BIRTHRIGHT CITIZENSHIP REQUIRES PARENTAL ALLEGIANCE TO THE UNITED STATES: THE MEANING OF "SUBJECT TO ITS JURISDICTION" IN THE FOURTEENTH AMENDMENT

Stephen P. Halbrook*

The Fourteenth Amendment provides that a person born in the United States is a citizen only if "subject to the jurisdiction thereof." According to the original public understanding, persons born here of illegal aliens or temporary visitors, who have no allegiance to the United States, are not citizens.

* Georgetown University, J.D.; Florida State University, Ph.D. Philosophy. Argued and won *Printz v. United States*, 521 U.S. 898 (1997), and other constitutional law cases in the Supreme Court. Books include *Securing Civil Rights: Freedmen, the Fourteenth Amendment, and the Right to Bear Arms*; *The Founders' Second Amendment*; and *The Right to Bear Arms*. Posts in the Volokh Conspiracy blog. Senior Fellow, The Independent Institute. For other books and articles, see https://stephenhalbrook.com/.

TABLE OF CONTENTS

INTRODUCTION

Section one of the Fourteenth Amendment of the United States Constitution, ratified in 1868, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

The first sentence of the above, the Citizenship Clause, declares persons (1) "born … in the United States *and* (2) "subject to the jurisdiction thereof" to be citizens of the United States. This is a conjunctive clause – both elements must be satisfied. Simply being born here does not suffice.

A superficial and incorrect reading of the clause holds that persons born in the United States, with two exceptions already recognized by the law of nations – children born of ambassadors and those born of members of invading armies[2] – are thereby automatically subject to its jurisdiction, and are thus citizens. That reading renders nugatory the element of being subject to U.S. jurisdiction. No explicit clause was necessary to exempt those universally recognized not to be citizens.

As adopted in 1789, the original Constitution did not define citizenship. However, it provided, "No Person except a *natural born Citizen*, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President…."[3] Congress was empowered "To establish an uniform Rule of Naturalization,"[4] which allowed for the making of aliens into naturalized citizens. Representatives were apportioned among the states based on the number of "free persons" (a broader term than citizenship) excluding "Indians not

---

[1] U.S. Const., Amend. XIV, § 1.

[2] "[C]hildren born out of the country in the armies of the state, or in the house of its minister at a foreign court, are reputed born in the country; for a citizen, who is absent with his family on the service of the state, but still dependent on it, and *subject to its jurisdiction*, cannot be considered as having quitted its territory." Emer de Vattel, *The Law of Nations* 103 (London: G.G. and J. Robinson, 1797) (emphasis added). Vattel was "the founding era's foremost expert on the law of nations...." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 239 (2019).

[3] U.S. Const., Art. II, § 1 (emphasis added). Representatives must have been a citizen for seven years, U.S. Const., Art. I, § 3, and senators must have been a citizen for nine years. *Id*., § 8.

[4] U.S. Const., Art. I, § 8.

taxed,"[5] which referred to Indians with allegiance to their tribes who did not pay taxes in the states.[6]

The following delves into the historical development of the Citizenship Clause to determine the true meaning of what it means to be born in and subject to the jurisdiction of the United States. This development may be traced in five basic stages.

First, the concept of natural-born citizenship was discussed briefly in debates in 1862 on the bill to abolish slavery in the District of Columbia. A child of parents owing allegiance to no other sovereignty was considered to be a citizen.

Second, the Civil Rights Act of 1866 provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States…." The Fourteenth Amendment was designed to constitutionalize the Civil Rights Act of 1866.

Third, the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Persons with allegiance to foreign states, and Indians with allegiance to their tribes, were not considered as being subject to the complete jurisdiction of the United States.

Fourth, the Expatriation Act of 1868 rejected the feudal concept of being a birth-place subject in the English common law. Enacted a day before the Fourteenth Amendment was certified as ratified, it further informed the intent of the Citizenship Clause.

Fifth, the same day the Fourteenth Amendment was certified as ratified, China and the United States signed the Burlingame-Seward Treaty, which further rejected the English common law by recognizing the "inalienable right of man to change his home and allegiance," while adding that nothing in the accord conferred naturalization on a subject of China in the United States.

After analyzing the above historical developments, pertinent Supreme Court cases are reviewed. In the *Slaughter-House Cases* (1872), the Court noted in dicta that the phrase "subject to its jurisdiction" excluded from citizenship, among others, "children of … citizens or subjects of foreign States born within the United States."[7] That was followed by *Elk v. Wilkins* (1884),

---

[5] U.S. Const., Art. I, § 2. The number also included 3/5 of all other persons, i.e., slaves, but that was abrogated by the Fourteenth Amendment. U.S. Const., Amend. XIV, § 2.

[6] In the constitutional convention of 1787, the clause providing for the basis of representation, first proposed by delegate James Wilson of Pennsylvania, ended with the words "except Indians not paying taxes, in each State," which he explained as "being the rule in the Act of Congress agreed to by eleven States, for apportioning quotas of revenue on the States, and requiring a Census only every 5-7, or 10 years." James Madison, *Debates on the Adoption of the Federal Convention*, ed. Jonathan Elliot, 181 (Philadelphia: J.B. Lippincott, 1845) (June 11, 1787).

[7] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).

which held that "all persons … born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the state in which they reside."[8]

In *United States v. Wong Kim Ark* (1898), the Court concluded that 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…."[9] The Court thus held that citizenship accrued to a child born in the United States of Chinese parents who, while subjects of the emperor of China, "have a permanent domicile and residence in the United States, and are there carrying on business…."[10] Since the parents were lawfully residing and domiciled in the United States, the holding applies only to those born of resident parents lawfully domiciled here. To the extent any of the opinion's generalizations might suggest that those born in the United States of illegal aliens are citizens, they are dicta.

While *Wong Kim Ark* remains the Supreme Court's last word on the Citizenship Clause, the Fourteenth Amendment has a second reference to "jurisdiction" in the provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[11] In *Plyler v. Doe* (1982), the Court stated in dicta that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."[12] The Court disregarded the textual distinction between being "subject to the jurisdiction," which denotes allegiance, and "within its jurisdiction," which simply means geographical presence.

The Supreme Court has repeatedly reaffirmed, most recently in *McDonald v. City of Chicago* (2010), that the Civil Rights Act of 1866 was the precursor of the Fourteenth Amendment.[13] It has never found the Act's element of citizenship "not subject to any foreign power" as inconsistent with the Amendment's "subject to the jurisdiction thereof." Unless the Amendment's definition of citizenship is read to embody the same meaning as that of the Act, the Act would unconstitutionally narrow the definition of citizenship. That is a result to be avoided.

Based on the above, should the Supreme Court decide the issue, it should hold that under the Citizenship Clause, persons born here of illegal aliens or temporary visitors, who have no allegiance to the United States, are not citizens.

---

[8] *Elk v. Wilkins*, 112 U.S. 94, 101 (1884).

[9] *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

[10] *Id*. at 705. As discussed below, being subjects of the Chinese emperor meant that they did not have the full allegiance to the United States contemplated by the original public understanding of the Citizenship Clause.

[11] U.S. Const., Amend. XIV, § 1.

[12] *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982).

[13] *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010).

I. TEXTUALLY AND AS ORIGINALLY UNDERSTOOD, THE CITIZENSHIP CLAUSE EMBODIES ALLEGIANCE TO THE UNITED STATES

A. In Debate on the Bill to Abolish Slavery in the District of Columbia in 1862, Natural-born Citizens Were Described as Having Parents Owing Allegiance to No Other Sovereignty

The meaning of natural-born citizens was discussed in Congress in 1862 during debates on a bill to abolish slavery in the District of Columbia. Rep. John Bingham of Ohio, who would later become the chief author of the Fourteenth Amendment, quoted the "natural-born citizen" and naturalization clauses of the Constitution, explaining: "To naturalize a person is to admit him to citizenship. Who are *natural-born citizens* but those born within the Republic? Those born within the Republic, whether black or white, are citizens by birth – natural-born citizens."[14]

The word "white," Bingham explained, does not appear in the Constitution, and thus citizenship is based no more on complexion than it is based on suffrage rights. He continued: "All from other lands, who, by the terms of your laws and a compliance with their provisions become naturalized, are adopted citizens of the United States; all other persons born within the Republic, of *parents owing allegiance to no other sovereignty*, are natural-born citizens."[15]

While there was no further discussion of the subject, this was a clear statement that children born in the United States of parents who owed allegiance to another sovereignty were not "natural-born citizens." No one voiced any disagreement of Bingham's statement.

The only exception to being a natural-born citizen, Bingham noted, concerned Indians, whose tribes were recognized as independent sovereignties. By contrast, Bingham summarized Chancellor Kent as declaring that "every person of African descent, born in this land, is a citizen of the United States, and although born in a condition of slavery under the laws of any State in which he might be held to service or labor, still he was a citizen of the United States under disabilities."[16]

Bingham sought to establish that enslaved blacks were citizens, which was not dependent on the right to vote. That citizenship did not depend on the right to suffrage was illustrated by other classes: "Are not children natural-born citizens of the United States? Are not they entitled to protection as citizens everywhere in all the States of the Union?"[17] Again: "Your wives and daughters are natural-born citizens of the United States. Citizenship is their birth-right."[18] Urging passage of the bill, Bingham referred to slaves as "natural-born citizens of the Republic"

---

[14] Cong. Globe, 37th Cong., 2d Sess., 1639 (April 11, 1862).

[15] *Id*. (emphasis added).

[16] *Id*.

[17] *Id*.

[18] *Id*.

who should be "made secure in their persons, in their lives, in their liberty, in their property, within this District...."[19]

Signed into law as An Act for the Release of certain Persons held to Service or Labor in the District of Columbia, the law provided:

> That all persons held to service or labor within the District of Columbia by reason of African descent are hereby discharged and freed of and from all claim to such service or labor; and from and after the passage of this act neither slavery nor involuntary servitude, except for crime, whereof the party shall be duly convicted, shall hereafter exist in said District.[20]

While the Act rendered slaves into free persons, it was silent on citizenship. That matter would await enactment of the Civil Rights Act of 1866.

B. The Civil Rights Act of 1866 Defined "Citizens" as "Persons Born In the United States and Not Subject to Any Foreign Power"

The Citizenship Clause of the Fourteenth Amendment was the outgrowth of the federal Civil Rights Act of 1866, which provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States…."[21] The Fourteenth Amendment in turn provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." As discussed below, being "not subject to any foreign power" was considered by the Amendment's framers as the equivalent to being "subject to the jurisdiction" of the United States. Both phrases denoted full allegiance to the United States.

On January 5, 1866, Senator Lyman Trumbull of Illinois, Chairman of the Committee on the Judiciary, introduced S. 61, the Civil Rights Bill, which was referred to the Judiciary Committee.[22] He reported the bill on January 11, 1866[23] and opened up its consideration the next day.[24] The bill had no citizenship clause. [25] On January 29, Trumbull opened debate by proposing that the draft be amended to add at the beginning, "That all persons of African descent born in the United States are hereby declared to be citizens of the United States…."[26] He argued

---

[19] *Id*.

[20] 12 Stat. 376 (1862).

[21] 14 Stat. 27 (1866).

[22] Cong. Globe, 39th Cong., 1st Sess. 129 (Jan. 5, 1866).

[23] *Id.* at 184 (Jan. 11, 1866).

[24] *Id.* at 211 (Jan. 12, 1866).

[25] *Id*.

[26] Cong. Globe, 39th Cong., 1st Sess., 474 (Jan. 29, 1866).

that the bill enforced the Thirteenth Amendment, which abolished slavery.[27] He also maintained that Congress had authority to define citizenship under the naturalization clause.[28]

The proposed bill was debated on January 30, 1866.[29] Senator Trumbull withdrew his amendment and substituted the following: "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…."[30] The following day, Trumbull modified the proposal to state "that all persons born in the United States, and not subject to any foreign Power, (excluding Indians not taxed,) are hereby declared to be citizens of the United States, without distinction of color."[31] He explained that "all these persons born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress. They are native-born citizens." [32]

Although Trumbull did not explain the meaning of "Indians not taxed," for which there was no statutory definition either, census takers in 1860 were instructed: "Indians *not taxed* are not to be enumerated. The families of Indians who have renounced tribal rule, and who under State or Territorial laws exercise the rights of citizens, are to be enumerated."[33] So Indians not taxed lived under tribal rule and did not exercise the rights of citizens.

On February 1, Senator Trumbull introduced the following to be added to S. 61: "All persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States, without distinction of color…."[34] In support, Senator Alexander Ramsey of Minnesota asked, "Was he [the negro] not born here? Does he owe any allegiance to a foreign Power? Is he not bound to bear arms in defense of his country?"[35]

Senator Trumbull desired "to make citizens of everybody born in the United States who owe allegiance to the United States. We cannot make a citizen of a child born of a foreign minister who is temporarily residing here."[36] He recognized that "a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens…."[37] That same principle would be equally valid under the Citizenship Clause.

---

[27] *Id.*

[28] *Id.* at 475.

[29] *Id.* at 497 (Jan. 30, 1866).

[30] *Id.* at 498.

[31] *Id.* at 527 (Jan. 31, 1866).

[32] *Id.*

[33] "Special Instructions, Schedule No. 1, 1860 Census: Instructions to the Marshals," Minnesota Population Center, University of Minnesota, IPUMS USA. https://usa.ipums.org/usa/voliii/inst1860.shtml.

[34] Cong. Globe, 39th Cong., 1st Sess., 569 (Feb. 1, 1866).

[35] *Id*. at 571.

[36] *Id*. at 572.

[37] *Id*.

Debate on the Civil Rights Bill centered on whether citizenship would be race-neutral, with some Western senators wishing to exclude Indians and Chinese from citizenship. Senator George H. Williams of Oregon argued that if Indians were citizens, then state laws that prohibited whites from selling arms and ammunition to Indians would be void.[38] The exclusion for "Indians not taxed" was thus voted to be included in the bill.[39] After further debate, the Civil Rights Bill passed the Senate.[40]

The bill was debated in the House on March 1, 1866. Rep. James Wilson of Iowa, Chairman of the Judiciary Committee, read the first section of the bill: "That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States without distinction of color."[41] He explained that to be "merely declaratory of what the law now is."[42]

Wilson quoted Blackstone as follows: "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England; that is, within the *ligeance*, or, as it is generally called, the allegiance of the king; and aliens are such as are born out of it."[43] That principle, Wilson added, "makes a man a subject in England, and a citizen here…."[44]

Rather than being an endorsement of the English rule of allegiance to the king,[45] Wilson's comments were calculated to exclude citizenship based on race: "English law made no distinction on account of race or color in declaring that all persons born within its jurisdiction are natural-born subjects, nor does it do so in regard to naturalization." That same English law "bound the colonies before the Revolution, and was not changed afterward."[46]

Thus, the U.S. Constitution recognized "natural-born and naturalized citizens."[47] As for the latter, Wilson quoted the first section of the naturalization act of April 14, 1802, as follows:

> That any alien who was residing within the limits, and under the jurisdiction of the United States, before the 29th day of January, 1795, may be admitted to become a citizen on due proof made to some one of the courts aforesaid: that he has resided two years at least within and under the jurisdiction of the United

---

[38] *Id.* at 573.

[39] *Id.* at 574-75.

[40] *Id.* at 606-07.

[41] *Id.* at 1115 (Mar. 1, 1866).

[42] *Id.*

[43] *Id*. at 1116, quoting *Sharswood's Blackstone*, vol. 1, p. 364.

[44] *Id.*

[45] That doctrine was explicitly rejected by the Declaration of Independence (1776), which asserted that governments "deriv[e] their just powers from the consent of the governed" and declared that the colonies "are Absolved from all Allegiance to the British Crown." America's rejection of the English concept of citizenship is discussed in more detail below.

[46] Cong. Globe, 39th Cong., 1st Sess., 1116 (Mar. 1, 1866).

[47] *Id.*

> States, and one year at least immediately preceding his application in the State or Territory where such court is at the time held.[48]

This demonstrated, Wilson continued, that resident blacks under U.S. jurisdiction before 1795 were eligible to be citizens. He asked:

> Well, if Africans naturalized under this law should have had children born to them, will any person say that such children would be less citizens than their parents? The parents being citizens of the United States by naturalization, would it not follow that children born to them would be citizens by birth? I apprehend that it will not be claimed by any one that the children of naturalized citizens of the United States do not partake of the citizenship of their parents.[49]

While the Constitution did not define citizenship, Wilson argued that under general law recognized by all nations, "every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign Governments, are native-born citizens of the United States."[50] His exclusion of children of "temporary sojourners" from citizenship rejected a strict application of birthplace citizenship according to the common law, as expressed by Blackstone above.

On March 2, 1866, Rep. Martin Thayer of Pennsylvania explained that "The sole purpose of this bill is to secure to that class of persons [former slaves] the fundamental rights of citizenship…."[51] He explained:

> To accomplish this great purpose, the bill declares, in the first place, that all persons born in the United States, and not subject to any foreign Power, are citizens of the United States…. That is, in my judgment, declaratory of the existing law. According to my apprehension, every person born in the United States, and not owing allegiance to a foreign Power, is a citizen of the United States.[52]

Thayer added that "We may naturalize any class of persons. It is a process to which you may not only submit foreigners, but one born in this country…."[53]

Congressman Henry Raymond of New York agreed that "Congress has the right to naturalize persons born in this country…."[54] Rep. Charles A. Eldridge, a Democrat from Wisconsin, disagreed, arguing that "the right of naturalization under the Constitution referred

---

[48] *Id.* See § 1 (Fourthly), 2 Stat. 153, 154 (1802). The 1802 act reduced the residency requirement for aliens to become citizens from 14 years to 5 years and otherwise liberalized the requirements to become a citizen.

[49] *Id.*

[50] *Id.* at 1117.

[51] *Id*. at 1152 (Mar. 2, 1866).

[52] *Id*.

[53] *Id*.

[54] *Id*.

only to persons of' foreign birth, that it had no reference to persons born in the United States."[55] That argument would deny naturalization to ex-slaves born in the United States. Proponents of the bill relied for its justification on the Thirteenth Amendment and, in the alternative, the naturalization power.

What would become the Civil Rights Act was debated on March 8 and 9, 1866. Representative John Broomall of Pennsylvania explained:

> The first provision of the bill declares that all persons born in the United States and not subject to any foreign Power are citizens of the United States. As a positive enactment this would hardly seem necessary. Even as a declaration of existing law, a proposition that at most can only be said to embrace the true meaning of the word "citizen" would seem to find its more appropriate place in the elementary treatises of law rather than upon the statute-books. What is a citizen but a human being who by reason of his being born within the jurisdiction of a Government owes allegiance to that Government?[56]

Representative Raymond proposed an amendment to the bill declaring: "That all persons born, or hereafter to be born, within the limits and under the jurisdiction of the United States, shall be deemed and considered, and are hereby declared to be, citizens of the United States, and entitled to all rights and privileges as such."[57] Raymond explained: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and constitution of the United States…. He has defined *status*; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms…."[58]

The next day, John Bingham explained that the introductory clause "is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen…."[59]

In opposition to section one, Rep. George R. Latham, a Unionist from West Virginia, averred: "Can Congress confer citizenship upon persons who are excluded by the Constitution? The courts have uniformly decided that negroes are not citizens under the Constitution."[60] That was exactly a major goal of the bill, to overturn the Supreme Court's decision in *Dred Scott*. Ultimately, it would take the Fourteenth Amendment to do so.

---

[55] *Id*. "Eldridge" is also spelled "Eldredge."

[56] *Id.* at 1262 (Mar. 8, 1866).

[57] *Id.* at 1266.

[58] *Id.*

[59] *Id.* at 1291 (Mar. 9, 1866).

[60] *Id.* at 1295. Unionists supported the policies of President Andrew Johnson and opposed Radical Republican policies. See National Union Executive Committee, *Proceedings of the National Union Convention*, Aug. 14, 1866. https://dn790003.ca.archive.org/0/items/procnationalunion00johnrich/procnationalunion00johnrich.pdf.

Having earlier passed the Senate, the bill now passed the House.[61] In a letter to President Andrew Johnson, Senator Trumbull explained: "The Bill declares 'all persons' born of parents domiciled in the United States, except untaxed Indians, to be citizens of the United States."[62] While Trumbull made no attempt to state the full scope of the meaning of "not subject to any foreign power," having a domicile excluded a temporary visitor.

No one in the debates offered any definition of a domicil, but Justice Joseph Story wrote in his commentaries, "the domicil of a person, [is] where he has his true, fixed, permanent home, and establishment, and to which, whenever he is absent, he has the intention of returning...."[63] John Bouvier's 1860 *A Law Dictionary* defined the term: "DOMICIL. The place where a person has fixed his ordinary dwelling, without a present intention of removal."[64] It adds: "By domicil of origin is understood the home of a man's parents, not the place where, the parents being on a visit or journey, a child happens to be born…. Domicil of origin is to be distinguished from the accidental place of birth."[65]

President Andrew Johnson vetoed the Bill. Declaring "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed" as citizens "comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, people of color.... Every individual of these races born in the United States is by the bill made a citizen of the United States."[66] That would give them federal citizenship, he continued, but the states reserve the power to confer state citizenship. While some argued that "all persons who are native born already are, by virtue of the Constitution, citizens of the United States," by proposing "to make them such" the bill assumed that they were not.[67] Given that eleven of the thirty-six States had no representation in Congress (the former Confederate states), Johnson asked whether "it is sound policy to make our entire colored population and all other excepted classes citizens of the United States."[68]

Little can be gleaned from Johnson's objection to the definition of citizenship other than he opposed it being race neutral.

---

[61] *Id.* at 1367 (Mar. 13, 1866).

[62] Letter from Sen. Lyman Trumbull, to President Andrew Johnson (undated), in Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress, Washington, D.C., quoted in Comment, "The Significance of Domicile in Lyman Trumbull's Conception of Citizenship," 119 Yale L. Jour. 1351, 1352-53 (2010).

[63] Joseph Story, *Commentaries on the Conflict of Laws* § 41, at 39 (Boston: Hilliard, Gray, and Co., 1834). And see *id*. at 42 ("that place . . . in which his habitation is fixed, without any present intention of moving therefrom.").

[64] 1 John Bouvier, *A Law Dictionary: Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 443 (Philadelphia: Childs & Peterson, 1860).

[65] *Id.*

[66] Cong. Globe, 39th Cong., 1st Sess. 1679 (Mar. 27, 1866).

[67] *Id*.

[68] *Id*.

Both Houses overrode the veto and the Civil Rights Act of 1866 became law.[69] As enacted, § 1 provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[70]

However, questions remained as to what authority did Congress have in the Constitution to regulate the subjects covered by the Civil Rights Act, which were matters traditionally left to the states. From the time it was introduced, opponents argued that nothing in the Constitution, including the Thirteenth Amendment's ban on slavery, delegated such power to Congress.[71] Even after the bill was enacted, it was "pronounced void by the jurists and courts of the South."[72] It was to remove any uncertainty that the Fourteenth Amendment would be proposed.

C. The Fourteenth Amendment Rephrased the Definition of "Citizen" as "Persons Born or Naturalized in the United States and Subject to the Jurisdiction Thereof"

On December 12, 1865, the Senate concurred with a House resolution to appoint a Joint Committee of Fifteen (including nine members from the House and six from the Senate) to investigate the condition of the Southern States.[73] This committee would later hear extensive testimony on the violations of freedmen's rights, and eventually drafted the Fourteenth Amendment.[74] Besides generating passage of the Civil Rights Act, the Joint Committee also induced passage of the Freedmen's Bureau Act of 1866, which enforced similar civil rights in areas of the South where ordinary judicial proceedings had not been restored following the war.[75]

---

[69] *Id.* at 1809 (Apr. 6, 1866) (Senate), 1861 (Apr. 9, 1866) (House).

[70] 14 Stat. 27 (1866).

[71] Cong. Globe, 39th Cong., 1st Sess. 476 (Jan. 29, 1866) (argument of Senator Willard Saulsbury of Delaware).

[72] Cong. Globe, 39th Cong., 1st Sess. 3210 (June 17, 1866) (statement of Indiana Representative George W. Julian).

[73] Cong. Globe, 39th Cong., 1st Sess. 30 (Dec. 12, 1865).

[74] See Benjamin Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914).

[75] § 14, 14 Stat. 173, 176-77 (1866).

On February 13, 1866, it was reported in both houses of Congress that the Joint Committee had recommended adoption of a constitutional amendment to read as follows: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property."[76] This appears to be the first reported draft of what would partially become § 1 of the Fourteenth Amendment.

The first draft was debated in the House for three days, beginning on February 27. John Bingham, the author, argued on its behalf that previously "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States."[77] He said that the proposed amendment would "arm the Congress . . . with the power to enforce this bill of rights as it stands in the Constitution today."[78] Representative Frederick E. Woodbridge of Vermont characterized the sweep of the proposed Fourteenth Amendment as empowering Congress to protect "the natural rights which necessarily pertain to citizenship."[79]

On April 30, 1866, Rep. Thaddeus Stevens of Pennsylvania, the leader of the House delegation to the Joint Committee, reported to the House a joint resolution proposing the constitutional amendment.[80] It was debated in the House on May 8 through 10. Rep. Stevens remarked that its provisions "are all asserted, in some form or another, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect, and allows Congress to correct the unjust legislation of the States…."[81] Representative Thayer stated that the proposed amendment "is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law," in order that the Act, "so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States."[82]

The House approved the draft on May 10, which included no citizenship clause.[83]

On May 23, Senator Jacob Howard of Michigan introduced the proposed amendment in the Senate on behalf of the Joint Committee.[84] Senator Benjamin Wade of Ohio offered a version prohibiting abridgment of privileges and immunities of "persons born in the United States" without qualification.[85] Senator William Fessenden of Maine offered: "Suppose a person

---

[76] Cong. Globe, 39th Cong., 1st Sess. 806, 813 (Feb. 13, 1866).

[77] *Id*. at 1033-34 (Feb. 26, 1866).

[78] *Id.* at 1088 (Feb. 28, 1866).

[79] *Id.* at 1088.

[80] Cong. Globe, 39th Cong., 1st Sess. 2286 (Apr. 30, 1866).

[81] *Id*. at 2459 (May 8, 1866).

[82] *Id.* at 2465.

[83] *Id*. at 2539, 2545 (May 10, 1866).

[84] *Id*. at 2765 (May 23, 1866).

[85] *Id*. at 2768.

is born here of parents from abroad temporarily in this country."[86] Senator Wade agreed that "a person may be born here and not be a citizen," such as children of foreign ministers, but "it could hardly be applicable to more than two or three or four persons," and thus "should come under that well-known maxim of the law, *de minimis lex non curat*."[87] Wade's proposal would not be adopted.

On May 29, Senator Howard proposed adding to the draft of § 1 of the proposed amendment: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[88]

Debate on the Citizenship Clause in the Senate took place primarily on May 30. Senator Howard explained:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.[89]

The "law of the land," i.e., "national law," was of course the Civil Rights Act of 1866. The concept of "natural law" was embodied in the Declaration of Independence, which was repeatedly referred to in the debates.[90] Neither Howard nor any other speaker in the ensuring debates made any reference to the English common law, under which a child born in Great Britain owed allegiance to the Crown and was a citizen.

As Howard specified above, three classes of persons born in the United States were excluded from citizenship – foreigners, aliens, and families of ambassadors or foreign ministers. Webster's 1828 Dictionary defined "foreigner" thus: "A person born in a foreign country, or without the country or jurisdiction of which one speaks. A Spaniard is a *foreigner* in France and England. All men not born in the United States are to them foreigners, and they are aliens till naturalized. A naturalized person is a citizen; but we still call him a *foreigner* by birth."[91] John Bouvier's 1860 *A Law Dictionary* stated simply: "FOREIGNERS. Aliens; persons born in another country than the United States, who have not been naturalized."[92]

Bouvier defined "alien" as: "One born out of the jurisdiction of the United States, who has not since been naturalized under their constitution and laws. To this there are some

---

[86] *Id*. at 2769.

[87] *Id*.

[88] *Id*. at 2869 (May 29, 1866).

[89] *Id.* at 2890 (May 30, 1866).

[90] *Id*. at 2459 (May 8, 1866) (reference by Rep. Thaddeus Stevens to the Declaration).

[91] Noah Webster, *American Dictionary of the English Language* (1828) ("foreigner").

[92] Bouvier, *A Law Dictionary* 539.

exceptions, as this children of the ministers of the United States in foreign courts."[93] Webster defined an "alien" in part as "A foreigner; one born in, or belonging to, another country; one who is not a denizen, or entitled to the privileges of a citizen."[94] As further explained in the definition:

> In France, a child born of residents who are not citizens, is an *alien.* In Great Britain, the children of aliens born in that country, are mostly natural born subjects; and the children of British subjects, owing allegiance to the crown of England, though born in other countries, are natural subjects, and entitled to the privileges of resident citizens.[95]

Blackstone himself confirmed that contrast: "The children of aliens, born here in England, are generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien."[96] Yet there was an exception to the English rule: "Yet the children of the king's embassadors born abroad were always held to be natural subjects…."[97]

This contrast between the French and British models is informative for the issue here. In the United States, according to the Civil Rights Act, a person born of residents who were not citizens because they were "subject to any foreign power" was an alien. By the English common law, a child born in Great Britain – even if the parents were French – owed allegiance to the British Crown and was a British subject.

Given the above, it would be redundant to read Senator Howard's statement as referring only to foreigners and aliens who in turn belong to the families of ambassadors or foreign ministers, because they are inherently aliens and foreigners. Moreover, based on the law of nations, persons born of ambassadors and foreign ministers retained citizenship in their own countries, not where they may be born abroad.[98] Even English common law recognized that exception. It would have been unnecessary to insert the "subject to its jurisdiction" clause to cover such persons.

Moreover, Howard did not literally mean that "every other class of persons" born here are citizens, as later the same day he clarified that being subject to jurisdiction "impl[ied] a full and complete jurisdiction on the part of the United States, … that is to say, the same jurisdiction in extent and quality, as applies to every citizen of the United States now," which excluded

---

[93] *Id*. at 91.

[94] Webster, *American Dictionary* ("alien").

[95] *Id*.

[96] 1 Blackstone, *Commentaries* *361-62.

[97] *Id*. at *361. Blackstone continued, "for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent: so with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the embassador." *Id.*

[98] Vattel, *The Law of Nations* 103. Vattel was regularly cited as an authority on the law of nations. E.g., Cong. Globe, 39th Cong., 1st Sess., 2103 (April 21, 1866) (Rep. Samuel Shellabarger of Ohio quoting Vattel as describing society and its members as "contracting parties"); *id*. at 2885 (May 29, 1866 (Rep. Geore R. Latham of West Virginia quoting Vattel on the relation between subjects and a prince).

Indians.[99] Howard did not consider the status of children born to illegal aliens, because the status of "illegal alien" did not exist in the law then.[100]

Senator Edgar Cowan of Pennsylvania asked whether "the child of a Chinese immigrant in California" or of "a Gypsy born in Pennsylvania" is a citizen.[101] He averred that a sojourner "has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word." [102] He maintained that a state had the right "of expelling a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; … who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen and perform none of the duties which devolve upon him…."[103] Cowan added that "before we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States, we ought to exclude others besides Indians not taxed…."[104]

The classes Cowan described include persons who, he thought, would not be subject to the jurisdiction of the United States. Today's illegal aliens fit nicely within the categories he listed above, i.e., those who invade the borders, owe no allegiance, recognize no authority, pay no taxes, and do no military service. Cowan's unfavorable views toward those he denigrated as "Gypsies"[105] should not distract from that.

Senator John Conness of California was favorable toward children born of Chinese in California being citizens, arguing:

> The proposition before us … relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens.… I am in favor of doing so.… We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.[106]

---

[99] Cong. Globe, 39th Cong., 1st Sess. 2895 (May 30, 1866).

[100] "Until 1875 alien migration to the United States was unrestricted. The Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. Act of Aug. 3, 1882, 22 Stat. 214." *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).

[101] Cong. Globe, 39th Cong., 1st Sess., 2890 (May 30, 1866). The term "Gypsy," which Cowan did not define, was a derogatory term for Romani people. Noah Webster, *American Dictionary of the English Language* (1828), provided this definition:

The Gipseys are a race of vagabonds which infest Europe, Africa and Asia, strolling about and subsisting mostly by theft, robbery and fortune-telling. The name is supposed to be corrupted from Egyptian, as they were thought to have come from Egypt. But their language indicates that they originated in Hindoostan.

[102] *Id.*

[103] *Id.* at 2891.

[104] *Id*.

[105] *Id.*

[106] *Id.*

In other words, citizenship should not be based on race. That did not mean, as Howard explained above, that citizenship would accrue to persons born here "who are foreigners [or] aliens," nor did it question that "a full and complete jurisdiction" was required.[107]

It is also noteworthy that, since there were no restrictions on Chinese emigration to the United States then, such Chinese residents were in the United States lawfully.[108]

Senator James R. Doolittle of Wisconsin opined that "there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States."[109] He thus proposed amending the bill by inserting the following italicized language: "All persons born in the United States, and subject to the jurisdiction thereof, *excluding Indians not taxed*, are citizens of the United States and of the States wherein they reside."[110] He reminded members that the framers of the Constitution "excluded the Indians who are not taxed ... as a part of the population upon which they based representation and taxation; much less did they make them citizens of the United States."[111]

Senator Reverdy Johnson of Maryland explained that "all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power … shall be considered as citizens of the United States…. I know of no better way to give rise to citizenship than the fact of the birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States."[112] To remove any ambiguity about the status of Indians, he supported Doolittle's amendment to insert "excluding Indians not taxed."[113]

Senator Lyman Trumbull explained that the clause "means 'subject to the complete jurisdiction thereof.'… Not owing allegiance to anybody else."[114] He averred that Indians "are not subject to our jurisdiction," and that "[i]t is only those persons who come completely within our jurisdiction, who are citizens…." [115] He noted that differences existed on the meaning of "Indians not taxed," and thus "the language proposed in this constitutional amendment is better than the language in the civil rights bill. The object to be arrived at is the same." [116] Indeed,

---

[107] *Id.* at 2890, 2895.

[108] The Treaty of Tien-Tsin between the United States of America and the Empire of China of 1858 did not address emigration. For text, see https://en.wikisource.org/wiki/Treaty_of_Tien-Tsin_between_the_United_States_of_America_and_the_Empire_of_China.

[109] Cong. Globe, 39th Cong., 1st Sess., 2892 (May 30, 1866).

[110] *Id*.

[111] *Id*. at 2893. See U.S. Const., Art. I, § 2.

[112] *Id*.

[113] *Id*. at 2894.

[114] *Id*.

[115] *Id*.

[116] *Id*. at 2894.

Indians "are not subject to our jurisdiction in the sense of owing allegiance solely to the United States…."[117]

Howard responded that the existing language was clear, agreeing with Trumbull "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 …; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now." [118] That excluded Indians.[119]

Senator Doolittle expressed the general understanding that the proponents of the amendment "had doubts, at least, as to the constitutionality of the civil rights bill that this proposition to amend the Constitution now appears to give it validity and force."[120] He reminded his colleagues of the language of the civil rights bill: "That all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[121]

Senator George H. Williams of Oregon thought it unnecessary to refer explicitly to Indians not taxed, given that they were subject to the general exclusion of persons "not subject to the jurisdiction thereof." He analogized:

> All persons living within a judicial district may be said, in one sense to be subject to the jurisdiction of the court in that district, but they are not in every sense subject to the jurisdiction of the court until they are brought, by proper process, within the reach of the power of the court. I understand the words here … to mean fully and completely subject to the jurisdiction of the United States.[122]

The Senate defeated Doolittle's amendment and then adopted the Howard text.[123] The body then moved on to consider the other sections of the constitutional amendment.

Some final debate took place on June 8, 1866. Senator John B. Henderson of Missouri thought that "this section will leave citizenship where it is now."[124] He expounded the concept of citizenship by reference to the *Dred Scott* case.[125] In *Dred Scott*, according to Henderson, Chief Justice Taney conceded to members of the state communities "all the personal rights, privileges, and immunities guarantied to citizens of this 'new Government.' In fact, the opinion distinctly asserts that the words 'people of the United States' and 'citizens' are 'synonymous

---

[117] *Id*.

[118] *Id*. at 2895.

[119] *Id*.

[120] *Id*. at 2896.

[121] *Id.*

[122] *Id*. at 2897.

[123] *Id*.

[124] *Id*. at 3031 (June 8, 1866).

[125] *Id*. at 3032.

terms.'"[126] However, Taney disregarded the plain meaning of the term "the people" by excluding blacks.[127]

After further debate, the Fourteenth Amendment passed the Senate.[128] On June 13, 1866, the House passed the proposed constitutional amendment, as amended by the Senate.[129]

As passed, § 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[130]

In sum, the clause "subject to the jurisdiction of" the United States was thoroughly explained in the Congressional debates. Senator Howard, who introduced the Citizenship Clause, explained that three classes of persons born in the United States were excluded from citizenship – foreigners, aliens, and families of ambassadors or foreign ministers. The clause implied "a full and complete jurisdiction," which excluded Indians because of tribal allegiance. Senator Reverdy Johnson included children "born of parents who at the time were subject to the authority of the United States." Senator Trumbull said that the clause means "subject to the complete jurisdiction thereof, i.e., "[n]ot owing allegiance to anybody else." In short, "fully and completely subject to the jurisdiction of the United States," as Senator George Williams put it.

Lastly, it goes without saying that the impetus for proposing and ratifying the Fourteenth Amendment was to constitutionalize the Civil Rights Act, not to abrogate it.

It is noteworthy that the clause "subject to the jurisdiction thereof" was not a common-law concept. No reference was made to the English common law in any of the above debates. The significance of that became explicitly clear in debates on the Expatriation Act of 1868.

D. Congress Rejected the English Common Law Of Citizenship in the Expatriation Act of 1868

Congress passed what was popularly known as the Expatriation Act on July 27, 1868, the day before the Fourteenth Amendment was declared as ratified.[131] The Act provided that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment

---

[126] *Id*.

[127] *Id.*

[128] *Id.* at 3042.

[129] *Id.* at 3149 (June 13, 1866).

[130] U.S. Const., Amend. XIV, § 1.

[131] "14th Amendment to the U.S. Constitution," National Archives, March 6, 2024. https://www.archives.gov/milestone-documents/14th-amendment.

of the rights of life, liberty, and the pursuit of happiness," and denied that naturalized citizens "are subjects of foreign states, owing allegiance to the governments thereof…."[132] It further provided that all naturalized citizens, when in foreign states, were entitled to "the same protection of persons and property that is accorded to native-born citizens…."[133]

With phraseology taken in part from the Declaration of Independence, as shown below the Expatriation Act was a repudiation of the English common-law doctrine of citizenship based solely on birthplace. It was passed in response to the arrest of naturalized citizens abroad by governments that refused to recognize the right of expatriation from those countries.

The impetus for the Expatriation Act was sparked when the Committee on Foreign Affairs in January 1868 reported a joint resolution requesting the President to intercede with the Queen of Great Britian the secure the release of Reverend John M'Mahon, who was "convicted as a Fenian raider" and confined in Canada.[134] An emigrant from Ireland, M'Mahon was "found travelling in company with Fenians who design the invasion of Canada" (an episode of the movement for Irish independence).[135]

In remarks on the House floor, Rep. Godlove Stein Orth of Indiana explained that because he was "born on British soil," Britain "still claims him as one of her subjects," in disregard of his status as a naturalized citizen of the United States.[136] He continued: "The British Government … as well as most of the other European nations, hold to the doctrine of perpetual allegiance, while we maintain the doctrine of expatriation, or the right of a person to absolve himself from his allegiance whenever his interest or his fancy prompts him to do so."[137]

Compared to the sound view of "that great law writer, Vattel" that "various reasons may oblige a man to choose another country," Rep. Shelby M. Cullom of Illinois asked "what becomes of the driveled statement of Blackstone when he says that 'allegiance is a principle of natural law that cannot be absolved even by swearing allegiance to a foreign prince.'"[138] Cullom added, "That statement of Blackstone … was made under the clouds of the darkness of the Middle Ages, and in accord of the feudal dogmas of those times, which are in opposition to the plainest rights of man."[139] The doctrine that a subject at birth had perpetual allegiance conflicted with the right expatriation.

---

[132] An Act concerning the Rights of American Citizens in Foreign States, 15 Stat. 223 (July 27, 1868).

[133] *Id.*

[134] Cong. Globe, 40th Cong., 2d Sess., 385 (Jan. 8, 1868). "The movement referred to as the Fenians in fact encompasses a series of Irish Republican organisations, spanning Ireland and America dedicated to the pursuit of Irish independence from Britain, by force if necessary." "The Fenians: An Overview," *The Irish Story*, n.d. https://www.theirishstory.com/2017/03/07/the-fenians-an-overview/.

[135] House Report No. 7, Committee on Foreign Affairs, 90th Cong., 2d Sess., at 2-3 (Jan. 8, 1868).

[136] Cong. Globe, 40th Cong., 2d Sess., 385 (Jan. 8, 1868).

[137] *Id.*

[138] *Id*. at 388.

[139] *Id*.

On January 30, 1868, Rep. Nathaniel P. Banks of Massachusetts, chairman of the Committee on Foreign Affairs, reported House bill No. 584, which would become the Act.[140] Rep. Ignatius L. Donnelley of Minnesota explained that a law was necessary to address the "arrests which are almost daily taking place of American citizens in the British islands."[141] The bill "is necessary, not alone to define the rights of American citizens abroad, native born and naturalized, but to arrest and resist the arrogant pretensions of the monarchial Governments of Europe on this question."[142]

Rep. Frederick E. Woodbridge of Vermont began by explaining "the English doctrine of allegiance" of *jus soli* (right of the soil) by quoting Blackstone as follows:

> Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is, therefore, a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot, by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be devested without the concurrent act of that prince to whom it was first due.[143]

"This doctrine," Woodbridge stated, "is unjust, unreasonable, and at war with the spirit of the present age."[144] He continued that "[i]t is high time that feudalism were driven from our shores and eliminated from our law, and now is the time to declare it."[145] In later debate, Rep. Alexander H. Baily of New York referred to it as "the slavish feudal doctrine of perpetual allegiance."[146]

Repeating Blackstone's statement that "the natural-born subject of one prince cannot … by swearing allegiance to another … discharge his natural allegiance to the former,"[147] Rep. Baker explained that England itself had enacted a statute in 1844 "ignoring her own feudal doctrine of continuing allegiance…." Thus, "England is estopped by her solemn, higher, and

---

[140] *Id.* at 865 (Jan. 30, 1868).

[141] *Id.* at 865

[142] *Id.* at 866.

[143] *Id*. at 868, quoting 1 Blackstone, Commentaries *357-58.

[144] *Id.*

[145] *Id.*

[146] *Id*. at 967 (Feb. 4, 1868).

[147] Cong. Globe, 40th Cong., 2d Sess., 1100 (Feb. 11, 1868), quoting 1 Blackstone, Commentaries *358.

more enlightened statute from appealing longer to the dead, and effete authority of her common law."[148]

Noting that the common law applied only when not abrogated by statute and not incompatible with American institutions, Rep. Orth explained that the common law was abrogated by the Declaration of Independence, the Constitution's provision on naturalization, the naturalization laws, and the government's consistent policy.[149] Rep. Frederick E. Woodbridge of Vermont added: "The proposition that once a citizen always a citizen is based on the feudal systems under which there were no free citizens…. [I]t was from this source and system that Blackstone derived his idea of indefeasible and perpetual allegiance to the English Crown."[150]

The Report of the Committee on Foreign Affairs Concerning the Rights of American Citizens in Foreign States of the House of Representatives was issued on February 27, 1868.[151] It detailed how naturalized citizens who were present in Great Britian had been arrested, convicted, and punished as criminals "upon the ground that they were natural-born subjects of the Crown" whose "allegiance was perpetual."[152] The chief source for that doctrine was Blackstone's writing on "natural allegiance"[153] (the same paragraph quoted by Rep. Woodbridge above).

According to the Report, "the American Constitution is itself proof that Blackstone's theory of allegiance was not accepted by the American governments."[154] Under feudalism, "[a]llegiance was due to the Crown and controlled by the place of birth…."[155] By contrast, "the express or implied consent of both parties is necessary to the extinction of mutual obligations between a Government and its subject."[156] After a lengthy discussion, the Committee submitted a revised bill to the House. [157]

In further debate, Rep. Philadelph Van Trump of Ohio quoted Noah Webster's essay written in 1789, reprinted during the War of 1812, denouncing Blackstone's concept of "natural allegiance" and the "debt of gratitude" due to the prince as based on "weak and futile reasoning."[158] Van Trump averred that feudalism established "this slavish doctrine of perpetual allegiance."[159]

---

[148] *Id*. at 1101.

[149] *Id*. at 1104.

[150] *Id*. at 1130 (Feb. 12, 1868).

[151] *Id*., App., 94 (Feb. 27, 1868).

[152] *Id*.

[153] *Id*. at 95.

[154] *Id*.

[155] *Id*.

[156] *Id*. at 96.

[157] *Id*. at 100.

[158] *Id*. at 1801 (Mar. 10, 1868).

[159] *Id*.

Asked by Rep. Jenckes of Rhode Island whether "the common law respecting allegiance" was in force, Rep. Nathaniel P. Banks – who originally introduced the bill – replied "never," explaining that the Constitution, the Declaration of Independence, and the wars of the Revolution and of 1812, "all these have abrogated the English common law…."[160] After further remarks, the bill passed the House.[161]

Instead of reflections on the fundamental basis of citizenship, the debate in the Senate focused on the authority of the President to take action to assist naturalized citizens being held abroad by governments that denied expatriation.[162] Concern was expressed that the president should not be able to declare war.[163] The bill passed the Senate on July 25, 1868,[164] and was signed into law two days later.[165]

In sum, the Expatriation Act and the proceedings thereon brought into sharp relief the distinction between the concepts of citizenship under the English common law, which was grounded on the place of birth as the basis for perpetual allegiance to the king, and under American law, which was based on both the place of birth and on complete jurisdiction, which the citizen could repudiate. Being enacted the day before the Fourteenth Amendment was declared to be ratified, the Act demonstrates the understanding in Congress that the Citizenship Clause was inconsistent with the English common-law rule.

E. Based on Allegiance, Not Birth Place, the Chinese-American Treaty of 1868 Was Not "Intended to Open the Flood-Gates of Citizenship"

On July 28, 1868, the same day that the Fourteenth Amendment was certified by the Secretary of State as ratified by the necessary number of states, China and the United States signed the Burlingame-Seward Treaty in Washington, D.C.[166] The Treaty included provisions that give further insight into the original public understanding of the nature of citizenship when the Fourteenth Amendment was ratified.

Entitled Additional Articles to the Treaty Between the United States of America and the Ta-tsing Empire of the 18th of June, 1858, the Treaty contained eight articles dealing with issues of commerce and immigration between the two countries. Two of the articles bore directly on the issues debated over the Citizenship Clause and the Expatriation Act, which was enacted on July 27, 1868, [167] a day before the Treaty was signed.

---

[160] *Id*. at 2316 (April 20, 1868).

[161] *Id*. at 2317-18.

[162] E.g., *id*. at 4358 (July 23, 1868) (Sen. Howard).

[163] E.g., *id*. at 4446 (July 25, 1868) (Sen. Howard).

[164] *Id.*

[165] 15 Stat. 223 (July 27, 1868).

[166] For the text, see Burlingame-Seward Treaty (July 28, 1868), https://en.wikisource.org/wiki/Burlingame_Treaty.

[167] An Act concerning the Rights of American Citizens in Foreign States, 15 Stat. 223 (July 27, 1868).

Article V of the Treaty began with familiar references to the right of expatriation, allegiance, and citizenship that had been recently heard in the Congressional proceedings described above:

> The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.[168]

The declared right to change one's "home and allegiance" repudiated the feudal concept that citizenship was inexorably bound to the soil on which one was born, which required permanent loyalty to the sovereign who ruled that soil. As discussed extensively above, the English common law embedded the concept of birthplace citizenship and permanent allegiance to the sovereign of the place where born.

Based on the above premise, the parties joined "in reprobating any other than an entirely voluntary emigration for these purposes," and agreed to pass laws making it a crime to take Chinese subjects to the United States, or U.S. citizens to China, "without their free and voluntary consent respectively."[169]

Article VI proceeded to declare that U.S. citizens visiting or residing in China, and Chinese subjects visiting or residing in the United States, "shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation…."[170] Besides the familiar reference to privileges and immunities, this "most favored nation" clause prohibited any restriction upon a right or activity of citizens of one country that was not applicable to the citizens of other foreign nations.[171]

Consistent with Article V, which tied citizenship to allegiance, Article VI further provided: "But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."[172] If nothing in the Treaty conferred naturalization on Chinese subjects in the United States, surely it was not understood that a person born of Chinese subjects in the United States had birth-right citizenship under American law. After all, the President's power to make treaties is predicated on the advice and consent of the Senate, two thirds of which must concur,[173] and the Senate ratified the Treaty

---

[168] Article V, Burlingame-Seward Treaty.

[169] *Id*.

[170] Article VI, *id*.

[171] See *In re Tiburcio Parrott*, 1 F. 481, 504 (D. Ca. 1880) (holding provision discriminating against Chinese in California Constitution to violate Articles V and VI of the Treaty). Due to other such state provisions, there were numerous other cases on the Treaty in the federal courts. Samuel B. Crandall, "The American Construction of the Most-Favored-Nation Clause," 7 *American Journal of International Law*, No. 4, 708, 719 (Oct. 1913). https://www.jstor.org/stable/2187328?seq=16.

[172] Article VI, Burlingame-Seward Treaty.

[173] U.S. Const., Art. II, § 2.

on July 24, 1868. Two thirds of the Senate had also proposed the Fourteenth Amendment two years earlier.

Some background on the Treaty gives further insights. Anson Burlingame served as the U.S. minister to the Qing Empire of China during 1862-67. His relations with the Chinese were so positive that when he retired from American service, the Chinese appointed him to head a diplomatic mission to the United States, which opened in March 1868.[174] He negotiated with Secretary of State William Seward, under whom he previously worked as minister in China. The two were in frequent communication. Burlingame was also in close contact with Senator Charles Sumner of Massachusetts, chairman of the Senate Committee on Foreign Relations, and Representative Nataniel Banks, chairman of the parallel House Committee.[175] As noted above, Banks had introduced what became the Expatriation Act in the House.[176]

Burlingame, who had been a Representative from Massachusetts before entering the foreign service, had close ties with members of Congress.[177] On June 9, 1868, the House of Representatives received Burlingame, who made remarks in support of closer ties between China and the United States, after which a recess was called for the members to meet him informally.[178] He was received in the Senate a week later, where he was introduced by Senator Sumner and had the opportunity to confer with members during a 20-minute recess.[179]

Senate debates on the Treaty were not recorded, as they took place in executive session.[180] It was later clarified that the provision against naturalization was critical to its ratification. In 1872, in debates on whether to extend the right of suffrage, Senator James Nye of Nevada stated: "We all remember the exact circumstances under which this treaty was made. It was found that the treaty could not be made if it did not contain that provision.… If it had not contained what was supposed to be at that time an inhibition on naturalization, the treaty never could have been made."[181] Senator Nye recalled "a conversation with Mr. Burlingame himself, wherein he was told … that that treaty could not be ratified unless it contained such a provision"; "in order to take it out of the mouth of anybody to say that it was intended to open the flood-

---

[174] Philip Chin, "Anson Burlingame – The Diplomat," *Chinese-American Heroes* (n.d.). https://www.burlingame.org/DocumentCenter/View/2093/Anson-Burlingame-The-Diplomat-CAH-PDF.

[175] Schrecker, "For the Equality of Men," 16.

[176] Cong. Globe, 40th Cong., 2d Sess., 865 (Jan. 30, 1868).

[177] Schrecker, "For the Equality of Men," 17.

[178] Cong. Globe, 40th Cong., 2d Sess., 2970 (June 9, 1868).

[179] *Id.* at 3215 (June 17, 1868).

[180] Earl M. Maltz, "The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment," 17 Harvard J. of Law & Pub. Policy, no. 1, 223, 229 (1994). In early 1869, Senator Sumner reported from the Committee on Foreign Relations "eight rules agreed upon between the Chinese imperial government and the ministers of the United States.... there is no action of Congress necessary on the subject...." Cong. Globe, 40th Cong., 3d Sess. 1480 (Feb. 23, 1869).

[181] Cong. Globe, 42d Cong., 2d Sess. 910 (Feb. 9, 1872).

gates of citizenship, this provision was inserted in the treaty."[182] Given this default position against naturalization, it is difficult to believe that birth without more conferred citizenship.

In sum, as did the Expatriation Act, the Treaty recognized "the inherent and inalienable right of man to change his home and allegiance." That repudiated the English common-law rule of perpetual citizenship in the place where born. That nothing in the Treaty could "be held to confer naturalization … upon the subjects of China in the United States" surely implied that a person born of subjects of China in the United States was not entitled to birth-right citizenship. The lack of conferring of naturalization is yet another indication that a Chinese subject was not "subject to the jurisdiction" of the United States in the fullest sense. These provisions of the Treaty thus give further evidence of the original public understanding of the Citizenship Clause.

II. THE SUPREME COURT HAS READ THE CITIZENSHIP CLAUSE VARIOUSLY TO PRECLUDE PERSONS WITH ALLEGIANCE TO A FOREIGN POWER AND TO INCLUDE PERSONS WITH A LAWFUL, PERMANENT DOMICILE IN THE UNITED STATES

The Supreme Court has not weighed in on the Citizenship Clause in recent times, and the current controversy over its meaning makes comprehensive review ripe. Historically, the Court's first two mentions interpreted the Clause as excluding children born in the United States of parents with allegiance to foreign states as not being citizens. In the *Slaughter-House Cases* (1872), it referred to such parents as "citizens or subjects of foreign States,"[183] and in *Elk v. Wilkins* (1884), as owing "allegiance to any alien power."[184]

But in *United States v. Wong Kim Ark* (1898), the Court held that a child born here of parents with a permanent, legal domicile in the United States, even though they were subjects of the emperor of China, was a citizen.[185] That conflicts with the original public understanding that "subject to the jurisdiction thereof" required full allegiance to the United States. Regardless, the holding does not extend to children born of illegal aliens or of lawful but temporary visitors. The Court should revisit *Wong Kim Ark.*

---

[182] *Id*. at 911. Similar explanations were also set forth in earlier proceedings. Cong. Globe, 40th Cong., 3d Sess. 1011 (Feb. 8, 1869) ("when the treaty with China was confirmed the idea of admitting Chinamen to naturalization … was unanimously opposed by the majority of the Senate.") (statement of Senator James R. Doolittle of Wisconsin); Cong. Globe, 41st Cong., 2d Sess. 4276 (June 9, 1870) ("For the fear that under this treaty the Chinese might claim that they had a right to naturalization in this country, the Senate inserted in the treaty the clause") (statement of Rep. Aaron A. Sargent of California).

[183] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).

[184] *Id*. at 101, citing *Slaughter-House Cases*, 16 Wall. at 73.

[185] *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898). The parents had a permanent domicile in San Francisco when the child was born, although the parents departed for China in 1890. Wong Kim Ark's residence since birth was California. He made a trip to China in 1890, returning that year, and did so again in 1894, but was denied entry when he returned the following year. *Id*. at 652-53.

There are no other direct precedents on point. *Plyler v. Doe* (1982) conflates "subject to the jurisdiction," which refers to allegiance, with "within its jurisdiction" in the Equal Protection Clause,[186] but that only refers to geography. The Court should write that off as non-textual dicta.

Significantly, in *McDonald v. City of Chicago* (2010) and its predecessors read the Civil Rights Act of 1866 as the precursor of § 1 of the Fourteenth Amendment.[187] The Civil Rights Act defines a person born here as a citizen if "not subject to any foreign power," which the Fourteenth Amendment reworded as "subject to the jurisdiction thereof." The Court should avoid any interpretation that the Civil Rights Act is no longer constitutional and reaffirm that the Civil Rights Act is coterminous with the Fourteenth Amendment.

A. The *Slaughter-House Cases*: The Citizenship Clause Excludes Children of Citizens of Foreign States Born in the United States

In the *Slaughter-House Cases* (1872), the Supreme Court noted in dicta about the Citizenship Clause: "That its 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."[188] Coming only six years after Congress proposed the Fourteenth Amendment to the states, that reflected the original understanding of the Clause.

B. *Elk v. Wilkins*: The Citizenship Clause Precludes Any Allegiance to a Foreign Power

Before analyzing the Supreme Court's decision in *Elk v. Wilkins* (1884), it would be useful to consider the ongoing status of "Indians not taxed," a category appearing in the apportionment of representation clause of the original Constitution[189] and in the Civil Rights Act of 1866.[190] Although no statutory definition of the phrase existed, in 1870 census takers were instructed: "'Indians not taxed' are not to be enumerated," which meant that they were not to be counted as citizens in the census. By contrast, census takers were instructed that "Indians out of their tribal relations, and exercising the rights of citizens under state or Territorial laws, will be included."[191]

The instructions for the census takers in 1880 provided the following express definition for categories of Indians:

---

[186] *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982).

[187] *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010).

[188] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).

[189] U.S. Const., Art. I, § 2.

[190] 14 Stat. 27 (1866).

[191] Jason Gauthier, *Measuring America: The Decennial Censuses From 1790 to 2000*, at 15 (Washington, D.C.: U.S. Census Bureau, 2002). https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf.

> By the phrase "Indians not taxed" is meant Indians living on reservations under the care of Government agents, or roaming individually, or in bands, over unsettled tracts of country.
>
> Indians not in tribal relations, whether full-bloods or halfbreeds, who are found mingled with the white population, residing in white families, engaged as servants or laborers, or living in huts or wigwams on the outskirts of towns or settlements are to be regarded as a part of the ordinary population of the country for the constitutional purpose of the apportionment of Representatives among the states, and are to be embraced in the enumeration.[192]

Consistent with the above, in resolving the status of an Indian in *Elk v. Wilkins*, the Supreme Court made clear that the Fourteenth Amendment's clause "subject to the jurisdiction thereof" did not make mere presence of a person born in the United States sufficient for citizenship. In an opinion by Justice Horace Gray, the Court held that an Indian born in the United States who later separated himself from his tribe, without more, was not a citizen: "The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States."[193] Citing the *Slaughter-House Cases*, the Court stated that the Citizenship Clause aimed "to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and *owing no allegiance to any alien power*, should be citizens of the United States and of the state in which they reside."[194]

As the Court explained, the phrase "subject to the jurisdiction thereof" means "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[195] Indians born in the United States with allegiance to an Indian tribe, "although in a geographical sense born in the United States," are no more "born in the United States and subject to the jurisdiction thereof," than are "the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."[196]

The Court found confirmation in that conclusion both in § 2 of the Fourteenth Amendment, which excluded "Indians not taxed" from the basis of representation, and in the Civil Rights Act of 1866, which declared as citizens "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed."[197] The Court referred to a treaty with Kansas Indians that "strikingly illustrates *the principle* that no one can become a citizen of a nation without its consent…."[198] Being a "principle," its application was not confined to Indians.

---

[192] *Id.* at 18.

[193] *Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

[194] *Id*. at 101, citing *Slaughter-House Cases*, 16 Wall. at 73 (emphasis added).

[195] *Id*. at 102.

[196] *Id*.

[197] *Id*. at 102-03.

[198] *Id*. at 103 (emphasis added).

Persons unlawfully in the United States are here without the nation's consent and their children are not natural-born citizens.

The above result was not changed by the Expatriation Act of 1868, because "while it affirms the right of every man to expatriate himself from one country, [it] contains nothing to enable him to become a citizen of another without being naturalized under its authority."[199] In other words, while a person may renounce his current citizenship, the country with which he desires citizenship must consent.

While being born into an Indian tribe did not suffice for U.S. citizenship, the Indian tribes had closer ties to the United States than did foreign states. As *Elk* described the relationship:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States.[200]

Unlike a foreign state, an Indian tribe had a direct tie to the United States. Yet a member of an Indian tribe born in U.S. territory owed immediate allegiance to the tribe, an alien nation, and a fortiori was not a citizen. All the more so would a member of a foreign state born in U.S. territory have owned immediate allegiance to the foreign state and would not be a citizen.

Post-*Elk*, the status of Indians remained the same for a time. A clear statement of what it meant for an Indian to be taxed or not taxed was set forth in the instructions to census takers in 1900:

> An Indian is to be considered "taxed" if he or she is detached from his or her tribe and living among white people as an individual, and as such subject to taxation, whether he or she actually pays taxes or not; also if he or she is living with his or her tribe but has received an allotment of land, and thereby has acquired citizenship.... An Indian on a reservation, without an allotment, or roaming over unsettled territory, is considered "not taxed"....[201]

As *Elk* related, Indians not taxed, "not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being 'naturalized in the United States,' by or under some treaty or statute."[202] Congress did just that in 1924 when it enacted the

---

[199] *Id*. at 107.

[200] *Id*. at 109.

[201] Gauthier, *Measuring America*, 44.

[202] *Elk*, 112 U.S. at 103.

Indian Citizenship Act, providing that "all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States...."[203]

C. *Wong Kim Ark*: A Child of Parents Lawfully, Permanently Domiciled in the United States Is a Citizen

United States v. Wong Kim Ark (1898), also written by Justice Gray, concerned whether the Citizenship Clause encompassed a child born in the United States of parents of Chinese descent who were themselves subjects of the emperor of China but had a permanent domicile and residence in the United States where they conducted their business.[204] The Court discussed the English common law, which defined a citizen under the principle of "birth within the allegiance" of the king, or "all persons born within the king's allegiance, and subject to his protection."[205]

Under that rule of perpetual loyalty, "every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born."[206] Quoting Justice Story, the Court continued that under the English common law, "the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth."[207]

The Court went on to state that before enactment of the Civil Rights Act of 1866 and the Fourteenth Amendment, "all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States."[208] Quoting the Civil Rights Act, including its definition of a citizen as a person born here and "not subject to any foreign power," the Court noted that Congress did not think it wise or safe "to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress," and it thus framed the Fourteenth Amendment.[209]

The Court further stated that the words "not subject to any foreign power" "were not intended to exclude any children born in this country from the citizenship which would

---

[203] 43 Stat. 253 (1924).

[204] *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898). When he was born, his parents had "previously established and are still enjoying a permanent domicile and residence" in San Francisco, where "[t]hey continued to reside and remain in the United States until 1890, when they departed for China...." *Id.* That wording did not clarify whether the parents returned to the United States. Wong Kim Ark's residence since birth was California. He made a trip to China in 1890, returning that year, and did so again in 1894, but was denied entry when he returned the following year. *Id*. at 652-53.

[205] *Id*. at 655.

[206] *Id.* at 658.

[207] *Id*. at 660, quoting *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) U.S. 99, 164 (1830) (Story, J.).

[208] *Id.* at 674-75.

[209] *Id*. at 675.

theretofore have been their birthright," such as "native-born children of foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory."[210] Of course, the Court's statement simply glossed over sojourners or temporary visitors who were indeed subject to a foreign power to which they owed allegiance. The Court added that "any possible doubt in this regard was removed" when the words of the Civil Rights Act was replaced by those of the Fourteenth Amendment,[211] but that ignored the explanations by the framers that the concepts were consistent.

The Court acknowledged that *Elk v. Wilkins* was the only adjudication it had made on the clause "subject to the jurisdiction thereof,"[212] but did not suggest that the decision was incorrect or should be overruled. It noted that in *Elk*, Justices Harlan and Wood had dissented, based in part on President Johnson's veto message regarding the Civil Rights Bill that its definition of citizen would include "the Chinese of the Pacific states, Indians subject to taxation, the people called 'Gypsies,' as well as the entire race designated as blacks" if born in the United States.[213] But *Elk* did not concern children born in the United States of foreign parents.[214] The object of the Fourteenth Amendment was to disqualify from citizenship "children of members of the Indian tribes, … children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state…."[215] But that was because the parents had allegiance to a tribe or a foreign power, which is a general principle the Court should have recognized as applicable to other groups, such as illegal entrants or temporary visitors.

Other than those exceptions, 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…."[216] Residence meant domicile, for the Court then repeated that, other than the above exceptions, the Amendment "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."[217]

The Court thus held that citizenship accrued to a child born in the United States of Chinese parents who were subjects of the emperor of China, who "have a permanent domicile and residence in the United States, and are there carrying on business…."[218]

Chief Justice Fuller, joined by Justice Harlan, dissented. Fuller wrote that the English common law rule "was the outcome of the connection in feudalism between the individual and

---

[210] *Id*. at 688.

[211] *Id*.

[212] *Id.* at 680.

[213] *Id*. at 682, quoting *Elk*, 112 U.S. at 112-14.

[214] *Id.*

[215] *Id.*

[216] *Id*. at 693.

[217] *Id.*

[218] *Id*. at 705.

the soil on which he lived, and the allegiance due was that of liege men to their liege lord."[219] Instead of the temporary obedience to laws by aliens in the country, it was a permanent status that could not be cancelled.[220] American independence abrogated all common-law rules and English statutes inconsistent with the new Nation's principles.[221] Basing citizenship on "the locality of birth," which created "a permanent tie of allegiance," did not survive the American Revolution.[222]

It would be unreasonable to read the term "natural-born citizen" eligible to be the President as including "the children of foreigners, happening to be born to them while passing through the country," while not including "children of our citizens, born abroad."[223] Chief Justice Fuller quoted Justice Story as writing that while persons born in a country are generally citizens, that "should not apply to the children of parents who were *in itinere* [en route] in the country, or who were abiding there for temporary purposes, as for health or curiosity or occasional business."[224]

Chief Justice Fuller further pointed out that the Civil Rights Act of 1866, which was passed by the same Congress that proposed the Fourteenth Amendment, was reenacted in 1874.[225] Its reference to persons born in the United States who are "not subject to any foreign power" presupposes that all such persons are "subject to the territorial jurisdiction of the United States," and yet may be "subject to the political jurisdiction of a foreign government" and owe it allegiance.[226] No reason existed to limit "subject to any foreign power" to children of diplomats and aliens born during hostile occupation.[227] The terms also included "the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct…."[228] The terms were inserted "to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States…."[229]

The dissent cited the treaty between the United States and China of 1868, which proclaimed that Chinese subjects could reside in the United States, but that did not confer citizenship on them, and that the same rules applied to U.S. citizens residing in China.[230] Indeed,

---

[219] *Id*. at 707 (Fuller, C.J., dissenting).

[220] *Id*.

[221] *Id.* at 709.

[222] *Id*. at 710.

[223] *Id*. at 715.

[224] *Id*., quoting Joseph Story, *Conflict of Laws*, § 48, at 48 (1834).

[225] *Id*. at 719, citing the Act's reenactment on June 22, 1874, Revised Statutes, § 1992.

[226] *Id*. at 720.

[227] *Id*.

[228] *Id*. at 721.

[229] *Id*.

[230] *Id*. at 730. It is unclear if Wong Kim Ark's parents came to the United States before or after the 1869 treaty. The Court simply related that Wong Kim Ark was born in 1873. *Id*. at 652.

subjects of the emperor of China were "bound to him by every conception of duty and by every principle of their religion, of which filial piety is the first and greatest commandment; and formerly, perhaps still, their penal laws denounced the severest penalties on those who renounced their country and allegiance...."[231]

An 1894 convention also recognized that Chinese residing in the United States were to be protected by law except that they had no right to citizenship.[232] Although that meant that while they were in the United States lawfully, their allegiance was to the emperor of China and they were thus not *fully* subject to the jurisdiction of the United States.[233]

Under those arrangements, Wong Kim Ark's parents were lawfully, permanently domiciled in the United States when he was born in 1873, and thus the actual holding was that he was "subject to the jurisdiction" of the United States because he was born of parents lawfully, permanently domiciled here.[234] If any of the opinion's generalizations might suggest that those born here of illegal aliens are citizens, they are dicta.

Three premises of the actual holding are problematic. First, the Court did not explain how the parents were subject to the full jurisdiction of the United States when they remained subjects of and owed their allegiance to the Emperor of China. Second, the Court assumed that the English common-law rule applied, even though being "subject to the jurisdiction" as an element of citizenship departed from the common law, which was based purely on place of birth. And third, the Court disregarded the explanations by the framers that jurisdiction must be complete, which excluded mere sojourners.

Comparing the majority and dissenting opinions, it is clear that Justice Gray did not distinguish *territorial jurisdiction*, which subjects those present to the laws, from *political jurisdiction*, which entails allegiance to the sovereign. He failed to follow his own opinion in *Elk* without recognizing that distinction, ignoring *Elk*'s general principles while seeking to distinguish it because it "concerned only members of the Indian tribes."[235]

While *Wong Kim Ark* remains the Supreme Court's last word on the "subject to the jurisdiction" clause, the next sentence of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[236] In dicta, the Court said about both phrases: "It is impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence, as less comprehensive than the words 'within its jurisdiction,'

---

[231] *Id*. at 725. " 'All persons renouncing their country and allegiance … shall be beheaded…." *Id*. n.2 (quoting Chinese Penal Code, 1810).

[232] *Id*. at 730-31, citing Convention Between the United States and China, 28 Stat. 1210, 1211 (1894).

[233] *Id*.

[234] The Chinese Exclusion Acts of 1882 provided that, beginning 90 days after passage, the coming of Chinese laborers to the United States was suspended and it became unlawful for such persons to come to or remain in the United States. 22 Stat. 58 (1882). "It is conceded that, if he is a citizen of the United States, the acts of congress known as the 'Chinese Exclusion Acts,' prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him." *Wong Kim Ark*, 169 U.S. at 653.

[235] *Wong Kim Ark*, 169 U.S. at 682.

[236] U.S. Const., Amend. XIV, § 1.

in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the states of the Union are not 'subject to the jurisdiction of the United States.'"[237] But as discussed below, "subject to the jurisdiction thereof" entails duties of citizenship like paying taxes and providing military service, which is *more* comprehensive than "within its jurisdiction," which only means physical presence without any such duties.

D. *Plyler v. Doe*: In Dicta, the Supreme Court Illogically Conflates "Subject to The Jurisdiction," Which Refers to Allegiance, with "Within its Jurisdiction," Which Denotes Geography

The above comparison of the two phrases "within its [a state's] jurisdiction" and "subject to the jurisdiction" of the United States was repeated in *Plyler v. Doe* (1982), in which the Court added, also in dicta, that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."[238] *Plyler* held that a state violated equal protection by denying to undocumented school-age children the free public education that it provided to children who are citizens.[239]

While the above two decisions thus stated that "subject to the jurisdiction thereof" is not less comprehensive" than "within its jurisdiction," the former may be read as *more* comprehensive than the latter. A person "subject to" the jurisdiction has duties as a citizen, such as paying taxes, serving on juries, and rendering military service, to which an alien merely "within" the territory is not liable. An alien within the territory is subject, for instance, to the criminal laws, but has no allegiance to the United States, as does a citizen. Similarly, the member of an Indian tribe is subject to the criminal law,[240] but that does not give rise to birthright citizenship.[241] Yet an Indian is "within the jurisdiction" and may not be denied the equal protection of the laws.[242]

Dissenting in *Plyler*, Chief Justice Burger (joined by three other justices) agreed that the Equal Protection Clause "*applies* to aliens who, after their illegal entry into this country, are indeed physically 'within the jurisdiction' of a state."[243] He made no comment on the majority's dicta about the Citizenship Clause. On the merits, given the Court's concession that "illegal aliens are not a suspect class, and that education is not a fundamental right," it was not irrational for the state to distinguish them from lawful residents.[244] "By definition, illegal aliens have no

---

[237] *Wong Kim Ark*, 169 U.S. at 687.

[238] *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982).

[239] *Id*. at 205.

[240] *United States v. Kagama*, 118 U.S. 375, 383 (1886) (federal law making murder of an Indian by another Indian on a reservation "is within the competency of congress.").

[241] *Elk*, 112 U.S. at 102

[242] *United States v. Antelope*, 430 U.S. 641, 647 (1977) ("The challenged statutes [applicable to Indians] do not otherwise violate equal protection.").

[243] *Plyler*, 457 U.S. at 243 (Burger, C.J., dissenting).

[244] *Id.* at 248.

right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state."[245]

An alien unlawfully in the United States may not be denied equal protection, but that status does not give rise to the alien's child receiving birthright citizenship.

E. *McDonald v. City of Chicago* Reaffirmed the Continued Vitality of the Civil Rights Act, Which Defines a Citizen as "Not Subject to Any Foreign Power"

The Supreme Court has repeatedly confirmed that the Civil Rights Act of 1866 was the precursor of the Fourteenth Amendment, and it has never found the Act's element of citizenship "not subject to any foreign power" as inconsistent with the Amendment's "subject to the jurisdiction thereof." Most recently, in *McDonald v. City of Chicago* (2010), the Court explained:

> Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866…. The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land."[246]

McDonald relied on two prior precedents for the above. In *General Building Contractors Assn., Inc. v. Pennsylvania* (1982), the Court noted that the Act "constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of 'incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land.'"[247] That case in turn cited the more detailed explanation in *Hurd v. Hodge* (1948), which noted "[f]requent references to the Civil Rights Act … in the record of the legislative debates on the adoption of the Amendment," and stated that "one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land."[248]

In footnotes, *Hurd* cited several of the same speeches of members of Congress in debates over what became the Fourteenth Amendment that are quoted in this Article.[249] For instance, Rep. Thayer stated that the proposed Amendment "is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, … in order …

---

[245] *Id*. at 250.

[246] *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010).

[247] *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982).

[248] *Hurd v. Hodge*, 334 U.S. 24, 32 (1948).

[249] *Id.* n.11-14.

that that provision … so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States."[250]

In sum, the Court has continued to reaffirm the vitality of the Civil Rights Act of 1866 and has never questioned its requirement for citizenship that a person born here be "not subject to any foreign power," although it blurred over those words in *Wong Kim Ark* without suggesting that they were inconsistent with the Citizenship Clause.[251] Unless the Amendment's "subject to the jurisdiction thereof" be read to persons subject to foreign powers, the Civil Rights Act would unconstitutionally narrow the definition of citizenship by requiring that a person born here be "not subject to any foreign power." One would be left with the anomaly, bordering on an oxymoron, that a person subject to a foreign power could nonetheless be subject to the jurisdiction of the United States.

CONCLUSION

The Citizenship Clause has two distinct elements, each of which must be given meaning and effect: "All persons [1] born … in the United States and [2] subject to the jurisdiction thereof, are citizens of the United States…." The second clause cannot simply be erased.

Being subject to the jurisdiction means *fully* subject to the jurisdiction, excluding aliens who are citizens of other countries, such as Wong Kim Ark's parents. Limiting the clause to miniscule scenarios like children of ambassadors, or unlikely hypotheticals like children of invading armies, was wholly unnecessary as they were already excluded from citizenship by the law of nations. As noted at the beginning of this article, Vattel – at the Founding, the leading expert on the law of nations – wrote that "children born out of the country in the armies of the state, or in the house of its minister at a foreign court, are reputed born in the country; for a citizen, who is absent with his family on the service of the state, but still dependent on it, and subject to its jurisdiction, cannot be considered as having quitted its territory."[252]

The original public understanding of the Citizenship Clause was expressed in the proceedings of Congress in both 1866 and 1868. The exclusion from citizenship of persons born here but who were "subject to any foreign power, excluding Indians not taxed" in the Civil Rights Act of 1866 was never questioned, but was reinforced, in the debates over the Citizenship Clause. Had there been any question about it, surely someone would have spoken up. Instead, the wordsmithing that evolved from "not subject to any foreign power" to "subject to the jurisdiction of" sought to ensure the same content. The deletion of the Act's "Indians not taxed" in the Citizenship Clause simply reinforced this understanding, since tribal allegiance left Indians not fully subject to the jurisdiction of the United States. The Expatriation Act and the Burlingame-Seward Treaty, the last nails in the coffin of the feudal English common law rule of birthright-citizenship, came into being right when the Fourteenth Amendment was declared ratified.

---

[250] *Id*. n.13 citing Cong. Globe, 39th Cong., 1st Sess. 2465.

[251] *Wong Kim Ark*, 169 U.S. at 688.

[252] Vattel, *The Law of Nations*, 103. See *supra* n.2.

The Supreme Court's initial cases on the Citizenship Clause, the *Slaughter-House Cases* and *Elk v. Wilkins*, read "subject to its jurisdiction" to exclude citizens of foreign states or those who owed allegiance to an alien power. *Wong Kim Ark* held the clause to include a child of foreign parents, even though they were subjects of a foreign power, with a permanent domicile and doing business in the United States. Based on the ongoing current litigation, the Supreme Court will have an opportunity to review and clarify its precedents and to engage the original public understanding of the Citizenship Clause. It should hold that being "subject to the jurisdiction thereof" excludes persons born in the United States of parents (a) who are here unlawfully or (b) who are here lawfully, but are not permanently domiciled here and are citizens of other countries.