BY BIRTH ALONE: THE ORIGINAL MEANING OF BIRTHRIGHT CITIZENSHIP AND SUBJECT TO THE JURISDICTION OF THE UNITED STATES

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ABSTRACT

The Citizenship Clause of the Fourteenth Amendment entrenched birthright citizenship into the Constitution. Building on a recent revisionist scholarly literature, President Trump's Executive Orders, including Order 14,160, have asserted that the scope of birthright citizenship should be understood to exclude children born on American soil to parents who are either unauthorized to be in the country or authorized to be in the country for only a limited purpose and period. This asserted limitation of birthright citizenship is at odds with the original meaning of the Fourteenth Amendment and the antecedent common-law rule of nativity that the language of the Fourteenth Amendment embodied and declared.

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INTRODUCTION

There is a conventional wisdom about the original meaning of the Citizenship Clause of the Fourteenth Amendment.[1] But that conventional wisdom has long been questioned by some,[2] and that dissenting view now informs President Donald Trump's recent Executive Order purporting to strip citizenship from children born in the United States to parents who are unauthorized aliens by requiring the federal government to deny citizenship documents

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[1] *See, e.g.*, Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996); MARTHA S. JONES, BIRTHRIGHT CITIZENS (2018); Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331 (2010); James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367 (2006); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008); Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719 (2012); Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016); Evan D. Bernick, Paul Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings* (Apr. 21, 2025) (unpublished manuscript) (on file with the *Harvard Journal of Law & Public Policy*); Gerard N. Magliocca, *Without Domicile Or Allegiance: Gypsies and Birthright Citizenship*, 49 HARV. J.L & PUB. POL'Y 539 (2026) (all offering a version of birthright citizenship that children born in the United States are citizens at birth, with few exceptions reserved for specialized circumstances).

[2] *See, e.g.*, PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT (1985); Patrick J. Charles, *Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L.J. 211 (2012); Mark Shawhan, *By Virtue of Being Born Here: Birthright Citizenship and the Civil Rights Act of 1866*, 15 HARV. LATIN AM. L. REV. 1 (2012) (summarizing consensualist understandings of citizenship contemporary to the Fourteenth Amendment); John C. Eastman, *Born in the USA? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955 (2008); William Ty Mayton, *Birthright Citizenship and the Civil Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); Kurt L. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2026); Randy Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html [https://perma.cc/EW9E-RANX] [hereinafter Barnett & Wurman, *Trump Might Have a Case*]; Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L & PUB. POL'Y 315 (2026) [hereinafter Wurman, *Jurisdiction*].

for such individuals.[3] Unsurprisingly, given the issuance of the Executive Order, some new defenders of its legality have emerged.

The conventional wisdom is right, and the Executive Order is wrong. Children born within the territory of the United States are natural-born citizens except under very narrow exceptions. Those historically recognized exceptions do not include the case of unauthorized aliens, and there is nothing about the logic of those exceptions that make them analogous to the modern situation of unauthorized aliens.

This Article reinforces the traditional view of the narrow exceptions to birthright citizenship by reconsidering the common law and statutory precursors that the constitutional language of the Fourteenth Amendment was understood to recognize and entrench. In particular, it pushes back against the new, revisionist view that alien parents must owe a robust form of allegiance to the United States and be members of the polity in order for their infants born within the United States to receive the benefit of birthright citizenship.[4] This is a misreading—and indeed a reversal—of the common law rule that the Fourteenth Amendment embodies.

Central to the modern debate is the question of how the textual qualification "subject to the jurisdiction of the United States" should be interpreted.[5] The English common law rule that had been carried into American legal practice recognized a very small set of exceptions to the baseline rule that individuals born on English soil were natural-born subjects. The language in the Fourteenth Amendment carried those exceptions forward in the new constitutional text, while implicitly recognizing a new one to account for the anomalous status of Native American tribes in American territory. These so-called "exceptions" to the birthright citizenship rule are better understood as scope conditions for the

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[3] Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

[4] *See, e.g.*, Wurman, *Jurisdiction*, *supra* note 2, at 372 (seeking to establish that birthright citizenship "depended largely, even if not exclusively, on the status of the parents as being within the allegiance and under the protection of the sovereign.").

[5] U.S. CONST. amend. XIV, § 1.

broader rule. They are not ad hoc carve outs, but rather indicate where the boundary to the underlying principle and logic of birthright citizenship can be found. That underlying principle is one in which individuals who are born within the governing authority of the nation, who are thereby subject to its jurisdiction, are—by virtue of that fact—natural-born citizens and not aliens.

This Article develops this originalist argument by examining the English and American sources that developed, conveyed, and explained the rule of birthright citizenship. The Article situates the adoption of the Fourteenth Amendment against both that well-established legal backdrop and the political challenges to it that had arisen as a result of slavery. The argument proceeds in several parts. Part I provides an overview of the conventional wisdom regarding birthright citizenship that is at odds with President Trump's Executive Order No. 14,160 and the revisionist theory that supports it. Part II examines how pro-slavery theories challenged traditional notions of birthright citizenship in the United States, and thus prompted the inclusion of a Citizenship Clause in the Fourteenth Amendment in order to reaffirm the traditional rule. Part III considers whether the "subject to the jurisdiction" language is best understood to embody a "no foreign allegiance" rule and concludes that it does not. Part IV considers whether that language is best understood to adopt a requirement of "welcome and obedience" for aliens and concludes that it does not.

I. THE CONVENTIONAL WISDOM AND THE REVISIONIST THEORY

The Fourteenth Amendment says that "[a]ll 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."[6] By this constitutional language, birthright citizenship is vested in those who are born "in the United States" and "subject to the jurisdiction thereof." Although the actual constitutional text

[6] U.S. CONST. amend. XIV, § 1.

embodying this rule was new with the Fourteenth Amendment, the underlying rule itself is not novel at all. Indeed, the rule of birthright citizenship was understood to be the longstanding status quo in the United States prior to the adoption of the Fourteenth Amendment. The Fourteenth Amendment was intended to reaffirm this longstanding common law rule regarding birthright citizenship and not to modify it in any important way.

Admittedly, there is no specific intention on the part of the Reconstruction Congress to extend citizenship to the children of unauthorized aliens. That was not their problem to consider. As is generally the case, modern interpreters must consider the original meaning of the text and the legal rule it embodies.[7] From an originalist perspective, the first critical issue is to ascertain a correct understanding of the rule as laid down by the constitutional founders and ratified by the people. There is necessarily judgement that must then be exercised to determine the implications of that rule for potential future—and often unforeseen—applications that arise over time. The disagreement between the conventional and revisionist views over birthright citizenship is less about contested applications, though, than about the meaning of the rule itself.

A. The Conventional Wisdom

There were three notable controversies in the early United States regarding birthright citizenship, and it was one of these controversies that eventually led to the drafting of the Fourteenth Amendment in order to resolve it. None of these historical controversies is particularly significant to, or informative of, current immigration debates. The first involved the problem of the transfer of sovereignty with the American Revolution and the possibility of claiming American citizenship by the "right of

[7] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 35 (1999); *see also* Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807 (articulating and clarifying the modern conception of "original public meaning" and originalist theory).

election."[8] The second involved the traditional English rule—"repugnant to the natural liberty of mankind" according to many early Americans[9]—that dictated "perpetual" allegiance to a sovereign and denied the possibility of renouncing natural-born citizenship, or the "right of expatriation."[10] The third was the question of whether race or the status of slavery created an exception to the birthright citizenship rule. Was it the case, as Attorney General Edward Bates put it, that the "fact of African descent [is deemed to] be so incompatible with the fact of citizenship that the two cannot exist together?"[11] The Supreme Court in *Dred Scott v. Sandford* had infamously suggested that this was true, which necessitated the language in the Fourteenth Amendment to settle the matter in the other direction.[12] On those matters—of the right of election, of the right of expatriation, and of race—there was extensive discussion and argument about the extent to which the American rule of birthright citizenship departed from the English rule. Otherwise, though, the American rule was understood simply to mirror the English rule. As the Fourteenth Amendment was being adopted, British Lord Chief Justice Alexander Cockburn wrote a study on nationality and aliens and observed simply and uncontroversially that, "[t]he law of the United States of America agrees with our own."[13]

The rule of birthright citizenship—with the possible exception of the question of race—was the same before and after the adoption of the Fourteenth Amendment. As Attorney General Bates

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[8] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *40–41 (N.Y., Alex. S. Gould 6th ed. 1848); Respublica v. Chapman, 1 U.S. 53, 53 (Pa. 1781); M'Ilvaine v. Coxe's Lessee, 8 U.S. 209, 212–13 (1808).

[9] 2 KENT, *supra* note 8, at *44.

[10] 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 90 (1803).

[11] Citizenship, 10 Op. Att'y Gen. 382, 398 (1862).

[12] 60 U.S. 393, 403 (1857) ("The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [*sic*] by that instrument to the citizen?").

[13] ALEXANDER COCKBURN, NATIONALITY 12 (London, William Ridgway 1869).

characterized the law in 1861, the "true principle" is "that every person born in the country is, at the moment of birth, *prima facie* a citizen."[14] "That *nativity* furnishes the rule, both of duty and of right, as between the individual and the government, is a historical and political truth so old and so universally accepted that it is needless to prove it by authority."[15] Nonetheless, "for the satisfaction of those who may have doubts upon the subject,"[16] the Attorney General provided the conventional authorities, most notably the *Commentaries* of James Kent on American law,[17] the *Commentaries* of William Blackstone on English law,[18] and the 1608 opinion of Chief Justice Edward Coke in *Calvin's Case* that was foundational to both.[19]

Attorney General Bates emphasized, in order to counter the pro-slavery views of those like Chief Justice Roger Taney, that "*prima facie*, every person in this country is born a citizen."[20] He "who denies it in individual cases assumes the burden of stating the exception to the general rule."[21] "There are but a few exceptions commonly made," and those were "the small and admitted class of the *natural born* composed of the children of foreign ministers and the like."[22] Attorney General Bates did not tarry over the "small and admitted class" of those children "and the like" because they did not matter for his particular purposes, but he knew that "few exceptions" to the "general rule" were well known in the law and very few indeed.[23]

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[14] Citizenship, 10 Op. Att'y Gen. at 394.

[15] *Id.* (emphasis in original).

[16] *Id.*

[17] *Id.* (citing 2 KENT, *supra* note 8, at *39–128).

[18] *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *365).

[19] *Id.* (citing Calvin v. Smith (1608) 77 Eng. Rep. 377 (KB)).

[20] *Id.* at 396.

[21] *Id.* at 396–97.

[22] *Id.* at 397 (emphasis in original).

[23] *Id.* Professor Lash seems to think it is significant that Attorney General Bates did not attempt to exhaustively list the exceptions to the common-law rule. Perhaps such exceptions were just "undefined" and could be developed by later political actors. Lash, *supra* note 2, at 32–34. There is no reason to think that Attorney General Bates meant to

The rule and its exceptions were plainly stated by James Kent, one of the most recognized legal authorities of the period.[24] His treatise was based on lectures first delivered at Columbia Law School in the 1790s and it was continuously revised afterward. He died while preparing the sixth edition for publication, but new editions continued to be produced throughout the nineteenth century and retained their central place in American law.[25] Kent restated the rule that "[n]atives are all persons born within the jurisdiction and allegiance of the United States."[26] Being born within the "jurisdiction and allegiance" of the country gave rise to two specific exceptions. The "rule of the common law" worked on the citizenship status of an infant "without any regard or reference to the political condition or allegiance of their parents, with the

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suggest any innovative new exceptions to the traditional rule as opposed to just simply stating the conventional understanding familiar to lawyers of his day. He was explicit that he only meant to state what was a "universally accepted" "political truth." Citizenship, 10 Op. Att'y Gen. at 394. Indeed, avoiding political debates over what personal characteristics of an individual might "disenfranchise" them from natural-born citizenship was the entire point of his opinion, given that Chief Justice Taney and others had their own ideas about what characteristics might be disqualifying from citizenship.

It is worth noting that an official 1885 Digest of the Opinions of the Attorneys General published by Congress describes Attorney General Bates as having concluded that "[a] child born in the United States of alien parents, who have never been naturalized, is, by the fact of birth, a native-born citizen of the United States, entitled to all the rights and privileges of citizenship." DIGEST OF THE OFFICIAL OPINIONS OF THE ATTORNEYS-GENERAL OF THE UNITED STATES 58 (Wash. D.C., Gov't Printing Off. 1885).

[24] *See, e.g.*, Judith S. Kaye, *Commentaries on Chancellor Kent*, 74 CHI.-KENT L. REV. 11, 29 (1998). (James Kent was "referred to as an American Blackstone" and "the founder of American equity jurisprudence").

[25] Kent's son, William Kent, resigned from a faculty position at Harvard Law School to help his father compile the sixth edition in what proved to be James Kent's final year. William brought the sixth edition to print the next year, and produced subsequent editions on his own until his own death. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 554 n.38 (1993).

[26] 2 KENT, *supra* note 8, at *39. This language first appeared in the posthumous sixth edition of the Commentaries. The fifth edition stated only that natives are "all persons born within the jurisdiction of the United States." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 38 (N.Y., W. Osborn 5th ed. 1844). It is not obvious that the addition of "allegiance" altered Kent's basic point, but it was more technically consistent with *Calvin's Case*.

exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent."[27] He goes on to take note of the second recognized exception, that of "children born in the armies of a state while abroad, and occupying a foreign country, [who] are deemed born in the allegiance of the sovereign to whom the army belongs."[28] As the international law theorist Emmerich de Vattel summarized:

> [C]hildren born out of 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.[29]

To these two common exceptions was added a third, one peculiar to the American context: the status of children born within the geographic territory of the United States but to parents in a Native American tribe.[30] They were within the territory, but not within the jurisdiction, of the United States. They were in "Indian country."[31]

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[27] 2 KENT, *supra* note 8, at *39 n.a. This footnote first appears in the sixth edition, praising the opinion in *Lynch v. Clarke*, 1 Sand. Ch. 584, 639 (N.Y. Ch. 1844), as particularly "learned[]." *Lynch* was published the same year as the fifth edition, and thus would have been known to Kent as he worked on the sixth, but it is unclear who added the footnote. Regardless, the footnote, and the reference to *Lynch*, was an integral part of Kent's *Commentaries* for more than two decades leading up to the drafting of the Fourteenth Amendment.

[28] 2 KENT, *supra* note 8, at *42.

[29] 1 EMMERICH DE VATTEL, THE LAW OF NATIONS 102 (§ 217) (Phila., T. & J.W. Johnson 6th ed. 1844) (1758).

[30] The relevant "tribes" here were political entities that were understood to be quasi-foreign in character, and thus children born within the jurisdiction of a tribe were aliens to the United States.

[31] As Professor Garrett Epps explains, "Indian country . . . was not a general description but a term of art" to reference geographic areas within the United States where "Indian title has not been extinguished." Epps, *supra* note 1, at 364 (quoting the Trade and Non-Intercourse Act of 1834, Pub. L. No. 23-161, § 1, 4. Stat. 730, 730–35). Indians within Indian country "were 'considered to be members of separate political communities and not part of the ordinary body politics of the states or of the United

As Senate Judiciary Committee Chairman Lyman Trumbull explained, "[w]e have had in this country, and have to-day, a large region of country within the territorial limits of the United States, [which is] unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them."[32] As Senator Trumbull explained, such children—born of those for whom the government of the United States does "not pretend to exercise any civil or criminal jurisdiction," even if they are within the territory of the United States—are not natural-born citizens.[33]

Unauthorized aliens do not fall within any of those three exceptions in the conventional view. Such aliens are not foreign emissaries with diplomatic immunity. They are not members of an occupying army in the service of a foreign state. They are not members of a quasi-foreign Indian tribe. As a consequence, children of such aliens who are born within the territory of the United States fall within the general rule of being natural-born citizens.

B. The Revisionist Theory

So goes the conventional wisdom, but there is a revisionist theory that would challenge that view. The revisionist view points out that immigration restrictions were uncommon up through the time of the adoption of the Fourteenth Amendment, and thus would not have been straightforwardly accounted for by the discussions of the time.[34] A legal regime of immigration restrictions creates a new factual situation into which the original meaning of the constitutional text must be integrated. Unauthorized aliens might

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States.'" *Id.* (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 641 (Rennard Strickland & Charles F. Wilkinson eds., 1982)).

[32] CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull).

[33] *Id.*

[34] *See* Wurman, *Jurisdiction*, *supra* note 2, at 319, 361–62.

be conceptualized as either analogous to a recognized exception to the general rule of birthright citizenship (e.g., they are like an invading army) or in a conceptual space implicit in the principle that structures the general rule and its recognized exceptions such that a new exception can now be made explicit.

The revisionist view turns on a question of what "allegiance" to the United States was required of parents within its territory by the "subject to the jurisdiction thereof" clause. John Eastman, a close advisor to President Trump, has long argued that "subject to the jurisdiction thereof" requires what he calls "complete" jurisdiction and excludes those who owe allegiance to a foreign sovereign.[35] More recently, some originalists have spun the language of the opinion of Attorney General Bates to suggest that jurisdiction does not extend to those aliens who do not "come in amity" and give "no obedience or allegiance to the country when they entered."[36]

The revisionist view is sometimes characterized as the "consensualist" approach to citizenship, in that it would emphasize the rejection of feudalistic notions of allegiance arising from blood or soil and instead emphasize a more liberal theory that makes mutual consent a precondition for allegiance. On this view, a proper republic should rest on "consensually based political membership."[37] Most significantly for present purposes, this means that the Citizenship Clause of the Fourteenth Amendment "expresses a constitutional commitment to citizenship based on mutual consent—the consent of the national community as well as that of the putative individual member."[38] Whether the "children of illegal and temporary visitor aliens" are birthright citizens should,

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[35] John C. Eastman, *The Significance of "Domicile" in* Wong Kim Ark, 22 CHAP. L. REV. 301, 303 (2019) [hereinafter Eastman, *Significance*]; *see also* Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 TEX. REV. L. & POL. 135, 208–09 (2019).

[36] Barnett & Wurman, *Trump Might Have a Case*, *supra* note 2.

[37] SCHUCK & SMITH, *supra* note 2, at 1.

[38] *Id.* at 6.

under this view, be understood to be "a matter of congressional choice rather than of constitutional prescription."[39]

The revisionist approach contends, in part, that the language of the Fourteenth Amendment should be informed by the language of the Civil Rights Act of 1866. It is uncontroversial that the Fourteenth Amendment was partially inspired by the desire of the Reconstruction Congress to put the Civil Rights Act of 1866 on firmer constitutional footing.[40] Indeed, some have argued that the Fourteenth Amendment did nothing more than constitutionalize the terms of the earlier Act.[41] The Civil Rights Act of 1866 stated, "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."[42] The positive language of the Fourteenth Amendment that sweeps in those "subject to the jurisdiction of the United States" might simply be understood as the converse of the negative language of the 1866 statute that excludes those "subject to any foreign power."[43] Any other reading, it is contended, would, in fact, make the "subject to the jurisdiction" language "redundant" since it would otherwise be enough to simply say "born . . . in the United States."[44] The revisionist view maintains that the Fourteenth Amendment requires "full and complete jurisdiction,"[45] which is to say that the individuals subject to it must not "ow[e] allegiance to anybody else."[46] Foreign nationals—though present within the territory of the United States—owe allegiance to their foreign sovereign unless and until

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[39] *Id.* at 5.

[40] John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389 (1992) ("Virtually everyone agrees that Section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866.")

[41] RAOUL BERGER, GOVERNMENT BY JUDICIARY 30 (1977).

[42] Civil Rights Act of 1866, Pub. L. No. 39-11, § 1, 14 Stat. 27–29.

[43] *Id.*

[44] John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 18, at 2 (Mar. 30, 2006) [hereinafter Eastman, *From Feudalism to Consent*].

[45] CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard).

[46] *Id.* at 2893 (statement of Sen. Trumbull).

they renounce that allegiance and naturalize into American citizenship; as a consequence, on this view, they are not within the "full and complete jurisdiction" of the United States.[47]

A second strand of revisionist argument would focus our attention less on parental *allegiance* than on parental *obedience*. A fully consensualist theory of citizenship would require the consent of the individual who seeks to join a community and the consent of the community that individual is seeking to join. Renouncing foreign allegiances and domiciling in the United States might be necessary conditions for foreign nationals to seek and obtain admittance into the American community, but those actions alone are not sufficient. The earlier wave of revisionist theory holds the door open for Congress to choose to create mechanisms by which the community might welcome the new arrivals through naturalization processes.[48] This more recent wave emphasizes that a lack of consent on the part of the community has already been expressed by the existence of restrictive immigration laws. Therefore, there can be no "mutual consent" in the case of illegal aliens of various stripes. Those individuals have already been told that they are not even welcome to be in the country, let alone to join the community and become citizens.

According to this strand of the argument, aliens do "not come in amity" when they "are present in the United States illegally."[49] They demonstrate by their very presence that they do not recognize the obligation of "allegiance" to the local laws, which is one of the

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[47] Eastman points out a softer version of this theory that would distinguish foreign nationals who have domiciled in the United States and made it their "permanent home," effectively entering into the American political community, from those who are temporarily sojourning in the United States. Eastman, *Significance*, *supra* note 35, at 305; *see also* Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L.J. 1351, 1353–54 (2010).

But Eastman himself would not admit that foreign nationals who are domiciled in the United States are, in fact, within the full and complete jurisdiction of the United States. For Eastman, making the United States your permanent home is not sufficient to absolve you of foreign allegiances. Eastman, *Significance*, *supra* note 35, at 306.

[48] Eastman, *From Feudalism to Consent*, *supra* note 44, at 8.

[49] Barnett & Wurman, *Trump Might Have a Case*, *supra* note 2.

correlative "obligations" that "constitute the all sufficient bond of union between the individual and his country."[50] When aliens enter into American territory, they "enter into a social compact" in which they exchange "'local' protection while in the lands" for "local obedience or allegiance to the sovereign."[51] Foreign nationals who do not give "local obedience" forfeit any claim to "protection;" that is, they hold themselves out as not subject to the jurisdiction of the United States.[52] They therefore must "find protection elsewhere, from some other government."[53] "Persons coming into the realm in violation of the laws and against the wishes of the polity as expressed in its laws" are not, properly speaking, subject to the jurisdiction of the United States.[54] They are not part of the social compact; they are not—indeed, they cannot be—members of the community. On this view, unauthorized aliens who enter the country "through an act of defiance" of immigration laws are conceptually equivalent to members of an invading army who likewise refuse to recognize or respect "one of the core rights of sovereignty—to control who enters the territory."[55]

Revisionists have contended that the constitutional language of "jurisdiction" is at least ambiguous, and if a rule is ambiguous then we can properly take into account the "consequences" of alternative formulations of the rule in determining how to resolve the ambiguity.[56] If the meaning of "jurisdiction" is ambiguous, then Professors Barnett and Wurman argue we should choose an interpretation that will rid it of any "feudalistic and archaic" ideas such that citizenship might follow from an so-called "accident of

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[50] Citizenship, 10 Op. Att'y Gen. 382, 395 (1862).

[51] Randy E. Barnett & Ilan Wurman, *Birthright Citizenship: A Reply to Critics*, VOLOKH CONSPIRACY (Feb. 18, 2025), https://reason.com/volokh/2025/02/18/birthright-citizenship/ [https://perma.cc/3UE5-2HQG] [hereinafter Barnett & Wurman, *Reply to Critics*].

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

birth."[57] The conventional view generally holds that there is a clear historical rule with a small number of equally clear and narrow exceptions to the rule. The revisionist view, by contrast, suggests that the presence of exceptions indicates "inexplicable anomalies," and thus we must reconceptualize the rule so as to better explain these exceptions.[58]

The revisionist theory relies on two key claims, neither of which is consistent with the original meaning of the Fourteenth Amendment's text. The first claim is that individuals are only "subject to the jurisdiction of the United States" if they owe no allegiance to any foreign sovereign. The second claim is that individuals are outside the jurisdiction of the United States if they are not sufficiently obedient to American law. Neither claim is persuasive.

C. The American Birthright Citizenship Rule in Depth

The Fourteenth Amendment was understood by its proponents to be declaratory of a preexisting common-law rule of birthright citizenship, one derived from England and continued in America.[59] The revisionist theory ignores or distorts that common-law rule. In order to clarify where the revisionist account goes astray, it is necessary to recapitulate the original meaning of the rule that was conveyed through the text of the Fourteenth Amendment that "all persons born or naturalized in the United States, and subject to the

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[57] *Id.*

[58] *Id.*

[59] CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull) ("[T]he bill now under consideration is but declaratory of what the law now is . . . ."). In this regard, the proponents simplified things as a descriptive matter. As already noted, American law as it had developed after the Revolution had already departed from some features (which are irrelevant for these purposes) of the ancient common law. *See supra* Section I.A. Moreover, the state of the existing American law on birthright citizenship was contested in regard to race, and from the congressional Republican perspective, Chief Justice Taney and his ilk were wrong about American law on this front. *See infra* Section II.B.

jurisdiction thereof, are citizens of the United States."[60] William Blackstone[61] stated the issue plainly:

> 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, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.[62]

As a first cut, individuals within the domains of the English king were either aliens or natural-born subjects. Natural-born subjects are simply those who were born within the king's dominion and were under his protection at the time of birth. The natural-born subject might eventually be required to take express oaths of allegiance, but obligations of allegiance for such individuals were natural and immediate from the moment of birth. Blackstone continued:

> [T]he law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage,

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[60] U.S. CONST. amend. XIV, § 1.

[61] It is fitting to begin with William Blackstone's *Commentaries*, called by some scholars "the bible of American lawyers," as it was widely known and cited by lawyers and Congressmen at this time. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 4 (2d ed. 1996).

[62] 1 WILLIAM BLACKSTONE, COMMENTARIES *367 (emphasis in original).

> and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing it's performance.[63]

According to Blackstone, natural allegiance arises from the debt of protection which the infant, born within the king's realm, owes to the sovereign who provided that protection. Additionally, as Blackstone stated:

> 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.[64]

Allegiance, within the language of the English law, came in two varieties. "Natural allegiance" was just described and is descriptive of the natural-born subject. Before an individual is even capable of choosing to be a citizen and to offer allegiance through an explicit oath, that individual already possesses a natural relationship to the sovereign of his birth. He owes debts of allegiance and obedience to that sovereign, and the sovereign, in turn, has duties of protection to that subject. "Local allegiance," by contrast, is the term of art for the duty of an individual temporarily within a sovereign's realm to obey the local law. "Local allegiance is such as is due from an alien, or stranger born, for so long as he continues within the king's dominion and protection: and it ceases, the instant

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[63] *Id.* at *368–69 (internal citations omitted).

[64] *Id.* at *369 (internal citations omitted). It is this traditional rule that allegiance cannot be "cancelled . . . by any change of . . . place" that Americans rejected through a right of expatriation. *See id.*

such stranger transfers himself from this kingdom to another."[65] Allegiance, whether natural or local, arises from "an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully."[66] To Blackstone, for the natural-born subject, the prince owes protection throughout the subject's life no matter where the subject might travel. The natural-born subject traveling abroad remains the king's subject and continues to owe the king allegiance and obedience; thus, the subject can rightfully expect protection in return. The local allegiance owed by the alien, by contrast, exists "only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire."[67] When the alien crosses the border and departs the king's realm, the "local allegiance" and its reciprocal bonds of protection and obedience immediately come to an end.

This body of English law had a clear and important implication: "The children of aliens, born here in England, are generally speaking, natural-born subjects, and entitled to all the privileges of such."[68] The conclusion that locally-born children of aliens are natural-born subjects followed from the logic of the rules of allegiance and protection. As Blackstone describes it, aliens within the realm owed local allegiance, or obedience, to the sovereign, and the sovereign owed them protection so long as they were within his dominion.[69] Children born to such aliens were situated exactly the same as children born to natural-born subjects.[70] Such children were immediately upon birth under the sovereign's protection, but unlike their parents, that protection was not merely local and temporary. And the natural debt of gratitude for such protection offered by the sovereign in infancy would be repaid through the

[65] *Id.* at *370 (internal citations omitted).
[66] *Id.*
[67] *Id.*
[68] *Id.* at *373 (internal citations omitted).
[69] *Id.* at *370.
[70] *Id.* at *373.

individual's natural allegiance.[71] The "general principle" of the English law, according to Blackstone, is "that every man owes natural allegiance where he is born."[72]

Blackstone notes it is only "generally speaking" true that the locally born children of aliens are natural-born subjects.[73] There were a very small number of exceptions, and the exceptions were determined by the same logic of natural and local allegiance. Aliens generally owe local allegiance to the sovereign.[74] They owe obedience to the local government and can claim protection from the local government so long as they are present within its jurisdiction.[75] Children born within that umbrella of protection are not aliens, but natural-born subjects.[76]

But there are categories of aliens who do *not* owe local allegiance while within the king's dominion and thus neither offer obedience nor receive the king's protection. They exist outside the local law. Children born to such aliens likewise receive no protection from the government and thus have no debts of allegiance to the sovereign. Children born in such circumstances have no mutual and natural claims of protection and obedience to the sovereign over the territory of their birth. The duties of protection for them in their infancy fall entirely on the alien parents' own sovereign.

The guiding principle for identifying aliens who fall within such an exception is that those who enter into a king's domain in service of a foreign prince do not owe local allegiance, but are simply under the obedience and protection of the foreign prince. This is true of the "king's embassadors."[77] The ambassador, "though in a foreign country, owes not even a local allegiance to the prince to whom he is sent."[78] The ambassador's children born abroad while the

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[71] *Id*. at *369.
[72] *Id*. at *373.
[73] *Id.*
[74] *Id*. at *370.
[75] *Id.*
[76] *Id*. at *373.
[77] *Id.*
[78] *Id.*

ambassador is in the king's service are, therefore, natural-born subjects of the king the ambassador represents. The ambassador in the king's service is "at home," even when he is abroad.

The deeper source of the common-law rule was the work of Sir Edward Coke, particularly his opinion in *Calvin's Case*.[79] *Calvin's Case* involved the question of whether Robert Calvin, who was born in Scotland in 1607, qualified as a natural-born subject in England once the Scottish and English thrones were united by King James I.[80] Coke explained that Calvin was a natural-born subject because he was born within the allegiance of King James I.[81] Coke observed that it is not "the soil, but *ligeantia* and *obedientia* that make the subject born."[82] Broadly, this meant there are "three incidents to a subject born."[83]

> 1. That the parents be under the actual obedience of the King.
> 2. That the place of his birth be within the King's dominion.
> And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom.[84]

As Coke noted in his *Institutes*, an alien is "one borne in a strange countrey under the obedience of a strange prince or countrey," one

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[79] Calvin v. Smith (1608) 77 Eng. Rep. 377 (KB). On the implications of Coke, see generally Benjamin Keener, *Calvin's Case and Birthright Citizenship*, 174 U. PA. L. REV. ONLINE 17 (2025).

[80] *Calvin's Case*, 77 Eng. Rep. at 377.

[81] *Id.* at 407.

[82] *Id.* at 384.

[83] *Id.* at 399.

[84] *Id.*

born "out of the ligeance of the king."[85] But one born within the king's ligeance "is no alien" but is rather a natural-born subject.[86]

The "ligeance" necessary to create the ties of a natural-born subject required circumstances of "actual obedience," but again the term "actual obedience" captured the mutual obligations of obedience and protection. Thus, being within the "actual obedience" of the king meant being in territory actually possessed and governed by the king. "It is termed actual obedience, because, though the King [of] England hath absolute right to other kingdoms or dominions, as France, Aquitai, Normandy, [et]c. yet seeing the King is not in actual possession thereof, none born there since the Crown of England was out of actual possession thereof, are subjects to the King of England."[87]

The fact that a sovereign might *claim* authority over some territory is not sufficient to make people born there his natural-born subjects. The sovereign must actually have possession of the territory and govern it to create the mutual ties of protection and obedience. Likewise, "any place within the King's dominions without obedience can never produce a natural subject."[88] Thus, "if any of the King's Ambassadors in foreign nations, have children there of their wives, being English women, by the common laws of England they are natural-born subjects, and yet they are born out-of the King's dominions."[89] The king's ambassadors abroad are "without obedience" to the local sovereign, and similarly, the foreign sovereign's ambassadors in England are "without obedience" to the English king and not recognized as his natural-born subjects.[90]

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[85] EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 129a (London, M.F.I.H. & R.T. 1633) (capitalization modernized).

[86] *Id.* at 129b. Coke here emphasizes that it is not birth within the king's realm of England itself that matters but birth within the king's dominions where "ligeance" is owed. *Id.*

[87] *Calvin's Case*, 77 Eng. Rep. at 399.

[88] *Id.*

[89] *Id.*

[90] *Id.*

Moreover, "if enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience."[91] Children born of invaders in territory occupied by an invading foreign army are aliens, not natural-born subjects. Though the territory on which they are born might belong to the king, that land was not in actual obedience to the king or under the king's actual protection at the moment of their birth. They were born outside the king's governance, or as Coke described it, "[o]ut of the ligeance of the king."[92] They were not subject to the jurisdiction of the king, because the king could not reach them so long as the territory was held in an enemy's hands.

The status of children born to English loyalists in such a situation of occupied territory was more complicated and contested under English common law. When taking note of the movement of British forces across American territory during the Revolution, Justice Joseph Story posited that "the capture and possession by the British was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance indeed to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance. It did not annihilate their allegiance to the state of South Carolina, and make them de facto aliens."[93]

One early English case argued, "[i]f the king be expelled by force and another usurps, yet the allegiance is not taken away, though the law be taken away."[94] Similarly, Blackstone argued that an English subject might be forgiven for obeying a "king *de facto*" and

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[91] *Id.*

[92] COKE, *supra* note 85, at 129a.

[93] Shanks v. DuPont, 28 U.S. 242, 246 (1830).

[94] *Case of the Postnati* (1608) (KB), *reprinted in* 2 COBBETT'S. ST. TR. 570 (London, T.C. Hansard 1809).

usurper, but would still owe primary allegiance to his rightful prince even if that prince is "out of possession" of his territory.[95]

Michael Foster, by contrast, seems to have construed the status of the de facto king somewhat more generously. "[I]n that respect natural Allegiance differth nothing from that we call local. For Allegiance considered in every Light is alike Due to the Person of the King; and is paid, and in the Nature of Things must constantly be paid, to that Prince who for the Time being is in the Actual and Full Possession of the Regal Dignity."[96] Without examining cases "which will be considered as Exceptions" to the "General Rule" of "Allegiance founded in Birth," Foster thought the "Equity of the Crown" should hold out "Mercy to Individuals" who found themselves in border cases.[97]

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[95] 4 WILLIAM BLACKSTONE, COMMENTARIES *77.

[96] MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES 184 (Dublin, Sarah Cotter 1767).

[97] *Id*. Mercy might suggest that children of English subjects born in occupied territory should be brought into the fold of natural allegiance if they were able to escape across enemy lines or if the territory could be retaken. Political realism, if not mercy, might counsel in favor of enforcing rules of treason vis-à-vis de facto kings, while wiping away a history of temporary allegiance in order to avoid the difficulties of a population of de jure aliens on recaptured English soil. If invaders and usurpers can be driven back into the sea, then the sovereign would prefer to minimize any lingering political and legal legacy of the occupation. Treating the children of loyalists born under the occupation as natural-born subjects is a path to normalcy. For competing views, *see* A.M. Honore, *Allegiance and the Usurper*, 25 CAMBRIDGE L.J. 214 (1967). From the other direction, Charles Molloy observed:

> If the King of England enters in a hostile manner the Territories of another Prince or State, and any be born within any of the Places or Guards possessed by the King's Army, they are looked upon in Law to be within his Protection, and such Person born is a natural born Subject of England; but then he must be of Parents Subjects, not hostile. CHARLES MOLLOY, DE JURE MARITIMO ET NAVALI: OR, A TREATISE OF AFFAIRS MARITIME AND OF COMMERCE 375 (London, Abel Swalle 1690).

The bounds of the king's dominion might be a function of conquest, but children born under his protection were his natural born subjects. Children born to enemy combatants or prisoners of war within that English-occupied territory, on the other

The 1860 edition of Chancellor Kent's influential *Commentaries on American Law* summarized this doctrine simply. "Natives are all persons born within the jurisdiction and allegiance of the United States."[98] That edition, which would have been in the hands of the drafters of the Fourteenth Amendment, includes an extended footnote pointing out that "[t]his is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent."[99] This "general rule" was likewise "the governing principle or common law of the United States" and the "system of national jurisprudence."[100] The American doctrine recognized the same logic and exceptions as the English. Kent continued:

> To create allegiance by birth, the party must be born, not only within the territory, but within the allegiance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs.[101]

As Kent glossed Coke, "[t]o make a subject born, the parents must be under the actual obedience of the king, and the place of birth be within the king's obedience as well as within his dominions."[102]

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hand, were like those of invading armies on English soil; they were alien enemies who owed allegiance to a foreign sovereign.

[98] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (Bos., Little, Brown & Co. 10th ed. 1860) (citing Calvin v. Smith (1608) 77 Eng. Rep. 377 (KB)).

[99] *Id.* at 1 n.a (citing *Calvin's Case*, 77 Eng. Rep. at 377).

[100] *Id.*

[101] *Id.* at 4.

[102] *Id.* at 4 n.d.

Significantly, Kent points out the requirements of "local obedience" in the American context as well:

> During the residence of aliens among us, they owe a local allegiance, and are equally bound with natives to obey all general laws for the maintenance of peace and the preservation of order, and which do not relate specially to our own citizens. This is a principle of justice and of public safety universally adopted; and if they are guilty of any illegal act, or involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country.[103]

Kent is clear that while within territory governed by the United States, aliens were subject to American law and owed obedience to American law in the same fashion as the native-born.

These rules of obedience and protection could have complicated, and sometimes undesired, consequences. Shortly after the adoption of the Fourteenth Amendment, for instance, a district court in Oregon was confronted with the case of an individual born in 1823 in Fort George in the disputed Oregon territory to a British employee of the British Hudson Bay Company who wanted to vote in an American election as an American citizen.[104] The key question was whether "he was born upon the soil, and subject to the jurisdiction of the United States."[105] Although Oregon was claimed by the United States, it was at the time of his birth governed by "joint occupation."[106] This "joint occupation" presented a challenge:

> As to the British subject and his children born here, the country was for the time being British soil, while to the American citizen and his offspring it was in the same sense

[103] *Id.* at 26.
[104] McKay v. Campbell, 16 F. Cas. 161 (D. Or. 1871).
[105] *Id.* at 163.
[106] *Id.* at 164.

> American soil. Neither government was entitled to exercise any authority over the citizens or subjects of the other, or to assert the power and rights of a sovereign over them, or their effects, within this particular territory.[107]

The court dispensed of the "joint occupation" issue:

> When it is said that by the common law a person born of alien parents, and in the allegiance of the United States, is born a citizen thereof, it is necessarily understood that he is not only born on soil over which the United States has or claims jurisdiction, but that such jurisdiction for the time being is both actual and exclusive, so that such person is in fact born within the power, protection and obedience of the United States.[108]

The court concluded that "mere *place* of birth cannot impose allegiance or confer citizenship," for that place must be "at the time of its birth under the power or protection of the United States."[109]

The court grounded its discussion of citizenship in its understanding of the Fourteenth Amendment. The Fourteenth Amendment, the court wrote, "is nothing more than declaratory of the rule of the common law" as found in Coke and Kent.[110] Its language regarding "subject to the jurisdiction" conveyed this longstanding idea that "a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience."[111] In the "singular" circumstances of the disputed Oregon territory, an alien could be born within the territory of the United States but outside

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[107] *Id.*
[108] *Id.*
[109] *Id.* (emphasis added).
[110] *Id.* at 165.
[111] *Id.*

its "jurisdiction" because the United States did not pretend to govern English residents of that territory.[112]

More troublesome, the default English and American rule meant that if American citizens bore children while traveling abroad, those children were born out of the jurisdiction of the United States, and were therefore aliens. They were "borne in a strange countrey, under the obedience of a strange prince."[113] In both England and America, the common-law rule was supplemented by statute in order to address the problem. This was the point of Horace Binney's widely cited paper on naturalization from just before the Civil War.[114] To Americans traveling abroad, Binney warned that "the state of the law in the United States is easily deduced" from the common law, and citizens by birth included only those "born within the limits and under the jurisdiction of the United States."[115] "Under the jurisdiction of the United States" simply captured the common law principle of territory "under the actual obedience" of the relevant sovereign.[116] St. George Tucker had made the same point decades before, observing that those "children of citizens of the United States born out of the limits and jurisdiction of the United States" required the intervention of legislation to make them citizens, for their children would be "aliens by birth, [as] are all persons born out of the dominions of the United States."[117] This was likewise understood to be the rule immediately after the adoption of the Fourteenth Amendment: "by the common law a person born out of the dominions and jurisdiction of the United States, and under the actual obedience of a foreign king, is an alien, *though his parents were American citizens*."[118]

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[112] *Id.* at 164.

[113] COKE, *supra* note 85, at 129a (capitalization modernized).

[114] *See generally* HORACE BINNEY, THE ALIENIGENÆ OF THE UNITED STATES UNDER THE PRESENT NATURALIZATION LAWS (Phila., C. Sherman 2d ed. 1853).

[115] *Id.* at 20.

[116] *Id.* at 16.

[117] 1 ST. GEORGE TUCKER, *supra* note 10, at 101.

[118] Letter from William A. Richardson, Sec'y of the Treasury, to Pres. Ulysses S. Grant (Oct. 20, 1873), *reprinted in* 2 CONG. SERIAL SET, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1208 (1873) (emphasis in original).

Conversely, as the judge in a widely cited 1844 case concluded, "every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen."[119] This New York case, *Lynch v. Clarke*, was the leading antebellum decision regarding the citizenship status of children born of alien parents while on a temporary sojourn in the United States, and it was relied on not only by Kent in his *Commentaries*, but by federal officials.[120] The case involved a dispute over the disposition of a New York property owner's land. At the time, such real property could only be inherited by a citizen, and the unusual question presented was whether a niece who had been born in America but raised in Ireland by her Irish parents qualified as a natural-born citizen capable of inheriting real property in New York.[121] The court concluded that neither her parentage nor her brief stay in the country altered the fact that she became a citizen by virtue of her birth on American soil: "Birth in this country does of itself constitute citizenship . . . . No one asks whether his parents were citizens or foreigners. It is enough that *he was born here*, whatever were the *status* of his parents."[122] Similarly, the Secretary of State noted shortly after passage of the Fourteenth Amendment, that "the child born of alien parents in the United States is held to be a citizen thereof and to be subject to duties with regard to this country which do not attach to the father."[123]

The common law rule regnant in both England and the United States from the founding through the Civil War, and incorporated into the Fourteenth Amendment, was both well-known and clear. Those born within "actual obedience" of the local sovereign, within

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[119] Lynch v. Clarke, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844).

[120] On use of the *Lynch* case, see Bernick et al., *supra* note 1.

[121] *Lynch*, 1 Sand. Ch. at 583 (as the Chancery Court explained, "the question on the right to inherit, must turn upon the alienage or citizenship of the person claiming to be the heir").

[122] *Lynch*, 1 Sand. Ch. at 663–64 (emphasis in original) (the Court immediately continued by noting that "[t]he universality of the public sentiment in this instance, is a part of the historical evidence of the state and progress of the law on the subject").

[123] Letter from Hamilton Fish, Sec'y of State, to Pres. Ulysses S. Grant (Aug. 25, 1873), *reprinted in* 2 CONG. SERIAL SET, *supra* note 118, at 1192.

territory actually governed by the purported sovereign, are natural born citizens.[124] Those born "out of the limits and jurisdiction" of the United States were aliens unless their situation was addressed by statute.[125] Territorial limits and jurisdiction normally ran together, but in exceptional circumstances it was possible for them to come apart, including when the government exercised no actual sovereignty over a territory, such as a foreign embassy or an invading army's encampment or a disputed territory under the actual control of a foreign government. Such exceptions did not turn on the alien status of a child's parents when born on American territory, but on the political circumstances of their presence on American territory. An alien ungoverned by American law does not produce natural-born American children, but few aliens walking on American territory can assert the claim of not being subject to the jurisdiction of American law.

II. *DRED SCOTT* AND CITIZENSHIP BY BIRTH ALONE

The first clause of the Fourteenth Amendment is a direct response to Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford*.[126] Whether the Republican Congress needed to "overturn" the decision through a constitutional amendment, or merely needed to clarify and settle the law in the aftermath of the jumble of opinions

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[124] KENT, *supra* note 98, at 4 n.d.

[125] 1 ST. GEORGE TUCKER, *supra* note 10, at 101. Henry St. George Tucker, the son of St. George Tucker, later described the traditional birthright citizenship rule as at odds with "natural reason" since Tucker thought that citizenship should properly follow the political status of the parents because "society can only be perpetuated by the children of its members, who naturally follow the conditions of their parents and succeed to their rights." 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA *57 (1836). He thus thought that the children of aliens should likewise "follow the condition and succeed to the rights of his parents," such that the "place of his *birth*" would not necessarily be "his country." *Id*.

[126] 60 U.S. 393 (1857).

in the case, there is no doubt that the Citizenship Clause of the Fourteenth Amendment was a rebuke of Chief Justice Taney.

The fact that Congress was responding to *Dred Scott* in drafting the new constitutional language has three significant features for present purposes. First, Congress decisively settled what had been a contested question and excluded race as a relevant criterion for birthright citizenship. Second, in doing so, Congress entrenched in the Constitution's text the common law rule which had previously been understood to be part of the constitutional background upon which the text rested. Third, Congress effectively settled a legal debate over whether birthright citizenship rested on "birth alone" or whether legislatures had a role in defining, qualifying, and restricting who could be counted as natural born citizens. The Fourteenth Amendment thus imposed a new limitation on the authority of legislatures to define who was a citizen and who was an alien.

A. Dred Scott *and Political Control of Birthright Citizenship*

Chief Justice Taney's opinion in *Dred Scott* was the culmination of a long-running debate in the antebellum years over whether, in the United States at least, there was a racial component to the common law rule of birthright citizenship. This debate reflected a complexity of simply transforming the old English language of "natural-born subjects" into the new American language of "natural-born citizens." Subjects were ruled, but citizens in a republic *governed*. Anyone could be a ruled subject, but not just anyone could exercise the highest political privilege of voting and serving in political office. Did saying that someone was a natural-born citizen necessarily mean they could serve as President or claim full membership in the community of the sovereign people? It was a conceptual puzzle over which Americans divided in the antebellum years.[127]

[127] Attorney General Caleb Cushing noted that "there is occasional confusion of thought, arising from the want of proper attention to the difference between the

Attorney General William Wirt had, in 1821, concluded that "it seems very manifest that no person is included in the description of citizen of the United States who has not the full rights of a citizen in the State of his residence."[128] It was not sufficient to qualify as a citizen under the Constitution and federal statutes to meet the requirements of "nativity, residence, and allegiance."[129] It was also a necessary condition of citizenship that an individual possess "the high characteristic privileges of a citizen of the State," that is, to be granted by state statute and constitution the "rights and privileges of a white man."[130] Most fundamentally, Attorney General Wirt just could not believe that it was possible that native-born "free negroes and mulattoes" could be "eligible to those high offices, and may command the purse and sword of the nation," and so he concluded *something* extra must be at work to prevent that possibility from arising under the Constitution.[131]

Attorney General Jeremiah Black instructed Secretary of State Lewis Cass in 1859 that "a free white person born in this country, of foreign parents, is a citizen of the United States."[132] He cited the New York *Lynch* case as the sole necessary authority on that point.[133] Attorney General Black was no doubt influenced by the congressional determination that only an alien with the status of "being a free white person" could become a naturalized American citizen, a point that was not at issue in the case of the Irish-American niece in *Lynch*.[134]

In his opinion in *Dred Scott*, Chief Justice Taney argued strenuously that the "descendants of Africans" could never be

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enjoyment of mere civil rights, the right of suffrage, and the right of citizenship as a political status of persons, independent of their sex, age, or condition." Right of Expatriation, 8 Op. Att'y Gen. 139, 142 (1856).

[128] Rights of Free Virginia Negroes, 1 Op. Att'y Gen. 506, 507 (1821).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Citizenship, 9 Op. Att'y Gen. 373, 374 (1859).

[133] *Id.*

[134] Naturalization Act of 1802, Pub. L. No. 7-28, § 1, 2 Stat. 153, 153.

understood to be citizens of the United States.[135] They were members of a "subjugated" race and "considered as a subordinate and inferior class of beings."[136] As a consequence, they could never "compose a portion of this people" and be "constituent members of this sovereignty."[137] According to the majority, to know who is a citizen required knowing who "has all the rights and privileges of a citizen of a State";[138] and to know who is a citizen of the United States required knowing "who were then members of the several State communities."[139] On this view, white citizens who are "member[s] of the community who form the sovereignty"[140]—that is, members of the "citizen race,"—are distinguished by law from those of "the African race," who may be "held in subjection and slavery, and governed at [the] pleasure" of the citizen race.[141] Justice Peter Daniel added for good measure that "the African negro race" was introduced into the country "not as members of civil or political society, but as slaves, as property in the strictest sense of the term."[142] Moreover, according to him, "the simple fact of emancipation"[143] could not "create a citizen" without the "co-operation or warrant of the Government."[144]

The federal Constitution of 1787 had referred to "citizens," but had not attempted to define either who were citizens or what citizenship entailed.[145] Congress could naturalize new citizens, and the Constitution recognized the existence of a category of natural-born citizens, but it did not say what qualified someone for that

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[135] 60 U.S. 393, 403 (1857).
[136] *Id.* at 404–05.
[137] *Id.* at 404.
[138] *Id.* at 405.
[139] *Id.* at 406.
[140] *Id.* at 422.
[141] *Id.* at 420.
[142] *Id.* at 475 (Daniel, J., concurring) (emphasis omitted).
[143] *Id.* at 480.
[144] *Id.* at 477.
[145] *See, e.g.*, U.S. CONST. art. II, § 1 ("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").

status.[146] This at least introduced doubt as to whether natural-born citizens were determined by the laws and practices of each state or depended in some fashion on race. The North Carolina Supreme Court had given what once had been a fairly conventional answer to that question in 1838, concluding that "all human beings within [the boundaries of the state] who are not slaves, fall within one of two classes."[147] There could be only aliens and citizens, and "before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their colour or complexion, were native born British subjects."[148] In the *Dred Scott* case, Justice John McLean thought "being born under our Constitution and laws" was sufficient to make someone "a citizen."[149] He argued the "most general and appropriate definition of the term citizen is 'a freeman.'"[150] To be a citizen, one did not have to possess political rights or a specific ancestry; one merely needed to be free and born subject to the jurisdiction of American law. "On the question of citizenship, it must be admitted that we have not been very fastidious."[151] Justice Benjamin Curtis detailed in his dissent that, at the time of the adoption of the Constitution, "free persons, descended from Africans held in slavery" were, in fact, regarded as citizens.[152] Nothing in the Constitution had altered the antecedent state of the law by which "every free person born on the soil of a State" is a citizen.[153]

In fact, in the years leading up to *Dred Scott* and the Civil War, legal opinion in the North and the South increasingly diverged on the question of black citizenship. The most comprehensive study of the subject found that "Northern courts generally acknowledged

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[146] *See id.*; *see also* U.S. CONST. art. I, § 8 (The Congress shall have Power To . . . establish an uniform Rule of Naturalization).

[147] State v. Manuel, 20 N.C. 144, 151 (1838).

[148] *Id.*

[149] *Dred Scott*, 60 U.S. at 531 (McLean, J., dissenting).

[150] *Id.*

[151] *Id.* at 533.

[152] *Id.* at 572 (Curtis, J., dissenting).

[153] *Id.*

black citizenship formally while rejecting democratic notions of the political privileges inherent in that status. Southern courts tended to deny black citizenship altogether."[154] In an early school segregation case, abolitionist lawyer Charles Sumner argued that the Massachusetts high court ought to vindicate the basic principle that the school board "cannot in any way violate that fundamental right of all citizens, Equality before the law" and treat some citizens as an inferior "*caste*."[155] The eminent Chief Justice Lemuel Shaw of Massachusetts did not question this "broad general principle" and conceded that "colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social."[156] But Shaw concluded that "when this great principle comes to be applied to the actual and various conditions of persons in society," it must be recognized that the rights to which any particular individual was entitled "must depend on laws adapted to their respective relations and conditions."[157]

Attorney General Bates followed a similar path when simultaneously emphasizing both that there could be no race exception to American citizenship and also that citizenship did not necessarily imply a maximal set of rights, including the franchise.[158]

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[154] ROGERS M. SMITH, CIVIC IDEALS 255 (1997); *see also* Shawhan, *supra* note 2; Amanda Frost, *Dred Scott's Daughter: Gradual Emancipation, Freedom Suits, and the Citizenship Clause*, 35 YALE J.L. & HUMANS. 812 (2024).

[155] ARGUMENT OF CHARLES SUMNER, ESQ. AGAINST THE CONSTITUTIONALITY OF SEPARATE COLORED SCHOOLS, IN THE CASE OF SARAH C. ROBERTS VS. THE CITY OF BOSTON 21 (Bos., B.F. Roberts 1849) (emphasis in original).

[156] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

[157] *Id.*

[158] Citizenship, 10 Op. Att'y Gen. 382, 384 (1862). The opinion continues:

> [W]ith regard to the right of suffrage, that is, the right to choose officers of government, there is a very common error to the effect that the right to vote for public officers is one of the constituent elements of American citizenship, the leading faculty indeed of the citizen, the test at once of his legal right, and the sufficient proof of his membership of the body politic. No error can be greater than this . . . .. *Id.*

As Bates argued, the identity of the natural-born citizen could not be regulated by law, but the *implications* of citizenship could be.[159] Knowing that someone was a citizen did not, by itself, tell you what rights they had.

Slaveholding states, by contrast, frequently thought that legal restrictions implied a lack of citizenship. The Tennessee Supreme Court, for example, thought that a citizen "in the sense of the constitution" could only mean those "entitled to all the privileges, immunities and rights, civil and political" within the polity.[160] The fact that Tennessee had treated "free negroes" as an "inferior caste" who had never been "allowed the enjoyment of equal rights, or the immunities of the free white citizen" meant *ipso facto* that "the word 'citizen'" was not "applicable to them."[161] Shortly before *Dred Scott*, the long-serving Chief Justice Joseph Henry Lumpkin of Georgia went on at length to explain that a "*free* person of color" in that state labored under "the most humiliating incidents of his degradation" and "severe restrictions" under the law.[162] The slave states necessarily had "our own peculiar policy, in order to fix the condition of a free negro," and only members of the "white population . . . can be *citizens* in this great and growing Republic."[163] In the slave states, "the highest act of sovereignty a government can perform, is to adopt a new member, with all the privileges and duties of citizenship."[164] The Georgia state government had not chosen to bestow those privileges on free blacks: "He resides among us, and yet is a stranger."[165]

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[159] *See id.* at 388 ("The phrase 'a citizen of the United States,' without addition or qualification, means neither more nor less than a member of the nation. And all such are, politically and legally, equal . . . . And as to voting and holding office, as that privilege is not essential to citizenship, so the deprivation of it by law is not a deprivation of citizenship.").

[160] State v. Claiborne, 19 Tenn. 331, 339 (1838).

[161] *Id.*

[162] Bryan v. Walton, 14 Ga. 185, 202, 203 (1853) (emphasis in original).

[163] *Id.* at 204, 206–07 (emphasis in original).

[164] *Id.* at 201.

[165] *Id.* at 202.

B. The Congressional Response and Citizenship by Birth Alone

The new constitutional text of the Fourteenth Amendment made plain that native, as opposed to naturalized, citizens were created by birth alone. Legislatures no longer had the authority, if they ever did, to impose additional qualifications to achieving that status. This limitation is a not insignificant feature of the constitutional rule that did important political work in context. The language of the Fourteenth Amendment cut off the possibility of politicians imposing additional requirements beyond the mere fact of being born within American jurisdiction.

The debate over the Civil Rights Act of 1866 set the stage for the adoption of the Fourteenth Amendment. The first Section of that statute declared 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."[166] The bill sponsor, Senator Lyman Trumbull, argued that the provision was "declaratory of what the law now is" and sought merely to put it beyond question that "birth entitles a person to citizenship, that every free-born person in this land is, by virtue of being born here, a citizen of the United States."[167] When President Andrew Johnson vetoed the bill, he began by objecting that Congress was seeking to "confer" citizenship on many individuals who might be better treated as "strangers to and unfamiliar with our institutions and laws" and needed to "pass through a certain probation" before "attaining the coveted prize" of U.S. citizenship.[168] In response, Senator Trumbull complained that he had not even considered the

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[166] Civil Rights Act of 1866, Pub. L. No. 39-11, § 1, 14 Stat. 27, 27. The language relating to "subject to any foreign power" was designed to exclude Indians. The Senate struggled with how best to express a rule that would clarify that the bill did not apply to those born in Indian tribes, which were understood to be "*quasi* foreign nations" and their members treated "as foreigners" until they were "incorporated into the United States as some are, and are taxable and become citizens." CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull) (emphasis in original).

[167] CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull).

[168] *Id.* at 1679.

declaration necessary, since "all native-born persons since the abolition of slavery were citizens of the United States," but nonetheless "one of the most common of acts passed by legislative bodies" was legislation designed to "provide greater certainty" by "declaring what the law is."[169]

Maryland's Senator Reverdy Johnson, a confidante of President Johnson and an attorney in the *Dred Scott* case,[170] thought the Civil Rights Act was not merely declaratory of the existing law. It was attempting to "declare who shall by a citizen."[171] Senator Johnson argued that the statute—and thus later the Fourteenth Amendment—was making a significant change to existing American law:

> It is not nativity that imparts the character of citizenship alone. There must be added to the fact of nativity, the other fact, that at the time of his birth he is, by the laws of the State in which he is born, a citizen; and the two things concurring, birth and citizenship, by the laws of the State, he becomes, by virtue of the two, a citizen of the United States.[172]

Congress was, in his view, attempting "the exercise of a positive and absolute power to change the law—not to declare what the law was in order to remove doubts, but to make the law."[173] Congress was attempting to declare that citizenship is conferred by "*birth alone*."[174] In doing so, Congress was most immediately attempting to disempower states from their sovereign right to "declare who

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[169] *Id.* at 1756. Senator Trumbull's initial bill did not focus on citizenship but instead declared that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." *Id.* at 211.

[170] *See* Britannica Editors, *Reverdy Johnson*, ENCYC. BRITANNICA (May 17, 2025), https://www.britannica.com/biography/Reverdy-Johnson [https://perma.cc/SF97-EBF9].

[171] CONG. GLOBE, 39th Cong., 1st Sess. 1776 (1866) (statement of Sen. Trumbull).

[172] *Id.* (statement of Sen. Johnson).

[173] *Id.* at 1777.

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

should be her citizens."[175] As Kentucky Congressman Garrett Davis put it, "every State made its own citizens."[176]

The Republican majority disagreed with Senator Johnson about the existing state of the law, but thought he was absolutely right about the rule they were attempting to declare and its implications for future politicians who hoped to restrict citizenship. Maine Senator Lott Morrill "hailed" the 1866 Civil Rights Act as a "lofty and sublime declaration" of "the grand principle both of nature and nations, both of law and politics, that birth gives citizenship by itself."[177] The "native born is a citizen, and a citizen by virtue of his birth alone."[178]

Continuing doubts about whether the Supreme Court would accept the constitutional validity of the Civil Rights Act of 1866 quickly led Congress to adopt the Fourteenth Amendment in an attempt to remove any such concerns. As soon as the citizenship provision was introduced into the Act, Senator Johnson objected that, given what Chief Justice Taney had said in *Dred Scott*, "this law which we are now about to pass will be held of course to be of no avail, as far as it professes to define what citizenship is."[179] That "object can only be safely and surely attained by an amendment of

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[175] *Id.*

[176] *Id.* at 528. (statement of Sen. Davis). Senator Davis was also clear throughout the debates on how that power to make citizens had been exercised: "It is a white man's Government. I say that a negro is not a citizen. He may be made a citizen, by power, but it will be in disregard, I think, of principle." *Id.* The "truth of principle" is that "a mixed population" is not "the governing population, the population that is clothed with political power and political sovereignty." *Id.* Senator Davis denied that Congress even had the authority to naturalize an alien arriving from Africa because "this is a Government and a political organization by white people" and "it is a principle . . . before and below the Constitution, that nobody but white people are or can be parties to it." *Id.* at 530. President Johnson thought Senator Davis wrong on that point as a matter of both constitutional law and public policy. It "would be an extraordinary condition for the country to be in" if "having within the limits of the United States four million people anxious to become citizens," there were no mechanism for making or recognizing their citizenship. *Id.* (statement of Pres. Johnson).

[177] *Id.* at 570 (statement of Sen. Morrill).

[178] *Id.*

[179] *Id.* at 504 (statement of Sen. Johnson).

the Constitution."[180] Congress soon agreed, and when the initial draft of the Fourteenth Amendment was introduced on the floor, Ohio Senator Benjamin Wade thought it wise, given the possibility that the government "should fall into the hands of those who are opposed to views that some of us maintain," that the language of the amendment ought to "fortify and make it very strong and clear" who qualified as a citizen.[181] There "may be danger that when party spirit runs high, it may receive a very different construction from that which we would not put upon it," and thus it was necessary to "put the question beyond all cavil for the present and for the future."[182] Senator Wade's own approach to doing that was to drop the reference to citizenship altogether and require that equal protection be given "to all persons born in the United States or naturalized under the laws thereof."[183] If "party spirit" might in the future cast doubt on who was a citizen, then Senator Wade believed it better to get to the nub of the matter and protect the rights of all persons born in the United States.[184]

The committee brought forward the language "all persons born in the United States and subject to the jurisdiction thereof are citizens" to address Senator Wade's concern.[185] If future politicians could not be trusted to recognize citizens, then it was necessary to specify in explicit text that those born in the United States were, in fact, citizens. When Senator Jacob Howard rose to explain the new language, he simply said that "the question of citizenship has been so fully discussed in this body as not to need any further elucidation."[186] According to Senator Howard, the proposed language was "simply declaratory of what [he regarded] as the law of the land already, that every person born within the limits of the United States . . . is . . . a citizen," excluding only those who were

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[180] *Id.*

[181] *Id.* at 2768 (statement of Sen. Wade).

[182] *Id.* at 2769.

[183] *Id.*

[184] *See id.* at 2768–69.

[185] *Id.* at 2869 (statement of Sen. Howard).

[186] *Id.* at 2890.

"foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States."[187] Indians "who maintain their tribal relations" were, like ambassadors, "not, in the sense of this amendment, born subject to the jurisdiction of the United States."[188] To the suggestion that the past statutory language of "Indians not taxed" captured the rule better, Senator Trumbull objected to making citizenship dependent on legislative decisions about taxation.[189] To the extent that "Indians not taxed" was understood to be a term of art and "did not mean literally excluding those upon whom a tax was not assessed and collected, but rather meant to define a class of persons" in terms of their tribal relations, then Senator Trumbull believed "subject to the jurisdiction" was the clearer and safer language to use.[190] It was "better to avoid these words" if it opened the door to future legislatures being able to pick and choose who might be born a citizen.[191]

The extended debate over black citizenship that led to the *Dred Scott* decision was put to rest by the Fourteenth Amendment. In order to do so, the Reconstruction Congress had to firmly and decisively reject the proposition that "nobody but white people" can be citizens of the United States.[192] It required further rejecting the long-standing argument of pro-slavery advocates that the existing political community could legislatively exclude undesirables from the ranks of the citizenry. It was not enough, these advocates had contended, to be born in the United States. You must also be welcomed here by law and custom.[193] If the Reconstruction Congress had left the qualifications for citizenship

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[187] *Id.*

[188] *Id.*

[189] *Id.* at 2894 (statement of Sen. Trumbull).

[190] *Id.*

[191] *Id.*

[192] *See, e.g.*, *id.* at 530 (statement of Sen. Davis) (illustrating the rejection of this notion in Congressional debate).

[193] For more on this version of "consensualism" married to racial hierarchy, *see* SMITH, *supra* note 154, at 174–181, 253–258.

undefined, they would have left the door open to such views once again gaining political power and consigning, via legislative action, some of those born in the United States to a permanent inferior caste. In drafting the Fourteenth Amendment, they closed that door. They declared birthright citizenship to be the law of the land and beyond the reach of future lawmakers who might think that birth alone was not sufficient to justify someone being included within the ranks of American citizens.[194]

III. SUBJECT TO THE JURISDICTION AND FOREIGN ALLEGIANCE

Does the Fourteenth Amendment's jurisdiction clause require that individuals subject to it owe no allegiance to any foreign sovereign? One strand of the revisionist theory of birthright citizenship insists that "any divided loyalty meant no citizenship."[195] By this account, the parents of a child born in the United States must "not ow[e] allegiance to anybody else" in order

[194] The constitutional text would seem to preclude the possibility of a legislature identifying undesirable classes of individuals otherwise subject to American governing authority as being ineligible for natural-born citizenship. The text would seem to allow a much more complicated effort to add or subtract from the potential reach of the text by altering the reach of American governance, by bringing some in or removing them from the jurisdiction of the United States. Most obviously, changes in the territorial borders of the United States carries with it changes in the population subject to American governance. If Greenland were to become the 51st state, children born in Greenland going forward would be natural born citizens. If Congress were to recognize some self-governing "autonomous zones" within American territory and did not seek to exercise any governing authority within those zones (comparable to how the drafters imagined Indian tribes), then children born within those zones might be outside the scope of the Amendment. Attempting to carve out some new set of individuals or classes of individuals within the American borders as beyond the reach of the American government and laws is perhaps possible, but would require a dramatic and complex legislative scheme to withdraw American authority and create an effective class of what might be characterized as "sovereign citizens." Certainly there is no such scheme currently in place.

[195] Brief of Members of Congress in Support of Defendants as Amici Curiae at 12, Washington v. Trump, 765 F. Supp. 3d 1142 (W.D. Wash. 2025) (No. 2:25-cv-00127-JCC).

for the child to qualify as a natural-born citizen.[196] This claim appeals to the dissent of Chief Justice Melville Fuller in *Wong Kim Ark*, who asserted that the "subject to the jurisdiction" language of the Fourteenth Amendment did not refer to individuals "whose parents owed local and temporary allegiance merely," but only to those whose parents were free of any "tie of permanent allegiance" to a foreign power.[197] Aliens had to be "completely subject" to American "political jurisdiction," which meant that they were "in no respect or degree subject to the political jurisdiction of any other government."[198] This suggested that an alien with a native-born child would have needed, at least, to have "renounced their allegiance to their native country" before the child's birth for that child to receive U.S. citizenship.[199] But Chief Justice Fuller also seemed to suggest that some aliens were "forbidden" from doing so by the system of government and positive laws of their native country, and thus they (and their American-born children) "must necessarily remain . . . subject" to their foreign sovereign and outside the political jurisdiction of the United States.[200] Strikingly, Chief Justice Fuller's argument was grounded—not in the debates surrounding the Fourteenth Amendment or the prior common law tradition—but primarily in international law as it was developing in the mid-nineteenth century and subsequently.[201] He threw out

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[196] *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull) (arguing that Navajoes are not "subject to the jurisdiction of the United States" because they owe allegiance to another entity).

[197] *See* United States v. Wong Kim Ark, 169 U.S. 649, 721 (1898) (Fuller, C.J., dissenting).

[198] *Id*. at 725.

[199] *Id*.

[200] *Id*. The construction of Chief Justice Fuller's hypothetical leaves it somewhat unclear how he would have thought of an alien who had renounced foreign allegiances despite these barriers, since he seems to regard such a hypothetical as exceedingly unlikely, at least with regard to the Chinese generally and Wong Kim Ark specifically in the case at hand. *Id*., at 725-726.

[201] *Id*. at 708. *But see* 2 KENT, *supra* note 8, at *39 n.a. (describing the "right of citizenship" as a "national right," that is "governed by the principles of the common law which prevail in the United States," rather than looking to principles of international law or the law of nations).

the common law tradition as irrelevant to the United States due to the British commitment to perpetual allegiance,[202] ignoring the American longstanding tradition to the contrary.[203] By this account, anyone who remained a citizen of a foreign country did not fall within the "full and complete jurisdiction" of the United States,[204] no matter how long they might reside within the territory of the United States; the allegiance of the child must be understood to flow, not from the place of the child's birth, but from the continued foreign allegiance of the parent, for such aliens and their American-born children "may be subject to the political jurisdiction of a foreign government."[205]

Adjoining a "no foreign allegiance" rule to the Fourteenth Amendment both mischaracterizes the debate surrounding the drafting of the Amendment and misunderstands the common-law rule of birthright citizenship that the Amendment embodied. The legal language of "subject to the jurisdiction" had never excluded the possibility of dual allegiances and had never required the renunciation of foreign allegiances. Those who owed foreign allegiances were routinely made subject to the jurisdiction of British and American law by virtue of their presence with the country, and that tie was sufficient to determine the nativity of any children that those foreign nationals might produce.

A. "Full and Complete Jurisdiction" in Context

Within the context of the congressional debates over the Fourteenth Amendment, arguments regarding the "full and complete jurisdiction" of the United States had a specific contextual meaning and was discussed in light of trying to make sense of the status of Indian tribes. There was no suggestion that the traditional

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[202] *Id*. at 711*; see also* CAROL NACKENOFF & JULIE NOVKOV, AMERICAN BY BIRTH: WONG KIM ARK AND THE BATTLE FOR CITIZENSHIP 121 (2022).

[203] See *supra* notes 2–33 and accompanying text.

[204] CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard).

[205] *Wong Kim Ark*, 169 U.S. at 720 (Fuller, C.J., dissenting).

common-law rule was in any way being altered. The question was how the Indian tribes should be understood as fitting within the traditional common-law rule.

The revisionist claim rests heavily on Senator Howard's remarks on May 30, 1866, in which he said that "'jurisdiction,' as here employed, ought to be construed so as to imply full and complete jurisdiction"[206] and Senator Trumbull's remarks on the same day that, "[w]hat do we man by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."[207] In context, both statements were meant to explain how the birthright citizenship rule applied to Indian tribal nations.[208]

Senator James Doolittle of Wisconsin worried that the "jurisdiction" language applied to "a large mass of the Indian population . . . who ought not to be included as citizens of the United States."[209] "Indians upon reservations," he thought, were "most clearly subject to our jurisdiction, both civil and military."[210] Including "all the wild Indians," Senator William Fessenden admitted, was beyond what anyone was intending to do with the Amendment, and if the proposed language swept that far, it would need to be modified.[211]

It was to alleviate such concerns that Senators Trumbull and Howard spoke. Senator Trumbull thought Senator Doolittle was just wrong in how he described the situation of the Indians:

> We make treaties with them, and therefore they are not subject to our jurisdiction. . . . If we want to control the Navajoes, or any other Indians of which the Senator of Wisconsin has spoken, how do we do it? Do we pass a law

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[206] CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard).
[207] *Id.* at 2893 (statement of Sen. Trumbull).
[208] *See id*. at 2892–97.
[209] *Id.* at 2892 (statement of Sen. Doolittle).
[210] *Id*.
[211] CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Fessenden).

> to control them? Are they subject to our jurisdiction in that sense?[212]

They clearly were not. "[W]ild Indians" could not be subjected to federal laws.[213] The federal government did not "pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another."[214] Indians who were within the treaty-making power and not the lawmaking power of the United States were best understood as owing "allegiance, partial allegiance if you please, to some other Government" and thus were not within the jurisdiction of the United States.[215]

Senator Johnson was more sympathetic to Senator Doolittle's point because he thought it was problematic to suggest that, as a constitutional matter, *any* Indian within the territory of the United States was beyond the jurisdiction of the United States. Senator Johnson agreed with the purpose of the proposed language—which was to settle the traditional rule that citizenship followed from the "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."[216] The question was how to instantiate that rule without sweeping in the Indian tribes. Even if Senator Trumbull was right that the federal government had traditionally dealt with the tribes through treaties, Senator Johnson thought it a mistake to characterize that as a matter of right, rather than choice. The federal government had seen fit thus far to "recognize some kind of national existence on the part of the aboriginal settlers of the United States; but we were under no obligation to do so, and we are under no constitutional obligation to do so now."[217] If the tribes were treated as outside the jurisdiction of the United States, that was at most a legal fiction and one that the courts might not adhere to if a

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[212] *Id.* (statement of Sen. Trumbull).
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* (statement of Sen. Johnson).
[217] *Id.*

case arose in which an Indian asserted citizenship under the language of the amendment.

Senator Trumbull nonetheless thought the language of the proposed Fourteenth Amendment was, on the whole, better and safer than the alternatives. It was clear, he thought, and presumably it would be clear to the courts, that "[i]n some sense they are regarded as within the territorial boundaries of the United States."[218] "[B]ut," he made clear, "I do not think they are subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here."[219] Senator Trumbull continued:

> We have had in this country, and have to-day, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure subject to their own laws and regulations, and we do not pretend to interfere with them. They would not be embraced by this provision.[220]

It was here that Senator Howard picked up the baton to resist the proposal of including additional language in the amendment to further distinguish the case of Indian tribes. Senator Howard "regard[ed] the language as it stands as sufficiently certain and exact."[221] He agreed with Senator Trumbull that "'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."[222] "Certainly," he continued, "gentlemen cannot contend that an Indian belonging to a tribe,

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[218] *Id.* at 2894 (statement of Sen. Trumbull).
[219] *Id.*
[220] *Id.*
[221] *Id.* at 2895 (statement of Sen. Howard).
[222] *Id.*

although born within the limits of a State, is subject to this full and complete jurisdiction."[223] The government had "always regarded and treated the Indian tribes within our limits as foreign Powers" with a "national character" analogous to foreign nations.[224]

Within the context of the debates in Congress, it is clear that the remarks expounding on the scope and meaning of "subject to the jurisdiction thereof" were addressing the specific and peculiar situation of the Indian tribes. Tribes were both within the territory of the United States and yet treated as foreign nations for many purposes.[225] Members of those tribes were likewise treated as subject to the jurisdiction of the tribal government and not to the ordinary jurisdiction of the federal government.[226] The tribes might be under American jurisdiction in some theoretical or ultimate sense, but they were not treated as such in any practical sense.[227] The United States might—at some point in the future—choose to exercise jurisdiction over them, but in 1866 the federal government "d[id] not pretend to interfere with them."[228]

The critical point—accepted on all sides in the 1866 congressional debate—was that Indians born on tribal lands were foreigners to the United States. But the *land* is doing the important work. Indian land is within the *territory* of the United States but is not *governed* by the United States. The revisionist account attempts to convert this rule about sovereign territory into a rule about personal allegiance. Thus, Eastman asserts that "mere birth on U.S. soil is not sufficient to meet the constitutional prerequisites for birthright citizenship,"[229] and asserts that the important question is whether a child could be claimed as a "citizen or subject of the parents' home country."[230] But the Reconstruction Congress was not concerned

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[223] *Id.*

[224] *Id.*

[225] *See id.* at 2894 (statement of Sen. Trumbull).

[226] *See id.*

[227] *See id.*

[228] *Id.*

[229] Eastman, *From Feudalism to Consent*, *supra* note 44, at 4.

[230] *Id.* at 2.

with whether foreign nations had some claim over the allegiances of native-born Americans. They were concerned with whether "Indian country" was governed by American law. In grappling with that problem, they reaffirmed and encapsulated the traditional common-law rule.

B. The Conceptual Error of a "No Foreign Allegiance" Rule

The existence of a foreign allegiance did not remove someone within the territory of the United States from its jurisdiction. The fact that a foreign national within the territory of the United States might owe a foreign allegiance did not alter the fact that they were subject to American jurisdiction so long as they were within the American territory; and the fact that a child born on American soil might also be a citizen of a foreign nation, and owe duties and allegiance to a foreign sovereign, did not exclude them from American citizenship. Individuals who are "subject to a foreign sovereign" could *also* be subject to the jurisdiction of the United States, and children born to parents with those circumstances are American citizens.

The revisionist account seems to rely on some slippage between the concepts of permanent allegiance and local allegiance. In *Calvin's Case*, Coke distinguished between multiple types of allegiances. Two types of allegiance applied to the king's subjects. Some subjects owed allegiance "by nature and birth-right" and others "not by nature, but by acquisition," that is, through an explicit process of naturalization and oath-swearing.[231] Aliens, by contrast, owed a much more limited form allegiance, one "wrought by the law," which required their obedience to the king so long as the alien was within the king's dominion and "within the King's protection."[232] Aliens who were acting in the service of a foreign king did not owe even a local allegiance, though, because they were either ambassadors or invaders.

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[231] Calvin v. Smith (1608) 77 Eng. Rep. 377, 383 (KB).

[232] *Id.*

Within both English common law and the broader global context of the American founding, the allegiance owed by subjects to the king was understood to be perpetual.[233] Americans adopted the then-extraordinary view that it was possible to expatriate and repudiate old allegiances. But the general legal background was one in which aliens residing in, or traveling in, a foreign land always owed a perpetual allegiance to their primary sovereign, even though they simultaneously owed a thinner, local allegiance to the sovereign within whose dominion they found themselves.[234] "Local allegiance" in that sense consisted of little more than an obligation of obedience to the law and a willingness to submit oneself to local governmental and legal authorities for so long as they resided in that sovereign's territory. That is, aliens owing local allegiance to the sovereign were subject to the sovereign's jurisdiction, just like native-born subjects—who owed a great deal

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[233] As Blackstone put it:

> 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. 1 WILLIAM BLACKSTONE, COMMENTARIES *369–70.

See also ROBERT PHILLIMORE, THE LAW OF DOMICIL 21 (Phila., T & J.W. Johnson 1847) ("He cannot shake off his allegiance to his native country, or divest himself altogether of his British character, by a voluntary transfer of himself to another country." (emphasis omitted)); GEORGE BOWYER, COMMENTARIES ON UNIVERSAL PUBLIC LAW 180 (London, V. & R. Stevens & G.S. Norton 1854) ("[T]hough a foreigner becomes subject to the laws and jurisdiction of the country where is, so long as he remains there, yet this position must be understood as not affecting the maxim *nemo potest exuere patriam*." Bowyer continued that "[t]herefore, by the law of England, if the crown send a writ to any subject when abroad, commanding his return, and the subject disobey, it is a high contempt of the royal prerogative, for which the offender's lands shall be seized till he return, and then he is liable to fine and imprisonment.").

[234] 2 KENT, *supra* note 8, at *42–43.

more than local allegiance. In short, an alien, "whilst resident here, is subject to and protected by the municipal law."[235]

Within the common-law context of the Fourteenth Amendment, an alien was always understood as "owing allegiance to another sovereign," while also being subject to the jurisdiction of the United States for as long as the alien was within U.S. territory. Not only was there no conflict between those two legal conditions, those overlapping obligations were pervasive and inherent in the notion of aliens traveling for anything other than the service of their sovereign.

The confusion over whether allegiance to another sovereign might exclude someone from the "subject to the jurisdiction" clause appears to arise out of problem of discussing the status of Indian tribes.[236] It is in that context that Senator Trumbull said that those subject to the jurisdiction of the United States are those "[n]ot owing allegiance to anybody else."[237] But as discussed above, it is apparent that Senator Trumbull thought tribal Indians did not even owe local allegiance to the United States and were treated—not just as resident aliens—but as foreign nations.[238] Members of the Reconstruction Congress seemed loathe to characterize tribal

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[235] JOSEPH CHITTY, A TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES, AND THE CONTRACTS RELATING THERETO 167 (London, Henry Butterworth 1820); *see also* GEORGE HANSARD, A TREATISE ON THE LAW RELATING TO ALIENS AND DENIZATION AND NATURALIZATION 103–04 (London, V. & R. Stevens & G.S. Norton 1844) ("An alien, whilst he resides here, is generally subject to our laws, and owes a local and temporary allegiance to the sovereign by whose authority those laws are administered, and by whom his person and property is protected."); RICHARD WOODDESSON, LECTURES ON THE LAW OF ENGLAND *227 (W.R. Williams ed., Phila., John S. Littell 1842) ("An alien while he resides here, is generally subject to our laws, and owes a local and temporary allegance [*sic*] to our sovereign, by whose authority those laws are administered, and by whom, therefore, he is protected in the enjoyment of such rights as are indulged to him."); 1 VATTEL, *supra* note 29, at 101 (§ 213) ("The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country. Bound to the society by their residence, they are subject to the laws of the state while they reside in it; and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens.").

[236] *See supra* notes 225–30 and accompanying text.

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

[238] See *supra* notes 166–91 and accompanying text.

Indians as owing no allegiance to the United States at all—"partial allegiance if you please"[239]—but it is clear that they understood them as falling outside the rules that would apply to ordinary aliens residing in American territory. They were not like a community of recently immigrated Germans, for example. Such a community would be subject to the lawmaking authority of the United States and the state within which they resided, even though those immigrants might be understood by their home country as owing a perpetual allegiance to it no matter where they might currently reside. By contrast, as members of a "*quasi* foreign nation,"[240] these "wild Indians" were treated through diplomatic relations, and so were necessarily outside of the jurisdiction of the United States.[241]

The treatise writer Thomas Cooley, a key figure in the revisionist case, seems to have been thinking in similar terms. Eastman, for instance, points to Cooley in support of his view of the contemporary understanding of the Citizenship Clause.[242] Cooley does say the following:

> "[A] citizen by birth must not only be born within the United States, but he must also be subject to the jurisdiction thereof; and by this is meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.[243]

But Cooley immediately goes on to say that "[t]he aboriginal inhabitants of the country may be said to be in this anomalous condition, so long as they preserve their tribal relations and

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

[240] CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Van Winkle).

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

[242] Eastman, *Significance*, *supra* note 35, at 304; *see also* Wurman, *Jurisdiction*, *supra* note 2, at Part IV.A.1.

[243] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 243 (1880).

recognize the headship of their chiefs."[244] The "semi-independent character of such a tribe" meant that individual members owed a local "obedience . . . to their tribal head."[245] Cooley does not suggest anyone else is in that "anomalous condition."

The suggestion that "any divided loyalty meant no citizenship" is deeply at odds with how the common-law rule developed.[246] Even when natural-born subjects owed perpetual allegiance to their native sovereign, that did not mean that they could not give an oath of allegiance to a foreign prince. The foreign prince might be willing to accept such a subject, but the risks of such an arrangement fell on the subject. Blackstone warned that a "natural-born subject . . . may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters."[247] In a world of perpetual allegiance, "there cannot, or at least should not be two or more co-ordinate absolute ligeances by one person to several independent or absolute princes" for "the natural-born subject of one prince cannot by swearing allegiance to another prince put off or discharge him from that natural allegiance."[248] But again, the burden fell on the subject to navigate the complications of dual allegiance. He "may entangle himself by his absolute subjecting [of] himself to another prince, which may bring him into great straits."[249]

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[244] *Id.*

[245] *Id.* They were only "semi-independent," however, since Cooley thought tribal Indians still "owe a qualified allegiance to the government of the United States." *Id.*

[246] Brief of Members of Congress in Support of Defendants as Amici Curiae at 7, Washington v. Trump, 765 F. Supp. 3d 1142 (W.D. Wash. 2025) (No. 2:25-cv-00127-JCC).

[247] 1 WILLIAM BLACKSTONE, COMMENTARIES *369.

[248] MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE 67 (Phila., Robert H. Small 1847) (1736).

[249] *Id.* at 68. Exempting citizens with such dual obligations from military service might be akin to a discretionary religious exemption. Rather than putting an individual in "great straits" as a European king might be inclined to do, the American republic might be more generous, especially given the highly controversial character of any American military draft at all in the nineteenth century. Professor Wurman notes that President Lincoln made just such an accommodation, but did not adequately explain its rationale. Wurman, *Jurisdiction*, *supra* note 2, at 370–72.

Americans welcomed the possibility of individuals shaking off the perpetual allegiances of their birth, but that did not mean that foreign sovereigns equally accepted the legitimacy of those individual decisions.[250] A British subject could naturalize into American citizenship but still not be released from the natural allegiance of his birth. The fact that the British subject in such a case had divided loyalties and owed a foreign allegiance was no obstacle to citizenship in American law, though. Similarly, if some foreign sovereign claimed the allegiance of an American citizen born on foreign soil, or of the child of a naturalized citizen born on American soil, that would not alter the child's American citizenship under American law.[251] Children born in America are citizens by birth alone and do not require the consent of a foreign sovereign.[252]

Finally, the revisionist emphasis on no foreign allegiances confuses the relevant situation of the parent and the child. Textually, the Fourteenth Amendment recognizes natural-born citizenship for all persons "born in the United States and subject to the jurisdiction thereof." The crucial question is whether the child born in American territory is subject to American jurisdiction. The default rule—the "prima facie" assumption—is that such a child "at the moment of birth" is an American citizen.[253] Attorney General Bates warned that "it is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in his parents."[254] The child inherits neither foreign allegiance nor American citizenship. The child is born into one or the other, which depends most fundamentally not on the circumstances of the *parent* but on the circumstances of the *child* at

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[250] 2 KENT, *supra* note 8, at *44–45 (recounting cases and finding that if an "emigrant should depart with the desire to expatriate, and actually join himself to another state; that though this be done, it only proved that a man might be entitled to the right of citizenship in two countries . . . [and it] did not prove that his own country had surrendered him").

[251] *See id.* at *47–48.

[252] *Id.* at 42–43.

[253] Citizenship, 10 Op. Att'y Gen. 382, 394 (1862).

[254] *Id.* at 399.

the moment of birth. The only relevant question is: is the child, at the moment of birth, under the governmental authority and protection of the United States? The parent can only negate that extension of jurisdiction by holding themselves "out of the ligeance of the king,"[255] namely by being actively in the service of a foreign power at the time and place of the child's birth. A parent who is part of an occupying army, for instance, successfully holds himself outside the jurisdiction of the local sovereign, and a child born within that occupied territory would likewise fall within the protection and governance of the invading force. A parent who is simply a foreigner in the land can work no such magic. To do so requires an exercise of sovereignty by a foreign power over American soil that does not inhere in the private activities of foreign nationals residing in the United States. Even if one were to grant the claim that an alien with foreign allegiances is not subject to the jurisdiction of the United States, the child of such an alien born in the United States still would be.

Birthright citizenship under the common-law rule, as incorporated into the text of the Constitution by the Fourteenth Amendment, does not depend on the allegiances of the parents. Indeed, the entire history of the common-law rule emphasized that children born of aliens were natives, despite the fact that their parents were neither natives nor subjects themselves and continued to be under foreign allegiances. Despite the alien status of the parents, the native-born child was under the protection of the local government, and it was that extension of jurisdiction by the local government over the infant within its territory that created the bonds of allegiance that determined a natural-born citizen. The extension of that governmental authority did not need to be invited, or even welcomed. It was the natural duty of the local sovereign and a consequence of a functional de facto government.[256] It is a

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[255] COKE, *supra* note 85, at 129a.

[256] It is, of course, possible for the sovereign to abdicate its role and withdraw its protection from the inhabitants of a territory. Such an abdication of sovereignty would, in turn, sever any ties of allegiance. No protection, no allegiance. Individuals born

direct consequence of the sovereign being in "actual possession" of its territory.[257] As the "guardian of all infants," the local sovereign "affords him [protection] from the instant of his birth," and "whoever is born within the king's power or protection is no alien."[258]

IV. ALIENS IN AMITY AND LOCAL ALLEGIANCE

Is Fourteenth Amendment jurisdiction abrogated if individuals do not display sufficient obedience to the local sovereign? Professors Barnett and Wurman contend that the American rule rests on an "allegiance-for-protection theory" that requires the allegiance of individuals on American territory in order for them to receive protection. This is a mischaracterization of the common law rule, and it effectively reverses the order of operation for those born within American territory.

A. Aliens in Amity

Central to the Barnett and Wurman thesis is that the rise of general legal restrictions on immigration create unforeseen challenges as to how the traditional birthright citizenship rules might apply. The framers of the Fourteenth Amendment, and the common law sources upon which they drew, did not anticipate the modern legal regime of immigration laws that broadly excludes individuals from entering the country without specific

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under such circumstances would be the natural-born citizens (or subjects) of whatever entity was exerting protective authority over that territory. *See* HALE, *supra* note 248, at 60 ("[I]t is treason for any subject, while the usurper is in full possession of the sovereignty, to practice treason against his person."); *see also* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 897 (Bos., Little, Brown & Co. 1863) ("[T]he true correlatives are sovereignty and subjection: if the subjection be withdrawn, and so admitted, the sovereignty is gone; if the sovereignty be removed, then is the subjection gone; and the subjection being gone, the people owing no subjection are no longer subjects, for they are all correlatives, which cannot exist without each other.").

[257] Calvin v. Smith (1608) 77 Eng. Rep. 377, 399 (KB).

[258] CHITTY, *supra* note 235, at 109.

authorization.[259] The drafters of the Fourteenth Amendment could not have addressed such a case directly, and the question arises as to how the broad legal rule that was articulated and ratified might apply to this new fact situation. Or perhaps more specifically, does the case of unauthorized immigrants fall within an exception to the broad rule that individuals born within U.S. territory are thereby natural-born citizens? Such a situation is clearly not within the traditional set of exceptions, but "[w]hy would the set be closed? The question is the principle of law that governs them, and whether that applies to these new situations."[260] They contend that "[u]nlawful [e]ntrants" are best seen as analogous to "an invading army," which is among the traditional exceptions, because like an invading army, unlawful entrants "did not come in amity."[261] On this view, whether a child is born in American territory depends on "the status of a child's parents."[262] Most notably, it depends on whether the parents are "foreigners who came in 'amity'—friendship."[263] We should understand the common law principle, they conclude, as one of granting birthright citizenship only to children born within the territory of aliens in amity, and aliens who are uninvited are necessarily not aliens in amity.

The idea of amity cannot do the work that Professors Barnett and Wurman want it to do. Sir Edward Coke in *Calvin's Case* did observe that "when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other."[264] The early nineteenth-century editor of Coke's *Institutes* noted that whether an alien "be in amity or not" was

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[259] *See* Wurman, *Jurisdiction*, *supra* note 2 at 319.

[260] @Ilan_Wurman, X (Mar. 3, 2025, 04:54 ET) https://x.com/ilan_wurman/status/1896680691607151070 [https://perma.cc/BAH9-T84R].

[261] Barnett & Wurman, *Trump Might Have a Case*, *supra* note 2.

[262] Barnett & Wurman, *Reply to Critics*, *supra* note 51; *see also* Wurman, *Jurisdiction*, *supra* note 2 at 326–27.

[263] Barnett & Wurman, *Trump Might Have a Case*, *supra* note 2.

[264] Calvin's Case (1608) 77 Eng. Rep. 377, 383 (KB).

determined, for example, by "a proclamation of war."[265] The ability to sue in court was one marker of an alien's good standing in the country and in a status of amity. But notably, "a proclamation prohibiting commerce" did not have a similar legal effect to a declaration of war on an alien and did not "disable" them from personal actions in the courts.[266]

Coke's reference to an "alien that is in amity" is later simply referred to as "alien friends." Joseph Chitty thus summarized Coke as dividing "the inhabitants of a state: Every man is either *alienigena*, an alien born, or *subditus*, a subject born: every alien is either a friend that is in league, or an enemy that is in open war."[267] The leading English treatise on the law of aliens in the early nineteenth century states plainly that:

> Aliens are, however, of two kinds; alien friend and alien enemy.
> An alien friend is one with whose sovereign the Crown of England is at peace.
> An alien enemy is one whose sovereign is at enmity with the Crown of England; and to constitute a person an alien enemy it appears that open acts done by his prince are sufficient; and that is not necessary that war should be proclaimed . . . .[268]

As Blackstone had earlier pointed out, "when I mention these rights of an alien, I must be understood [as speaking] of alien-friends only, or such whose countries are in peace with ours; for alien-enemies have no rights, no privileges, unless by the king's special favour, during the time of war."[269] St. George Tucker in his

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[265] COKE, *supra* note 85, at 129b n.2.

[266] *Id.*

[267] CHITTY, *supra* note 235, at 108.

[268] GEORGE HANSARD, A TREATISE ON THE LAW RELATING TO ALIENS, AND DENIZATION AND NATURALIZATION 100 (London, V. & R. Stevens & G.S. Norton 1844).

[269] 1 WILLIAM BLACKSTONE, COMMENTARIES *372; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *68 (stating that "violation of *safe-conduct* or *passports*, expressly

American edition of Blackstone's *Commentaries* likewise pointed out that "an alien, whose nation is in amity with England," is "clearly and indisputably entitled to the full protection of the laws in every matter that respects his personal liberty, his personal security, and his personal property."[270] Oxford's Vinerian Professor of English Law Richard Wooddesson, in his *Lectures on the Law of England*, similarly added to his discussion of the rights of aliens in England:

> What I have hitherto said of the privileges of aliens, applies only to such strangers whose state is in amity with our sovereign: for an alien enemy cannot, in reason, be entitled to any privilege or protection from our laws, except, perhaps, as to atrocious attempts on his life, or in other flagitious cases. But an alien enemy, who comes here by letters of safe conduct, or resides here by the king's license, may maintain an action" in the courts.[271]

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granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war; or committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct; these are breaches of the public faith"). Blackstone continued that:

> [I]t is farther enacted by the statue . . . that if any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obedience, against any stranger in amity, league or truce, or under safe-conduct; and especially by attacking his person, or spoiling him, or robbing him of his goods; the lord chancellor, with any of the justices of either the king's bench or the common please, may cause full restitution and amends to be made to the party injured. *Id.* at *69–70.

[270] 1 ST. GEORGE TUCKER, *supra* note 10, at 98.

[271] WOODDESSON, *supra* note 235, at 219. *See also* 1 HERBERT BROOM & EDWARD A. HADLEY, COMMENTARIES ON THE LAWS OF ENGLAND 450 (London, William Maxwell & Son, Henry Sweet & Stevens & Sons 1869) ("These rights however can be exercised by alien friends only, or such whose countries are at peace with ours; for alien enemies have no rights, no privileges, unless by the special favour of the sovereign during the time of war.").

Reviewing the English cases, Matthew Hale traced the difference between aliens in amity and alien enemies and specifically how they were subject to the jurisdiction of English law. The distinction had particular salience in the context of the offense of high treason, those being offenses "against the person or government of the king."[272] Natural-born subjects could, of course, be tried for high treason.

> Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his alligeance to be true and faithful to the king," and commission of such offenses is "a breach of the trust, that is owing to the king . . . against that faith and alligeance he owes to the king.[273]

Aliens, too, could be subject to trials for high treason, *if* they were aliens in amity. "If an alien, the subject of a foreign prince in amity with the king, live here, and enjoy the benefit of the king's protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance."[274] By contrast, "if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor alligeance."[275]

This discussion draws out that aliens in amity were those subject to the ordinary law, precisely because they owed obedience and allegiance to that law while present in the territory. The only alternative to aliens in amity in the common law tradition was that of alien *enemies*, and they were distinguished by the fact that they were subject to the law of war and not the ordinary, municipal law. As foreign enemies, they owed no allegiance or obedience if they made their way into the territory and thus should be treated

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[272] HALE, *supra* note 248, at 59.
[273] *Id.*
[274] *Id.*
[275] *Id.*

accordingly. Though, notably, even "the subject of a foreign prince [who] lives here as a private man, and then war is proclaimed betwixt our king and that foreign prince, and yet that alien continues here in *England* without returning to his natural sovereign," he lives in the country "under the cover and protection of the king of *England*" and "by continuing here he continues the owning of his former local allegiance."[276] Even an alien enemy who lives in the territory as "a private man" during a state of open war owes local obedience and allegiance and to that degree is no different than an alien in amity.[277]

Whether aliens are "in amity" is first and foremost a question of international relations. Aliens are in amity if their home country is not in declared or de facto war with the United States. Individual aliens as private citizens cannot alter that status. Alien friends are converted into alien enemies as a consequence of the actions of the sovereign to which they belong, not as a consequence of their own private conduct. Even though an alien hailing from a country at peace with the United States cannot, as a private actor, make war upon the U.S. and become an alien enemy, an alien enemy can, through their private actions within the American territory, demonstrate that they are still functionally an alien in amity.[278]

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[276] *Id.* at 60. Similarly, Hale writes:

> [M]erchants of a hostile country found in [England] at the beginning of the war shall be attached without harm to their body or goods, till it be known, how the *English* merchants are used in the hostile country; and if the *English* merchants be well used there, theirs shall be likewise used here; so that in this case such merchants, though alien enemies, have the benefit of the king's protection, and so owe a local alligeance, which, if they violate, they may be dealt with as traitors, not as enemies, for they have the advantage of the king's protection, as well as his other subjects. *Id.*

[277] *Id.* ("[I]f the subject of a forein [*sic*] prince lives here as a private man, and war is proclaim[e]d betwixt our king and that forein [*sic*] prince, and yet that alien continues here in *England* without returning to his natural sovereign, but under the cover and protection of the king of *England* . . . by continuing here he continues the owning of his former local allegiance." (emphases in original)).

[278] *See id.*

Unless an individual alien resident in the United States engaged in warlike conduct themselves, they were subject to the ordinary jurisdiction of the laws and owed the ordinary obligations of local allegiance and obedience that any other resident alien owed.

The logic of this common-law principle can give rise to edge cases beyond the traditional exceptions discussed in the birthright context, but those edge cases only emphasize just how disanalogous the case of unauthorized aliens is. An alien might, for example, join a non-state actor that functions as if it were a sovereign state capable of engaging in war. In our immediate history, for example, an international terrorist group like Al Qaeda might wage a de facto war against the United States despite not being a sovereign state in its own right; thus, members of that group might be regarded as alien enemies even though their country of origin, like Saudi Arabia, is not itself in a state of war with the United States.[279] An active member of Al Qaeda found on American soil in 2002 might therefore be treated as an unlawful combatant rather than as a criminal. If an active member of Al Qaeda gave birth on American soil in 2002, there might be reasonable grounds for concluding that the child would not be born "subject to the jurisdiction" of the United States and thus would not be a natural-born citizen because the parents were de facto, if not de jure, part of an invading army with no obligations of local allegiance to American laws.

The case of Perkin Warbeck fits in a similar category. Warbeck was a pretender to the English throne and used as a pawn of

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[279] On the uncertainty relating to the status of members of groups like Al Qaeda, see Mark Weisburd, *Al-Qaeda and the Law of War*, 11 LEWIS & CLARK L. REV. 1063, 1064–65 (2007) (concluding that Al Qaeda are more like combatants of war than criminals); *see also* Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1, 72–73 (2011) (characterizing international terrorists as "enemies" rather than "combatants"); Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 1–2 (2004) (characterizing international terrorists as unlawful enemy combatants); Ruth Wedgwood, *Combatants or Criminals? How Washington Should Handle Terrorists: Fighting a War Under its Rules*, 83 FOREIGN AFF. 126, 126 (2004) (arguing that a "war is in fact raging, and criminal law is too weak a weapon").

various European monarchs to destabilize King Henry VII. Finally, in 1498, he landed in Cornwall with a military force of several hundred men in an effort to rally local noblemen to his cause and claim the English crown. His incursion failed, and he was captured and eventually executed.[280] The Warbeck case is of some interest because it is discussed by Coke in *Calvin's Case* as an example of someone "being an alien born in Flanders" who had "invaded this realm with great power" and was considered as having been "taken in the war" and thus "could not be punished by the common law."[281] As an "alien enemy come to invade this realm," Warbeck "never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity."[282] Therefore he was "put to death by martial law,"[283] not by common law. Hale cites Warbeck's case as an example of an "alien enemy" and not "a traitor, because he violates no trust nor alligeance."[284] Some revisionists have pointed to the Warbeck case as evidence that an individual's "unlawful" "mere presence" puts that individual outside the jurisdiction of the laws,[285] but that clearly mischaracterizes the case. Warbeck was executed not because of his "mere presence" but because *he actively tried to topple the English government with a small army*. He was treated as being under martial law and not municipal law because the English authorities understood him to be an alien enemy and a combatant, not an alien friend and a criminal. In Warbeck's case, he was not treated as an agent of a foreign sovereign openly at war with England, but he

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[280] For additional scholarship on Perkin Warbeck, see generally Rachel Morgan, *Pretenders and Punishments*, 18 VULCAN HIST. REV. 54 (2014); J.E. Cussans, *Notes on the Perkin Warbeck Insurrection*, 1 TRANSACTIONS ROYAL HIST. SOC'Y 57 (1872); JAMES GAIRDNER, HISTORY OF THE LIFE AND REIGN OF RICHARD THE THIRD 263 (Cambridge, Cambridge Univ. Press 1898).

[281] Calvin v. Smith (1608) 77 Eng. Rep. 377, 384 (KB).

[282] *Id.*

[283] *Id.*

[284] 1 HALE, *supra* note 248, at 59.

[285] *See* Brief of Members of Congress in Support of Defendants as Amici Curiae at 9, Washington v. Trump, 765 F. Supp. 3d 1142 (W.D. Wash. 2025) (No. 2:25-cv-00127-JCC).

was nonetheless an alien enemy conducting a de facto war as a kind of non-state actor.

One might similarly imagine the nineteenth-century phenomenon of "filibustering." A nineteenth-century journalist characterized the "filibuster" as a "type of adventurer," a "citizen or subject of any country, who makes war upon a state with which his own is at peace, with intent to overrun and occupy it, not merely for the piratical ends of rapine and plunder."[286] "Such [an] act of war is, by the law of nations, a crime against both countries."[287] William Walker, an American, is perhaps the most notorious example, having led mercenary armies into Mexican-held California and later into Nicaragua with a goal of setting himself up as the president of a new republic.[288] The Caracus-born Narciso López had similar ambitions and met his fate in Cuba.[289] For a time, there was fear that would-be (and likely home-grown) filibusters would turn their sights on domestic governments.[290] By definition, such private military adventurers are non-state actors who would ordinarily be alien friends on the shores upon which they arrive but for their own actions.

If a force of foreign mercenaries landed in New Haven and attempted by military force to seize a chunk of American territory as their own, they could properly be treated not as mere criminals who violated their duties of local allegiance and obedience, but as unlawful enemy combatants—despite hailing from foreign nations that are at peace with the United States. If a baby were born in New Haven, Connecticut to filibustering parents who had temporary control over the territory, that baby could plausibly be treated as an alien and not a natural-born American. The baby's alien parents held themselves outside the jurisdiction of the United States and in

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[286] JAMES JEFFREY ROCHE, THE STORY OF THE FILIBUSTERS 1 (London, T. Fisher Unwin, N.Y., MacMillian & Co. 1891).

[287] *Id.* at 2.

[288] John M. Bass, *William Walker*, 3 AM. HIST. MAG. 207, 210–11, 214 (1898).

[289] ROCHE, *supra* note 286, at 22, 27.

[290] *See* Daniel J. Burge, *John Brown, Filibuster: Republicans, Harpers Ferry, and the Use of Violence, 1855–1860*, 43 J. EARLY REPUB. 245, 245–46, 249–50, 264 (2023).

a state of war, even though they were not in service of any extant foreign sovereign at the time. During such a period of occupation, New Haven would not be in "actual obedience" to the American government, even though the occupying army was not the servants of a foreign prince.[291] An alien enemy would have "come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there," even if the King's dominions were otherwise at peace with all the nations of the world.[292]

Far from being evidence that mere unlawful presence in a country is sufficient to remove an individual from the jurisdiction of the law in the common-law tradition, such cases demonstrate the strength of the traditional rule and the logic of the traditional exceptions to that rule. It is acting in the service of a foreign state that puts one outside the jurisdiction of the laws. The traditional examples of aliens in such a situation are the ambassadors and invading armies. Those examples illustrate just how few and exceptional the exceptions truly are. One does not have to think those examples are a "closed set" to recognize that any analogous examples that fall under the same principle would likewise be few and exceptional. The presence of active international terrorists or a band of mercenaries on American territory would similarly trigger the traditional exception to birthright citizenship. Such alien enemies would be acting in the service of a would-be sovereign rather than an actual sovereign state, but through their actions they would be positioning themselves as combatants rather than as criminals. Through the exercise of paramilitary force, they would be demonstrating that they "never [were] in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity."[293] But what held them outside of the jurisdiction of the United States was not their unauthorized presence in the country but their attempt to conduct a war within the United States.

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[291] *See* Calvin v. Smith (1608) 77 Eng. Rep. 377, 399 (KB).

[292] *Id.*

[293] *Id.* at 384.

Professors Barnett and Wurman assert that disobedience to the local laws puts the alien out of amity, but that is not the common law rule.[294] Local obedience and local allegiance are the duties that are owed by the alien to the sovereign in whose territory he finds himself. That duty is always owed by the alien in amity. Presumptively, an alien enemy does not owe such a duty since he bears allegiance to a foreign prince who is at war with the dominion in which he is present, but even that presumption is defeasible if the alien enemy shows himself to not be a combatant.[295] But aliens in either situation, aliens who owe local obedience and local allegiance to the local sovereign are situated in the exact same position as the local subjects or citizens. That is, aliens within the territory owe obedience to the law just like a natural-born citizen does—and aliens can be held accountable for violating that duty just like a natural-born citizen can. Breaking the duty of local obedience by violating the municipal law subjects the alien to legal consequences that they would not face if they had not violated the law. They should be protected in their person and property when they obey the law, and they can be held to account when they do not. It is that possibility of holding the alien to account through the application of the law that is the point of the concept of local allegiance. In other words, being subject to the jurisdiction of the government and its laws means being properly subject to legal punishment if one were to break those laws. By contrast, an invading army cannot be held to account for violating the municipal laws, and if members of the invading army are captured, they cannot properly be subjected to the ordinary legal proceedings and punishments that would apply to citizens for violating local law. Disobedience to the law does not move the alien out of the

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[294] Barnett & Wurman, *Reply to Critics*, *supra* note 51 ("[O]ne cannot give allegiance and a promise to obey the laws through an act of defiance of those laws—most especially when one is consciously aware that the polity has not consented to one's admission thereto."); @Ilan_Wurman, X (Mar. 3, 2025, at 16:54 ET), https://x.com/ilan_wurman/status/1896680687656370567 [https://perma.cc/ELD7-M2NY] (arguing that "unlawful entrants" have not entered into a social compact "at all").

[295] *See* HALE, *supra* note 248, at 60.

category of being an alien in amity or remove them from the jurisdiction of the United States. Rather, it triggers repercussions that are only applicable to those who owed the duty of obedience in the first place.

The revisionist argument is not salvaged by asserting that the immigration laws are somehow unique. An alien who crosses an international border without authorization does not commit an act of war, and it would require an act of war to remove the alien from the category of being in amity and possessing a duty of local obedience. It is true that an alien might cross an international border without authorization and then hold themselves out as not subject to the jurisdiction of the country that they have entered. That is what invading armies do. But that is not what the vast majority of unauthorized or uninvited aliens do. They instead conduct themselves in accordance with a duty of local allegiance and obedience by putting themselves under the actual obedience of the local sovereign. Even if they entered the territory "through an act of defiance" of the law, they do not continue to hold themselves out as beyond the reach of the law.[296] More generally, they generally obey all the municipal laws but one. They daily submit themselves to the jurisdiction of the government. They are always subject to detention and deportation, and if appropriate, criminal trial and imprisonment, for violating the law regarding their unlawful entry into the United States.

Moreover, the United States government does not treat unauthorized aliens as if they do not owe local obedience to the municipal law and are not subject to the jurisdiction of the United States. If found within the United States, they are not subjected to martial law. If the government so desires, it follows its own civil laws for deportation and removal of such aliens, but that is *itself* an application of the jurisdiction of the United States. But until the government chooses to take the step of deporting such an alien, it expects those individuals to demonstrate local obedience and

[296] Barnett & Wurman, *Reply to Critics*, *supra* note 51.

adherence to the laws; and it addresses violations of the law by those individuals through ordinary legal proceedings. If there is a neighborhood of unauthorized aliens, local authorities do not regard it as the equivalent of "Indian country"[297] or an occupied fort over which American law has no force and should not be applied. The United States would absolutely deny the proposition that it does "not pretend to exercise any civil or criminal jurisdiction" over a neighborhood of unauthorized immigrants.[298] Such a neighborhood is not understood by either its inhabitants or by the American government as an autonomous zone beyond the scope of the jurisdiction of the United States.[299]

Aliens are "in amity" if they are not at war with the United States. A native of Canada does not enter into a state of war with the United States simply by being present in the United States without proper authorization. Despite being unlawfully present in the United States, the Canadian would still owe local obedience to American laws and would still be subject to American jurisdiction. The result of being subject to American jurisdiction might well be that the Canadian might find herself detained and deported, but that is a signal that American laws—*all* the American laws—apply

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[297] On the idea of "Indian country," see Epps, *supra* note 1, at 363–371.

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

[299] If the government did treat such a neighborhood as some kind of autonomous zone outside of American law, then it would indeed raise the question of whether such a neighborhood was in "actual obedience" to the American government and whether children born there were in fact natural-born citizens. If officials of state, local, and federal government refused to enter a neighborhood or attempt to enforce any law there, then the government might well have ceded sovereignty over that territory, at least temporarily. The American government would not be the de facto sovereign authority over the territory even if they continued to maintain a nominal legal claim over it. Actual protection to residents of that territory would be offered by some other entity, and that entity would have a good claim to being the de facto sovereign over it. Such a possibility of loss of effective governance is more likely to be the result of organized criminal gangs or insurrectionist paramilitary organizations than from the activities of unauthorized aliens, but the government seems no more likely to be inclined to admit that a territory under the sway of a gang or a militia is actually outside the jurisdiction of the United States than it is to admit that a territory that just happens to be populated by unauthorized aliens is.

to her while she is present within the American territory. So long as she is present within the United States, she understands herself to be subject to American law and the American government understands her to be subject to its laws. In her daily life, her legal duties and obligations are the same as if she were a native-born American or a Canadian present in the country with the proper authorization. The existence of such legal duties and obligations is what it means to be under the jurisdiction of the United States.

Saying that an inhabitant of the United States is not subject to the jurisdiction of the United States has implications far beyond the specific question of birthright citizenship. Saying that an inhabitant is not subject to the jurisdiction of the United States is saying that they have "no rights, no privileges."[300] It is to say that they are owed no protection of the laws, except perhaps in the most "flagitious cases."[301] That is not how we understand the situation of unauthorized aliens, and we do not understand their situation that way precisely because they are aliens in amity, even if they arrived uninvited.

B. Protection and Allegiance

The revisionist account is also mistaken about the relationship between protection and allegiance under the common-law rule embodied in the text of the Fourteenth Amendment. This account contends that individuals who have not "entered into the social compact with the [United States]" and given "allegiance to the [United States]" have not, as a consequence, contracted for any protection from the United States.[302] If they have not entered the social compact, on this account they are therefore not under the protection or "subject to the jurisdiction"[303] of the nation "in the

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[300] 1 WILLIAM BLACKSTONE, COMMENTARIES *372.

[301] WOODDESSON, *supra* note 235, at *229.

[302] Barnett & Wurman, *Reply to Critics*, *supra* note 51.

[303] *Id.* (quoting U.S. CONST., amend. XIV, § 1).

relevant sense."[304] A parent who enters the United States unlawfully, therefore, "would have to find protection elsewhere" for their infant.[305]

Note the implication for just the alien parent here. The argument is that the unauthorized alien is outside the social compact to such a degree that the alien has no claim of protection from the American government and the American government has no duty to provide such protection. Quite literally, on this theory, an unauthorized alien could be murdered in the streets of an American city and, properly speaking, there should be no legal repercussions. Such an individual is functionally in "the state of nature."[306] Their only legal recourse against being murdered with impunity is self-help through the natural right of self-defense or by appealing to a foreign government to enter American territory and extend its protection over them.[307] Such a theory is not only at odds with how

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[304] Barnett & Wurman, *Reply to Critics*, *supra* note 51.

[305] *Id.*

[306] *Id.*

[307] The common-law rule that recognized the duty of the local sovereign to provide protection to aliens within its territory arose in the context of a recognized duty on the part of the sovereign to provide protection for its own natural subjects anywhere in the world. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *370 (describing that "the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent"). If a sovereign refused to provide local protection for aliens within its territory, the sovereign to whom those aliens owed allegiance would be obliged to take necessary action to ensure that they were protected while in that foreign territory. At the extreme, that duty might be fulfilled by military incursion.

From an international relations perspective, the recognition of a duty of local protection for foreign nationals who are not alien enemies reduces the threat of such military conflicts. Protecting the subjects of the foreign prince when they are in your territory is how states avoid a foreign prince mounting a military campaign against itself. Indeed, the United States government itself has asserted an inherent constitutional authority of the President to use military force to protect the lives and property of American citizens abroad. *See, e.g.*, Deployment of U.S. Armed Forces to Haiti, 28 Op. O. L. C. 30 (2004). Such a perceived duty on the part of the American president to provide extraterritorial protection creates an imperative for foreign sovereigns to ensure the safety of Americans within their borders. By focusing solely on the individual level, Professors Barnett and Wurman miss the international rationale for such a sovereign duty to provide local protection to all inhabitants of their territory.

American law and governance actually operates vis-à-vis unauthorized aliens, but it is grossly unappealing on its own terms.[308] Such a vision of the government's duties to the inhabitants of its territory has no basis in the original meaning of the Fourteenth Amendment or the legal understandings of the period.[309]

The text of the Fourteenth Amendment is primarily concerned with the status of children born in the United States and not their parents. The rule quite literally refers only to the child: "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof."[310] As a practical matter, the parent and child are entangled, but conceptually it matters that it is the child who must be born "subject to the jurisdiction thereof" in order to qualify as a natural-born citizen. The actions of the parents are an important factor in determining whether the jurisdiction of the United States extends over an infant, but the crucial question is whether the newborn falls within the protection of the American government.

Whether a newborn is within the jurisdiction of the United States does not depend on whether the parents have been good or deserving citizens (or noncitizens) or behaved in a virtuous or lawful manner. It depends solely on whether the infant was born on American soil while that soil was subject to American laws and

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[308] Perhaps Professors Barnett and Wurman imagine that unauthorized aliens should be enticed to "give up their personal executive power," Barnett & Wurman, *Trump Might Have a Case*, *supra* note 2, if the United States government entered into a series of treaties promising to provide protection for unauthorized aliens who are citizens of those treaty partners. The unauthorized alien would not have individually entered into a social compact with the United States, but their home country might explicitly establish such a compact by treaty and replicate the allegiance-for-protection dynamic. The United States might seek to avoid the diplomatic crisis that would accompany lynch mobs having free rein to murder the citizens of allied countries on American land by promising that the American government would extend protection over such individuals despite their having entered the country illegally. Such a regime of international agreements for protection of alien inhabitants of American territory would seem to simply lead us back to the status quo.

[309] On the revisionist account, the same implication is true for the alien child who, under this theory, would also be outside the social compact and outside the jurisdiction of the United States.

[310] U.S. CONST., amend. XIV, § 1.

under the protection and authority of the American government. The parents can affect whether an infant is born under those circumstances by, for example, removing themselves from American territory before the birth of a child. They can likewise affect it by removing themselves from the reach of American laws. The most notable way of accomplishing that, other than removing themselves from the territory, is by displacing the American government from the territory by engaging in a military occupation. As Justice Joseph Story noted, "the children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens."[311] But this is not a question of the "status" of the parents, but of their activities. Enemies engaged in occupation by conquest have placed themselves outside of American governance, and if they give birth while so doing, the child is likewise outside of American governance. But unauthorized aliens have not put themselves outside of American governance. Indeed, by entering the country in something other than a warlike manner, they have voluntarily put themselves inside of American governance; they have chosen to make themselves subject to the jurisdiction of the United States.

For an alien entering into a sovereign's territory, the alien implicitly pledges obedience and the sovereign implicitly pledges protection. Coke is clear about the order of the exchange.[312] When an alien comes into England he comes "within the King's protection," and "*therefore* . . . he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other."[313] As Coke clearly lays out, "power and protection draweth ligeance. . . ."[314] Thus, "it is truly said that *protectio trahit*

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[311] Inglis v. Trs. of the Sailor's Snug Harbour, 28 U.S. 99, 156 (1830) (Story, J., dissenting).

[312] *Contra* Barnett & Wurman, *Reply to Critics*, *supra* note 51 ("If anything came first, allegiance did . . . .").

[313] Calvin v. Smith (1608) 77 Eng. Rep. 377, 383 (KB) (emphasis added).

[314] *Id.* at 388.

subjectionem, *et subjectio protectionem*," which is why "liegance doth not begin by the oath."[315]

Protection draws the subjection first, and this is particularly obvious in the case of infants. The newborn infant is not capable of taking an oath, pledging allegiance, or offering obedience.[316] The infant owes a natural duty of obedience and allegiance because of the protection he or she received. As Coke characterized it, it was a "law of nature" that "faith, ligeance, and obedience" are due to the government that provides protection.[317] It follows therefore that "[w]hosoever is born within the King's power or protection, is no alien."[318] Coke observes that "[e]very stranger born must at his birth be either *amicus* or *inimicus*," either an alien friend or an alien enemy.[319] "[B]ut Calvin at his birth could neither be *amicus* nor *inimicus*; *ergo* he is no stranger born. *Inimicus* he cannot be, because he is *subditus*: for that cause also he cannot be *amicus* . . . ."[320] Those born subject to the jurisdiction of the king can be neither alien friend nor alien enemy, for they are born under the king's protection. "[L]igeance and obedience of the subject to the sovereign is due by the law of nature," and the sovereign to whom such obedience [is owed] is known by the fact that the sovereign is the one who provides protection.[321] "Liegeance is the true and faithful obedience of a liegeman or subject[] to his liege, lord, or soveraigne," and such ligeance is the bond of God ("*ligeantie est vinculum fidei*").[322] As Coke explains, the sovereign is known by the provision of protection, and thus any foreigner who lives in this kingdom under the king's protection owes allegiance to the king ("*quilibet alienigena qui in hoc regno sub protectione regis degit, domino*

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[315] *Id.* at 382.

[316] It is fortunate indeed that a toddler is owed protection even when not fulfilling the duty of obedience.

[317] *Calvin's Case*, 77 Eng. Rep. at 392.

[318] *Id.* at 407.

[319] *Id.*

[320] *Id.*

[321] *Id.*

[322] COKE, *supra* note 85, at 129a (capitalization modernized).

regi ligeantiam debet").[323] There is a mutual exchange of protection and obedience, but protection comes first in the exchange. A purported sovereign who does not, or cannot, offer protection is no sovereign at all, and thus cannot demand obedience and allegiance in return.[324]

The common law rule of birthright citizenship operates against the background of what Coke explicitly referred to as the law of nature, the law "written with the finger of God in the heart of man."[325] Lord Macclesfield drew out the implication for infants.

> [T]he King . . . as *pater patrice* . . . is protector of all his subjects; that in virtue of his high trust, he is more particularly to take care of those who are not able to take care of themselves, consequently of infants, who by reason of their nonage are under incapacities; from hence natural allegiance arises, as a debt of gratitude . . . .[326]

As *pater patrice*, the "trust" of protection falls upon the sovereign "as the protector of all his subjects."[327] "[N]atural allegiance" is owed "in return for the protection which from the instant of his birth was afforded to him by the crown."[328] The duty of protection is extended to "any infant residing temporarily or permanently

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[323] *Id.*

[324] "For if the government ceases to fulfil the purpose for which it is instituted, its authority necessarily vanishes with the reasons of natural law, on which that authority is founded, and it, in fact, ceases to be a government." GEORGE BOWYER, THE ENGLISH CONSTITUTION 568 (London, James Burns 1841). The purpose of the government is the provision of the "duty of protection." *Id.* It is the fact that the provision of protection is the natural duty of sovereignty that it is owed even before the sovereign takes any explicit oath to provide it. HENRY JOHN STEPHEN, 2 NEW COMMENTARIES ON THE LAWS OF ENGLAND 419 (London, Henry Butterworth 1842).

[325] Calvin v. Smith (1608) 77 Eng. Rep. 377, 392 (KB).

[326] Eyre v. Countess of Shafsbury (1722) 24 Eng. Rep. 659, 666; *see also* MATTHEW BACON, NEW ABRIDGMENT OF THE LAW 436 (London, A. Strahan, 1832).

[327] *Id.*

[328] CHITTY, *supra* note 235, at 111.

within" the sovereign's jurisdiction.[329] The duty of protection of newborn infants is not affected by the status of the parents, but only by the actual governing capacity of the sovereign.[330] The sovereign owes a duty of protection to infants within its territory when it has possession of, and governing authority over, that territory. When that protection is successfully extended, then the infant, in turn, owes allegiance and obedience to that sovereign.

A sovereign's duty to protect an infant arises from the child's mere presence within a sovereign's governing authority. If a newborn infant, merely an hour removed from its mother's womb, were left at a fire station, the state would not ask after the immigration status of the parent before assuming protection of the child. If a neighbor reported that a newborn infant was being neglected or abused in the house next door, the state would not ask about the immigration status of the parent before extending protection to the child. If a mother were to die in childbirth, the state would not ask about the immigration status of the mother before undertaking the protection of the child. The child in such circumstances is within the jurisdiction of the United States regardless of the immigration status of the parent, and because the child is within the jurisdiction of the United States, the government owes the child a duty of protection. That is the natural duty of a sovereign in actual possession of a territory. Under the common law embodied in the Fourteenth Amendment, the correlative to a state fulfilling that duty is birthright citizenship.

The state's duty to the newborn precedes the social compact, or rather, to the extent that sovereign authority exists as a consequence

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[329] JOHN ADAMS, THE DOCTRINE OF EQUITY 87 (Phila., T. & J. W. Johnson & Co. 4th ed. 1859).

[330] Professor Wurman dismisses Coke's natural law context and reformulates his theory as one of a "social compact." Wurman, *Jurisdiction*, *supra* note 2, at 345. In this reformulation, infants are owed protection because their parents bargained for it through their obedience. There is no basis in Coke for such a claim, and there is nothing in the subsequent common-law tradition that suggests such view about the origins of government protection for infants within a sovereign's domain. Natural-born citizenship is not "earned," either through the actions of the parents or the child. *Contra id.* at 357, 372–72.

of a social compact, the newborn is not a party to it. The sovereign assumes the duty to protect infants within its jurisdiction without waiting for the infant to enter into any compact. The newborn infant can engage in neither "social compact formation" nor "social compact breach."[331] The infant might later breach the social compact by ignoring the debt of gratitude he has assumed and the obligations of obedience and allegiance that he has acquired, but the duties of allegiance that the infant acquired arose naturally from the "moment of birth."[332] To the extent that there is a "feudalistic and archaic conception of subjectship" associated with this rule of natural birthright, it is not the idea that sovereigns have a duty of protection over infants born within their domain and the correlative duties of allegiance that arise from receiving that protection.[333] The feudalistic element is the idea that such allegiance is perpetual and cannot be set aside, that one is permanently and forever bound to one's liege lord. And it is that feudalistic element of the traditional rule that Americans rejected from the very moment of the Revolution and formalized in the acknowledged right of expatriation.[334] The naturally-born citizen may upon their

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[331] @Ilan_Wurman, X (Mar. 3, 2025, at 16:54 ET), https://x.com/ilan_wurman/status/1896680687656370567 [https://perma.cc/M4B2-XR82].

[332] Citizenship, 10 Op. Att'y Gen. 382, 394 (1862).

[333] Barnett & Wurman, *Reply to Critics*, supra note 51.

[334] *See* Juando v. Taylor, 13 F. Cas. 1179, 1181 (S.D.N.Y. 1818) ("[T]he modern doctrine of perpetual allegiance . . . grew out of the feudal system, and was supported upon a principle which became imperative with the obligations on which it was founded. In this country, expatriation is conceived to be a fundamental right."); *see also* Doe v. Acklam (1824) 107 Eng. Rep. 572, 575 (KB) ("There was nothing in the claim of their independence by which they could be rendered aliens, they could not of their own accord, and by their own act throw off their allegiance, '*nemo potest exuere patriam*.'"); *see also* CHITTY, *supra* note 235, at 129. Chitty recounts that:

> 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; *nemo potest exure patriam*. *Id.*

maturity choose to set aside their citizenship, but the conferral of citizenship upon the extension of protection occurred before that opportunity to choose expatriation was available to be made.[335]

CONCLUSION

The traditional rule of birthright citizenship is not "ambiguous as applied to the modern-day questions."[336] The "principle of law that governs" both birthright citizenship and its exceptions do not need reformulation.[337] The modern regime of general immigration

See ISAAC FRANKLIN RUSSELL, OUTLINE STUDY OF LAW 128 (N.Y., Baker, Voorhis & Co. 1894). The book describes:

> The right of voluntary expatriation is now universally recognized as a natural and inherent right of all people, indispensable to the right of life, liberty and the pursuit of happiness. Great Britain for years asserted the doctrine expressed by the maxim, 'Once an Englishman, always an Englishman.' . . . Great Britain has finally admitted the principle of voluntary expatriation, having for years conducted her diplomacy in accordance with the absurd rule of the feudal law, *nemo potest exuere patriam*. *Id.*

See also EDWARD CHANNING, THE JEFFERSONIAN SYSTEM 170 (1906) ("All European nations in the eighteenth century were united in holding the doctrine of indefeasible allegiance; once a Frenchman, always a Frenchman; once an Englishman, always an Englishman. The United States occupied an anomalous position.").

[335] The practicalities of determining if, and when, an individual might have expatriated bedeviled the effort to give reality to this right of expatriation. Prior to the creation of a formal process of declaring expatriation, courts would be forced to look at behavioral clues as to whether an individual had actually exercised the right or was instead simply claiming a convenient excuse to avoid some civil duty. Without any agreed upon metric for determining whether a natural-born citizen had in fact expatriated, courts were thrown back on the kind of analysis that Professor Wurman found during the Civil War. Wurman, *Jurisdiction*, *supra* note 2, at 370–72. As Attorney General Caleb Cushing pointed out, a person "does not effectually cast off" their obligations "by pretense of emigration." Right of Expatriation, 8 Op. Att'y Gen. 139, 145 (1856). Expatriation was a natural right accepted in the United States, but it had to be exercised "*under fit circumstances of time and manner*" and that often required a contextualized inquiry. *Id.* at 166. The state had the right to refuse to recognize an asserted act of expatriation "in certain circumstances, as in case of war." *Id.* at 168.

[336] Barnett & Wurman, *Reply to Critics*, *supra* note 51.

[337] @Ilan_Wurman, X (Mar. 3, 2025, at 16:54 ET), https://x.com/ilan_wurman/status/1896680691607151070 [https://perma.cc/LM8X-CU6S].

restrictions creates a new context within which traditional principles need to be applied, but it cannot alter or amend the traditional principles.

Children born under the protection of American law are citizens by virtue of the Fourteenth Amendment, as they were citizens by virtue of the longstanding common-law principles that the Fourteenth Amendment recognized and declared. Aliens within the territory of the United States are subject to—and under the protection of—American law, except in the extraordinary circumstances in which American law cannot reach them or is withheld from them. Unauthorized aliens are not in such an extraordinary circumstance, and their newborn children are certainly not so. Unauthorized aliens within the territory of the United States are subject to the municipal law of the United States—including the law of deportation and removal—and while tolerated within the territory are subject to the protection of that law.

The United States, like any sovereign nation, may choose to discourage or minimize immigration or the presence of aliens within its territory. In addition, it may take steps through public policy to limit the set of people who can naturalize into American citizenship and can take actions to minimize the possibility that aliens will give birth within the United States. Such policy choices may be wise or unwise, difficult or easy to effectuate, but they are available choices within the constitutional order.

The Fourteenth Amendment cuts off one particular policy choice, and it was thought necessary to entrench the common-law rule into constitutional text precisely because the desirability of that policy choice had become increasingly contested in the mid-nineteenth century. Chief Justice Taney's opinion in *Dred Scott* reflected the emerging view of the slave states that the recognition of the citizenship of those born within the country should be dependent on a political assessment of whether some categories of people were politically desirable and truly deserved to be members of the

"governing population."[338] Legislatures should, in that view, be able to determine that some natural-born inhabitants of the country could not be citizens. The Reconstruction Congress decisively and purposefully rejected that emerging view regarding the law of American citizenship. It left open the question of what privileges and immunities might be entailed by citizenship, but it slammed the door on the idea that the qualifications for natural-born citizenship could be determined by legislatures or the executive without a further constitutional amendment. That liberal rule of birthright citizenship was controversial in its day, and it has been controversial since, but it is the nature of constitutional entrenchment that subsequent controversy does not alter the original meaning of the rule.[339]

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[338] CONG. GLOBE, 39th Cong., 1st Sess. 528 (1866) (statement of Sen. Davis).

[339] One might argue that the drafters of the Fourteenth Amendment did not anticipate a world of mass immigration, and if they had done so, they would have taken the path of most European countries of the day and that "children follow the conditions of their fathers." 1 VATTEL, *supra* note 29, at 101 (§ 213). The ability to exclude foreigners and their offspring from the country might be a matter of sovereignty and national self-preservation.

How should we think about such a claim as a constitutional matter? It might simply be a non-originalist argument. Regardless of the original rule laid down in the Fourteenth Amendment, a living constitution should recognize the ability to restrict who is eligible for natural-born citizenship. It might be regarded as a background condition that created an implicit qualification to what drafters of the Fourteenth Amendment were saying in their explicit text. There is no evidence that they were writing against such a background concept, however. It might mean that the principle of self-preservation simply trumps the requirements of the constitutional text, whatever those might be. Of course, the burden for ignoring a constitutional rule for the sake of self-preservation is justifiably high, and such an argument should acknowledge explicitly that it is calling for the violation of the existing constitutional text in order to advance a higher good.

It should be observed, however, that all such claims on behalf of a sovereign principle of "self-preservation" to exclude the natural-born children of aliens from the rolls of citizenship reopen the door that the congressional Republicans were trying to close. Such arguments invite current politicians to determine which natural-born children are undesirable to the future health of the polity and to exclude them in the name of preserving the purity of the republic. This was, of course, the same argument that the slaveholders made for excluding free blacks from citizenship and that critics made for rejecting the Citizenship Clause of the Fourteenth Amendment. Appealing to the

It has been argued that adherence to the original meaning of written constitutional provisions is a method by which we "lock-in" the "legitimacy-enhancing features of a constitution," most notably the features by which it "protects individual rights."[340] The Reconstruction Congress would have been sympathetic to that sentiment. The Jeffersonian Judge Spencer Roane once complained that the Constitution "is considered a nose of wax, and is stretched and contracted at the arbitrary will and pleasure of those who are entrusted to administer it."[341] Identifying the original meaning of the constitutional text and faithfully adhering to that meaning once it has been identified is an important security against exercises of arbitrary will by those who happen to currently hold government power. The Fourteenth Amendment sought to lock-in the liberty-enhancing rule that current political majorities cannot exclude undesirable populations from their birthright as citizens. Construing children born of unauthorized aliens as outside the jurisdiction of the United States would undo that achievement and reopen the door to political manipulation of the qualifications of birthright citizenship; that is a door of the sort that the Reconstruction Congress sought to close. The Reconstruction Congress entrenched the traditional common-law rule that citizenship was determined not by the legal status of a child's parents, but by birth alone.

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sovereign authority of self-preservation to work around the conventional understanding of the original meaning of birthright citizenship is a fraught exercise.

[340] Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7, 17–18 (2006).

[341] Hampden, *Letter to the Editor*, RICHMOND ENQUIRER, June 18, 1819, *reprinted in* 2 JOHN P. BRANCH HIST. PAPERS OF RANDOLPH-MACON COLLEGE 98 (William E. Dodd ed., 1905).