by state constitutions and are reflected in some of the first acts of Congress.<sup>91</sup> Importantly, the disdain for common-law principles related to citizenship and nationality was 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 was to categorically reject *jus soli*’s “accident of birth” and perpetual allegiance as the basis for citizenship.<sup>92</sup>

Moreover, the Fourteenth Amendment was an effort to fully implement the principles of the Revolution, which had not been possible under the specter of slavery. The *Dred Scott* majority’s primary flaw was not that it utilized compact theory, but that it so painfully mishandled compact theory and failed to view it in light of the other natural rights of man.<sup>93</sup> The aim of the amendment was not to reinstate common-law *jus soli*, but finally to apply the principles of the Revolution to the freed slaves and their descendants in the same way they had always been applied to those of European descent. Speaker of the House Schuyler Colfax (R-IN) went so far as to call the amendment “the Declaration of Independence placed immutably and forever in our Constitution” and remarked that just as their fathers had justified the Revolution on the security of the right to equality before the law, “[s]o say their sons today, in this Constitutional Amendment.”<sup>94</sup>

**Making Sense of *Wong Kim Ark*: Birthright Citizenship for Those Who Are Situated Similarly to Freed Slaves or Treated as *De Facto* Citizens.** While the bulk of the *Wong Kim Ark* majority

opinion was dedicated to an analysis of citizenship under English common law and its applicability in the post-Revolution United States, scattered throughout this analysis is a concurrent and much more forceful argument concerning the unfair way in which principles of citizenship and naturalization were applied to Chinese immigrants when compared to European and African immigrants. It is this latter reasoning that remains consistent both with the original meaning of the Fourteenth Amendment and with the Court’s own precedent and that must survive into the present day. Focusing on this framework of unequally applied citizenship principles also helps to make sense of the opinion’s true anomaly: If the Court really did adopt English common-law *jus soli* as the basis of American citizenship, its own narrow holding undermines the reasoning it used to reach that conclusion.

Under a true application of common-law *jus soli*, factors such as permanent domicile and lawful presence ought to be irrelevant to an analysis of citizenship. The Court’s holding should have been unqualified and straightforward: “Wong Kim Ark was born on United States soil. His parents were not foreign ambassadors or under the control of an invading army. He is therefore a citizen of the United States.” Pure *jus soli* simply does not recognize other factors as relevant to the determination of allegiance.

But this was not the Court’s conclusion. If the majority adopted the *jus soli* “inherited” from England, it limited the application of that *jus soli* in a uniquely American way. The majority’s ultimate conception of *jus soli* appears to be one of an “Americanized” *jus soli* bound by the very considerations so important to determinations of unqualified allegiance under the original meaning of the Amendment. This includes, principally, whether the person was lawfully present and permanently domiciled:

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 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*. 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.<sup>95</sup>

That lawful presence and permanent domicile are even included here, despite a previous analysis of their utter irrelevance under English common law, heavily implies that the Court considered these factors to be 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. In fact, it is likely that the *Wong Kim Ark* majority considered a combination of these three things to be significant to its conclusion.

*Wong Kim Ark* was fundamentally about equal treatment and fairness before the law without regard to race or national origin. The Court well understood that the unequal treatment of the children of Chinese immigrants was an affront to the Fourteenth Amendment and would allow Congress to render its purpose moot by simply passing discriminatory naturalization laws.<sup>96</sup> In other words, while Congress could not prevent the freed slaves from ever becoming citizens, it could do an end run around the amendment to ensure that other disfavored races never became citizens. In this context and for the purpose of furthering the basic principles of the Fourteenth Amendment’s Citizenship Clause—under which citizenship was not to be withheld on the basis of race or previous nationality—it would be far from absurd for the Court to adopt a limited conception of jus soli as a compromise construction of what it means to be subject to the complete jurisdiction of the United States.

In fact, it would not even be unprecedented for the Court to adopt an “Americanized” jus soli that was essentially no broader than the original meaning of the Citizenship Clause, for this is precisely the route taken by several of the jurists and at least one of the state court cases on which the majority relied. For example, both international law scholar William

Edward Hall and Justice Joseph Story (cited by the majority) presumed citizenship for U.S.-born children. However, Hall’s exposition of temporary allegiance—that a non-domiciled alien cannot wholly escape his legal relationship with the native country to which he intends to return—actually reinforces the argument that such individuals were precisely those temporary sojourners who still owed allegiance to a foreign power and were therefore excluded from birthright citizenship.<sup>97</sup> Meanwhile, Story limited his presumption to reasonably exclude U.S.-born children of temporary sojourners.<sup>98</sup>

The New Jersey Supreme Court in *Benny v. O’Brien*, to which the *Wong Kim Ark* majority pointed as one of the “foregoing considerations and authorities irresistibly leading” to its own conclusion, similarly tied the Citizenship Clause to principles of permanent allegiance and excluded from citizenship the U.S.-born children of temporary residents.<sup>99</sup> This reliance on principles of domicile is also consistent with the ways by which the Court had previously used domicile to determine the extent of rights and duties retained by aliens.<sup>100</sup>

Moreover, in the 1920 case of *Kwock Jan Fat v. White*, the U.S. Supreme Court again appeared to intentionally limit the scope of *Wong Kim Ark*’s alleged adoption of jus soli to those born of parents permanently domiciled in the United States.<sup>101</sup> While the case was not directly about the scope of the Citizenship Clause, the Court cited *Wong Kim Ark* for the premise that if neither of the parties disputed that a particular individual was the person he claimed to be, then he was born to parents who were permanently domiciled in the United States and was therefore a U.S. citizen.<sup>102</sup> Two decades after *Wong Kim Ark*, the Court continued to indicate that whatever framework of citizenship the opinion did or did not adopt, it was limited to permanently domiciled aliens. Despite claims by some scholars that the Supreme Court has since expanded the premises of *Wong Kim Ark* so that it effectively covers the U.S.-born children of illegal or non-domiciled aliens, the Court has not again addressed the parameters of the Citizenship Clause.<sup>103</sup>

Given the Court’s concern for equitable treatment, its self-imposed limitations on the holding, its reliance on relatively narrow concepts of birthright citizenship, and its subsequent use of a similarly strict construction of citizenship related to domicile, the most coherent conception of *Wong Kim Ark* is not one of universal birthright citizenship. Instead, it is much more reasonable to assume that the majority intentionally

crafted a flexible type of “Americanized” jus soli that declined distinctions based on race even as it limited its application only to U.S.-born children who—consistent with the original meaning of the Fourteenth Amendment—owed complete allegiance to the United States. Such an assumption leaves a post-*Wong Kim Ark* birthright citizenship framework with several consistent concepts coherently tied together instead of a framework completely at odds with any theory of citizenship delineated by Congress, previously explained by the Court, or informed by context.

This framework can be explained thusly: The Fourteenth Amendment ensured that there could no longer exist in the United States a generations-long class of perpetual non-citizens confined to permanent resident alien status based on race. Those who owed meaningful allegiance to a foreign power and who were not otherwise part of the American people in terms of their complete subjection to U.S. jurisdiction were excluded from citizenship. Yet Chinese immigrants were excluded based on race from fully exercising their natural right of expatriation and could never legally become part of the “American people.” Those who were lawfully and permanently resident in the United States no longer owed a meaningful allegiance to China and would have been permitted to become citizens if they had instead been of European descent. This race-based exclusion was an affront to the Fourteenth Amendment that would again have created a class of perpetual non-citizens similar in status to the freed slaves.

The *Wong Kim Ark* majority largely couched these concepts in terms of jus soli, but a jus soli modified to fit within the narrower confines of lawful permanent domicile. Lawful presence and permanent domicile are important—even necessary—factors for determining whether a person is sufficiently subject to the complete jurisdiction of the United States for purposes of birthright citizenship. Therefore, the jus soli of *Wong Kim Ark* is nothing more than the reiteration of the original meaning of the Citizenship Clause.

This is what many contemporary scholars thought the Court did as well. It is not a modern innovation to suggest that *Wong Kim Ark* should be narrowly construed as adopting a limited “Americanized” jus soli that extends birthright citizenship only to those individuals who were born subject to the complete jurisdiction of the United States. Similar conclusions are found in the writings of several prominent constitutional and international law scholars in the years

following the opinion.<sup>104</sup> For example, in the immediate aftermath of *Wong Kim Ark*, the *Yale Law Journal* acknowledged that the Court failed to adopt the fullest extent of jus soli and instead invoked an Americanized concept of common law that upheld the right of expatriation and made allegiance dependent upon permanent domicile as opposed to mere temporary presence.<sup>105</sup> This view was so prevalent in the decades following *Wong Kim Ark* that even by 1921, one scholar was forced to concede that the Court had not decided the issue of citizenship for the U.S.-born children of “sojourners or transients in this country” and that his own conclusions on the matter—that they were citizens by birth—was at odds with the conclusions of other renowned scholars.<sup>106</sup>

### What This Means Today

What would this understanding of *Wong Kim Ark* and the Fourteenth Amendment mean for United States immigration and naturalization policies today? Certainly, America’s immigration and naturalization laws have changed dramatically in the past century, and the modern framework no longer risks the creation of de facto classes of permanent resident aliens perpetually excluded from naturalization because of national origin or race. Today, the government recognizes three general categories of foreign nationals present in the United States: (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.<sup>107</sup>

By applying the relevant factors discussed above, it should be relatively easy to determine which of these three modern categories of aliens would qualify as being “subject to the jurisdiction of the United States” under the original meaning of the term. The Citizenship Clause’s original meaning necessitates that a person be subject to the “complete jurisdiction” of the United States by being subject to “the same jurisdiction in extent and quality as applies to every citizen of the United States now.”<sup>108</sup> It implies that those individuals owe a permanent allegiance to the United States that is undiluted by being meaningfully subject to another sovereign. This can be determined by asking whether the United States government treats these individuals as more than mere foreigners (for example, by demanding certain duties of them or allowing them to enjoy certain rights as though they themselves were citizens). In other words, the question is whether any of these three

classes are essentially part of the American people in that they have been adopted into the fabric of American political life. It is clear that under this original framework, the U.S.-born children of immigrant aliens qualify for birthright citizenship, while the U.S.-born children of illegal and nonimmigrant aliens do not.

Immigrant aliens are, in the eyes of the United States government, a fundamentally unique class of aliens.<sup>109</sup> In many respects, they are already quasi-citizens on par with those who, under previous immigration frameworks in the 18th and 19th centuries, had declared their intent to naturalize.<sup>110</sup> In fact, no alien can become a naturalized citizen today without first becoming an immigrant alien, making this a necessary first step toward citizenship.<sup>111</sup>

For these reasons, immigrant aliens are subject to rights and duties less akin to other foreigners and more akin to U.S. nationals, who by statutory definition owe their permanent allegiance to the United States.<sup>112</sup> Like citizens and nationals, immigrant aliens must register for the draft and pay taxes on their worldwide income.<sup>113</sup> Unlike other classes of aliens, they are eligible for many federal jobs, can set up small businesses without obtaining special visas, and can leave and re-enter the U.S. with relative freedom.<sup>114</sup> Moreover, immigrant aliens may purchase and possess firearms subject only to the same requirements as citizens, effectively raising them to membership in “the people” of the United States for whom the right to keep and bear arms is protected.<sup>115</sup> And while non-citizens of any stripe cannot vote, legal permanent residents, along with citizens and nationals, can make contributions to federal, state, and local political campaigns.<sup>116</sup>

It may be questioned whether it is wise policy to allow immigrant aliens to retain their original nationality indefinitely, as the United States does by not revoking permanent resident status for the small percentage of immigrant aliens who choose not to naturalize.<sup>117</sup> The fact remains, however, that the U.S. government treats immigrant aliens as a part of the “American people” 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.<sup>118</sup> While they are not yet fully naturalized, they have taken formal steps to break their bonds of allegiance with their native country.

The relationship of illegal and nonimmigrant aliens to the United States is far different. Illegal aliens in particular are granted fewer and less robust

constitutional protections than are citizens and even lawful nonimmigrant aliens.<sup>119</sup> They have no legal right to remain as residents in the United States for any period of time and are, in fact, under constant threat of forcible expulsion from the country. 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.”<sup>120</sup>

An important consideration is also the fact that despite repeated accusations of racism levelled against proponents of a narrower interpretation of the Citizenship Clause, neither illegal aliens nor nonimmigrant aliens are excluded from full participation in the American polity because of their race or national origin. Rather, illegal aliens are excluded as a result of having failed to follow the process of legal entry and naturalization. Much as John Elk could not unilaterally divest himself of his allegiance to his tribe and submit himself to the complete jurisdiction of the United States government, illegal aliens do not suddenly become subject to “the same jurisdiction in extent and quality as applies to every citizen of the United States now” because of a unilateral decision to live in this country in violation of its laws. But unlike John Elk, who legally resided in Nebraska, and certainly unlike Wong Kim Ark, whose parents were lawfully domiciled in California, illegal aliens made a deliberate decision *to avoid* subjecting themselves to the complete jurisdiction of U.S. law. The child of an illegal immigrant maintains the national character of his or her parents, who are not themselves subject to the complete jurisdiction of the United States.<sup>121</sup>

Similarly, nonimmigrant aliens are not “part of the American people,” because it is presumed that they retain meaningful ties of allegiance to their native country. Their relationship to the United States does not take on a new character along the “ascending scale of rights and duties,” nor should it: They are permitted into the United States only for a specified and limited purpose and may remain here only for a specified and limited period of time. They are not on the first affirmative steps toward citizenship; they are in every sense of the word mere “sojourners” in the country, entitled to the equal protection of the laws but not to the rights and duties of citizenship.

## Conclusion

Despite the current U.S. policy that broadly recognizes almost every child born within the geographical boundaries as a citizen, it is clear that the original

meaning of the Fourteenth Amendment undermines any claim that this policy of universal birthright citizenship is constitutionally mandated. The amendment's framers and ratifiers explicitly understood themselves to be constitutionalizing a policy that intentionally did not apply to aliens who owed only a qualified or temporary allegiance to the United States. Birthright citizenship was reserved for any U.S.-born individuals of any race or national origin as long as, at the time of their birth, they were subject to the complete jurisdiction of the United States—that is, that they were sufficiently part of the “American people” to justify bestowing on them many of the same rights and duties normally reserved for citizens.

Insofar as the Supreme Court in *Wong Kim Ark* appeared to adopt true English common-law jus soli as the basis for United States citizenship, the decision is irreconcilable with both history and the original meaning of the Fourteenth Amendment. There is, however, an alternative interpretation of *Wong Kim Ark* that avoids such an abrupt and troubling departure from the original meaning and that also makes sense of the Court's own limited holding: namely, that the *Wong Kim Ark* majority intentionally restricted the adoption of jus soli to an “Americanized” version bound by the factors of lawful and permanent domicile.

Should the original meaning of the Citizenship Clause, as understood through this more consistent interpretation of *Wong Kim Ark*, be applied to categories of aliens under the modern immigration framework, it is clear that only the U.S.-born children of immigrant aliens would meet the criteria for birthright citizenship. Unlike nonimmigrant and illegal aliens, immigrant aliens enjoy many of the rights and are subjected to many of the duties that are normally reserved for citizens. They have taken a substantial and necessary step toward naturalization that is akin to previous laws regarding declarations of one's intent to naturalize. They alone of the three general categories of aliens are situated similarly to Wong Kim Ark and the freed slaves, having both lawful and permanent domicile in the United States.

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## Endnotes

1. Although this concept is also referred to simply as “birthright citizenship,” the term “universal birthright citizenship” more aptly mirrors the underlying argument. Very few, if any, scholars or politicians suggest that citizenship is never a birthright. All sides generally agree that, at a minimum, the U.S.-born children of U.S. citizens are themselves citizens at birth: While they are free to unyoke themselves from U.S. citizenship upon reaching the age of majority, they need not affirmatively “choose” U.S. citizenship or otherwise go through the process of naturalization. The distinction in the debate is whether citizenship is also the birthright of U.S.-born children without citizen parents. In other words, is citizenship universally the birthright of all U.S.-born children or the birthright merely of a specific group of U.S.-born children whose parents meet specific criteria? For these reasons, this paper will refer to the view that every U.S.-born child (except those born to accredited foreign ambassadors) obtains birthright citizenship as “universal birthright citizenship.”
2. For example, the 1985 publication of Peter H. Schuck and Rogers M. Smith’s *Citizenship Without Consent: Illegal Aliens in the American Polity* (Yale University Press) drew significant public attention to the issue of birthright citizenship, as did the 1997 House Immigration Subcommittee hearings on the Fourteenth Amendment.
3. See Trump Campaign, *Immigration Reform that Will Make America Great Again 4* (Aug. 16, 2015), <https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf>; *Transcript: Early Start—Trump Goes After Bush on Iraq; Bangkok Bombing Manhunt Widens; Deadly Police Shooting Ignites Protests*, CNN (Aug. 20, 2015), <http://www.cnn.com/TRANSCRIPTS/1508/20/es.02.html>; *The Bill O’Reilly Blues*, Fox News (Nov. 11, 2015), [http://video.foxnews.com/v/4608339663001/?playlist\\_id=930909812001#sp=show-clips](http://video.foxnews.com/v/4608339663001/?playlist_id=930909812001#sp=show-clips); Meet the Press, *Trump: Birthright Citizenship Not in the Constitution*, NBC News (Aug. 14, 2016), <https://www.nbcnews.com/meet-the-press/video/trump--birthright-citizenship-not-in-the-constitution-599319619848>.
4. See, e.g., Dana P. Goldman, James P. Smith & Neeraj Sood, *Immigrants and the Cost of Medical Care*, 25 HEALTH AFFAIRS 1700 (2006) (finding that illegal aliens account for disproportionately fewer medical costs paid for by public sources compared to citizens but acknowledging that the overall annual costs exceeding \$1.1 billion “are by no means insignificant in absolute terms”); Michael D. Antonovich, *County Spent Nearly \$639 Million in the Past Year to Support Families of Illegal Aliens*, Press Release for Office of Los Angeles County Supervisor (Aug. 22, 2014) (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 Pelter Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 1 (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, *The Fiscal Burden of Illegal Immigration on United States Taxpayers* (2017), FED’N FOR AM. IMMIGR. REFORM REPORT (2017) (examining the fiscal impact of illegal aliens as reflected in both federal and state budgets and concluding that illegal immigrants account for a total annual fiscal burden of \$115 billion on U.S. taxpayers, even accounting for the taxes that illegal aliens themselves pay).
5. The term “birth tourism” refers to the practice of pregnant foreign women who travel to the United States for the express purpose of giving birth on U.S. soil and thereby making their children presumptive U.S. citizens. See Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y. TIMES (Mar. 28, 2011), <https://www.nytimes.com/2011/03/29/us/29babies.html>. Often, these mothers then return with their U.S.-born children to their native countries and raise them with no actual connection to the United States. In the past few decades, a burgeoning birth tourism industry has sprung up, with hundreds of companies luring upper-class and upper-middle class foreign women to give birth in the United States by touting the benefits of having a U.S. passport holder in the family: significantly reduced costs of an American college education, access to U.S. government jobs, and the possibility of the citizen-child’s later sponsoring familial immigration. 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 Steven A. Camarota, *There Are Possibly 36,000 Birth Tourists Annually*, CTR. FOR IMMIGRATION STUDIES (Apr. 28, 2015); Glenn Kessler, *“Birth Tourists” and “Anchor Babies:” What Trump and Bush Got Right*, WASH. POST (Aug. 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/08/25/birth-tourists-and-anchor-babies-what-trump-and-bush-got-right/?utm\\_term=.4acfbdf22dfb](https://www.washingtonpost.com/news/fact-checker/wp/2015/08/25/birth-tourists-and-anchor-babies-what-trump-and-bush-got-right/?utm_term=.4acfbdf22dfb). 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. See also Press Release, Dep’t of Justice, *Federal Prosecutors Unseal Indictments Naming 19 People Linked to Chinese “Birth Tourism” Schemes that Helped Thousands of Aliens Give Birth in U.S. to Secure Birthright Citizenship for Their Children* (Jan. 31, 2019) (showcasing how Chinese birth tourism companies promote the exploitation of United States generosity with regard to birthright citizenship).
6. See, e.g., *An Agenda for American Immigration Reform*, HERITAGE FOUND. SPECIAL REPORT No. 210 (Feb. 20, 2019); Andrew Arthur, *Birthright Citizenship: An Overview*, CTR. FOR IMMIGR. STUDIES (Nov. 2018); *Reform Birthright Citizenship*, NUMBERSUSA, <https://www.numbersusa.com/solutions/reform-birthright-citizenship> (last visited Mar. 3, 2019); Michael Anton, *Citizenship Shouldn’t Be a Birthright*, WASH. POST (July 18, 2018), [https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b\\_story.html?utm\\_term=.ee4d554f16a2](https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b_story.html?utm_term=.ee4d554f16a2); Matthew Spalding, *The Case Against Birthright Citizenship*, WALL ST. J. (Oct. 31, 2018), <https://www.wsj.com/articles/the-case-against-birthright-citizenship-1541025425>; Cal Thomas, *Why We Should End Birthright Citizenship*, CHICAGO TRIBUNE (Nov. 6, 2018), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-birthright-citizenship-abolish-babies-1107-story.html>.
7. 169 U.S. 649 (1898).
8. See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, Georgetown Law Faculty and Other Works 1353 (2011).
9. *United States v. Wong Kim Ark*, 169 U.S. 649, 699 (1898).

10. *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857).
11. *Id.* at 407.
12. See generally Alix Oswald, *The Reaction to the Dred Scott Decision*, 4 VOCES NOVAE Art. 9 (2012). Abraham Lincoln, then campaigning throughout Illinois for the Republican presidential ticket of John C. Fremont and William Dayton, condemned the decision as erroneous and based on false assumptions about historical facts. Abraham Lincoln, “Speech on the Dred Scott Decision in Springfield, Illinois (June 26, 1857),” <http://teachingamericanhistory.org/library/document/speech-on-the-dred-scott-decision/>. Frederick Douglass decried the “judicial incarnation of wolfishness” and argued that slavery was not the result of the Constitution but of “the moral blindness of the American people.” Frederick Douglass, “The Dred Scott Decision: Speech, Delivered, in part, at the Anniversary of the American Abolition Society, Held in New York, May 14th, 1857,” in *Two Speeches by Frederick Douglass*, in *The Frederick Douglass Papers at the Library of Congress*, <http://memory.loc.gov/ammem/doughtml/doughome.html>. Northern newspapers such as the *Chicago Daily Tribune* scorned the opinion as “the first step in a revolution which, if not arrested, nullifies the Revolution of ‘76 and makes us all slaves again.” *The Political Decision*, CHI. DAILY TRIBUNE (Mar. 13, 1857).
13. 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, Part II (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).
14. The Joint Committee on Reconstruction was created at the outset of the 39th Congress to “inquire into the condition of the States which formed the Confederate States of America, and report whether they, or any of them, are entitled to be represented in either house of Congress.” REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION VII (1866). The committee’s in-depth report detailed the horrible social, political, and legal conditions of the freedmen in former Confederate states, including attempts effectively to re-enslave them and unprovoked killings. See, e.g., REPORT OF THE JOINT COMMITTEE, pt. III, at 5 (testimony of Brevet Maj. Gen. 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 (testimony of Brevet Brig. Gen. George Spencer) (describing murders 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 whatever they choose...”).
15. Johnson vetoed the Civil Rights Act of 1866 at least in part because he believed that Congress lacked the constitutional authority to displace state laws that discriminated on the basis of race and to place limits on the ability of states to legislate under the Tenth Amendment’s general police power. Congressional Globe, 39th Cong., 1st Sess., 1680 (1866) (President Johnson Veto Message to Senate).
16. See Maggs, *supra* note 13, at 1083, 1086.
17. Civil Rights Act of 1866, § 1.
18. See, e.g., Congressional Globe, 39th Cong., 1st Sess. 498 (1866) (Sen. Van Winkle) (“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 500 (Sen. Cowan) (noting that he was willing to vote for an amendment to the Constitution making citizens of freed slaves but that he did not think the Civil Rights Act itself was sufficient for the task); *id.* at 504 (Sen. Johnson) (arguing that it “is very desirable that [the proposed statutory definition of citizenship] be given” but asserting a corresponding belief that the *Dred Scott* decision rendered the statute “to no avail” without a constitutional amendment).
19. See Congressional Globe, 39th Cong., 1st Sess., 2896 (May 30, 1886) (Sen. Howard) (stating that the Fourteenth Amendment was drafted and ratified 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 their old masters.”); *id.* at 504 (Sen. Johnson) (connecting the purpose of the Civil Rights Act with that of overturning *Dred Scott* and arguing that a constitutional amendment would be needed to accomplish this).
20. Congressional Globe, 39th Cong., 1st Sess., App. 82 (Jan. 19, 1867) (Rep. Miller).
21. The provisions of the Civil Rights Act were later codified as Section 1992 of the Revised Statutes of the United States, a precursor to the modern United States Code. This statutory definition was not redacted or repealed until 1940, when the Roosevelt Administration spearheaded a comprehensive immigration law reform that resulted in the current statutory definition, which mirrors the language of the Fourteenth Amendment. In other words, for 70 years, Congress, the courts, and legal scholars all understood the definitions of the term “citizen” in the Civil Rights Act and the Fourteenth Amendment to be at the very least compatible.
22. See James C. Ho, *Defining “American,”* 9 GREEN BAG 2d 367 (2006); Elizabeth Wydra, *Birthright Citizenship: A Constitutional Guarantee*, AM. CONSTITUTION Soc’y FOR LAW & POL’y (May 2009), [https://www.theconstitution.org/wp-content/uploads/2017/12/20090507\\_Issue\\_Brief\\_Elizabeth\\_Wydra\\_Birthright\\_Citizenship\\_A\\_Constitutional\\_Guarantee\\_ACS.pdf](https://www.theconstitution.org/wp-content/uploads/2017/12/20090507_Issue_Brief_Elizabeth_Wydra_Birthright_Citizenship_A_Constitutional_Guarantee_ACS.pdf); Paul Gowder, *Reading the Plain Text of the Birthright Clause in the Fourteenth Amendment*, NISKANEN CTR. (Nov. 1, 2018), <https://niskanencenter.org/blog/reading-the-plain-text-of-the-birthright-clause-in-the-fourteenth-amendment/>.
23. Trumbull’s party affiliation shifted several times throughout his political career, and he was at various times a Democrat, a Republican, a Liberal Republican, and then a Democrat again. See Biographical Directory of the U.S. Congress, *Trumbull, Lyman, (1813–1896)*, U.S. SENATE HISTORICAL OFFICE, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=t000392> (last visited Mar. 28, 2019). Trumbull initially proposed the language “That all persons of African descent born in the United States are hereby declared to be citizens of the United States.” Congressional Globe, 39th Cong., 1st Sess., 497 (Jan. 30, 1866) (Sen. Trumbull). Almost immediately after debate on the language commenced, Trumbull withdrew this more restrictive language in favor of the 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. Senator Lane (R-KS) and Senator Ramsey (R-MN) subsequently issued proposals for language building on that proposed by Trumbull but excluding various subsets of tribal Indians. *See id.* at 504, 522, 527. Trumbull attempted to accommodate these various concerns and also removed the superfluous "without distinction of color," resulting in the Act's final wording of "All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens." *Id.* at 1413.
24. Congressional Globe, 39th Cong., 1st Sess., 572 (Feb. 1, 1866) (Sen. Trumbull).
  25. *Id.*
  26. *Id.* As Blackstone explained, under common law, allegiance could be divided into two types: natural and local. Local allegiance "is such as is due from an alien, or stranger born, for so long time as he continued within the king's dominion and protection." This was distinct from natural allegiance, which was owed to the sovereign in perpetuity by all those born in his kingdom. Trumbull was evidently concerned that the term "allegiance" would be mistaken as encompassing both types of common-law allegiance and was particularly motivated to ensure that U.S.-born persons with only a "local" allegiance based on transient residence were more clearly excluded from birthright citizenship.
  27. *Id.*
  28. *Id.*
  29. *See* Justin Fox, *Dismantling a Fake Argument Against Birthright Citizenship*, BLOOMBERG (July 24, 2018), <https://www.bloomberg.com/opinion/articles/2018-07-24/ignore-fake-arguments-over-birthright-citizenship>; Garrett Epps, *Constitutional Citizenship: A Legislative History*, AM. IMMIGR. COUNCIL (Mar. 2011), [https://www.americanimmigrationcouncil.org/sites/default/files/research/Epps\\_-\\_Constitutional\\_Citizenship\\_032811.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/Epps_-_Constitutional_Citizenship_032811.pdf); Elizabeth Wydra, *Born Under the Constitution: Why Recent Attacks on Birthright Citizenship Are Unfounded*, AM. CONST. SOC'Y (Mar. 2011), [https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Wydra\\_Birthright\\_Citizenship2.pdf](https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Wydra_Birthright_Citizenship2.pdf).
  30. Congressional Globe, 39th Cong., 1st Sess., 2890-91 (May 30, 1866) (Sen. Cowan). Emphasis added.
  31. *Id.* at 2890 (Sen. Cowan).
  32. Conness largely considered Cowan's description of the Gypsy and Chinese "problem" to be exaggerated and based on uninformed characterizations of their work habits. *See* Congressional Globe, 39th Cong., 1st Sess., 2890-93 (May 30, 1866) (Sen. Conness).
  33. Congressional Globe, 39th Cong., 1st Sess., 2895 (May 30, 1866) (Sen. Howard).
  34. Congressional Globe, 39th Cong., 1st Sess., 2893 (May 30, 1866) (Sen. Fessenden).
  35. Congressional Globe, 39th Cong., 1st Sess., 2893 (May 30, 1866) (Sen. Trumbull).
  36. Congressional Globe, 39th Cong., 1st Sess., 2897 (May 30, 1866) (Sen. Williams).
  37. *Id.*
  38. *Id.*
  39. *See* "Original Meaning According to Congress," *supra*.
  40. *See* Speech of Hon. John M. Broomall, of Pennsylvania, on the Civil Rights Bill (Mar. 8, 1866), <https://babel.hathitrust.org/cgi/pt?id=yale.39002053501418;view=1up;seq=7>.
  41. *Id.* at 3.
  42. Congressional Globe, 39th Cong., 1st Sess., 2893 (May 30, 1866) (Sen. Johnson).
  43. *Id.*
  44. Letter from Sen. Lyman Trumbull to President Andrew Johnson, in Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress, Washington, D.C.; *see also* Justin Lollman, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 VA. L. REV. 455 (2015).
  45. *See* Congressional Globe, 39th Cong., 1st Sess., 506 (Jan. 30, 1866) (Sen. Johnson) (noting that the Indian tribes "have no sovereign power whatever; they are not a nation in the general acceptance of that term," and that the Indians would therefore be citizens since they really were not subject to any other real government); *id.* at 526 (Sen. Conness) (explaining cases such as the "Digger Indians," who were cut off from all connections to their tribes but placed on public reservations).
  46. *See* Congressional Globe, 39th Cong., 1st Sess., 571 (Feb. 1, 1866) (Sen. Henderson); *id.* at 2894 (Sen. Trumbull); *id.* at 2894-95 (Sen. Howard).
  47. *Id.* at 2895 (Sen. Howard) ("[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 conditions or otherwise, in order to make them citizens of the United States. Does the honorable Senator from Wisconsin contemplate that?... It would, in short, be a naturalization, whenever the States saw fit to impose a tax upon the Indians, of the whole Indian race within the limits of the States.").
  48. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF LAW IN THE UNITED STATES* 243 (1880).
  49. *Id.*
  50. *Id.*
  51. *Id.* ("The aboriginal inhabitants of the country may be said to be in this anomalous condition, 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.").

52. *Id.*
53. 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).
54. *Id.*
55. *Id.* (“Aliens, among whom are persons born here and naturalized abroad, dwelling in 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.”).
56. FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW 32-35 (1881).
57. See SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 278 (1893) (“If a stranger or traveler 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.”); 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].”); 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.”).
58. M. A. Lesser, *Citizenship and Franchise*, 4 COL. L. TIMES 145, 146 (1891) (“Indians are no more born within the United States and subject to the jurisdiction thereof, within the meaning of the [Fourteenth] Amendment, than are the children of foreign subjects, born while the latter transiently sojourn here, or than the children of ambassadors or other public ministers.”). The author also contemplates that permanent residence is a telltale sign of a presumed change of allegiance in a way that transient or temporary residence is not. *Id.* at 145.
59. Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, Nov. 28, 1885, For. Rel. 1885, 814, 815, in JOHN BASSETT MOORE, 3 A DIGEST OF INTERNATIONAL LAW AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS 279 (1906); Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan. 15, 1885, For. Rel. 1885, 394, in 3 A DIGEST OF INTERNATIONAL LAW AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS 278-79; *Beniguo Santos Suarez v. Mexico*, No. 716, Conv. of July 4, 1868, MS Op. VI. 416 (Apr. 22, 1876), as reported in JOHN BASSETT MOORE, III HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2449 (1898); *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 JOHN BASSETT MOORE, III HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2449-50 (1898).
60. 83 U.S. 36 (1872). For a more in-depth discussion of the *Slaughterhouse Cases*, see Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges and Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1 (1998).
61. *Slaughterhouse Cases*, 83 U.S. at 73.
62. 88 U.S. 162 (1874).
63. *Id.* at 167-68.
64. 112 U.S. 94 (1884). The question before the Court was “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.” *Id.* at 99.
65. *Id.* at 98-99.
66. *Id.* at 102.
67. *Id.* at 99 (“The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States.”).
68. *Id.* at 102.
69. This systematic discrimination on the basis of race was also prevalent at the state level. The 1849 California gold rush led hundreds of thousands of Chinese subjects to immigrate to California over the decades spanning the 1850s to 1870s. California repeatedly tried to check the growing population of Chinese immigrants by passing discriminatory legislation based on ethnicity alone, although these statutes were often struck down as violations of U.S. treaty obligations with China and, later, as violations of the Fourteenth Amendment’s Equal Protection Clause.
70. The Naturalization Law of 1802, which remained in effect until the early 20th century, only allowed for the naturalization of “free white person[s].” While it was amended in 1870 to allow for the naturalization of “persons of African descent,” there remained no mechanism of naturalization for non-white or non-African immigrants, such as the Chinese.
71. See, e.g., Convention Between the United States of America and the Empire of China, Emigration Between the Two Countries, China-U.S., art. IV, Dec. 8, 1894, 2 Fed. Stat. Ann. 111 (clarifying and agreeing that Chinese immigrants, whether permanently or temporarily residing in the United States, are excepted from the right of naturalization).
72. Treaty Between the United States and China, Concerning Immigration, U.S.-China, Nov. 17, 1880, 22 Stat. 826.

73. Although there technically were some narrow immigration restrictions prior to the Exclusion Acts, such as those prohibiting the immigration of slaves, prostitutes, and convicts, the restrictions on Chinese immigration represented the United States' first attempt to limit immigration on a broad scale and then continue to enforce those restrictions through comprehensive deportation schemes. The term "unlawful immigrants" appears to have been used in federal legislation for the first time in the Act of March 3, 1891, which codified certain penalties relating to immigration and authorized the newly created office of Superintendent of Immigration to provide for the "return" of "unlawful immigrants." This 1891 Act was largely a means to carry into effect the restriction of the Exclusion Acts.
74. Scott Act of 1888, ch. 1064, 25 Stat. 504, repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.
75. XIAOJIAN ZHAO, *ASIAN AMERICAN CHRONOLOGY: CHRONOLOGIES OF THE AMERICAN MOSAIC* 22 (2009).
76. 169 U.S. 649 (1898).
77. *Id.* at 652-53.
78. *Id.*
79. *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 domicile [*sic*] 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 Citizenship Clause].").
80. *Id.*
81. *Id.*
82. *Id.* at 658.
83. *See id.* at 697-99.
84. SIR WILLIAM BLACKSTONE, *2 COMMENTARIES ON THE LAWS OF ENGLAND* 326 (William Draper Lewis ed. 1897).
85. *See* SIR WILLIAM BLACKSTONE, *2 COMMENTARIES ON THE LAWS OF ENGLAND* 328 (William Draper Lewis ed. 1897); 7 Coke Report 1a, 77 ER 377 (1608).
86. BLACKSTONE, *supra* note 84, at 328.
87. Grotius contended that the right to leave one's country and "quit the State," while not absolute, was more or less a natural right enshrined in and protected by the law of nations. *See* Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 *European Journal of International Law* 901 (Nov. 2016).
88. *See id.* Like Grotius, the Swiss Vattel affirmed a basic principle that "[e]very man has a right to quit his country," including cases in which a person has "an absolute right to renounce his country, and abandon it entirely—a right founded on reasons derived from the very nature of the social compact." In addition, his conception of "natural born citizenship," in which children were the subjects or citizens of a sovereign only if the child's father was a subject or citizen, was very different from Blackstone's. EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (1797). Contrary to Blackstone's foundational explanations of *jus soli*, Vattel reasoned that "citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages." Those born of non-citizens, who were not bound by these duties and did not participate in these advantages, could claim the nation only as their "place of birth" and not their "country." *Id.*
89. *See, e.g.,* Andrew J. Reck, *Natural Law in American Revolutionary Thought*, 30 *REV. OF METAPHYSICS* 686, 688-87, 701, 714 (1977) (noting Grotius among the "philosophers of natural law who most influenced the American revolutionaries" and explaining how the "patriot pamphleteers of the American Revolution" commingled natural law with common law as they "endeavored to apply their inherited philosophy to a new experience within a wild environment"); JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED* (1764) (paraphrasing Grotius in his repudiation of Blackstone's theory of the political omnipotence of Parliament); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (2012) (describing the influence of Grotius and Vattel on the colonists with respect to the laws of nature, the law of nations, and the principles of civil government); Charles G. Fenwick, *The Authority of Vattel*, 7 *AM. POLITICAL SCIENCE REV.* 395 (1913) (exploring Vattel's impact on American legal theory well into the 19th century).
90. THE DECLARATION OF INDEPENDENCE PARA. 2 (U.S. 1776).
91. *See, e.g.,* CT. CONST. art. I, §§ 1-2; MD. CONST. DECL. OF RIGHTS, art. 1; ARK. CONST. of 1836, art. II, §§ 1-2; KY. CONST. of 1792, art. XII, §§ 1-2; N.H. CONST. pt. I, art. 1.
92. *See, e.g.,* Congressional Globe, 40th Cong., 2nd Sess., 868 (Jan. 30, 1868) (Rep. Woodward) (describing the common law's *jus soli* as "an indefensible feudal doctrine of indefeasible allegiance"); Congressional Globe, 40th Cong., 2nd Sess., 967 (Feb. 1, 1868) (Rep. Bailey) (decrying the "slavish feudal doctrine of perpetual allegiance"); Congressional Globe, 40th Cong., 2nd Sess., 1130-31 (Feb. 12, 1868) (Rep. Woodbridge) (condemning *jus soli*'s doctrine of perpetual allegiance as "not only at war with the theory of our institutions, but...equally at war with every principle of justice and of sound public law").
93. Justice John McClain's dissent in the case explored this flaw at some length, noting that at the time of ratification, five of the 13 states had extended suffrage to black men, making them citizens both of their respective states and of the United States generally. The United States government, while "not made especially for the colored race," was undoubtedly not created to the categorical exclusion of it either. Those of African descent were included as part of the "people of the United States" and had, in proportion to their numbers as voters in those five states, as meaningful a role in the ratification of the Constitution as did white voters.

94. Speech in Indianapolis, Indiana (Aug. 7, 1866), reprinted in CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866: IN THE STATES OF OHIO, INDIANA, AND KENTUCKY 14 (1866).
95. *Wong Kim Ark*, 169 U.S. at 693-94. Emphasis added.
96. See, e.g., *id.* 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, Scottish, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.”); *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.”).
97. 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. WILLIAM EDWARD HALL, A TREATISE ON THE FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN 4 (1894 ed.). While Hall does not explicitly draw the conclusion that such persons rebut the presumption of not being subject to the complete jurisdiction of the United States for purposes of birthright citizenship, it certainly appears that this conclusion is most reasonable.
98. “A reasonable qualification on 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 who were abiding there for temporary purposes, as for health or curiosity or occasional business.” JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 48 (1834).
99. 32 A. Rep. 697 (N.J. Sup. Ct. 1895). *Benny* involved a question of whether a U.S.-born son of non-naturalized but permanently domiciled Scottish immigrants, who subsequently lived in New York and even voted in local elections, was a U.S. citizen entitled to run for office. The New Jersey Supreme Court determined that he was a citizen. In doing so, it implied “instances in which the right to citizenship does not attach by reason of birth in this country.” It concluded, however, that based on the context and purpose of the amendment, “[p]ersons intended to be excepted are only those born in this country of foreign parents who are temporarily traveling here, and children born of [diplomats]” because these were “born within the allegiance of the sovereign power to which they belong or which their parents represent.” The *Benny* court drew explicitly on parallels between the status of the freed slaves and the status of permanent resident aliens, noting that Congress could not have intended to make citizens of the U.S.-born children of the former but not the latter.
100. See, e.g., *Lau Ow Bew v. United States*, 144 U.S. 47 (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 persons stand by reason of their domicile of choice, or commercial domicile, is to be presumed....”).
101. 253 U.S. 454 (1920).
102. *Id.* at 457. The case revolved around the question of whether the petitioner, who was seeking entry into the United States, had been afforded fair procedures for determining whether he lied about his identity.
103. These scholars tend to point to *Plyler v. Doe*, 457 U.S. 202 (1981), *INS v. Rios-Pineda*, 471 U.S. 444 (1985), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In none of these cases, however, was the Court presented with a question arising under the Citizenship Clause.
104. See, e.g., HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (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 never subject to its jurisdiction. But the children, born within the United States, to permanent 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, 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.’”); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 224-25, 227 (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 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.”); JOHN WESTLAKE, 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 fourteenth amendment, 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.”).
105. 7 YALE L. J. 366, 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 more temporary sojourn is sufficient to render the child a British subject.”).

106. Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 YALE L. J. 545, 552 (1921).
107. There are a few categories of aliens who do not necessarily meet the exact criteria for any of these three categories, including persons initially classified as refugees or asylum seekers. Refugees are required to apply for lawful permanent resident status within one year after being admitted to the U.S., while those granted asylum may seek—but do not have to seek—lawful permanent resident status after one year of being granted asylum. See *Refugees: Filing for a Permanent Residency (Green Card)*, U.S. CUSTOMS & IMMIGR. SERVS. (updated Oct. 24, 2017), <https://www.uscis.gov/humanitarian/refugees-asylum/refugees>; *Asylum: Filing for Permanent Residence (Green Card)*, U.S. CUSTOMS & IMMIGR. SERVS. (updated Jan. 28, 2019), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum>.
108. Congressional Globe, 39th Cong., 1st Sess., 2895 (May 30, 1866) (Sen. Howard).
109. The Supreme Court itself has noted the significant differences between the rights and duties of lawful permanent residents and the rights and duties of illegal or nonimmigrant aliens, referring to a “generous and ascending scale of rights” that increases as the alien’s “identity with our society” increases. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The sliding scale begins with “mere lawful presence in this country,” which “creates an implied assurance of safe conduct and gives [the alien] certain rights.” *Id.* These rights become more extensive upon the alien’s taking steps to become a citizen, such as by declaring an intent to naturalize, and become most fully expansive with the actual act of naturalization. *Id.*
110. As the Supreme Court noted in 1923, “the rights, privileges, and duties of...those alien declarants differ substantially from those of nondeclarants.” *Terrace v. Thompson*, 263 U.S. 197 (1923). Lawful permanent residents are no longer required to fill out declarations of intent in order to naturalize. Instead, the entirety of the class is treated as an entity distinct from nonimmigrant and illegal aliens. For example, it used to be the case that any alien who had not declared an intent to naturalize was not subject to registration with the Selective Service System and could not be drafted. Today, however, all immigrant aliens are subject to these requirements, primarily because a declaration of intent is no longer required for naturalization.
111. See generally *Path to U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS. (updated Jan. 22, 2013), <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/path-us-citizenship>.
112. 8 U.S.C. §1101(a)(22) (“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 8 U.S.C. §1101(a)(21) (“The term ‘national’ means a person owing permanent allegiance to a state.”).
113. *Who Must Register*, SELECTIVE SERV. SYST., <https://www.sss.gov/Registration/Immigrants-and-Dual-Nationals> (last visited Jan. 4, 2019); *Introduction to Residency Under U.S. Tax Law*, INTERNAL REVENUE SERV. (updated May 28, 2018), <https://www.irs.gov/individuals/international-taxpayers/introduction-to-residency-under-us-tax-law>.
114. *Employment of Non-Citizens*, USAJOBS, <https://www.usajobs.gov/Help/working-in-government/non-citizens/> (last visited Jan. 6, 2019); *International Travel as a Permanent Resident*, U.S. CITIZENSHIP & IMMIGR. SERVS. (updated Jan. 1, 2018), <https://www.uscis.gov/green-card/after-green-card-granted/international-travel-permanent-resident>; *Returning Resident Visas*, U.S. DEP’T OF STATE—BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/returning-resident.html> (last visited Jan. 6, 2019). Moreover, lawful permanent residents—like citizens and nationals—are eligible for expedited security processing at U.S. airports and are even grouped together with citizens and nationals as one category for purposes of U.S. Customs and Border Patrol online travel information. *Applying for TSA Pre ✓: Who Can Apply for TSA Pre ✓?*, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/precheck/faq> (last visited Jan. 4, 2019); *For U.S. Citizens/Lawful Permanent Residents*, CUSTOMS & BORDER PATROL (modified Aug. 23, 2018), <https://www.cbp.gov/travel/us-citizens>.
115. Federal law excludes immigrant aliens from the general prohibition on the purchase or possession of firearms by aliens. See 8 U.S.C. § 922(g)(5).
116. See Bipartisan Campaign Finance Reform Act of 2002, 2 U.S.C. § 441(e) (2006).
117. Under federal law, lawful permanent residents do not need to apply for naturalization when eligible and may opt to continue renewing their so-called green cards every 10 years for as long as they continue to be nonremovable under immigration law.
118. This presumption is supported by surveys of lawful permanent residents who are eligible for citizenship but who have not yet naturalized. For example, a 2012 study by the Pew Research Center found that fewer than one in 10 Latino green card holders expressed no desire to become U.S. citizens. See Paul Taylor et al., *An Awakened Giant: The Hispanic Electorate Is Likely to Double by 2030*, PEW HISPANIC CTR. at 22, 39 (Nov. 14, 2012). The main reasons for not yet having naturalized include financial, administrative, and language barriers. *Id.*
119. For example, federal courts have routinely declined to apply strict scrutiny review in equal protection cases involving nonimmigrant and illegal aliens. See *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). Even when the Court in *Plyler v. Doe* held that Texas could not withhold funds for the public education of illegal alien children, the majority still recognized 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*, 457 U.S. at 218–220.
120. *United States v. Toner*, 728 F.2d 115, 128–29 (2d Cir. 1984). See also *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2013) (quoting *Toner* approvingly in this regard).
121. Importantly, it is rarely true that a child born in the United States to illegal or temporary alien parents does not also at birth attain the nationality of his parents. The vast majority of countries (including the United States) recognize some degree of jus sanguinis citizenship, by which children born abroad of citizens themselves acquire citizenship at birth. Assuming that the U.S.-born children of illegal aliens roughly reflect the demographic distributions of all illegal aliens residing in the United States, the overwhelming majority of these children

are also citizens of another country. For example, 80 percent of all illegal aliens in the United States are from Mexico, El Salvador, Guatemala, Honduras, the Philippines, South Korea, Ecuador, and Vietnam, all of which automatically consider the U.S.-born children of their citizens also to retain the citizenship of their parents. See Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, DEPT. OF HOMELAND SECURITY OFFICE OF IMMIGR. STUDIES (Mar. 2013), <https://immigration.procon.org/sourcefiles/illegal-immigration-population-2012.pdf>; U.S. OFFICE OF PERSONNEL MANAGEMENT, *CITIZENSHIP LAWS OF THE WORLD* (Mar. 2001), <https://www.multiplecitizenship.com/documents/IS-01.pdf>. Moreover, the countries of origin for the vast majority of birth tourists—China, Russia, Nigeria, and Turkey—all recognize as citizens the children born abroad of citizens. Even in countries like India that have more restrictive views of citizenship by descent, citizenship may be recognized for children born abroad of citizens as long as the birth is registered with the Indian embassy within one year. Finally, any concerns about statelessness for the U.S.-born children of illegal or nonimmigrant aliens could be dealt with by providing U.S. nationality to U.S.-born children of aliens who cannot otherwise acquire citizenship in another country.