

# WITHOUT DOMICILE OR ALLEGIANCE: GYPSIES AND BIRTHRIGHT CITIZENSHIP

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## INTRODUCTION

Though Professors Wurman and Whittington disagree on the original public meaning of the Citizenship Clause, and hence birthright citizenship, they must agree that children born in the United States to Roma (or gypsy) parents are citizens.<sup>1</sup> They must agree on this because Senator Lyman Trumbull was asked by Senator Edgar Cowan during the debate on the Civil Rights Act of 1866 whether the Act would “have the effect of naturalizing the children of Chinese and Gypsies born in this country.”<sup>2</sup> Senator Trumbull replied: “Undoubtedly.”<sup>3</sup> President Andrew Johnson concurred with Trumbull in his overridden veto of the Civil Rights Act, the precursor of the Fourteenth Amendment’s Citizenship Clause.<sup>4</sup> There, the President rejected the Act in part because “the people called gypsies” would become birth citizens.<sup>5</sup> And the link

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<sup>1</sup> Compare Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL’Y 315 (2026), with Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 HARV. J.L. & PUB. POL’Y 459 (2026). In this Article, I generally use “gypsy” when discussing the historical sources and “Roma” when speaking in my own voice.

<sup>2</sup> CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Cowan); *see* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (“[A]ll persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”).

<sup>3</sup> CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull).

<sup>4</sup> *See* Andrew Johnson, Veto Message (Mar. 27, 1866), in 6 MESSAGES AND PAPERS OF THE PRESIDENTS 405, 405 (James D. Richardson ed., Wash. D.C., Gov’t Printing Off. 1897).

<sup>5</sup> *Id.*

between gypsies and birth citizenship was repeated in Congress when the Citizenship Clause of the Fourteenth Amendment was discussed shortly thereafter.<sup>6</sup>

Why did the Roma feature so prominently in the citizenship conversation, and what does that mean for the interpretation of birthright citizenship today?<sup>7</sup> This Article argues that the invocations of gypsies drew on Blackstone's discussion of them in his *Commentaries* and reinforces the long-settled view that neither legal status, domicile, nor allegiance are requirements for birth citizenship in the United States.<sup>8</sup> Blackstone explained that for over two centuries Parliament barred "Egyptians" from entering the country, imposed fines on anyone who helped them immigrate illegally, and set out harsh punishments on any that remained.<sup>9</sup> But children born within the Crown's territory to these nomadic and unlawful parents were still treated as subjects.<sup>10</sup> Thus, the law of

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<sup>6</sup> U.S. CONST. amend XIV, § 1 ("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."); *see infra* notes 42–44 & 50–52 and accompanying text.

<sup>7</sup> Professor Leslie F. Goldstein was the first scholar to ask this question. *See* Leslie F. Goldstein, *Technologies of Travel, 'Birth Tourism,' and Birthright Citizenship*, 79 MD. L. REV. 177, 186–88 (2019).

<sup>8</sup> I addressed other aspects of birthright citizenship in a prior article. *See generally* Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008). For a draft paper that makes some similar points to mine about the Roma, see Jed H. Shugerman, *An Originalist Case for Birthright Citizenship of Unlawful Immigrants' Children: Anti-Gypsy and 1850s–60s Anti-Chinese Restrictions as Categorical Context* (July 31, 2025), [https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=5135&context=faculty\\_scholarship](https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=5135&context=faculty_scholarship).

<sup>9</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*165–66; *see* An Act Concerning Egyptians 1530, 22 Hen. 8, c. 10 (Eng.); An Act for the Punishment of Certain Persons Calling Themselves Egyptians 1554, 1 & 2 Phil. & M., c. 4 (Eng.). I have modernized spellings from the sixteenth century in citing or quoting statutes from that era.

<sup>10</sup> *See* 1 WILLIAM BLACKSTONE, COMMENTARIES \*361–62 ("The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such."); *id.* at \*133 ("[N]o power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will."); *see also* An Act for the Punishment of Vagabonds Calling Themselves Egyptians 1563, 5 Eliz. 1, c. 20 (Eng.) (stating that the Act "shall not extend to compel any person or persons born within the Queen's Majesty's Dominions to depart of out of this Realm of England or

England was that native-born children of illegal aliens were not themselves aliens. Almost all lawyers in the ante-bellum era read Blackstone as part of their training, which explains why so many references were made to gypsies during the Civil Rights Act and Citizenship Clause debates.<sup>11</sup>

Notwithstanding that tradition, in 1866, Senator Cowan argued that American birthright citizenship should not apply to gypsies because, among other things, they “have no homes” and “no allegiance” to the United States.<sup>12</sup> He lost. He lost even though they paradigmatically lacked homes or allegiance.<sup>13</sup> Senator Cowan and President Johnson lost because the text of the Fourteenth Amendment says nothing about domicile or allegiance for purposes of national citizenship. But they also lost because they wanted Congress to reject the longstanding principle that the status of parents was almost always irrelevant to the status of their native-born children.<sup>14</sup> Congress refused to do that then, and no President can do that now.

## I. THE COMMENTARIES AND THE STATUTES

This Part examines Blackstone’s account of the law of England as applied to “Egyptians” and takes a more detailed look at the statutes that he referenced but did not fully discuss. In the sixteenth

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Wales,” *id.* § 4, in response to “scruple and doubt” about whether native-born Roma should be treated like aliens, *id.* § 1).

<sup>11</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997) (stating that Blackstone was a primary legal authority for nineteenth century American lawyers).

<sup>12</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan).

<sup>13</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*165 (describing the Roma as “a strange kind of commonwealth among themselves of wandering imposters and jugglers”); *see also infra* notes 51–52 & 56–62 and accompanying text.

<sup>14</sup> I say “almost always” because the common law did not consider children born in England to foreign diplomats to be subjects. For a recent case applying that concept in the United States, see *Moncada v. Rubio*, 153 F.4th 733 (9th Cir. 2025) (holding that a son born to a Nicaraguan diplomat to the United Nations in the United States was not a birthright American citizen given the common-law backdrop to the Citizenship Clause).

century, Parliament enacted a series of laws barring “Egyptians” from entering the country and imposing capital punishment on those that refused to leave or refused to give up their itinerant lifestyle.<sup>15</sup> Yet Parliament went out of its way in 1563 to make clear that children born within the Crown’s territory to these undesirable parents could not be deported.<sup>16</sup> In other words, the native-born children of illegal alien parents were treated as subjects rather than as aliens. This was part of the “ancient and fundamental rule of citizenship” adopted by the Fourteenth Amendment.<sup>17</sup>

#### A. *Blackstone’s Foundation*

The *Commentaries* discussed “Egyptians” in Volume Four, and Blackstone’s prose has the virtue of being identical to what lawyers would have read in the nineteenth century.<sup>18</sup> Let us begin by looking at some of what he said in Volume One about the difference between subjects and aliens, before turning to his narrative about the Roma.

On the definition of subjects, Blackstone’s first principle was: “[n]atural-born subjects are such as are born within the dominions of the Crown of England.”<sup>19</sup> He added that “[t]he children of aliens, born here in England, are, generally speaking, natural-born

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<sup>15</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*165–66; *see also* An Act Concerning Egyptians 1530, 22 Hen. 8, c. 10 (Eng.); An Act for the Punishment of Certain Persons Calling Themselves Egyptians 1554, 1 & 2 Phil. & M., c. 4 (Eng.).

<sup>16</sup> See An Act for the Punishment of Vagabonds Calling Themselves Egyptians 1563, 5 Eliz. 1, c. 20 (Eng.).

<sup>17</sup> Cf. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (“The [F]ourteenth [A]mendment affirms the ancient and fundamental rule of citizenship by birth within the territory . . . ”).

<sup>18</sup> Many editions of the *Commentaries* were issued after Blackstone wrote the first one, but they added only citations or notes on developments that occurred after the initial publication. The text was not altered. *See, e.g.*, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Phila., J.B. Lippincott & Co., 1865).

<sup>19</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*354.

subjects, and entitled to all the privileges of such.”<sup>20</sup> One of a subject’s basic rights was that “no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will.”<sup>21</sup> There was no mention of an exception for children born to aliens who were gypsies, even though the *Commentaries* talked about these “outlandish” people at some length.<sup>22</sup> “Outlandish” here literally meant “out of the land” or foreign.<sup>23</sup>

Blackstone’s remarks on gypsies came in a chapter entitled “Of Offenses Against the Public Health, and the Public Police or Economy.”<sup>24</sup> He described them as “a strange kind of commonwealth among themselves of wandering imposters and jugglers” who are “another object of the severity of some of our unrepealed statutes.”<sup>25</sup> After some speculation about where they came from, Blackstone quoted from a 1530 Act of Parliament that said “outlandish people, calling themselves Egyptians . . . have come into this realm and gone from shire to shire and place to place in great company, and used great, subtle and crafty means to deceive the people . . . and also have committed many heinous felonies and robberies.”<sup>26</sup> The Act directed them “to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels.”<sup>27</sup> Blackstone noted that a subsequent anti-gypsy law under Queen Mary provided that “if any such persons shall be imported into this kingdom, the importer shall

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<sup>20</sup> *Id.* at \*361–62. The only implied exception was for children born to foreign ambassadors, given that “the children of the king’s ambassadors born abroad were always held to be natural subjects” of the Crown. *See id.* at \*361.

<sup>21</sup> *Id.* at \*133 (emphasis added).

<sup>22</sup> *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES \*165.

<sup>23</sup> This is also how the word was used, for example, in the King James Bible. *See Nehemiah* 13:26 (stating that, though Solomon was beloved of God, “even him did outlandish women cause to sin”).

<sup>24</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*161.

<sup>25</sup> *Id.* at \*165.

<sup>26</sup> *Id.* at \*165–66 (quoting An Act Concerning Egyptians 1530, 22 Hen. 8 c. 10 (Eng.)).

<sup>27</sup> *Id.* at \*166.

forfeit 40 [pounds].”<sup>28</sup> Furthermore, any gypsy who remained for more than one month was guilty of a felony and would be executed, though by Blackstone’s time this punishment was no longer inflicted.<sup>29</sup> Finally, he noted that any person over the age of fourteen, “whether natural born subject or stranger [in other words, alien],” who adopted a gypsy lifestyle also faced capital punishment.<sup>30</sup>

Two important points emerge from this summary. First, the Roma were unlawful immigrants in Britain. They were not permitted to enter the realm, they were not permitted to stay, and anyone who helped them enter was subject to a fine. Second, they lacked a domicile. Part of the reason that the Roma were so disliked was because they were itinerant. Yet nothing in Blackstone’s discussion suggested that either of these facts denied subject status to native-born Roma children.<sup>31</sup> Instead, he expressly said that some native-born subjects could be among the Roma.<sup>32</sup> Put another way, the law of England did not treat native-born children of illegal aliens differently from those of legal aliens: they were all treated as subjects of the Crown.<sup>33</sup>

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<sup>28</sup> *Id.* (citing An Act for the Punishment of Certain Persons Calling Themselves Egyptians 1554, 1 & 2 Phil. & M. c. 4 (Eng.)). The 1554 Act explained that, notwithstanding the provisions of the 1530 Act, the Roma were still entering the realm “using their old accustomed devilish and naughty practices and devices, with such abominable lying as is not in any Christian Realm to be permitted.” *See id.* The 1554 Act also stated that the goal of the 1530 Act was the “banishing” of the Roma. *See id.*

<sup>29</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*166 (“[T]o the honour of our national humanity, there are no instances more modern than the [seventeenth century] of carrying these [capital punishment] laws into practice.”). In the jargon of the time, the Roma were formally denied “the benefit of clergy.” *See id.*; *see also* HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 618–21 (John H. Langbein, Renee Lettow Lerner & Bruce P. Smith eds., 2009) (explaining that concept).

<sup>30</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*166.

<sup>31</sup> As a practical matter, a lack of domicile probably made establishing native-birth difficult in the sixteenth century.

<sup>32</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*166.

<sup>33</sup> Though the Roma also lacked allegiance to any nation, that point received no attention at common law because the premise was that anyone born in the territory

Now a critic might say that this is only an argument from omission.<sup>34</sup> But there is also affirmative evidence—in a 1563 Act of Parliament that Blackstone mentioned but did not quote—that native-born gypsy children were treated as subjects.<sup>35</sup>

*B. The 1563 Act of Parliament*

Under Queen Elizabeth I, Parliament sought to clarify how the law applied to native-born gypsies. The preface of the 1563 Act on the “Punishment of Vagabonds, Calling Themselves Egyptians” stated that “scruple and doubt” had arisen about “whether such persons as being born within this Realm of England or other of the Queen’s Highness Dominions” were punishable “in like manner as others of that sort are, being strangers [in other words, aliens] borne and transported into this Realm.”<sup>36</sup> New legislation was therefore desirable “[f]or the voiding of all doubts and ambiguities in that behalf.”<sup>37</sup>

After reiterating the criminal penalties that applied to gypsies, the Act stated that the law “shall not extend to compel any [person or persons] born within any of the Queen’s Majesty’s Dominions to depart out of this Realm of England or Wales.”<sup>38</sup> Instead, they were required “to leave their said naughty idle and ungodly life and company and to place themselves in some honest service, or to exercise themselves at home with their parents or elsewhere

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owed the Crown allegiance and received its protection. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES \*357.

<sup>34</sup> In fairness to Blackstone, condensing English law into only four volumes required many omissions.

<sup>35</sup> *See* DAVID CRESSY, GYPSIES: AN ENGLISH HISTORY 73 (2018) (stating that historians often misdate the Act as from 1562); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES \*166 (noting the Act for the Punishment of Vagabonds Calling Themselves Egyptians 1563, 5 Eliz. 1, c. 20 (Eng.)).

<sup>36</sup> An Act for the Punishment of Vagabonds Calling Themselves Egyptians 1563, 5 Eliz. 1, c. 20 (Eng.).

<sup>37</sup> *Id.* The 1563 Act was therefore framed as a clarification of the law rather than as creating an exception for the native-born children of the Roma.

<sup>38</sup> *Id.*

honestly in some lawful work, trade, or occupation.”<sup>39</sup> In this sense, native-born gypsies were just like any other subject. Vagrancy was a crime that applied to all, as was made clear by another Act of Parliament in 1597.<sup>40</sup> But native-born gypsies could not be treated as illegal aliens and deported.

The takeaway here is that Parliament responded to doubts about the status of native-born Roma by declaring that they should be treated as subjects of the realm and regulated based on their conduct like other subjects. That must be true because: (1) Blackstone said that a fundamental right of subjects was that they could not be deported, and (2) the 1563 Act held that native-born gypsies could not be deported; (3) they were not deprived of any other subject right like owning property.<sup>41</sup> Moreover, native-born Roma were held to same standard as other subjects with respect to the requirement of finding gainful employment that could lead to property ownership. Likewise, adopting a more typical Roma lifestyle was a capital crime for any subject and alien alike.

In sum, the law of England, established by the Roma precedent and relayed by Blackstone, was that children born within the Crown’s dominions were deemed subjects even though their parents were illegally there and lacked a domicile. The question is whether the Fourteenth Amendment revised that understanding.

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<sup>39</sup> *Id.* The 1554 Act made the same point about granting amnesty to Roma who assimilated, but did not make a distinction regarding deportation for those who did not.

<sup>40</sup> See An Act for the Punishment of Rogues, Vagabonds and Sturdy Beggars 1597, 39 Eliz. 1, c. 4 (Eng.) (listing “Egyptians” as one of types of vagabonds who could be punished). For a superb history of vagrancy, see generally RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016).

<sup>41</sup> My research has uncovered no statute or case stating that native-born gypsies were not entitled to a right held by a subject of the Crown.

## II. THE 39TH CONGRESS

This Part probes the discussion of the Roma and birthright citizenship in the debates on the Civil Rights Act of 1866 and on the Citizenship Clause. The English background, as told by Blackstone, helps solve the mystery of why gypsies were discussed in the first place. As for the substance, Senator Cowan's argument against extending birthright citizenship to gypsies rested, in part, on his claim that they lacked any domicile or allegiance to the United States.<sup>42</sup> Though both these claims were true, Congress did not exclude them from birth citizenship. Thus, the Fourteenth Amendment reaffirmed the law of England with respect to the Roma, which included the view that native-born children of illegal alien parents were not themselves aliens.

### A. *Why Gypsies?*

Without context, the references to gypsies in 1866 may seem odd. Indeed, some members of Congress and the public did not understand why the President or others were talking about them. For example, Senator John Conness said:

[W]hy all this talk about Gypsies and Chinese? I have lived in the United States for now many a year, and really I have heard more about Gypsies within the last two or three months than I have heard before in my life. It cannot be because they have increased so much of late. It cannot be because they have been felt to be particularly oppressive in this or that locality.<sup>43</sup>

Likewise, *The Chicago Tribune* responded to the President's veto of the Civil Rights Act with: "[t]he objection to a man's citizenship on the ground that his parents were Gypsies would pass for about

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<sup>42</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan).

<sup>43</sup> *Id.* at 2892 (statement of Sen. Conness).

as much as the objection that his uncle was an astrologer or that his grandmother was a witch.”<sup>44</sup> At least one modern scholar takes a similar view, describing the back-and-forth about the Roma in Congress as “baffling.”<sup>45</sup>

Blackstone’s *Commentaries* provide an answer to this riddle. Lawyers in Congress talked about gypsies because Blackstone did.<sup>46</sup> No other explanation makes sense given that the Roma played an insignificant role in American life during the nineteenth century—aside from the occasional newspaper article, they were hardly mentioned.<sup>47</sup> But the Roma were an excellent paradigm for thinking about birth citizenship because under English law they were singled out for unfavorable treatment. Readers of Blackstone would have known that history.<sup>48</sup> They also would have known Blackstone’s definition of a subject as a natural-born person within the Crown’s dominions and would have seen no exclusion of children born there to gypsies mentioned in his treatise. Talking about them was therefore a way of exploring the breadth of the birth citizenship principle.

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<sup>44</sup> *The Veto Message*, CHI. TRIB., Mar. 29, 1866, at 2.

<sup>45</sup> Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 ST. LOUIS U. PUB. L. REV. 329, 362 (2013).

<sup>46</sup> Senator Conness, who was puzzled by the gypsy references, was not a lawyer. He was a businessman who made his fortune during the California gold rush. *See Conness, John, 1821–1909*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/c000695> [https://perma.cc/UHT3-YCH5]. Senators Cowan and Trumbull, though, were lawyers. *See Cowan, Edgar, 1815–1885*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/C000819> [https://perma.cc/F8DT-SZ8Q]; *Trumbull, Lyman, 1813–1896*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/T000392> [https://perma.cc/JC33-R4GW].

<sup>47</sup> *See* Mensel, *supra* note 45, at 360 n.208 (listing some contemporary articles).

<sup>48</sup> I am not, of course, suggesting that American lawyers would have known all the details of the sixteenth-century statutes on “Egyptians.”

B. *Senator Cowan's Unsuccessful Effort to Change the Law*

Though Senator Cowan raised the Roma issue in the Civil Rights Act debate, he saved his argument for the Citizenship Clause debate.<sup>49</sup> Cowan framed the question this way:

[B]efore 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, because I look upon Indians not taxed as being much less dangerous and much less pestiferous to society than I look upon Gypsies.<sup>50</sup>

He then explained that Pennsylvania should have the power to:

[E]xpel[] 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 have a distinct, independent government of their own—an *imperium in imperio*; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen."<sup>51</sup>

Moreover, Senator Cowan continued, they:

[P]erform none of the duties which devolve upon [a citizen], but, on the other hand, have no homes, pretend to own no land, live nowhere, settle as trespassers where ever they go, and whose sole merit is a universal swindle . . . I mean the Gypsies. They wander in gangs in my State.<sup>52</sup>

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<sup>49</sup> See *supra* 2–3 and accompanying text.

<sup>50</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

This speech is worth unpacking because of its parallels to the current litigation on birth citizenship for the children of American illegal aliens and temporary foreign visitors.<sup>53</sup> Senator Cowan characterized the Roma as invading borders, owing no allegiance to the United States, recognizing no governmental authority, having a government of their own, having no homes, and acting as trespassers. Deep thought is not required to see the analogy to modern arguments against birthright citizenship. Deep thought is also not required to see that Senator Cowan's argument failed to persuade his colleagues. Senator Conness was dismissive of Cowan's invasion argument: "I had never heard myself of the invasion of Pennsylvania by Gypsies . . . . The only invasion of Pennsylvania within my recollection was an invasion very much worse and more disastrous to the State, and more to be feared and more feared, than that of Gypsies. It was an invasion of rebels," most notably at Gettysburg.<sup>54</sup>

Taking a wider perspective, the inclusion of the Roma within the Citizenship Clause's grant of citizenship destroys the argument that domicile is a requirement for birthright citizenship.<sup>55</sup> Gypsies had no domicile. The one adjective that almost everyone used to describe them was some form of "wandering."<sup>56</sup> For instance,

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<sup>53</sup> This litigation is now pending before the Supreme Court. *See* *Barbara v. Trump*, 790 F. Supp. 3d 80 (D.N.H. 2025), *cert. granted before judgment*, 2025 WL 3493157 (U.S. Dec. 5, 2025) (mem.).

<sup>54</sup> *See* CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866) (statement of Sen. Conness).

<sup>55</sup> Consider, for example, Mark Shawhan, *Comment, The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L.J. 1351, 1353 (2010) (arguing that Senator Trumbull thought domicile was required). This Comment reached that erroneous conclusion in part by ignoring Senator Trumbull's comment about Roma citizenship.

<sup>56</sup> *See, e.g.*, CONG. GLOBE, 31st Cong., 1st Sess. 1889 (1850) (statement of Rep. Ewing) (comparing free blacks to "the wandering Gypsies who once overspread modern Europe"); *cf.* CONG. GLOBE, 39th Cong., 1st Sess. 246 (1866) (statement of Rep. Davis) (discussing "Pennsylvania [and] her Gypsy gangs, that are perpetually vibrating between her plains and mountains"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 449 (Chauncey A. Goodrich ed., 1848) (defining "gypsies" as "vagabonds" that are "strolling about").

Blackstone and Cowan both used this term.<sup>57</sup> And a leading current dictionary defines a gypsy as “a person who wanders or roams from place to place.”<sup>58</sup> The fact that children born here to itinerant Roma parents were “undoubtedly” considered citizens of the United States in 1866<sup>59</sup> cannot be reconciled with a constitutional domicile requirement.<sup>60</sup>

A similar observation follows for the claim that parental allegiance to the United States is required for their native-born children to become citizens. Senator Cowan said that the Roma had no such allegiance and were an *imperium et imperio*.<sup>61</sup> Likewise, Blackstone called them a “strange kind of commonwealth among themselves.”<sup>62</sup> And the Roma have long followed a well-developed body of customary law that they apply to themselves no matter where they are.<sup>63</sup> Extracting any allegiance requirement to the United States from these basic points about the Roma is therefore also nearly impossible, especially given that this specific argument was made and rejected in 1866.

To sum up, the express recognition of Roma birthright citizenship in 1866 poses a grave problem for the revisionist view of the Citizenship Clause. In part, that is because those references were not made on a blank slate. They brought with them the English gloss that native-born children of illegal aliens were treated as

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<sup>57</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*165; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan).

<sup>58</sup> *Gypsy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Gypsy> [<https://perma.cc/CK44-VK93>].

<sup>59</sup> *See* CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull).

<sup>60</sup> This also means that the Citizenship Clause confers birth citizenship on children born here to temporary visitors (including tourists). The law of England, for example, made no distinction between the children of temporary visitors and other aliens with respect to their subject status.

<sup>61</sup> Cf. Mensel, *supra* note 45, at 360 n.208 (stating that the Roma “constituted an *imperium et imperio*, but they did not do so under the rubric of any foreign power” because “[t]here is no indication that they claimed to have been or were recognized as being citizens or subjects of any other country”).

<sup>62</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*165.

<sup>63</sup> *See* Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the ‘Gypsies’*, 103 YALE L.J. 323 (1993).

subjects of the Crown. Of equal or greater importance, though, was the fact that native-born gypsy children were considered birth citizens in the United States even though their parents lacked any domicile or any allegiance to the United States.

## CONCLUSION

A common departure point for the modern debate on birthright citizenship is that there were no illegal aliens in the United States when the Fourteenth Amendment was ratified.<sup>64</sup> But gypsies were illegal aliens in England for centuries. And their native-born children were treated as subjects of the Crown, not aliens. This English tradition informs the meaning of the Citizenship Clause. Even without that context, though, careful consideration of what Congress's explicit inclusion of gypsies within the scope of birthright citizenship means must lead to the rejection of an unwritten domicile or allegiance requirement. As Congressman John A. Bingham told an Ohio crowd in 1867: "[i]f a man is not a citizen of the country in which he was born, in God's name of what country is he a citizen? If he may not live there, where has he a right to live?"<sup>65</sup>

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<sup>64</sup> See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 92 (1985). This claim is problematic, but I addressed that issue in my prior birthright citizenship article. See Magliocca, *supra* note 8.

<sup>65</sup> SUMMIT CNTY. BEACON, Sept. 26, 1867, at 1.