THE BIRTHRIGHT CITIZENSHIP DEBATE

STEVEN J. MENASHI*

On the first day of his second term as President of the United States, Donald J. Trump issued Executive Order No. 14,160, *Protecting the Meaning and Value of American Citizenship*.[1] The Executive Order requires federal agencies, on a prospective basis, to decline to issue or to accept citizenship documents for the children of temporary visitors and illegal aliens born in the United States more than thirty days after the effective date.

Several states, individuals, and advocacy groups promptly filed lawsuits across the country, arguing that the Executive Order violated the Citizenship Clause of the Fourteenth Amendment, and courts awarded emergency relief preventing the Order from taking effect.[2]

In the early days of those emergency proceedings, several judges voiced strong doubts that the Executive Order had any arguable legal basis. During an emergency hearing in Seattle, for example, one federal district judge claimed that he could not "remember another case" in which the government action was so "blatantly unconstitutional."[3] There was also a "torrent of criticism" from "law school professors, with several competing to condemn the order in the harshest terms."[4] Many insisted that there was not even a genuine debate to be had.

As the cases have progressed, however, the legal debate has assumed a more measured tone. In court proceedings, the overwrought rhetoric from the early emergency hearings was

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* Circuit Judge, U.S. Court of Appeals for the Second Circuit.

[1] 90 Fed. Reg. 8449 (Jan. 20, 2025).

[2] *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2549 (2025).

[3] Transcript of TRO Hearing at 13:13, Washington v. Trump, 764 F. Supp. 3d 1050 (W.D. Wash. 2025) (statement of Hon. John C. Coughenour) (No. 2:25-cv-127).

[4] Samuel Estreicher & Rudra Reddy, *Revisiting the Scope of Constitutional Birthright Citizenship*, 24 GEO. J.L. & PUB. POL'Y (forthcoming 2026) (manuscript at 1), https://ssrn.com/abstract=5223361.

replaced with a sober acknowledgment that the government presented credible legal authorities to support its view that the qualifying language of the Citizenship Clause—"subject to the jurisdiction thereof"—reflects requirements of parental allegiance and legal domicile in the United States and thereby excludes the children of illegal aliens and temporary visitors from automatic entitlement to citizenship by birth without the need for naturalization.[5]

The same district judge in Seattle—while ultimately ruling against the government—acknowledged in a written order that citizenship does not follow automatically from birth in the territory and that "[t]o the Government's credit, allegiance has at least some importance to citizenship."[6]

Published opinions from the First and Ninth Circuits have acknowledged that executive branch regulations from the early twentieth century, and at least one authoritative 1953 treatise, support the government's position.[7] And a federal district judge in New Hampshire recognized that the federal government had "advance[d] nonfrivolous arguments in support" of its interpretation by "focusing on the concepts of 'allegiance' and 'domicile,' the scope of the government's regulatory 'jurisdiction,' the status of Native Americans under the Fourteenth Amendment, and the precedent of *Elk v. Wilkins*."[8]

In *Elk*, the Supreme Court held that the Citizenship Clause would confer citizenship on only those children whose parents are "owing

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[5] *Cf.* United States v. Wong Kim Ark, 169 U.S. 649, 658 (1898) ("[T]hough at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the king of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the crown." (quoting A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 741 (1896))).

[6] Washington v. Trump, 765 F. Supp. 3d 1142, 1151 (W.D. Wash. 2025).

[7] Doe v. Trump, 157 F.4th 36, 63 (1st Cir. 2025); Washington v. Trump, 145 F.4th 1013, 1035 (9th Cir. 2025).

[8] N.H. Indonesian Cmty. Support v. Trump, 765 F. Supp. 3d 102, 110 (D.N.H. 2025).

no allegiance to any alien power," which required a "formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law."[9] The Supreme Court reiterated that view in the *Slaughter-House Cases*[10] when it explained that the phrase "subject to the jurisdiction" was "intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."[11]

Several commentators around the time of the Fourteenth Amendment understood "subject to the jurisdiction" in a similar way. Francis Wharton, for example, recognized that "Indians are held not within this clause, not being 'subject to the jurisdiction of the United States.' The same reasoning, it may be argued, would exclude children born in the United States to foreigners here on transient residence, such children not being by the law of nations 'subject to the jurisdiction of the United States.'"[12]

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

[10] 83 U.S. 36 (1873).

[11] *Id.* at 73.

[12] 2 FRANCIS WHARTON, DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES § 183, at 393–94 (1887) (internal citation omitted); *see also* HANNIS TAYLOR, TREATISE ON INTERNATIONAL PUBLIC LAW § 178, at 220 (1901) ("[C]hildren born in the United States to foreigners here on transient residence are not citizens, because by the law of nations they were not at the time of their birth 'subject to the jurisdiction.'"); WILLIAM EDWARD HALL, TREATISE ON INTERNATIONAL LAW 228 n.1 (5th ed. 1904) ("Starting from the judicially ascertained circumstance that Indians are not citizens of the United States because they are not, in a full sense, 'subject to the jurisdiction' of the United States, it is considered that à fortiori the children of foreigners in transient residence are not citizens, their fathers being subject to the jurisdiction less completely than Indians."). John Westlake expounded on the same principle:

> [T]hat when the father has domiciled himself in the Union he has exercised the right of expatriation claimed for him by congress, and that his children afterwards born there are not subject to any foreign power within the meaning of section 1992 but are subject to the jurisdiction of the United States within the meaning of fourteenth amendment, therefore are citizens; but that when the father at the time of the birth is in the Union for a transient purpose his children born within it have his nationality, and probably without being allowed an option in favour of that of the United States. And these

In lectures posthumously published in 1891, Justice Samuel Miller wrote that "[i]f a stranger or traveller passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction."[13]

I

"Discerning 'the original understanding of an ancient text' means wading through 'an enormous mass of material,' evaluating 'the reliability of that material,' and 'immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.'"[14] That sort of work is often difficult to accomplish "in contentious cases argued in April and decided in June."[15] As a result, academic research becomes especially important. And scholars have begun to illuminate the public understanding of the Citizenship Clause at the time the Fourteenth Amendment was ratified.

In 2018, Professor Samuel Estreicher wrote an essay suggesting that "the touchstone for understanding the 'subject to the jurisdiction' of the U.S. qualification of the citizenship clause is whether the children born in the United States are lawfully in the

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conclusions appear to be in accordance with the practice of the United States executive department. JOHN WESTLAKE, INTERNATIONAL LAW 219–20 (1904).

[13] SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION 279 (N.Y. & Albany, Banks & Bros. 1891).

[14] Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 782–83 (2022) (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989)).

[15] *Id.* at 783.

country at the time of birth,"[16] and he has recently developed a full-length study concluding "that the citizenship clause of the Fourteenth Amendment does not confer citizenship by birth to the children of illegal aliens" and doubting that it does so "to those of temporary visitors."[17] He notes that the "subject to the jurisdiction" language of the Citizenship Clause was an affirmative version of what the Civil Rights Act of 1866 stated in the negative: "[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."[18]

This understanding—that citizenship depended on not being subject to a foreign power—was reflected in the debate over the Citizenship Clause. In introducing the language, Senator Jacob Howard said that the Citizenship Clause "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of [a]mbassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[19] Senator Lyman Trumbull asked "What do we mean by 'subject to the jurisdiction

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[16] Samuel Estreicher & David Moosmann, *Birthright Citizenship for Children of Unlawful U.S. Immigrants Remains an Open Question*, JUST SEC. (Nov. 20, 2018), https://www.justsecurity.org/61550/birthright-citizenship-children-unlawful-u-s-immigrants-remains-open-question/ [https://perma.cc/JY48-YB4J].

[17] Estreicher & Reddy, *supra* note 4 (manuscript at 37); *see also* Kurt Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 100 NOTRE DAME L. REV. (forthcoming 2026), https://ssrn.com/abstract=5140319; Richard A. Epstein, *The Hopeless Case for Birthright Citizenship: The Fourteenth Amendment Did Not Touch the Status of the Children of Illegal Aliens and Temporary Visitors to the United States* (May 14, 2025), https://ssrn.com/abstract=5254575.

[18] Estreicher & Reddy, *supra* note 4 (manuscript at 3) (emphasis added) (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27). There is wide agreement that the primary motivation for constitutionalizing citizenship was that President Andrew Johnson had raised doubts about the authority of Congress to enact the Civil Rights Act of 1866. *See id.* The same Congress that adopted the Civil Rights Act submitted the Fourteenth Amendment two months later, without any indication that it had embraced a different view of citizenship by birth.

[19] *Id.* at 17 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard)).

of the United States'? Not owing allegiance to anybody else. That is what it means."[20] And Senator Reverdy Johnson said that "all that this amendment provides is, that all persons born in the United States and not subject to some foreign power—for that no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States. . . . I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, *born of parents who at the time were subject to the authority of the United States*."[21]

Despite what some commentators have suggested, the Supreme Court has yet to address whether the Citizenship Clause extends citizenship by birth to children of parents illegally or temporarily in the country.[22] In *United States v. Wong Kim Ark*,[23] the Supreme Court held that a child born in the United States to lawfully present Chinese citizens was entitled to citizenship. But "*Wong Kim Ark*, often cited as definitive support for the extensive view of constitutional birthright citizenship, actually reflects an important limitation. The Court's holding is limited to its facts—children of parents with 'permanent domicile and residence' in the United States and who had lawfully entered into this country. The Court suggested that the case might have been decided differently if

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[20] *Id.* at 18 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull)).

[21] *Id.* at 19 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson)).

[22] *See* Minor v. Happersett, 88 U.S. 162, 167–68 (1874). In that case, the Court said:

> At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. *As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. Id.* (emphasis added).

[23] 169 U.S. 649 (1898).

Wong's parents had not been legally permitted to enter and reside in the country."[24] And decades of executive branch practice in making determinations of citizenship do not reflect the view that place of birth, irrespective of parental status, was decisive.[25]

This Issue of the *Harvard Journal of Law and Public Policy* makes significant contributions to this ongoing debate. Professor Ilan Wurman helps to clarify the relationships between allegiance, domicile, and being subject to the jurisdiction of the United States.[26] The Supreme Court itself connected these concepts in *Wong Kim Ark*.[27] The Court understood the concepts in light of the common law background against which the Fourteenth Amendment was ratified.[28]

Professor Wurman argues that the common law rule focused on whether a child's parents "were under the protection and within the allegiance of the sovereign" rather than merely present in the territory.[29] Both the allegiance to the sovereign and the sovereign's extension of protection—for example, its consent to the presence of an alien—were essential components of birthright citizenship.[30]

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[24] Estreicher & Reddy, *supra* note 4 (manuscript at 35); *see also* William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 253 (2008) ("The holding in *Wong Kim Ark* and the majority's interpretation of the Fourteenth Amendment were, then, carefully limited, to those whom we today refer to as 'LPR's,' to aliens lawfully present and permanently residing in the United States and who are deserving of particular consideration because they are, as the modern Court has said, 'in so many respects situated similarly to citizens.'" (quoting Toll v. Moreno, 458 U.S. 1, 44 (1982) (Rehnquist, J., dissenting))).

[25] Estreicher & Reddy, *supra* note 4 (manuscript at 20–29).

[26] Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL'Y 315 (2026).

[27] *See, e.g.*, *Wong Kim Ark*, 169 U.S. at 693 ("Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.").

[28] *See id.* at 654 (insisting that the Fourteenth Amendment "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution").

[29] Wurman, *supra* note 26, at 320.

[30] *See id.* at 324; *cf. Wong Kim Ark*, 169 U.S. at 655 ("Such allegiance and protection were mutual."); Minor v. Happersett, 88 U.S. 162,166 (1874) ("Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.").

Children born to parents who satisfied the common law rule were subject to the complete municipal jurisdiction of the United States. "The best reading of the historical evidence," Professor Wurman concludes, "is that the [Citizenship] Clause extended birthright citizenship to children born of parents subject to the complete municipal jurisdiction of the United States."[31] Under this framework, the children of aliens lawfully domiciled in the United States—but not those illegally or temporarily present—would receive birthright citizenship because only lawful domiciliaries are subject to that complete municipal jurisdiction.[32]

In response, Professor Keith Whittington argues that the common law rule simply made everyone born in the country a prima facie citizen, subject only to exceptions for children of ambassadors and of foreign armies.[33] A third exception, which he describes as peculiar to the American context, applied to the children of American Indians because the United States then included territory under tribal control despite being within the territorial limits of the United States.[34] In response to arguments about the relevance of complete allegiance to the United States, Professor Whittington concludes that individuals are subject to the jurisdiction of the United States for purposes of the Citizenship Clause even when they still owe allegiance to their home countries. He rejects the argument that entering the country without permission would defeat an entitlement to birthright citizenship because an illegal alien is not equivalent to an alien enemy subject to the laws of war.[35]

Professor Gerard N. Magliocca further argues that the widespread understanding, with roots in English law, was that the children of nomads would be entitled to birthright citizenship and that those who sought to reject that approach lost the debate in the

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[31] Wurman, *supra* note 26, at 321.

[32] *See id.*

[33] 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, 465–66 (2026).

[34] *Id.* at 468.

[35] *See id.* at 525.

United States.[36] Professor Magliocca therefore concludes that the status of the parents is almost always irrelevant to whether a child is entitled to birthright citizenship.[37]

II

These investigations into the antecedent common law are important because the Citizenship Clause relies on a concept—the jurisdiction of the United States—that may have been familiar to legislators in the nineteenth century but reflects political ideas "that are not those of our day."[38] We have long known that the Fourteenth Amendment does not confer birthright citizenship on the children of diplomats, foreign soldiers, or American Indians. These categories show that the status of a child follows that of the parents. But the Citizenship Clause does not reference these categories of parental status. The exclusion results from the application of a broader principle.[39]

During the debate in the Senate over the Citizenship Clause, one senator proposed an amendment that would have expressly excluded "Indians not taxed." The senators rejected that amendment because the Indians, as part of a separate political community, were not subject to the complete jurisdiction of the United States. "[T]he very fact that we have treaty relations with them shows that they are not subject to our jurisdiction," said Senator Trumbull. "We cannot make a treaty with ourselves."[40] Trumbull explained that the Indians "are not subject to our jurisdiction in the sense of owing allegiance solely to the United

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[36] Gerard N. Magliocca, *Without Domicile or Allegiance: Gypsies and Birthright Citizenship*, 49 HARV. J.L. & PUB. POL'Y 539, 541 (2026).

[37] *See id.*

[38] Scalia, *supra* note 14, at 857.

[39] *Cf.* United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) ("The law must comport with *the principles underlying* the . . . Amendment." (emphasis added)).

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

States."[41] When another senator objected that Congress had "the power at its pleasure to extend the laws of the United States over the Indians and to govern them,"[42] Trumbull responded that Congress "would have the same power that it has to extend the laws of the United States over Mexico and govern her" if it had "sufficient physical power to enforce it."[43] He said that "we have the power to do it, but it would be a violation of our treaty obligations, a violation of the faith of this nation, to extend our laws over these Indian tribes."[44] The debate reflected an understanding that the "jurisdiction of the United States" referred not simply to the legal authority the United States could exercise over a person; it referred to whether the United States would, in fact, exercise its full legal authority over that person or would—as a matter of comity or discretion—treat the person as part of a separate polity that had its own legal interest at stake.[45] The question that the Executive Order implicates is whether that principle extends to aliens illegally or temporarily within the territory of the United States. Has the United States "refrained from exercising its

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[41] *Id.* at 2894; *see also id*. at 2893 ("It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States.' . . . It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens.").

[42] *Id.* at 2894 (statement of Sen. Hendricks).

[43] *Id.* (statement of Sen. Trumbull).

[44] *Id.* That being "subject to the jurisdiction of the United States" depended on practice rather than authority was further shown when Senator Trumbull envisioned circumstances under which "these Indians come within our limits and within our jurisdiction." *Id.*

[45] The Civil Rights Act of 1866 featured the "excluding Indians not taxed" language, *see supra* note 18 and accompanying text, perhaps because it modified "not subject to any foreign power" and a tribal government might be considered a domestic rather than a *foreign* power. Senator Trumball said that he favored the language of the Civil Rights Act of 1866 but thought "it better to avoid these words" about Indians not taxed "and that the language proposed in this constitutional amendment is better than the language in the civil rights bill. The object to be arrived at is the same." CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull).

complete municipal jurisdiction" over those aliens?[46] This symposium helpfully engages with that question.

But this debate prompts other questions that deserve attention. First, what is the relationship between "owing no allegiance to any alien power"[47] and the availability of dual citizenship? Since 1795, Congress has required an applicant for naturalization "to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen."[48] But the executive branch no longer appears to require new citizens to adhere to that oath.[49] For those born into the citizenship of more than one country, the State Department previously required the citizen, on reaching majority, to make an election between American citizenship and the citizenship of his parents.[50] And Congress codified the actions by which someone could be deemed to have expatriated himself.[51] But

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[46] Wurman, *supra* note 26, at 323.

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

[48] 8 U.S.C. § 1448(a)(2); United States v. Wong Kim Ark, 169 U.S. 649, 711 (1898) (Fuller, J., dissenting) ("As early as the act of January 29, 1795 (1 Stat. 414, ch. 20), applicants for naturalization were required to take, not simply an oath to support the [C]onstitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects.").

[49] "Sometime over the last 30 years, however, the State Department began to acquiesce in, and even to embrace, the retention of dual nationality at the time of naturalization, to the point that it now informally advises aspiring new citizens that they can of course retain their original nationality." David A. Martin, *Dual Nationality: TR's "Self-Evident Absurdity"* (Oct. 27, 2004), *reprinted in* UVA LAW., Spring 2005, https://www.law.virginia.edu/static/uvalawyer/html/alumni/uvalawyer/sp05/martin_lecture.htm [https://perma.cc/7LDZ-YGNB].

[50] *See* PETER J. SPIRO, AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP 32 (2016) ("As Acting Secretary of State James D. Porter instructed the U.S. minister to Switzerland in 1885, 'Of this election, two things are to be observed; when once made it is final, and requires no formal act, but may be inferred from the conduct of the party from whom election is required.'" (quoting 3 JOHN BASSETT MOORE & FRANCIS WHARTON, DIGEST OF INTERNATIONAL LAW 545–46 (1906))).

[51] *See* Expatriation Act of 1907, § 2, Pub. L. No. 59-193, 34 Stat. 1228, 1228 ("That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."); Nationality Act of 1940, § 401, Pub. L. No. 76-

the Supreme Court later held that the State Department could not "require a citizen by nativity to elect between dual citizenships upon reaching a majority,"[52] and it invalidated the "statutory sections providing for involuntary expatriation."[53] One might consider whether the greater availability of dual citizenship affects what it means to be subject to the jurisdiction of the United States or whether the principle should be understood from the perspective of a Congress that did not expect dual citizenship generally to be available.

Second, how does the requirement that birth or naturalization occur "in the United States" affect aliens detained at the border but released into the country pending a hearing? Courts have held that the Citizenship Clause applies only to those born in the states or in territories "destined for statehood" but not in unincorporated territories.[54] The question then arises as to how the Citizenship Clause would apply to the child of "an alien who is detained shortly after unlawful entry" or who arrived at a port of entry and is then

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853, 54 Stat. 1137, 1168 (enumerating circumstances under which "[a] person who is a national of the United States, whether by birth or naturalization, shall lose his nationality"); Immigration and Nationality Act of 1952, § 350, Pub. L. No. 82-414, 66 Stat. 163, 269 (providing that "[a] person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-years" unless he meets certain criteria).

[52] Mandoli v. Acheson, 344 U.S. 133, 138 (1952).

[53] Afroyim v. Rusk, 387 U.S. 253, 255 (1967); *see also* Vance v. Terrazas, 444 U.S. 252, 260 (1980) ("In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.").

[54] Fitisemanu v. United States, 1 F.4th 862, 877 (10th Cir. 2021); *see also* Tuaua v. United States, 788 F.3d 300, 306 (D.C. Cir. 2015) ("Even assuming a background context grounded in principles of *jus soli*, we are skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States's sphere of sovereignty—even where, as is the case with American Samoa, ultimate governance remains statutorily vested with the United States Government."). Congress has statutorily extended citizenship to those born in certain territories. *See, e.g.*, 8 U.S.C. § 1402.

paroled into the country pending a determination of admissibility.[55] Such an alien is legally "treated as if stopped at the border"[56] because an "alien 'paroled' into the United States pending admissibility ha[s] not effected an 'entry.'"[57] One might then consider whether the child of such an alien would be born subject to the jurisdiction of the United States.[58]

Third, what is the effect of the statutory enactment of the language of the Citizenship Clause?[59] The First Circuit has said that "in construing § 1401(a)," a court ought to focus on "what the unusual phrase 'subject to the jurisdiction thereof' was understood to mean when § 1401(a) became law in 1952" and when Congress first enacted that language in a statute "in the Nationality Act of 1940."[60] There is a basic interpretive problem with that approach.[61] It would be surprising to discover that Congress departed from the constitutional standard by enacting the exact constitutional language. And it would be more surprising still if those congressional enactments which sought to restrict the possibility of dual nationality simultaneously liberalized the circumstances under which the children of alien parents received American

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[55] DHS v. Thuraissigiam, 591 U.S. 103, 140 (2020).

[56] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

[57] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (quoting Leng May Ma v. Barber, 357 U.S. 185, 188–89 (1958)).

[58] *Cf.* CLEMENT LINCOLN BOUVÉ, TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS 421–25 (1912) (arguing that "a child born in detention pending the deportation of the alien mother" is not a citizen because "presence under detention does not constitute residence; and, therefore, its relations to the United States do not partake of the nature of allegiance, and consequently fall short in laying the foundation for the existence of that protection without which the child could not, it would seem, be correctly said to be 'subject to the jurisdiction of the United States'").

[59] *See* 8 U.S.C. § 1401(a) (providing that "a person born in the United States, and subject to the jurisdiction thereof," shall be a national and citizen at birth).

[60] Doe v. Trump, 157 F.4th 36, 60 (1st Cir. 2025).

[61] *See* Hall v. Hall, 584 U.S. 59, 73 (2018) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947))); *see also* George v. McDonough, 596 U.S. 740, 746 (2022).

citizenship.[62] But the understanding of "subject to the jurisdiction" that prevailed in 1940 and 1952 will be of concern to litigants and scholars.

The Supreme Court may resolve the legality of Executive Order 14,160 before these questions receive the full attention of scholars. The Court, no doubt, will have the benefit of the views of able attorneys and many amici curiae. But the detailed consideration of the contributors to this Issue provides a solid foundation on which the debate can proceed.

[62] *See* SPIRO, *supra* note 50, at 6 ("[T]he nationality acts of 1940 and 1952 made it almost impossible under U.S. law to actively maintain another nationality without forfeiting one's U.S. citizenship.").