JURISDICTION AND CITIZENSHIP

ILAN WURMAN*

ABSTRACT

This Article makes a series of interventions into the existing literature on birthright citizenship. It makes three historical claims about the common law rule and its development. First, the Article centers the importance of parental status. The relevant status was not the citizenship of the parents, however, but whether they were under the protection of, and owed allegiance to, the sovereign. The common law rule therefore did not depend on descent, but the modern belief that the rule depended solely on place of birth is also mistaken. Second, it reveals through an examination of safe-conducts and English statutes from the twelfth through fourteenth centuries that the sovereign's consent to an alien's presence was necessary to extend the king's protection. Third, it uncovers new evidence, including from treatises and military authorities, that suggest that by the American Civil War the applicability of the common law rule to children born of temporary sojourners was contested.

Whether the common law was incorporated by the Fourteenth Amendment's jurisdictional phrase is another matter. The Article offers a

* Julius E. Davis Professor of Law, University of Minnesota Law School. The author wishes to thank Randy E. Barnett, who initially collaborated on the ideas that are now elaborated and expanded in Part I of this Article. *See* Randy E. 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]; 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/5G4E-TZKB]. The author also thanks colleagues and the other interlocutors who have helped shape the trajectory of this project, several of whom nevertheless disagree with its conclusions: William Baude, Allan Erbsen, David Kinnaird, David Upham, Michael Ramsey, Mark Shawhan, and Amy Wildermuth. Benjamin Ayanian and Elliott Wainwright provided tremendous research assistance and support, along with the research librarians at the University of Minnesota. The author also wishes to thank the editors at the *Harvard Journal of Law and Public Policy*, who provided excellent technical and substantive edits throughout this long Article.

historically grounded understanding of the Citizenship Clause: it required the parents of a child born to be subject to the complete municipal jurisdiction of the United States. If the law of nations applied, or if the law of nations provided for an exception to the exercise of a legislative, executive, or judicial jurisdiction over a foreigner within the territory, then any child born would not have been "subject to the jurisdiction" of the United States in the relevant sense. This law of nations theory allowed the drafters to incorporate the bulk of the common law because the sovereign's protection was a precondition to the applicability of much of the sovereign's municipal jurisdiction. Ambassadors and foreign armies, for example, were subject to the law of nations and not to the municipal law because they were not under the protection of, and owed no allegiance to, the sovereign. This theory also accounts for the exclusion of the Indian tribes, which were dependent nations under the law of nations with their own municipal laws.

This Article briefly concludes with tentative applications to the modern-day questions surrounding children born to temporary visitors or unlawfully present aliens. As suggested, there is evidence that protection was a precondition for jurisdiction, and permission was necessary for that protection, suggesting that unlawfully present aliens might fall outside the scope of the rule. Some contemporaneous commentators also thought that temporary visitors were not subject to the complete jurisdiction of the United States, although their theory as to why is unclear. This Article suggests ways in which temporary visitors may not have been fully subject to U.S. jurisdiction: to take but one example, Union authorities in Louisiana thought they could not conscript the children born in Louisiana to temporary visitors. The case both for and against a recent executive order purporting to deny citizenship to such children is therefore more complicated than either side has assumed.

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INTRODUCTION

The academic consensus has long been that constitutional birthright citizenship applies to children born in the United States to persons temporarily visiting or unlawfully present.[1] Recently, an Executive Order has purported to exclude both groups from the benefits of such citizenship, igniting renewed debate over the issue.[2] It is widely recognized that the framers of the Fourteenth Amendment, and earlier jurists who addressed the question of birthright citizenship, were not presented with issues of illegal migration or large numbers of temporary visitors.[3] How birthright citizenship does or does not apply to children born to those falling under either category is therefore a function of the jurisdictional phrase in the Fourteenth Amendment—which provides that all persons born in the United States "subject to the jurisdiction thereof" are citizens—and how that phrase relates, if at all, to the common law of birthright citizenship.[4]

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[1] *See, e.g.*, Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 407, 472 (2020) (concluding that birthright citizenship applies to "persons born in the United States to parents who are only temporary visitors or parents not lawfully present in the United States"); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 PA. J. CONST. L. 499, 526 (2008) (concluding unlawfully present persons are subject to the birthright citizenship rule); *id.* at 507 n.43 (suggesting the same for temporary visitors); Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 347–48 (2010) (similar); James C. Ho, *Defining "American," Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 374 (2006) (finding that the Amendment's "sweeping language reaches all aliens regardless of immigration status"); Gerald L. Neuman, *Back to Dred Scott?*, 24 S.D. L. REV. 485, 492 (1987) (similar).

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

[3] Ramsey, *supra* note 1, at 409; Magliocca, *supra* note 1, at 513 n.71; *see also* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2224–26 (2021) (agreeing with the general point that the Framers did not consider the issue of illegal immigration, but arguing that illegally trafficked enslaved persons were in the United States in violation of the law).

[4] U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

This Article demonstrates that the historical evidence is far more nuanced than advocates on either side have assumed.[5] This Article first advances a series of historical propositions about the common law and its development. First, it argues that the most relevant desideratum at common law was whether the parents, including alien parents, were under the protection and within the allegiance of the sovereign. Unlike existing scholarship, this Article thus centers the importance of parental status to the common law rule. Unlike the rule of *jus sanguinis*, however, the relevant status was not the citizenship of the parents but rather whether they were

[5] Some dissenting voices have picked up on some of the themes that this Article will address, but none has been widely cited or acknowledged. *See, e.g.*, Gage Raley, *Could the Supreme Court Defy the "Legal Consensus" and Uphold a Trump-Like Executive Order on Birthright Citizenship?*, 17 CHARLESTON L. REV. 95, 95–98 (2022) (focusing on allegiance and illegal immigration); Justin Lollman, Note, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 VA. L. REV. 455, 455–58 (2015) (focusing on domicile and temporary visitors). For a more recent contribution, see Andrew T. Hyman, *Originalism, Illegal Immigration, and the Citizenship Clause*, 15 BR. J. AM. LEG. STUDIES 1, 1 (2025) (addressing both issues).

See PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT (1985) (arguing that citizenship should be understood in a more consensual Lockean strain that was present among at least some antebellum legal sources); *see also* PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 207–16 (1998); Edward J. Erler, *American Citizenship and Postmodern Challenges*, *in* THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION 25–73 (Edward J. Erler et al. eds., 2007) (making similar consent-based arguments); William T. Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMM. L.J. 221, 224–25 (2008) (similar). This Lockean strain, however, was arguably rejected by antislavery writers. *See, e.g.*, Mark Shawhan, *"By Virtue of Being Born Here": Birthright Citizenship and the Civil Rights Act of 1866*, 15 HARV. LATIN AM. L. REV. 1, 6–7 (2012). That does not, however, address the role of consent in establishing an alien's allegiance and protection, which is a significant focus of this Article—nor do these prior works discuss the legal concept of jurisdiction under the law of nations and its relationship to protection.

Other scholars have focused on the legislative history, which this Article will address to establish its consistency with the background jurisdictional rules that are the focus. *See, e.g.*, Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2026); Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 TEX. REV. L. & POL. 135, 135–36 (2020).

under the protection—and therefore within the allegiance—of the sovereign.[6]

Second, the Article is the first to examine "safe-conducts" and merchant statutes from the twelfth through the fourteenth centuries, which suggest that the king's license or express statutory permission was required to extend the king's protection to aliens. Third, it uncovers new evidence, including in treatises and the decisions of military authorities, which suggests that by the American Civil War, the applicability of the common law rule to temporary sojourners was uncertain and contested.

Whether the Fourteenth Amendment's language incorporates or departs from the common law rule of birthright citizenship is another matter. This Article proposes a historically grounded interpretation of the phrase "subject to the jurisdiction" in the Citizenship Clause, one that closely relates to some existing accounts. The best reading of the historical evidence is that the Clause extended birthright citizenship to children born of parents subject to the complete municipal jurisdiction of the United States. Under the law of nations,[7] certain categories of individuals could

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[6] The scholars who do focus on the status of the parents have typically argued for excluding even the children of lawfully present, resident aliens. *See, e.g.*, Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 5–8 (2009); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 958–66 (2008); *see also* Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 ST. LOUIS U. PUB. L. REV. 329, 330–31 (2013) (addressing jurisdiction and double allegiances in the late nineteenth century and similarly suggesting that even children born of domiciled foreigners were excluded). This Article disagrees with the conclusion of these articles. *See infra* Part III. That is because, although parental status matters, the relevant status, at least at common law, is being under the protection of the sovereign, which lawful residents are. The more conventional scholarship tends to ignore parental status entirely to the question of the common-law rule. Ramsey, for example, writes that the alternative options were "that citizenship derived from one's parents," or that "[b]irth in England made a person an English subject regardless of the parents' circumstances." Ramsey, *supra* note 1, at 412–13. This Article shows that that is a false dichotomy.

[7] The law of nations is implicated where two or more states or their people have dealings with one another. *See, e.g.*, 2 EMERICH DE VATTEL, THE LAW OF NATIONS chs. 6–8 (Joseph Chitty ed., Phila.: P. & J.W. Johnson & Co. 1856) (describing rules respecting

be physically present in a territory but subject to the law of nations, rather than to the municipal[8] power of the local sovereign. These included not only ambassadors and foreign armies, which were traditional exceptions to birthright citizenship, but also alien enemies without authorization to remain and distressed vessels that entered foreign ports involuntarily. Most significantly, under the law of nations, local sovereigns did not have complete legislative or judicial jurisdiction over the municipal rights of dependent nations such as the Indian tribes. The jurisdictional language thus seems to have allowed the framers of the Fourteenth Amendment to adopt the common law rules while excluding Indians still subject to the authority of their tribes or who had otherwise never recognized the authority of the U.S. government.

This law of nations account of jurisdiction might also explain why some contemporaneous writers presumed that domicile mattered for birthright citizenship.[9] Under the law of nations, a foreign sovereign retained some degree of jurisdiction and sovereignty over its citizens temporarily residing in another nation; and the

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the relationship between individuals and foreign nations generally); 1 WILLIAM BLACKSTONE, COMMENTARIES *43 (observing that the "law of nations" arose "to regulate . . . mutual intercourse," which "depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities"). It is also interesting to observe that the U.S. Constitution grants Congress the power to regulate commerce *with foreign nations*—suggesting that the law of nations deals not just with the law governing the relationship between sovereigns, but also the law governing the relationships between their subjects. U.S. CONST. art. I, § 8, cl. 3; *see also* Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers*, 127 PENN ST. L. REV. 643, 664–79 (2023) (amassing evidence that the term "foreign nations" in this context referred to the individual subjects thereof).

[8] The municipal power is the domestic, local authority of a sovereign. *See* GILES JACOB, A NEW LAW-DICTIONARY (London, W. Strahan & W. Woodfall, 10th ed. 1782) (defining "municipal law" as an obligatory rule of civil conduct, distinguishing it from the natural or moral law, and as a law prescribed by the "supreme power in a state," which distinguishes it from the law of nations (a subset of the natural law)). *See infra* note 76 (assessing Jacob's influence); *see also* THE WORKS OF ALEXANDER HAMILTON 440 (Henry Cabot Lodge ed., 4th ed. 1904) ("The Executive is charged with the execution of all laws, the laws of nations as well as the municipal law, which recognizes and adopts those laws.").

[9] *See infra* Part III.A.3 & Part IV.B.

local sovereign refrained from exercising its complete municipal jurisdiction over them—for example, the conscription of temporary visitors or their children was thought to be improper. The law of nations account would also seem to explain what the Citizenship Clause's leading drafter intended when he stated that "subject to the jurisdiction" of the United States meant "a full and complete jurisdiction," a jurisdiction that is "coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now."[10]

Not only does the law of nations theory fit much of the evidence, but it buttresses other recent historical scholarship arguing that the traditional dichotomy between the common law and *jus soli* on the one hand, and the Roman or continental (European) rule of *jus sanguinis* on the other, was an invention of the late nineteenth century.[11] This Article shows, for example, that parental status did matter, but the relevant status was not citizenship; rather, the relevant status was whether the parents were under the protection and within the allegiance of the sovereign. Focusing on this parental status allowed American writers and judges to negotiate the problem of allegiance in a revolutionary era, and to raise questions about dual allegiances in an age of increasing international travel. The Article also demonstrates that, contrary to assertions in the briefing to the Supreme Court in *United States v. Wong Kim Ark*, the continental rule was not identical to the "law of nations," which, after all, was also thought to be part of the common law.[12]

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

[11] *See generally* Nathan Perl-Rosenthal & Sam Erman, *Inventing Birthright: The Nineteenth-Century Fabrication of* jus soli *and* jus sanguinis, 42 LAW & HIST. REV. 421 (2024).

[12] To elaborate, the law of nations as used in this Article refers to the body of international law relating to ambassadors, alien visitors, dependent nations, and related jurisdictional rules, which were closely connected to the common law rules on birthright subjectship. Some of the briefing in the Supreme Court's famous *Wong Kim*

The implications today for the children of unlawfully present aliens and temporary visitors are open to competing interpretations. On the one hand, at common law, the case against birthright citizenship for the children of unlawfully present aliens—who may not be under the protection of the sovereign—is stronger than the case for denying citizenship to the children of temporary visitors, who unquestionably are under that protection. On the other hand, under the text of the Fourteenth Amendment, the law of nations seemed to provide exceptions to the exercise of complete municipal jurisdiction over transient foreigners. But there does not appear to have been any international law rules *preventing* the exercise of complete jurisdiction over those who simply came unlawfully. As to this group, however, evidence suggests that the sovereign's consent and protection were conditions precedent to the applicability of at least *some* of the sovereign's municipal jurisdiction, particularly to the benefits of that jurisdiction, such as the right to sue in court and to enforce contracts. Whatever else, this Article demonstrates that the case both for and against recent

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Ark decision, in contrast, presumed that the Roman and continental rule of citizenship by descent was the rule of the law of nations. *See* Brief for Appellant at 6, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (distinguishing the common law from the Roman and continental law); *id.* at 6–7 (describing the rule of descent as both the rule of the Roman law and of the law of nations); Brief for Appellee at 6, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (somewhat erroneously characterizing the government's brief as distinguishing between the common law and the "law of nations" or "international law"). That cannot be entirely true because the law of nations was also understood to be part of the common law, which had the opposite rule. *See* United States v. Smith, 18 U.S. 153, 161 (1820); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 557 (2019) ("the law of nations . . . was commonly said to be to be part of the common law"). It appears, indeed, that Wong Kim Ark's lawyers erroneously characterized the government's argument as distinguishing between the common law and the "law of nations" or "international law." The brief actually distinguished between the common law and the "Roman" or "continental" rule, though there was some confusion and conflation of terminology more generally. It is also true that some writers on the law of nations presumed that the continental rule was the law of nations rule. It is, therefore, important to be exceptionally clear that by using the term "law of nations," this Article does not mean to assume the conclusion as to which was the applicable birthright rule. Indeed, as this Article shows, both parentage and place of birth remained relevant under the common law.

efforts by the executive to restrict birthright citizenship is more complicated than traditionally believed.

The trajectory of the argument follows the author's own exploration of the relevant materials. Part I begins with the common law of birthright citizenship and establishes the evidence for the three propositions about the common law described in this introduction. Part II explores the antebellum rules under the law of nations relating to jurisdiction and establishes the connection between jurisdiction and protection in the antebellum period. Part III investigates the legislative history of the Citizenship Clause of the Fourteenth Amendment. Part IV examines the contemporaneous, post-ratification interpretations of the Amendment. To the author's surprise, the evidence and material relating to each body of law and period become relatively coherent when viewed through the lens of jurisdiction under prevailing rules under the law of nations, and of the connection between protection and jurisdiction, a lens that had not been immediately obvious.

A final introductory note on methodology. The history uncovered in this Article should be relevant to any method of constitutional interpretation. No standard method completely ignores history, one of the central modalities of constitutional interpretation.[13] Indeed, this history should be of particular interest to common-law or "living" constitutionalists. The history demonstrates that the common law of birthright citizenship developed to address a set of discrete historical problems: in medieval and early modern England, to address the problem of unification; in the early American period, to address questions surrounding revolutions in government and the right of election; in the antebellum period, to address the issue of potential dual allegiance resulting from increased international travel; and in the Reconstruction era, to address the status of the newly freed people. This historical development reveals both change and continuity, particularly as

[13] *See generally* JACK BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

the status of the parents became more important to solving these variegated issues. A common-law constitutionalist could plausibly look at this history to support, for example, recent efforts to restrict birthright citizenship, particularly with respect to transient visitors. Whether the historical account offered here is consistent with the "original meaning" of the Fourteenth Amendment is addressed more fully in Part III, after evidence from the congressional debates is considered.

I. PROTECTION AND ALLEGIANCE

The common law of birthright subjectship, and subsequently birthright citizenship, depended partly on the accidental status of one's place of birth. The traditional formulation was that a child in infancy received protection from the sovereign, which created a debt of perpetual allegiance on the part of the child. This Part shows, however, that this exchange of allegiance for protection—or protection for allegiance—was ultimately rooted in what was often described as a mutual compact between the parent and the sovereign. Obedience was due the sovereign by the law of nature because men banded together to form government for the benefits of common life; the sovereign therefore owed legal and physical protection to the subjects in exchange. Aliens, in particular, did not receive any protection in infancy; any exchange of what was called a "local" and "temporary" allegiance for a local and temporary protection was the result of an immediate, often explicit, exchange with the sovereign. Part I.A describes this development in English law, centering on the importance of parental status—whether the parents were under the protection, and therefore within the allegiance, of the sovereign—and its implications for aliens visiting the realm. This Part describes the safe-conducts and statutes of the twelfth through fourteenth centuries that gave aliens permission to enter the realm and guaranteed them the king's protection.

During and immediately after the American Revolution, Americans had to adapt their understanding of birthright

citizenship to account for the right of revolution. Americans even more firmly understood that allegiance and protection were reciprocal obligations rooted in a mutual compact. They asserted a right of election—the right to choose one's allegiance when a revolution in government occurs—which necessarily required an inquiry into the choices of the parents who had children during the revolutionary period. The status of the parents particularly mattered during temporary occupation or displacement caused by war. Part I.B traces these developments.

Finally, Part I.C traces how Americans grappled with the question of temporary visitors in an era of increasing international travel. There was no doubt that temporary visitors were under the local and temporary protection of the sovereign and would seem to be included within the common law's rule of birthright subjectship or citizenship. As international travel and the resulting problem of double allegiances increased, however, some American authorities suggested that the common law should (or did) focus on the intentions and domicile of the parents. This Part uncovers new evidence for the proposition that the rule as applied to temporary visitors was contested in the antebellum and Civil War periods, including evidence from military authorities in Louisiana who confronted questions about whether children born in the United States to French subjects could be conscripted.

A. English Authorities

1. Edward Coke

a. Coke and the Natural Law

The common law rule of birthright subjectship was first[14] articulated in *Calvin's Case*, a 1608 decision reported by Sir Edward Coke.[15] Lord Chancellor Ellesmere also published an opinion in the case,[16] which is less well known[17] but consistent with Coke's report of the decision, which purports to synthesize and summarize the reasons of twelve of the judges in the case who ruled for Calvin.[18] After King James VI of Scotland became King James I of England, there was a pressing need to determine how much the two kingdoms should become unified. A commission recommended certain laws to naturalize Scottish subjects born prior to James's ascent to the English throne (the *antenati*) and to declare subjects born after his ascent (the *postnati*) to be natural born subjects of both England and Scotland.[19] Parliament defeated both bills, and so, the matter of the *postnati* was left to the common law courts.[20]

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[14] Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMANS. 73, 74 (1997) ("*Calvin's Case* is the earliest, most influential theoretical articulation by an English court of what came to be the common-law rule that a person's status was vested at birth, and based upon place of birth.").

[15] Calvin v. Smith (1608) 77 Eng. Rep. 377 (KB).

[16] A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 659–96 (Thomas Jones Howell ed., London, T.C. Hansard 1816) [hereinafter STATE TRIALS].

[17] Price, *supra* note 14, at 89.

[18] 77 Eng. Rep. at 381 (claiming to "reduce the sum and effect of all" the arguments and opinions of the judges "to such a method, as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the judgment and resolution of the case in question."). There were two dissenters. Price, *supra* note 14, at 82. *See also* JAMES KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 17 (1978) (describing authoritativeness of Coke's report).

[19] Price, *supra* note 14, at 97–102 (describing the parliamentary debate).

[20] *Id.* at 85, 97; KETTNER, *supra* note 18, at 16.

The opportunity arose when Robert Calvin's guardians brought suit to inherit lands in England. Calvin had been born in Scotland after the ascent of James to the throne of England; the question was whether he was a natural born subject of James in his capacity only as King of Scotland, or in his natural capacity and therefore also as King of England. In other words, the question was whether Calvin could have the benefit of English laws because he was born a subject of a king whose domains included both Scotland and England.

Opponents of Calvin's claim argued that he was born within the allegiance and jurisdiction of the laws of Scotland, and outside the allegiance and jurisdiction of the laws of England; therefore, he was not a natural-born subject of England entitled to inherit under English law.[21] They relied on the medieval theory that the king had two bodies, one natural and one political, and that allegiance was tied to the king's political body. Here, moreover, the king had two political bodies, such that Calvin's allegiance was to the king in his political capacity as ruler of Scotland.[22]

All the lawyers and judges agreed that one was a natural-born subject if one was born under the protection of, and within the allegiance, of the king; under and within *which* capacity of the king was the only question. Coke began by describing the mutual compact between the king and his people rooted in the natural law. That was the mutual and reciprocal obligations of allegiance and protection: "between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects."[23] This creates a

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[21] Price, *supra* note 14, at 98, 101 (describing this argument); 77 Eng. Rep. at 380 (reporting defendants' argument to be that "[e]very subject that is born out of the extent and reach of the laws of England, cannot by judgment of those laws be a natural subject to the King, in respect of his kingdom of England," and that "[w]hatsoever appeareth to be out of the jurisdiction of the laws of England, cannot be tried by the same laws").

[22] *See generally* Price, *supra* note 14, at 97–113.

[23] 77 Eng. Rep. at 382.

"*duplex et reciprocum ligamen*"—a dual and reciprocal tie.[24] There is a "mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them."[25] According to Coke, "*protectio trahit subjectionem, et subjectio protectionem*," that is, protection draws subjection, and subjection draws protection.[26] This is a "double bond" because "as the subject is bound to the king in obedience, so the king is bound to the subject in protection."[27]

That is not to say one must first have sworn allegiance. Rather, allegiance follows from the fact of birth because from that moment the infant is under the protection of, and therefore will owe an allegiance to, the king.[28] But the reciprocal nature of the bond is unquestionable. Indeed, Coke wrote that, at the origins of society, allegiance to the sovereign came first.[29] And once a king had subjects to obey him, he owed them protection. Thus, Coke concluded that the "ligeance and obedience of the subject to the Sovereign" are "due by the law of nature," and that "protection and government" to his subjects are "due by the law of nature."[30] That was the conclusion that would have been reached by consulting continental or civilian thinkers of the period as well.[31]

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* ("*[Q]uia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen*." (translation provided by author)).

[28] *Id.* (explaining that "ligeance doth not begin by [an] oath").

[29] *Id.* at 392.

[30] *Id.* at 394.

[31] As Polly Price explains, Jean Bodin, the great French theorist of the sixteenth century, wrote: "It is then the acknowledgment and obedience of the free subject towards his sovereign prince, and the tuition, justice, and defense of the prince towards the subject, which maketh the citizen." JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 64 (Kenneth McRae ed., Harv. Univ. Press 1962) (Richard Knolles trans., 1606). Thus, Price writes, "The status of citizen, then, had feudal overtones, representing a mutual obligation between a superior and an inferior, a liege lord and a subject." Price, *supra* note 14, at 132. Bodin was also well known in England. *Id.* at 131–

In sum, allegiance and protection were reciprocal obligations due by the law of nature. As will become clearer momentarily, once the sovereign commanded allegiance and afforded protection, any child born to one of his subjects would be under his protection and would owe him future allegiance. And any child in the next generation would also fall under the sovereign's protection because, again, the parent would have been a subject under the sovereign's protection, entitling his children to protection. And so on and on *ad infinitum*.

b. Aliens and Local Allegiance

As for aliens, Coke observed that they owed the king a local allegiance and obedience while in his kingdom because they received local protection from the king. This exchange was, of course, immediate. An alien born in a foreign land did not receive any protection in infancy. Rather, the alien owed allegiance immediately upon entering the realm in exchange for the immediate protection he was to receive while present.[32] This type of allegiance, Coke reported, was "*ligeantia localis*," or a local ligeance "wrought by the law": this applies "when an alien that is

32. Price also describes the similar understanding of the Scottish writer Thomas Craig. *Id.* at 129 ("[T]he law of Scotland was essentially feudal, and Craig urged that James's governmental authority was based upon the personal, reciprocal dependence of all the King's subjects."). Although feudalism is often associated with status, that should not detract from the point that even feudal relations were justified on the basis of a kind of social compact.

[32] This is not to suggest that Coke saw the exchange between alien and sovereign in proto-Lockean terms, but the analogy fits even under Coke's world view. As many scholars have recognized, Coke analogized the nation to a family. "The natural community of allegiance was the aggregation of all those reciprocal relationships of allegiance and protection between individual subjects and the king," James Kettner has written. KETTNER, *supra* note 18, at 23. "It resembled the natural family, where a common paternity made sons and daughters into brothers and sisters." *Id.*; *see also* SCHUCK & SMITH, *supra* note 5, at 19. But even if there was an automatic mutual bond of protection and loyalty between parents and children immediately upon birth, it is quite obvious that a stranger to the family could not unilaterally become part of the family. Any adoption would result from mutual agreement.

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."[33] "Concerning the local obedience," Coke continued, "it is observable, that as there is a local protection on the King's part, so there is a local ligeance of the subject's part."[34]

This local allegiance, Coke explained, was sufficiently strong to make natural-born subjects of any children born to the alien while in the realm. This "local obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is a natural born subject.""[35] In other words, an alien who exchanged allegiance for protection became a *subject* of the king while in the king's lands. And that alien's child born would become a natural-born subject.

Coke then explained why invading armies were excepted from this rule: it is "*nec cœlum, nec solum*"—neither the climate nor soil—that makes a subject, but rather being born "under the ligeance of a subject" and "under the protection of the King."[36] To be a natural born subject, then, one must be born under the ligeance *of a subject*; that is, the child has to be born "under the ligeance of" the parent who is "a subject" of the king's. An alien parent was such a subject if within the local allegiance and obedience of the king and under his local protection.

This passage is important because it confirms that allegiance and jurisdiction or power were related, and that the status of the parents—whether they were within the allegiance and under the protection of the sovereign—was a relevant consideration.

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

[34] *Id.* at 384. Ellesmere stated similarly: "[a]nd ligeantia hath some times a more large extension: for, hee that is an alien borne out of the kings dominions, vnder the obedience of another king, if hee dwell in England, and be protected by the king and his lawes, hee oweth to the king the duetie of allegiance." 2 STATE TRIALS, *supra* note 16, at 679.

[35] 77 Eng. Rep. at 384.

[36] *Id.*

"[U]nless it be in special cases," Coke stated later in his report, there are "regularly . . . three incidents to a subject born. 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."[37] A birthright subject was one whose parents, whether aliens or themselves natural-born subjects, were in allegiance to, and under the protection of, the king at the time of birth. Such protection would entitle a child to protection, which would then create a subsequent debt of allegiance on the part of the child.

That parental status would be relevant is not surprising. As two scholars recently explained, both French and British "jurists and commentators . . . invoked the father's legal power over his minor children to explain why his allegiance determined that of his child. The father's power within the family meant that he could compel his family to move or act in ways that affected subjecthood."[38] Coke's discussion of ligeance supports this conclusion. It would be surprising, to say the least, if the rule of birthright subjectship ignored the status of the parents because it is unlikely that a legal rule would supersede the natural relation between a parent and child.

In sum, *Calvin's Case* establishes the central importance of not only one's place of birth, but also the status of one's parents and whether they were under the protection (and thus within the allegiance) of the sovereign.

2. William Blackstone

William Blackstone's *Commentaries*, influential on the American founding as well as subsequent generations,[39] repeated many of

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[37] *Id.* at 399.

[38] Perl-Rosenthal & Erman, *supra* note 11, at 7.

[39] For just a small indication of Blackstone's influence, see, for example, Debates of the Virginia Convention (June 18, 1788) (statement of James Madison), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1371, 1382 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (noting that Blackstone's work was a "book which is in every man's hand"); Thomas Jefferson to James Madison (Feb. 17,

these same themes about birthright subjectship, but his treatise also reflected the more social contractarian philosophy of the late and early eighteenth century.[40] Blackstone began his discussion of birthright subjectship by recounting that "[n]atural-born subjects are such as are born within the dominions of the crown of the England; that is, within the ligeance, or, as it is generally called, the allegiance, of the king." In contrast, aliens "are born out of it." "Allegiance is the tie, or *ligamen*," he continued, "which binds the subject to the king, *in return for* that protection which the king affords the subject."[41] Allegiance and protection constituted a mutual compact between the sovereign and subject.[42]

The social contractarian nature of allegiance and protection is even clearer in light of Blackstone's earlier discussion regarding the ends of society. Blackstone denied that a social contract to exit the state of nature ever existed explicitly. Yet even though "society had not its formal beginning from any convention of individuals, actuated by their wants and their fears," Blackstone wrote, "it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that

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1826), *in* THOMAS JEFFERSON: POLITICAL WRITINGS 57, 58 (Joyce Appleby & Terence Ball eds., 2004) ("[T]he honied Mansfieldism of Blackstone became the Student's Hornbook"). For his influence on the antebellum generation, see *infra* note 50.

[40] Benjamin Keener, in a recent and thoughtful essay, argues that Coke's discussion of obedience referred only to actual possession of territory. Benjamin Keener, Calvin's Case *and Birthright Citizenship*, 174 U. PA. L. REV. ONLINE (2025). But of course, the common law had developed since Coke, and Blackstone reflects a more social contractarian understanding of citizenship, as discussed in this section. Moreover, the dual meaning of allegiance—loyalty and faith to the sovereign as well the sovereign's actual control and ability to command obedience—was already present in Coke. *See infra* Part II.A.1; *see also* KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 137–38 (2001) ("Before *ligeance* was employed to refer to a tract of land, the term had already been used to refer to a certain quality of interpersonal relationship.").

[41] 1 WILLIAM BLACKSTONE, COMMENTARIES *366 (second emphasis added).

[42] In his chapter on treason, Blackstone reiterated the exchange: "allegiance" is the "tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him." 4 WILLIAM BLACKSTONE, COMMENTARIES *74. He reiterates that such allegiance is either "natural and perpetual" or "local and temporary, which is incident to aliens." *Id.*

therefore is the solid and natural foundation, as well as the cement of civil society."[43] This, Blackstone wrote, "is what we mean by the original contract of society," which even if never "formally expressed" at the beginning of civil government, "must always be understood and implied, in the very act of associating together."[44] The terms of this contract were "that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or," Blackstone elaborated, "that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any."[45]

To be sure, whatever the original or social contract may have been, a child is not born in the state of nature and cannot make this exchange expressly. The child received protection in infancy and therefore owed a debt of obedience to the sovereign subsequently. Natural allegiance "is due from all men born within the king's dominions immediately upon their birth," Blackstone explained, for they are then "under the king's protection" and "at a time, too, when (during their infancy) they are incapable of protecting themselves"; their allegiance is therefore "a debt of gratitude, which cannot be forfeited, cancelled, or altered" except by the concurrence of the legislature.[46] The birthright subjectship rule thus retained ascriptive elements. To repeat the point—it cannot be too often repeated—the rule traced back to the mutual compact between sovereign and parents, which entitled the child to protection, thus creating a subsequent allegiance, and so on until the chain was broken.

As for the local allegiance of an alien, Blackstone emphasized the immediate exchange between sovereign and foreigner. "Local allegiance is such as is due from an alien, or stranger born, for so

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[43] 1 WILLIAM BLACKSTONE, COMMENTARIES *47.

[44] *Id.* at *47–48.

[45] *Id.* at *48.

[46] *Id.* at *369.

long time as he continues within the king's dominion and protection."[47] While natural allegiance is perpetual, local allegiance is temporary. "[F]or this reason, evidently founded upon the nature of government," Blackstone explained, "allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully."[48] Natural allegiance therefore extends everywhere, at all times; local allegiance is temporary while the alien is in the realm.

Blackstone's treatise further suggested the relevance of parental status, namely, whether the parents are within the allegiance and under the protection of the sovereign. "The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such."[49] The widely read Sharswood edition of Blackstone's *Commentaries*, prominent in the years leading up to the adoption of the Fourteenth Amendment,[50] contains a note from a previous editor of Blackstone's work: "Unless the alien parents are acting in the realm as enemies; for my lord Coke says, it is not *cœlum nec solum*, but their being born within the allegiance and under the protection of the king."[51] Once again, the allegiance and protection of the parents—here, the enemy invaders—determined the status of the child born within the sovereign's territorial domains.

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[47] *Id.* at *370.

[48] *Id.*

[49] *Id.* at *373–74.

[50] *See, e.g.*, *Review of* Commentaries on the Laws of England, in Four Books, N. AM. REV. (Apr. 1860) (reviewing WILLIAM BLACKSTONE, COMMENTARIES), at 550–52 (generally describing the high praise for the book and that it will become indispensable to lawyers and students). Several state supreme courts cited the edition between 1859 and 1868, including in Rhode Island, Pennsylvania, California, Indiana, New Jersey, Iowa, West Virginia, Maine, Missouri, and Kentucky, as well as the Supreme Court of the United States. *See Ex parte* Garland, 71 U.S. 333, 381 (1866). Sharswood, a professor at the University of Pennsylvania, also became a Justice on the Supreme Court of Pennsylvania in 1867, further attesting to his prominence.

[51] 1 WILLIAM BLACKSTONE, COMMENTARIES *373 n.15 (George Sharswood ed., 1866).

Blackstone himself made a similar point about ambassadors, mentioning the counterpart to protection, allegiance. The maxim "that every man owes natural allegiance where he is born" contains an exception: "the children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent," Blackstone wrote, "so, with regard to the son also, he was held . . . to be born under the king of England's allegiance, represented by his father the ambassador."[52] Thus, we see again that a relevant consideration for the birthright rule with respect to alien children, and perhaps the decisive consideration, was whether the parents were under the protection (and within the allegiance) of the sovereign.[53]

3. License and Safe-Conduct

Coke and Blackstone reveal that parental status mattered, and particularly whether the parents were under the protection of the

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[52] *Id.* at *373.

[53] Other influential English authorities are consistent with these observations. Chief Justice Matthew Hale emphasized the social compact underpinnings of allegiance and protection. "[T]here is a radical and fundamental allegiance due before any oath at all made to observe and keep the same. For there doth intervene an implicit faith between the governor and governed, *viz*. of the part of the former, protection, on the part of the latter, allegiance or fealty," Hale wrote. MATTHEW HALE, PREROGATIVES OF THE KING 59 (1976). "And this," he added, "is the foundation of that superadded stipulation or oath of the king at his coronation for the due protection of the subjects, and of the subjects for their fidelity to the prince." *Id.* "Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the king." 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 59 (London, E. & R. Nutt 1736). Intriguingly, Hale wrote that the common law required an *oath of allegiance* even on the part of aliens, who were over twelve years of age: "The second obligation that the common law did put upon every subject was the oath of *allegiance* or fealty. Which every man above the age of twelve years is to take in that leet or hundred wherein he is commorant, whether he be ecclesiastical or temporal, noble or not, natural subject or an alien that oweth a local subjection." HALE, PREROGATIVES, *supra*, at 53. More generally on local allegiance, Hale wrote that a "local" allegiance "obligeth all, that are resident within the king's dominions, and partake of the benefit of the king's protection, altho strangers born." *Id.* at 62.

sovereign. Both also demonstrate that allegiance and protection were a mutual compact between sovereign and subject, including alien subjects. Significant and neglected historical evidence further demonstrates the central importance of the sovereign's consent to the extension of protection, both to the sovereign's own subjects travelling abroad and to another sovereign's subjects coming to England.

Starting with the king's subjects, the community of allegiance extended to the children born abroad to English parents. Professor James Kettner has written that, in the world of Coke, "legislators defined status in terms of simple and coherent principles of allegiance," and "[t]he community of allegiance transcended political boundaries and legal jurisdictions."[54] Two scholars have recently suggested, similarly, that "[j]urists paid attention to birth on territory and descent as two among a number of criteria or mechanisms that determined whether a controlling principle was applicable in a particular case," but neither "was dispositive in itself of a child's allegiance."[55] The system therefore had elements of both *jus soli* and *jus sanguinis*, concepts that did not exist as such until the latter half of the nineteenth century.[56]

There would be some debate among American jurists and scholars in the nineteenth century over whether the *jus sanguinis* elements derived from the common law or only from statutes, such as the 1351 *De Natis Ultra Mare* statute that declared children born to English parents abroad may inherit.[57] Presuming the statute to

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[54] KETTNER, *supra* note 18, at 15, 28.

[55] Perl-Rosenthal & Erman, *supra* note 11, at 423.

[56] *See* KETTNER, *supra* note 18, at 15. For a recent intellectual history of the two bases of citizenship and how they originated only in 1860, see Perl-Rosenthal & Erman, *supra* note 11.

[57] Status of Children Born Abroad Act 1351, 25 Edw. 3 (Eng.). For the American debate, see *infra* notes 172–175 and accompanying text. There is some question whether the 1351 statute has been misconstrued as extending natural-born status to children born abroad to English subjects or merely dealt with inheritance. *See* Perl-Rosenthal & Erman, *supra* note 11, at 426 & n.14; KIM, *supra* note 40, at 155–58. Regardless, the principle that such children were natural-born subjects was established at least as early

be declaratory of the common law, it is noteworthy that English judges narrowly interpreted the statute and held that a child born to English parents abroad was not a natural-born subject "if the parents left the dominions without license or stayed outside the realm longer than their licenses permitted."[58] This limitation suggests that whether one was within the protection of the king—at least if *outside* the realm—depended on the king's consent as well as the status of the parents.

A similar rule appears to have applied to aliens *inside* the realm. Scholars have shown that in the twelfth and thirteenth centuries, merchants generally required a grant of safe-conduct to trade and do business in fairs throughout the country.[59] These safe-conducts guaranteed the bearer the king's *peace* or the king's *protection*. Thus, a grant to merchants attending the fair of St. Ives in 1110 extended the king's "firm peace."[60] A safe-conduct issued to merchants from Cologne in 1157 guaranteed they would be in the king's "custody and protection" as if they "were my men and friends."[61] Some of these safe-conducts stated the bearers would be considered as the king's "faithful men": "*quia homines et fideles mei sunt*."[62] They were, in other words, the king's temporary subjects.

Issuing such letters of safe-conduct or "protection" was so common that more than a few examples would be redundant. In 1316, the king issued letters of safe-conduct to two French knights; the letter stated they would have "safe and secure conduct," and be taken "into our special protection and defense."[63] Another grant to

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as 1541. Perl-Rosenthal & Erman, *supra* note 11, at 426 & n.14; KIM, *supra* note 40, at 155–58.

[58] KETTNER, *supra* note 18, at 14 (citing Hyde v. Hill (1582) 37 Eng. Rep. 270).

[59] KIM, *supra* note 40, at 25–29.

[60] *Id.* at 26.

[61] *Id.* at 27.

[62] *Id.*

[63] THOMAS RYMER, 2 FOEDERA, CONVENTIONES, LITERAE, ET CUJUSCUNQUE GENERIS ACTA PUBLICA INTER REGES ANGLIAE 104 (3d ed. 1739) ("*Nous, voillantz purvoier a la seurte de eux, si come il affert, avoms pris en nostre sauf & seure conduit, & en nostre protectione & defense especiale*." (translation provided by author)). The *Foedera* is littered with such safe-conducts, often described as "*protectione & conductu*."

one William of Wynum and his men provided that William "has letters of protection for himself and his men when they come into the land and power of the king with their goods and merchandise."[64]

The examples are legion.[65] One scholar has described these "letters of protection and safe-conduct" as "forms of written permission . . . issued by the English crown to aliens since the

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[64] PATENT ROLLS OF THE REIGN OF HENRY III, 1225–1232, at 324 (1903) ("*Willelmus de Wynum, prepositus de Barbeflet, habet literas de protectione pro se et hominibus suis cum in terram et potestatem regis venerint cum rebus et mercandisis suis*." (translation provided by author)).

[65] One scholar has explained that the relevant passes were described as "*Conductu, litteras de conductu, litteras de protection*." Laurence Jean-Marie, *Close Relations? Some Examples of Trade Links Between England and the Towns and Ports of Lower Normandy in the Thirteenth and Early Fourteenth Centuries*, *in* 32 ANGLO-NORMAN STUDIES: PROCEEDINGS OF THE BATTLE CONFERENCE 2009, at 96, 104 (C.P. Lewis ed., Susan Nicholls trans., 2010). For specific "letters of protection," see *id.* at 102 & n.49, 110 & n.118, 111 & n.121.

Another scholar writes that in England, "Portuguese merchants obtained dozens of safe-conducts and letters of protection from the English rulers throughout the thirteenth century." Flavio Miranda, *Conflict Management in Western Europe: The Case of Portuguese Merchants in England, Flanders and Normandy, 1250–1500*, 32 CONTINUITY & CHANGE 11, 14 (2017). Still another writes of Castilian merchants: "[b]etween 1248 and 1350 [safe-conducts from England] reached into the hundreds, the majority of them coming after 1300. These safe-conducts to individuals or small groups of three or four merchants guaranteed protection for periods ranging from a few months to five years." Teofilo F. Ruiz, *Castilian Merchants in England, 1248–1350*, *in* ORDER AND INNOVATION IN THE MIDDLE AGES: ESSAYS IN HONOR OF JOSEPH R. STRAYER 173, 177 (William Chester Jordan, Bruce McNab & Teofilo Ruiz eds., 1976).

A more general study of safe-conducts in the medieval period concludes such conducts were "a protection granted to an individual or to a group of people traversing a region or going to a determined place. Christiane de Craecker-Dussart, *L'evolution du Sauf-Conduit dans les Principautés de la Basse Lotharingie, du Ville au XIVe Siècle*, 80 MIDDLE AGES: REV. HIST. & PHILOLOGY 185, 185–86 (1974) ("[*U*]*ne protection concédée à un individu ou à un groupe de personnes traversant une region ou se rendant en un lieu déterminé*." (translation provided by author)). The two elements "found in the notion of safe conduct" were "displacement and protection." *Id.* at 188. In 796, Charlemagne granted a safe conduct to English merchants that guaranteed them "*protectionem et patrocinium*." *Id.* at 190. Many other safe-conducts used similar words like "safety," "security," or "defense." *Id.* at 193 & n.38.

thirteenth century."[66] Summarizing the safe-conducts in Carolingian Europe, a French scholar explained:

> The right to accord protection to a foreign traveler belonged to the monarch. The sources show that each individual, whether he be a royal envoy, an ambassador, a pilgrim, a merchant, or simply one traveling to the imperial court, is always protected by the sole sovereign. It is to the latter that belongs the right to impose peace, and safe conduct, which is an emanation and manifestation of this peace, cannot be accorded without his assent.[67]

The monarch was the sole dispenser of protection, and no protection could be extended to voyagers without his consent. That seems also to have been the rule of safe-conducts in England, perhaps a practice the Normans brought with them after the Conquest.

At some point, a shift occurred, and safe passage and the king's protection were extended to aliens from friendly nations by statute. Magna Carta guaranteed to friendly aliens "safe and secure conduct" to engage in trade, "unless they have been previously and publicly forbidden."[68] The Carta Mercatoria of 1303 was a general grant of safe-conduct and "protection" to merchants from Germany, France, Spain, Portugal, and other European provinces.[69]

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[66] W. Mark Ormrod, *Enmity or Amity? The Status of French Immigrants to England During an Age of War c.1290–c.1540*, 105 HISTORY 28, 38, 41, 56 (2020). The author notes that such letters were routinely granted to "French merchants." *Id.* at 40 n.56.

[67] Craecker-Dussart, *supra* note 65, at 197 ("[L]*e droit d'accorder protection à un voyageur appartient au monarque. Les sources montrent que tout individu, qu'il soit missus, ambassadeur, pèlerin, marchand ou simplement une personne se rendant à la curia imperialis, est toujours protégé par le seul souverain. C'est à ce dernier que revient le droit d'imposer la paix, et le sauf-conduit, qui est une émanation et une manifestation de celle-ci, ne peut être accordé qu'avec son assentiment*." (translation provided by author)).

[68] MAGNA CARTA, c. 30 (1297).

[69] KIM, *supra* note 40, at 37. One scholar has explained that the charter was an "agreement between two parties, the king and foreign merchants," where the latter would pay new customs duties and in return they would receive, among other things,

Similarly, a 1353 statute provided, "to give courage to Merchant Strangers to come with their Wares and Merchandises into the Realm," that they "may safely and surely under our Protection and safe-conduct come and dwell in our said Realm."[70]

It is no surprise, then, that Coke and Blackstone presumed that aliens from friendly nations were under the protection of the king. Such aliens no longer needed specific safe-conducts to ensure they were within the king's protection. The sovereign's consent, as expressed in various statutes, already guaranteed that protection. Blackstone summarized safe-conducts as follows: "during the continuance of any safe-conduct, either express or implied, the foreigner is under the *protection* of the king and the law."[71] One scholar has explained that an example of a general, implied safe conduct, "was the protection extended to alien merchants under the English domestic law of Magna Carta."[72]

As a result of these statutes, by the seventeenth and eighteenth centuries, only alien enemies—aliens from nations at war with England—required safe-conducts. The English judges explained in 1703 that "if an *alien enemy* come[s] into England without the Queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here."[73] "Protection and Allegiance are reciprocal Obligations," wrote another English judge, Michael Foster, in the 1760s.[74] Alien enemies granted permission to remain "by license or safe-conduct" could access courts and maintain

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the king's royal "protection." NORMAN GRAS, THE EARLY ENGLISH CUSTOMS SYSTEM 258–59 (1918). The charter specifically guaranteed "*quod omnes mercatores dictorum regnorum et terrarum salvo et secure sub tuitione et protectione nostra*." *Id.* at 260.

[70] Ordinance of the Staple 1353, 27 Edw. 3 stat. 2 c. 2 (Eng.).

[71] 4 WILLIAM BLACKSTONE, COMMENTARIES *68 (emphasis added).

[72] Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 874–75 (2006).

[73] Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1878 (2009) (quoting Sylvester's Case (1703) 87 Eng. Rep. 1157, 1157 (QB)).

[74] *Id.* at 1839 & n.37; Michael Foster, *Discourse I. of High Treason*, *in* A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY 181, 188 (Michael Dodson ed., London, 3d ed. 1792).

actions; they were "under the protection of the law; and in consequence of that protection, they owe[d] a local and temporary allegiance to the Crown."[75] (This connection between protection and jurisdiction shall be further explored in Part II.)

Giles Jacob's prominent law dictionary[76] described the rule respecting enemy aliens: "An *Alien* Enemy coming into this Kingdom, and taken in War, shall . . . not be indicted at Common Law, for the Indictment must conclude *contra Ligeantiam suam*, &c. And such was never in the Protection of the King."[77] In other words, aliens from nations at war with England were not under the protection of the king unless a license or safe-conduct was granted.

In summary, the materials respecting subjects travelling abroad suggest that parental status mattered for citizenship, that the community of allegiance could extend beyond the sovereign's soil, and that the community of allegiance depended on the sovereign's consent. The materials respecting safe-conducts and related statutes similarly suggest that for an alien to be under the sovereign's protection, the sovereign's consent by statute or by safe-conduct was required.

B. American Authorities

The birthright rule continued to develop as a result of the American Revolution. Although the British continued to treat natural allegiance as perpetual—for many decades in the early nineteenth century, going so far as to impress into imperial naval service former British subjects who had been naturalized in the United States[78]—Americans firmly adopted John Locke's rejection

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[75] Foster, *supra* note 74, at 186.

[76] Hamburger, *supra* note 73, at 1878 (describing it as the most prominent law dictionary in the eighteenth century). For a more in-depth discussion of this dictionary's prevalence and popularity, see Ilan Wurman, *The Original Presidency: A Conception of Administrative Control*, 16 J. LEGAL ANALYSIS 1, 35 (2024).

[77] Hamburger, *supra* note 73, at 1878 (quoting JACOB, *supra* note 8, entry for "Alien").

[78] JAMES FULTON ZIMMERMAN, IMPRESSMENT OF AMERICAN SEAMEN 22–24 (1925). The British did not, however, treat those born in America prior to the end of the

of perpetual allegiance.[79] Many believed in the right of expatriation.[80] Additionally, Americans did not consider themselves subjects of a sovereign; the people themselves were sovereign. Therefore, the allegiance demanded of them was to the laws, which expressed the will of the sovereign community, and they were citizens, not subjects.[81]

More generally, American authorities support the proposition that whether the parents were within the allegiance and under the protection of the laws of the United States was highly relevant for determining the scope of the birthright citizenship rule. In an era of revolution, it is not surprising that the rule would continue emphasizing parental choice—otherwise the right to elect an allegiance in a revolutionary period could not have been operationalized. But parental choice was not the only desideratum; place of birth continued to matter, too, and some judges appear to have thought that a child born in American territory during the revolution could elect American citizenship within a reasonable

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Revolutionary War as subjects to whom the doctrine of perpetual allegiance applied. Inglis v. Trs. of Sailor's Snug Harbor, 28 U.S. 99, 121 (1830) (noting that the English rule by that time was not to treat the American *antenati* as owing a perpetual allegiance). By the time of Blackstone's writing, it was maintained that a subject's allegiance could be discharged "by the united concurrence of the legislature." 1 WILLIAM BLACKSTONE, COMMENTARIES *368. This was a partial softening of the idea of perpetual allegiance.

[79] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 113–22 (rejecting rule of perpetual allegiance); KETTNER, *supra* note 18, at 173 ("By 1776 American theorists had rejected the concept that the colonists were perpetually bound by their subjectship. . . . Allegiance was contractual, and contracts could be broken or annulled."); Citizenship, 10 Op. Att'ys Gen. 382, 395 (1862) ("But that law of the perpetuity of allegiance is now changed, both in Europe and America.").

[80] KETTNER, *supra* note 18, at 200–09, 267–69.

[81] *See id.* at 179, 183, 187. For example, on June 24, 1776, the Continental Congress passed a resolution defining treason against the colonies that explained "[t]hat all persons residing within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or mak[ing] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same time, allegiance thereto." 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 475–76 (Worthington Chauncey Ford ed., 1905) [hereinafter JCC].

time of reaching majority, notwithstanding any contrary allegiance the parents may have chosen during the child's infancy.

1. Revolutionary Discourse

"It was widely assumed in the late eighteenth century," Professor Philip Hamburger has explained, "that allegiance was given on the condition of protection, and similarly that protection was given on the condition of allegiance."[82] Although citizenship and territory "were relevant for determining who owed allegiance," ultimately allegiance or submission "was necessary for protection, and protection was necessary for allegiance."[83] Certainly by the time of the American Revolution, the idea that allegiance and protection were at the heart of the social compact was a commonplace in the American mind. "Underlying the reciprocal nature of protection and allegiance was the logic of consent," Hamburger writes.[84] Individuals "sought the protection of government and its laws for their natural liberty by consenting to the formation of civil society" and "thereby consensually created government and submission or allegiance to it."[85] Or, as Professor James Kettner put it, many Americans "acknowledged that allegiance began with an act of individual volition," and that this allegiance could be dissolved either by mutual consent or by the "default" of the government.[86]

Moses Mather, for example, argued against perpetual allegiance in 1775. He wrote, that "the obligation to obedience in" all cases of allegiance "arises from the reason and fitness of things," namely that "protection mutually entitles to subjection, and subjection to protection."[87] He agreed that natural allegiance was owed by someone protected in infancy, but that just as one becomes

[82] Hamburger, *supra* note 73, at 1834.

[83] *Id.* at 1835.

[84] *Id.* at 1839.

[85] *Id.* at 1840.

[86] KETTNER, *supra* note 18, at 209.

[87] MOSES MATHER, AMERICA'S APPEAL TO THE IMPARTIAL WORLD 16 (Hartford, Ebenezer Watson 1775).

independent of one's parents, so too one could become independent of the nation in whose dominions he was born by force of "accident" rather than "choice."[88] He thus argued that anyone can leave the realm—not just aliens—and give up their subjectship. "[W]hen a person, under a natural, acquired, or local allegiance removes out of the realm to some distant climate, goes out of the protection of the King, and loses all benefit of the laws and government of the kingdom; his allegiance, which is mutual or not at all, ceaseth."[89] Therefore, Mather wrote, when the "protection and the benefits of government" ceases, "the obligation of obedience also ceaseth."[90]

When Parliament in 1775 effectively declared Americans outside the protection of the law because of the ongoing rebellion, the Chief Justice of South Carolina, William Drayton, declared the contract between America and Great Britain to be dissolved. He wrote that "this Act of Parliament . . . released America from Great-Britain" because it absolved America of "the Faith, Allegiance and Subjection of America to the British Crown" when it "solemnly declar[ed] the former out of the Protection of the latter," thereby "actually dissolving the Original Contract between King and People."[91]

"[W]e had been bound to [the King] by allegiance," members of the Continental Congress argued, but "this bond was now dissolved by his assent to the last act of Parliament, by which he declares us out of his protection, and by his levying war on us, a fact which had long ago proved us out of his protection." This, they explained, was because of "a certain position in law that allegiance and protection are reciprocal, the one ceasing when the other is

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[88] *Id.* at 17–18.

[89] *Id.* at 16.

[90] *Id.*

[91] WILLIAM-HENRY DRAYTON, A CHARGE, ON THE RISE OF THE AMERICAN EMPIRE 5 (Charlestown, David Bruce 1776). I am indebted to Hamburger, *supra* note 73, at 1843, for this citation.

withdrawn."[92] The Declaration of Independence resolved that the king had "abdicated Government here, by declaring us out of his Protection."[93]

Numerous state constitutions declared that allegiance and protection were mutual, reciprocal, and at the heart of the original contract between sovereign and subject.[94] "Allegiance and Protection are, in the Nature of Things, reciprocal Ties, each equally depending upon the other, and liable to be dissolved by the other's being refused or withdrawn," began the New Jersey constitution.[95] "[A]llegiance and protection are, in their nature, reciprocal, and the one should of right be refused when the other is withdrawn," the North Carolina constitution declared.[96] The Continental Congress resolved, "[t]hat all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony," and moreover "that all persons passing through, visiting, or mak[ing] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto."[97] In enacting a statute to remove enemy aliens without any judicial process whatsoever, the Maryland legislature began by announcing that "in every free state, allegiance and protection are reciprocal, and no man is entitled to the benefits of the one, who refuses to yield the other."[98]

In sum, early seventeenth-century writers already understood the obligations of allegiance and protection to be rooted in a mutual compact compelled by natural law, which the common law judges

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[92] 1 THE WRITINGS OF THOMAS JEFFERSON 21–22 (Paul Leicester Ford ed., New York, G.P. Putnam & Sons 1892); Hamburger, *supra* note 73, at 1844.

[93] THE DECLARATION OF INDEPENDENCE para. 25 (U.S. 1776).

[94] Hamburger, *supra* note 73, at 1845–46.

[95] *Id.* at 1845 (quoting N.J. CONST. of 1776, pmbl.).

[96] *Id.* (quoting N.C. CONST. of 1776, pmbl.).

[97] *Id.* at 1853 (quoting 5 JCC, *supra* note 81, at 475).

[98] *Id*. at 1924 (quoting An Act for the Better Security of the Government, ch. XX, pmbl., 1777 Md. Laws 187, 187).

articulated in *Calvin's Case*. By the American Revolution over a century and a half later, thinkers and writers on the subject rooted the mutual and reciprocal obligations more firmly in Lockean social compact theory, or on the original contract between the sovereign and his people. Chancellor Kent summarized the idea when writing about a circuit court decision by Chief Justice Ellsworth: "The compact between the community and its members was, that the community should protect its members, and that the members should at all times be obedient to the laws of the community, and faithful to its defence."[99] It was still widely accepted, to be sure, that a child in infancy received protection and thus owed his allegiance in return.[100] That exchange of allegiance and protection was, however, ultimately rooted in the mutual compact between the parent and the sovereign—a compact that the Americans even more than the British understood to be social contractarian in nature.

2. Revolution and Election

The American Revolution also produced one of the most significant Supreme Court opinions on the nature of birthright citizenship and allegiance. John Inglis was born in New York City in 1776. It was possible that he had been born prior to July 4 (the date of independence), between July 4 and September 15 (before the

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[99] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *47.

[100] *See, e.g.*, 1 THE WORKS OF THE HONOURABLE JAMES WILSON 313 (Bird Wilson ed., Phila., Lorenzo Press 1804).

> Every citizen, as soon as he is born, is under the protection of the state, and is entitled to all the advantages arising from that protection: he, therefore, owes obedience to that power, from which the protection, which he enjoys, is derived. But while he continues in infancy and nonage, he cannot perform the duties of obedience. The performance of them must be respited, till he arrive at the years of discretion and maturity. When he arrives at those years, he owes obedience, not only for the protection, which he then enjoys, but also for that, which, from his birth, he has enjoyed. *Id.*

British occupied the city), or after September 15 (the date the British occupation began). John Inglis's father was the infamous royalist Charles Inglis. It was known that with—or just prior—to the British departure from New York in 1783, Charles and his son returned to Great Britain, and John never returned to the United States. The relevant question was whether John Inglis was a citizen who could inherit land in New York, or an alien who could not.[101]

The opinion for the majority emphasized the "mutual compact" that determined whether one was a subject or citizen of a given society: whether the individual received protection from the government and gave the government allegiance in return.[102] What is more, during a revolution, each subject had the right to elect which allegiance to adopt.[103] The Court decided that it did not matter precisely when John Inglis had been born. If before the Revolution or after the occupation of New York, he was "under the protection of the British government, and not under that of the state of New York, and of course owing no allegiance to the state of New York."[104] His father could have elected an allegiance to New York,

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[101] Inglis v. Trs. of Sailor's Snug Harbor, 28 U.S. 99, 100, 102 (1830) (facts and argument of counsel); *id.* at 123–26 (majority opinion).

[102] It emphasized this exchange in discussing the case of *M'Ilvaine v. Coxe's Lessee*:

> "[T]he doctrine of allegiance became applicable to his case, which rests on the ground of a mutual compact between the government and the citizen or subject, which it is said cannot be dissolved by either party without the concurrence of the other. It is the tie which binds the governed to their government, in return for the protection which the government affords them. New Jersey, in October 1776, was in a condition to extend that protection, which Coxe tacitly accepted by remaining there." *Id.* at 124–25 (majority opinion).

Justice Story's concurrence agreed. "[T]he party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, de facto." *Id.* at 155 (opinion of Story, J.).

[103] *Id.* at 121 (majority opinion).

[104] *Id.* at 126.

but did not do so by adhering to the British and departing with them.[105]

If he had been born between the date of independence and the British occupation, his father had nevertheless elected to adhere to the British. And because "his infancy incapacitated him from making any election for himself," John's "election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority."[106] The Court emphasized:

> The facts disclosed in this case, then, lead irresistibly to the conclusion that it was the fixed determination of Charles Inglis the father, at the declaration of independence, to adhere to his native allegiance. And John Inglis the son must be deemed to have followed the condition of his father, and the character of a British subject attached to and fastened on him also, which he has never attempted to throw off by any act disaffirming the choice made for him by his father.[107]

The Court's discussion illuminates important facets of birthright citizenship, facets which the Revolution surfaced and forced judges to confront and elaborate. First, the status of the parent was relevant to determining the status of the child. At least in the case of revolution, however, the child—after reaching the age of majority—could, within a reasonable time, make a different election than the parent. To the extent the Supreme Court reflected American thought of the early Republic period, it appears that Americans rejected both the perpetual allegiance of the medieval and early modern common law and Locke's proposition that a child is born a citizen of no country, following the condition of the father until at majority he may choose to become a citizen of any

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[105] *Id.*

[106] *Id.*

[107] *Id.* at 124.

country.[108] Both parental status and one's place of birth continued to matter. Second, the decision emphasizes that the relevant status was whether the parent was under the protection of, and within the allegiance of, the government, that is, to whom the parents chose to adhere and from whom they chose to receive protection.[109]

3. War and Occupation

In the *Inglis* case, Justice Story wrote a separate opinion that offered a more comprehensive treatment of the birthright rule. He thought that the timing of John Inglis's birth mattered. "Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth."[110] Justice Story thus connected both place of birth and the status of the parents as being under the protection of the government to the birthright rule. In consequence of that rule, if Inglis was born between July 4 and September 15, Justice Story thought he was born a citizen entitled to inherit property—because his parents, at that time, would have

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[108] LOCKE, *supra* note 79, at § 118 ("It is plain then, by the practice of governments themselves, as well as by the law of right reason, that *a child is born a subject of no country or government*. He is under his father's tuition and authority, till he comes to age of discretion; and then he is a freeman, at liberty what government he will put himself under, what body politic he will unite himself to . . . ." (emphasis added)).

[109] As Kettner summarized, "Americans came to see that citizenship must begin with an act of individual choice. Every man had to have the right to decide whether to be a citizen or an alien. His power to make this choice was clearly acknowledged to be a matter of right, not of grace, for the American republics were to be legitimate governments firmly grounded on consent, not authoritarian states that ruled by force and fiat over involuntary and unwilling subjects." KETTNER, *supra* note 18, at 208. That said, "[i]t was not yet clear how far this right of election could be extended" and "[t]he notion that allegiance in an established political community could only be broken by default or by mutual consent still characterized most discussions of the relationship between a person who had explicitly or implicitly made his choice and the community that accepted him as a member." *Id.* at 209.

[110] *Inglis*, 28 U.S. at 100, 102 (1830) (opinion of Story, J.).

been under the protection of the New York government.[111] If he had been born before July 4 or after September 15, the matter would have been more complicated.

Justice Story argued that the rule of the common law was that "the children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens."[112] That is consistent with the rule announced by Coke and Blackstone: the children of invaders or enemy aliens are excluded from birthright subjectship. Justice Story also thought, however, that "the children of the natives, born during such temporary occupation by conquest, are, upon a reconquest or reoccupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy."[113] Under Roman law, and the law of nations, *postliminium* restored a people or individuals to their former condition as if they had never been occupied or taken captive.[114]

On this reasoning, John Inglis could have become a citizen of New York upon the reconquest of New York City because in the eyes of the law, at least for this purpose, New York City will always have belonged to the state of New York. But, as Justice Story reminded

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[111] *Id.*; *see also id.* at 170–71.

[112] *Id.* at 156.

[113] *Id.*

[114] In Roman Law, the principle of *postliminium* referred to the right of an individual to recover their rights following return from enemy capture. J. INST. 1.12.5 ("[F]or on escape from captivity a man recovers all his former rights, and among them the right of paternal power over his children, the law of postliminium resting on a fiction that the captive has never been absent from the state."). According to Vattel, the principle takes effect when "persons return, and things are recovered, by the right of postliminium, when, after having been taken by the enemy, they come again into the power of their own nation." 2 VATTEL, *supra* note 7, at *393 (§ 206). Grotius wrote that the principle "applies to nations" as well, "so that a free people, who have been subjugated, upon being delivered from the yoke of the enemy by the power of their allies [or themselves], will recover their former condition." HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 354 (A.C. Campbell trans., 1901). As to individuals, "[u]pon any one's returning to his former condition by the law of postliminium, all his rights are restored as fully, as if he had never been in the hands and power of the enemy." *Id.*

his readers, it was not enough *merely* to have been born in a sovereign's territory. One must also be within the allegiance of that sovereign. "To constitute a citizen, the party must be born not only within the territory, but within the ligeance of the government."[115] And in this case, John Inglis's "parents were under the protection of, and adhering to the British government de facto," and so he "was to all intents and purposes an alien born."[116] He cannot "be deemed born within the ligeance of the state of New York, if, at the time of his birth, his parents were in a territory then occupied by her enemies and adhering to them as subjects, de facto, in virtue of their original allegiance."[117]

In sum, at least according to Justice Story, the status of the parents mattered, too; the most critical status was their allegiance and the sovereign from whom they drew protection. If a child's parents were under the protection of New York at the time of their child's birth, that child was a natural-born citizen. After the occupation, if they adhered to the enemy, they were under the protection of, and within the allegiance of, the enemy. Yet, if they did not adhere to the enemy, then the territory in which John Inglis was born would be deemed to have always been the territory of New York upon reconquest, such that it could be said he had been born under the protection of, and within the allegiance of, New York.

Although Justice Story was writing for himself in the *Inglis* case, he made a similar argument for all but one of the Justices in *Shanks v. Dupont*.[118] The question was whether Ann Scott's children, all born in England, could inherit part of her father's South Carolina estate. Ann Scott had left South Carolina for England in December 1782 with a British officer whom she had married during the war. Because the children were born in England to an English father, they were not American citizens, and for that reason could not inherit. They could only inherit the estate if Ann Scott was in fact a

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[115] *Inglis*, 28 U.S. at 167 (opinion of Story, J.).

[116] *Id.*

[117] *Id.*

[118] Shanks v. Dupont, 28 U.S. 242 (1830).

British subject whose property interests were protected by a 1794 treaty.[119]

The Court ultimately held that her departure with her husband to England constituted an election of allegiance for the British, and therefore her property interests were so protected.[120] But the Court first considered whether her stay in Charleston during the occupation constituted an election of allegiance for the British. Justice Story wrote for the Court:

> They owed allegiance indeed to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspend their former allegiance. It did not annihilate their allegiance to the state of South Carolina, and make them de facto aliens. That could only be by a treaty of peace, which should cede the territory, and them with it; or by a permanent conquest, not disturbed or controverted by arms, which would lead to a like result.[121]

To be sure, this discussion did not specifically mention birthright citizenship, but it supports Justice Story's more general point. If Ann Scott's children had been born during the occupation, whether they would have been treated as American birthright citizens would have depended not on the actual sovereignty or territorial control at the time of birth. It would have depended on whether Ann Scott had maintained her "permanent" allegiance to South Carolina and whether South Carolina ultimately reconquered the territory in question. This discussion again supports the proposition that mere territorial presence is not enough. One must also be in the "ligeance" of the sovereign. Just as foreign armies are not in the ligeance of the sovereign, neither are natives in occupied territory who remain loyal to their native allegiance. That remains true even though, as the Court had previously held in a different

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[119] *Id.* at 243.

[120] *Id.* at 247–49.

[121] *Id.* at 246.

case, natives are not *otherwise* subject to the jurisdiction of their native sovereignty during the occupation.[122]

Chancellor James Kent's influential commentaries[123] made a similar point:

> To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance 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. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered.[124]

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[122] United States v. Rice, 17 U.S. 246, 254 (1819) (holding that British-imposed customs duties applied in Maine during the British occupation):

> The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience.

In an earlier case, Justice Story, writing as a circuit justice, held that until a permanent incorporation or treaty the town would nevertheless "be entitled to the full benefit of the law of postliminy." United States v. Hayward, 26 F. Cas. 240, 246 (C.C.D. Mass. 1815) (No. 15,336).

[123] On Kent's influence, see Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377, 380 (2009); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 548 (1993).

[124] 2 KENT, *supra* note 99, at *42.

Here, Chancellor Kent makes clear once again that the status of a child's parents is at least relevant to the question of birthright citizenship. And the relevant status is their allegiance and the sovereign from whom they draw protection, not mere territorial possession or presence at the time of birth. Any children born to parents "adhering to the enemy"—Charles Inglis, for example — would be deemed born under the ligeance of the occupiers. Those remaining loyal, however, would, upon reconquest, be treated as native born citizens.[125]

Another case illustrates the importance of allegiance in wartime. In *Hardy v. De Leon*,[126] the Texas Supreme Court addressed birthright citizenship in the context of Texas's war for independence against Mexico.[127] At issue was a tract of land in Texas that had belonged to Sylvester De Leon, who had been forcibly removed to Louisiana by the Texas government during the war. The infant plaintiff was born in Louisiana, and the question centered on his right to inherit as a citizen of Texas.[128] The Court held that (1) the status of the child followed that of the parents, and (2) because the parents were involuntarily removed from Texas, the child born would be considered a citizen of Texas, where the parents had been legally domiciled.[129]

The Court relied on Justice Story's treatise on the conflict of laws, which explained that the domicile of the child follows that of the parent, and that "persons who are born in a country are generally deemed to be citizens and subjects of that country."[130] Justice Story

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[125] Story's opinion in *Inglis*, including its discussion of postliminy, was quoted at length by professor and Pennsylvania Supreme Court Justice George Sharswood's 1870 lectures, suggesting some continued prominence. GEORGE SHARSWOOD, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW 139–41 (Phila., T. & J. W. Johnson & Co. 1870).

[126] Hardy v. De Leon, 5 Tex. 211 (1849).

[127] *Id.* at 211.

[128] *Id.* at 211.

[129] *Id.* at 213–14.

[130] *Id.*; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 48 (Bos., Hilliard, Gray & Co. 1834).

then added, "A reasonable qualification of this rule would seem to be that it should not apply to the children of parents who were *in itinere* in the country or who were abiding there for temporary purposes."[131] The Texas Supreme Court recognized that Justice Story had observed that this exception was not universally established, but held that it would operate in this case. Sylvester De Leon's temporary and involuntary sojourn in Louisiana would not make his children born in Louisiana citizens of that state or of the United States. Instead, they would follow the citizenship of the father's domicile.[132]

Another related example, contemporaneous with the enactment of the Fourteenth Amendment, is the joint occupation of Oregon by the United States and Great Britain. In 1872, Congress enacted a law naturalizing residents of Oregon who had been born to British parents during the joint occupation.[133] The fact that those individuals had been born in territory jointly controlled by the United States, and later entirely under U.S. control, was insufficient because their parents had been British subjects at the time of birth. In the case that precipitated the legislation, a federal judge had denied the citizenship claim of an Oregon resident born in the territory to British parents. "It is admitted that the plaintiff's father was a British subject by birth," the District Court held, "and while he lived in the territory—at least between 1818 and 1846—he was in the allegiance of the King of Great Britain, and his children, wherever born therein, were born in the same allegiance, and are British subjects."[134] Once again, at least in the context of war, occupation, or in this case, joint occupation, the allegiance of the parents was highly relevant and often dispositive.

The previous materials merit a short summary. In the context of revolution and war, Americans, particularly American judges,

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[131] *Hardy*, 5 Tex. at 237; STORY, *supra* note 130, at 48.

[132] *Hardy*, 5 Tex. at 237.

[133] CONG. GLOBE, 42d Cong., 2d. Sess. 2796 (1872); Act of May 18, 1872, ch. 172, § 3, 17 Stat. 122, 134.

[134] W.L. Hill, *Doctrine of Natural Allegiance*, 21 AM. L. REG. 69, 77 (1873) (reporting the judge's opinion).

appear to have presumed that the mere location of one's birth—and the temporary exercise of sovereignty by a particular sovereign—were insufficient to confer citizenship by birth. Perhaps these decisions only apply in the context of war, occupation, and revolution. Yet it is these contexts that gave judges an opportunity to address the matter generally. The right to citizenship rarely arose otherwise.[135] These cases show that Americans understood that the common law rule had to be adapted to their early modern world, rooted as it was in theories of social contract, revolution, and election. The new revolutionary context required a renewed focus on the status of the parents and their allegiance—a status that had always been relevant but which war and revolution forced judges to confront directly.

4. Freedom Suits

An important and instructive set of cases has been uncovered by Professor Amanda Frost: the birthright freedom suits of the children of enslaved women, including those who were fugitives from slavery.[136] Senator Lyman Trumbull, the leading drafter of the citizenship provision of the Civil Rights Act of 1866, was even involved as a lawyer in one such suit, but not one involving fugitive slaves.[137] What is particularly interesting about these suits is that they seem to confirm that the status of the parent mattered, although the relevant status was the question.

As Frost notes, American law followed the doctrine of *partus sequitur ventrum*—"that which is born follows the womb"—for purposes of determining the enslaved status of children born to enslaved mothers.[138] To get around this common law background,

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[135] The next section discusses one of those rare cases in the more general context; it was perhaps the only case to address the question outside the context of the war and revolution.

[136] Amanda Frost, *Dred Scott's Daughter: Gradual Emancipation, Freedom Suits, and the Citizenship Clause*, 35 YALE J.L. & HUMANS. 812, 814–15 (2024).

[137] *Id.* at 826, 838–39; Jarrot v. Jarrot, 7 Ill. (2 Gilm.) 1, 2 (1845).

[138] Frost, *supra* note 136, at 816–17 & n.18.

northern states had to enact specific laws nullifying the relevance of this parental status.[139] Thus the Pennsylvania Supreme Court, in the leading case, held that Eliza, a child born in Pennsylvania to a fugitive from slavery two years after the escape, was born free.[140]

Setting the statute aside, Eliza's case could be instructive of the general understanding of birthright citizenship. The case suggests that at least in the North, the view was that the political condition of the parents should not matter. That is, the political condition of Eliza's parents as citizen, alien, or slave was immaterial to the condition of the child. That is not inconsistent with the law of birthright citizenship: a child born of alien parents is a birthright citizen so long as the alien parents are under the protection and within the allegiance of the sovereign. Eliza's mother was lawfully present in Pennsylvania under the laws thereof. She was unquestionably under the protection and within the allegiance of Pennsylvania. Pennsylvania might have to deliver her up to her enslavers according to Article IV of the Constitution,[141] and her escape might have been unlawful under the laws of the state from which she escaped. Neither, however, affected the legality of her stay under the laws of Pennsylvania or the general protection afforded to her by that state.[142]

5. Taney and Bates

The next important discussion of birthright citizenship prior to the adoption of the Fourteenth Amendment is Attorney General

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[139] *Id.* at 817–18.

[140] *Id.* at 824–27; Commonwealth v. Holloway, 2 Serg. & Rawle 305, 307 (Pa. 1816).

[141] U.S. CONST. art. IV, § 2, cl. 3 ("No person, held to service or labor, in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such service or labor, but shall be delivered up, on claim of the party to which such service or labor may be.").

[142] If the relevant sovereign for purposes of legality of presence is the federal government, then there is no question Eliza was legally present in the United States, even if illegally present in Philadelphia. In any event, the author is not aware of any federal law that prohibited enslaved persons from fleeing into free states, although federal law did provide for the recapturing of such escapees.

Edward Bates' opinion on whether free black persons born in the United States were citizens.[143] The opinion itself was a response to the Supreme Court's controversial and erroneous decision in *Dred Scott v. Sandford*,[144] authored by Chief Justice Roger Taney. The Court held that free persons of African descent could not be citizens because their ancestors were not part of the political community that adopted the Constitution. They were also, however, not *aliens*; they had no permanent allegiance to any other political community. Thus, according to the Court in *Dred Scott*, not only were free black persons not citizens, but they also were not aliens and so could not be naturalized by Congress.[145] It has been said that the Court in *Dred Scott* adopted a more social contractarian understanding of citizenship.[146] Even had the Court been correct as to the citizenship of persons of African descent (and it was not), that would not have answered the question about the conditions in which children born to alien parents would have been considered citizens. As observed in Part III, members of the Thirty-Ninth Congress discussed the difference between aliens and slaves under the law of nations.

Attorney General Bates' opinion five years after the *Dred Scott* decision offers a more general defense of birthright citizenship and is of more enduring significance. "In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation," Bates wrote; that is, "to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and

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[143] Citizenship, 10 Op. Att'ys Gen. 382 (1862).

[144] 60 U.S. 393 (1857).

[145] 60 U.S. at 417 ("And this power granted to Congress to establish an [*sic*] uniform rule of *naturalization* is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class."). Bates agreed that enslaved persons could not be aliens because they were not members "of some other nation." 10 Op. Att'ys Gen. at 388–89.

[146] SCHUCK & SMITH, *supra* note 5, at 67–69.

protection on the other."[147] Bates then acknowledged this mutual and reciprocal tie binds a child born in the United States. "In every civilized country the individual is *born* to duties and rights, the duty of allegiance and the right to protection," Bates wrote, "and these are correlative obligations, the one the price of the other, and they constitute the all-sufficient bond of union between the individual and his country; and the country he is born in *is*, *prima facie*, *his* country."[148]

Bates' opinion thus confirms that, as late as 1862, the exchange of allegiance and protection was the basis for birthright citizenship. To be sure, Bates noted that infants who received protection owed a subsequent debt of allegiance.[149] He does not question, however, that the parents themselves had to be under the sovereign's protection for the child to receive that protection. The significance of Bates' opinion is the centrality of this concept, which would persist beyond the adoption of the Fourteenth Amendment. "The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare," the Supreme Court would state in 1874. "Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance."[150]

C. Temporary Sojourning

American judges and treatise writers rarely discussed birthright citizenship outside the context of revolution, occupation, or forced removal. In an era with effectively no immigration restrictions and

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[147] 10 Op. Att'ys. Gen. at 388.

[148] *Id.* at 395.

[149] *Id.* at 403 ("I did verily believe that the oath of allegiance was not the cause but the sequence of citizenship, given only as a solemn guarantee for the performance of duties already incurred.").

[150] Minor v. Happersett, 88 U.S. 162, 165–66 (1874).

relaxed naturalization rules, most aliens who came to the United States came to settle. The naturalization statutes provided that any children under twenty-one years of age became naturalized along with their alien parents; they did not distinguish between children born in the United States or abroad.[151] As for those who had U.S.-born children but returned to their home country, the citizenship or alienage of the children was usually irrelevant. It was only in the rare case where the alien parents returned home with such children, and where there was inheritable property in the United States, that the issue of birthright citizenship for the children of aliens would have arisen.

This section describes the American authorities touching on the question of birthright citizenship for children born to temporary visitors. It demonstrates that the status of such children was hardly settled, and in fact significant evidence—particular from the Civil War period—suggests that such children born in the United States had weaker claims to citizenship than traditionally believed. The historical material suggests that the application of the common law rule to the children of temporary sojourners was contested. Nor is it surprising that there should be dissensus on the topic, as the problem of international travel and the resulting double allegiances had not seriously confronted the English jurists[152] and only became increasingly prominent in the American antebellum period.

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[151] *See, e.g.*, Act of April 14, 1802, § 4, 2 Stat. 153, 155.

[152] There are hints that the English common law judges of the sixteenth century may have thought domicile mattered for birthright citizenship, although this evidence is equivocal. In 1563, the common law judges explained that "if a frenchman husband and wife come here into *England*, stay here, and have issue a son; in this case, by his being born here, he is a liege-man, although his father and mother were aliens." Keener, *supra* note 40 (quoting Anon. (1563), *in* JAMES DYER, LES REPORTS DES DIVERS SELECT MATTERS & RESOLUTIONS DES REVEREND JUDGES & SAGES DEL LEY 224a–224b (London, 1686)). It is hard to know exactly what the judges had in mind by including the words "stay here," but the words imply a more permanent residence of the parents.

In 1581, Parliament considered a bill declaring that "children of aliens, not being denizens, and born in England, should not be accounted English." 1 JOURNALS OF THE HOUSE OF COMMONS 118 (1581); Jacob Selwood, *"English-Born Reputed Strangers": Birth and Descent in Seventeenth-Century London*, 44 J. BR. STUD. 728, 731–32 (2005). The bill passed the Commons but died in the House of Lords. *Id.* at 732. On the one hand the

1. *Lynch v. Clarke*

Lynch v. Clarke, decided by the Assistant Vice Chancellor of New York's Court of Chancery in 1844, was one of those rare cases involving significant property to which the child of a temporary sojourner might have a claim.[153] Some have argued that this case suggests that parental status did not matter for birthright citizenship.[154] That is incorrect. The parents' status as citizens or foreigners was irrelevant, which was consistent with the common-law rule. That does not militate against the common-law rule that the parents had to be under the protection of the sovereign. The case does, however, suggest that at least some thought that temporary sojourners were included within the birthright rule.

At issue was significant property in New York belonging to Thomas Lynch and John Clarke, whose firm purchased the necessary property to control spring water that they then sold through their highly profitable mineral and soda water business. Thomas died intestate; the New York legislature passed a law allowing Bernard Lynch, Thomas's brother who came to the United

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proposal might suggest that such children were thought natural-born subjects; on the other hand, it could suggest uncertainty as to their status. The passage in the Commons also suggested that many thought they should *not* be treated as subjects; the failure in the upper chamber suggests others thought otherwise, although it is possible they thought the bill was unnecessary. English judges did, however, as early as 1668 regard a double natural allegiance as an impossibility like having "two natural fathers." Craw v. Ramsey (1668) 124 Eng. Rep. 1072, 1075 (KB). The question in that case was whether naturalization could create the same natural allegiance to the new sovereign as birth created to the old. The court's resolution suggests that a system in which a nation claimed as its own subjects both children born to its subjects abroad and children born to foreign subjects temporarily within the realm would have been at least potentially problematic.

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

[154] *See, e.g.*, Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 HARV. J.L. & PUB. POL'Y (2026).

States and was naturalized after Thomas's death, to inherit Thomas's property, subject to the claims of any other heirs.[155]

The only other claimant was Julia Lynch, the daughter of Patrick Lynch, another of Thomas's brothers. Patrick had spent four years in the United States. Julia was born in the United States a few months before Patrick and his family returned to Ireland.[156] Although Julia Lynch's lawyers insisted that Patrick Lynch and his family were domiciled in the United States at the time, the judge concluded the Lynches had never indicated their intent to abandon Ireland and to establish a U.S. domicile; therefore, "Julia Lynch was born in this state, of alien parents, during their temporary sojourn."[157]

The judge held that Julia Lynch was a birthright citizen. "By the common law, all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the *status* or condition of their parents."[158] When discussing the common consent of the American people on the subject, Judge Sandford reiterated, "No one asks whether his parents were citizens or were foreigners. It is enough that *he was born here,* whatever were the *status* of his parents."[159] Although it may appear that Judge Sandford held that the only material point is the fact of birth in a particular territorial jurisdiction, that reading would seem to be mistaken. Judge Sandford recognized, for example, that the status of one's parents as ambassadors was relevant to the applicability of birthright citizenship. The children of ambassadors, he stated, "are deemed to be born within the allegiance of the sovereign represented," and therefore are not birthright citizens.[160]

Judge Sandford thus recognized that the status of the parents was, in fact, relevant. The point he was making was that the status of the parents as *citizens* or *aliens* was irrelevant. As he stated, no

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[155] 1 Sand Ch. 583 at 585–86.
[156] *Id.* at 586–88.
[157] *Id.* at 638.
[158] *Id.* at 639.
[159] *Id.* at 664.
[160] *Id.* at 658.

one asks a person born in the country "whether his parents were *citizens or were foreigners*."[161] This point becomes clearer in light of Judge Sandford's summary of the position of the opposing lawyers: "It is insisted that the national rule is that of the public law, by which a child follows the *status* of its parents."[162] The lawyers had insisted that the American rule does, or should, follow the rule of the European writers according to which the citizenship status of the child followed the citizenship status of the father. The entire discussion was in the context of the parents' "political" condition—that is, their citizenship or alienage.[163] Neither Julia Lynch's lawyers nor Judge Sandford disputed that the alien parents must at least be within the local and temporary allegiance and under the local and temporary protection of the sovereign.[164]

2. *Ludlam v. Ludlam*

Judge Sandford's opinion on the merits of the question was "in considerable tension" with a subsequent decision by the New York courts.[165] In *Ludlam v. Ludlam*,[166] the intermediate appellate court addressed the common-law rule applicable to a child born to an

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[161] *Id.* at 664 (emphasis added).

[162] *Id.* at 644.

[163] *Id.* at 589–90 (argument of counsel) ("Then by recurring to public law, which furnishes the rule of decision, Julia is clearly an alien to the United States, on the principle that in questions of alienage and citizenship, the child follows the *political* condition of the parent." (emphasis added)); *id.* at 595 (similar); *id.* at 596 (similar).

[164] The later editions of Chancellor Kent's treatise parrot this same language, citing *Lynch v. Clarke*, and cannot be taken for the proposition that the status of the parents was irrelevant; only their status as non-citizens was irrelevant. *See, e.g.*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 n.a (New York, William Kent, 8th ed. 1854) ("This is the rule of the common law, without any regard or reference to the *political condition* or allegiance of their parents." (emphasis added)). Executive branch opinions also presumed that children born of alien parents were citizens, not addressing but also not presuming there is any distinction between parents who were domiciled at the time of birth and those who were temporarily sojourning. These opinions will be discussed in Part IV, *infra*.

[165] Ramsey, *supra* note 1, at 415 n.39.

[166] Ludlam v. Ludlam, 31 Barb. 486 (N.Y. Gen. Term 1860), *aff'd*, 26 N.Y. 356 (1863).

American citizen sojourning abroad, the mirror image of the problem at issue in *Lynch*.[167] At issue was the right of inheritance as of 1847, a few years prior to the enactment of an 1855 statute which specifically provided that children born abroad to U.S. citizen parents were themselves citizens.[168] Hence the common-law rule, whatever it was, was the relevant one.

The judges concluded in a 2–1 decision that the child was an American citizen. "By the common law when a subject is traveling or sojourning abroad, either on the public business, or on lawful occasion of his own, with the express or implied license and sanction of the sovereign, and with the intention of returning," the majority concluded, that subject "continues under the protection of the sovereign power" of his permanent allegiance and "so he retains the privileges and continues under the obligations of [that] allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship."[169] The child had returned to the United States before the age of majority; the court presumed that the foreign country would not treat such a child as being a citizen of that foreign country. By this logic, its ruling would apply equally to a temporary sojourner in the United States.[170]

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[167] *Id.* at 487–89.

[168] Act of Feb. 10, 1855, ch. 71, 10 Stat. 604.

[169] *Ludlam*, 31 Barb. at 503.

[170] *Id.* at 503–04. The Court continued:

> It may be objected that the country in which such children are born, might claim them as citizens by reason of their birth. I apprehend not, when the residence of the parents was merely temporary, and when the children were removed before their majority. Cases might perhaps be supposed when the children would be to some extent under both allegiances, or at least might be entitled or bound to elect between the two. But when, as in this case, the parent returns to his native country, which he had never abjured, nor permanently forsaken, bringing the child while still an infant, that country cannot be called upon to relinquish his allegiance, or that of his children, on account of any possible conflict with the country of his temporary abode. *Id.*

The New York Court of Appeals unanimously affirmed the majority's decision, but more readily accepted the possibility of a double allegiance.[171] The Court first addressed the disputed question whether the common-law rule in England was that children born to English subjects abroad were natural-born citizens. Chancellor Kent had argued that this was, in fact, the rule and that English statutes merely declared the common law.[172] Horace Binney famously responded that such children had citizenship only by virtue of statutes,[173] including the 1351 *De Natis Ultra Mare* statute which allowed children born abroad to English subjects to inherit.[174] The Court in *Ludlam* sided with Kent,[175] and concluded that "[i]t is impossible to suggest any other ground for the obligation than that of parentage."[176] The Court added that the doctrine that the children "follow, in regard to their political rights and duties, the condition of their fathers," was "founded in natural law, and [was] substantially the same in most, if not all, civilized countries."[177]

The Court's decision, although in tension with *Lynch*, was not incompatible with it. One could conclude that children born of temporary sojourners are birthright citizens but more easily lose their citizenship through expatriation. "It does not militate against this position, that by the law of England the children of alien parents, born within the kingdom, are held to be citizens," the Court insisted.[178] "There are many instances of double allegiance; as for instance, one may owe a natural and permanent allegiance to the country of his birth, and a local and temporary allegiance to the country in which he resides."[179] The Court therefore "supposed"

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[171] Ludlam v. Ludlam, 26 N.Y. 356, 377–78 (1863).

[172] 2 KENT, *supra* note 99, at *50–53.

[173] Horace Binney, *The Alienigenae of the United States*, 2 U. PA. L. REV. 193, 194–201 (1854) (arguing the common law rule did not grant citizenship to children born abroad).

[174] 25 Edw. 3 stat. 1.

[175] 26 N.Y. at 369–70.

[176] *Id.* at 364.

[177] *Id.* at 368.

[178] *Id.* at 371.

[179] *Id.*

that "a child may be in a position which will enable him to elect, when he becomes of age, of which of two countries he will become a permanent citizen."[180] The Court recognized the theoretical complications with double allegiance, but suggested such matters should be addressed in specific circumstances.[181]

In summary, *Ludlam* suggested once again that both parental status and place of birth mattered for the rule of citizenship by birth. And the appellate court decision is evidence that some judges, contrary to the holding of *Lynch*, thought that the common law rule provided some kind of exceptions for temporary sojourning, although whether the court would have ruled similarly regarding an alien visiting the United States is hard to know. The state's highest court, although affirming the appellate court, presumed still a third possibility: that such a child would be able to elect which of the two nations to adopt upon reaching the age of majority.

3. Additional Antebellum Evidence

There were therefore three possible solutions to the question of temporary sojourning on offer. First, Judge Sandford in *Lynch v. Clarke* suggested that birthright citizenship applied to temporary sojourners.[182] Second, the New York Court of Appeals suggested that such children could choose their permanent citizenship upon reaching the age of majority.[183] Third, the intermediate appellate court in *Ludlam* strongly suggested that the children of temporary sojourners do not enjoy birthright citizenship.[184] Justice Story had also suggested that an exception for temporary sojourners would be "reasonable," although such a rule was not "universally

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[180] *Id.*

[181] *Id.* at 377.

[182] *See supra* notes 153–64 and accompanying text.

[183] *See supra* notes 166–81 and accompanying text.

[184] *See supra* notes 171–70 and accompanying text.

established"; the Texas Supreme Court in the *Hardy* case also applied that exception.[185]

There is other antebellum evidence, too, that temporary sojourners were excluded. For example, Ohio congressman Philemon Bliss, responding to *Dred Scott* in Congress, argued that "Citizenship, as well as allegiance, is the incident of birth. The few exceptions, as to children of foreign ministers or temporary sojourners, but confirm the doctrine; and, indeed, until the interests of slavery demanded a different position, none other was thought of in modern law."[186] The speech was reprinted in Ohio and Washington newspapers,[187] and as a pamphlet also in the nation's capital.[188] Another example is provided by the funeral oration delivered after President Lincoln's assassination by the famous historian George Bancroft. Describing the allegiance of slaves, he stated a more general point: "That rightful claim belongs to the United States, because every one born on their soil, with the few exceptions of the children of travelers and transient residents, owes them a primary allegiance."[189] The oration was also reprinted in several newspapers.[190]

In another antebellum treatise, by Henry St. George Tucker— the son of the more famous Virginian, law professor, and constitutional commentator St. George Tucker—Tucker discussed the "common

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[185] *See supra* notes 130–132 and accompanying text.

[186] CONG. GLOBE, 35th Cong., 1st Sess. 210 (1858) (statement of Rep. Bliss).

[187] Speech of Hon. P. Bliss, In the House of Representatives on the 6th of January, ASHLAND UNION, Feb. 3, 1858, at 1; *Citizenship: State Citizens, General Citizens, Speech of Hon. Philemon Bliss*, NAT'L ERA, Feb. 11, 1858, at 23.

[188] PHILEMON BLISS, CITIZENSHIP: STATE CITIZENS, GENERAL CITIZENS: SPEECH OF HON. PHILEMON BLISS, OF OHIO; DELIVERED IN THE HOUSE OF REPRESENTATIVES, JAN. 7, 1858 (Wash., D.C., Buell & Blanchard 1858).

[189] George Bancroft, Oration at Obsequies of Abraham Lincoln (Apr. 25, 1865), *in* PULPIT & ROSTRUM, NOS. 34 & 35, at 5 (N.Y., Schermerhorn, Bancroft & Co. 1865), *available at* https://tile.loc.gov/storage-services/public/gdcmassbookdig/hongeorgebancrof00banc/hongeorgebancrof00banc.pdf [https://perma.cc/VB9T-443V].

[190] Oration by the Hon. Geo. Bancroft, N.Y. HERALD, Apr. 26, 1865, at 8; Funeral Address, BEDFORD INQUIRER, May 5, 1865, at 1; Abraham Lincoln, XENIA SENTINEL, May 5, 1865, at 1; Meeting in Union Square, ELLSWORTH AM., May 12, 1865, at 1.

law doctrine of allegiance and alienage."[191] He then stated the traditional birthright rule. "But," he added, "though a child be born in the country, yet if both his parents were strangers not designing a permanent change of country, it would be sufficiently obvious, that, as he must follow the condition and succeed to the rights of his parents, he would on the principles of natural reason be considered as much a stranger to the country as his father."[192]

None of this evidence is dispositive of the common-law rule. Especially given the prominence of the decision in *Lynch v. Clarke*, the most that can be said is the applicability of the rule to temporary sojourners was contested prior to the Civil War.

4. Civil War

The Civil War also produced evidence on the question in the context of the claims of persons born in the United States to foreign subjects, particularly French subjects, to be exempted from military conscription.

In 1865, the Union commanding generals in the Department of the Gulf and the Military Division of West Mississippi in New Orleans addressed claims from the children of French nationals to draft exemptions. One stated that his opinion "has always been that when parents of foreign birth become permanently domiciled in the U.S. their children born in this country are citizens by birth and liable to the duties and entitled to the privileges of American Citizens"; any contrary "laws of France have no bearing upon the subject until" the parents return "under French jurisdiction."[193] Another wrote that the "accident of birth" generally "determines

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[191] 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 57 (Richmond, Sheperd and Colin, 3d. ed. 1846).

[192] *Id.* The same passage appears in the third edition postdating *Lynch v. Clarke*, but it is unclear whether the author was aware of that decision. *See id.* at 56.

[193] Note of Major Gen. Hurlbut (Feb. 5, 1865), *microformed on* Microcopy No. 53, Roll 16, Vol. 27–29, Mar. 19, 1865–Feb. 4, 1867, NAID: 188124588, at 70 (Nat'l Archives Microfilm Publ'ns), *available at* https://catalog.archives.gov/id/188124588?objectPage=70 [https://perma.cc/N47D-V2NP].

the question of native allegiance," but that the obligations of this relation "are determined by the municipal laws of the country in which the parents are domiciled."[194]

In 1863, the judge of the Provost Court in the Department of the Gulf addressed the proofs necessary for those claiming exemptions from conscription on the ground that they were born to French subjects. Had one's birth in the United States determined the question, the entire analysis would have been unnecessary. The judge concluded, however, that because the United States conferred citizenship upon children born abroad to U.S. citizen parents, that same privilege would surely be accorded to children born to French subjects in the United States.[195] Using the language of Attorney General Bates, the judge concluded that U.S.-born persons are "prima facie" citizens.[196] The burden was therefore on them to establish they had no allegiance. The judge thus concluded that

> [B]efore a person born in the United States be confirmed in his claims to foreign nationality, proper proof be required,—
> [First,] that neither of the parents was born in the United States.
> [Second,] that neither of the parents has resided in the United States more than twenty-one years.
> [Third,] that neither of the parents has ever in any way exercised the rights of citizenship, or claimed at any time protection as a citizen.

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[194] Note of Major Gen. Canby (Feb. 21, 1865), *microformed on* Microcopy No. 53, Roll 16, Vol. 27–29, Mar. 19, 1865–Feb. 4, 1867, NAID: 188124588, at 70 (Nat'l Archives Microfilm Publ'ns), *available at* https://catalog.archives.gov/id/188124588?objectPage=70 [https://perma.cc/N47D-V2NP].

[195] Letter from A.A. Atocha to Brig. Gen. James Bowen (Nov. 12, 1863), *microformed on* NARA Record Group 94: Records of the Adjutant General's Office, 1863—Atocha, A A—File No. G480, NAID: 85651033, at 3 (Nat'l Archives & Recs. Admin.), *available at* https://catalog.archives.gov/id/85651033?objectPage=3 [https://perma.cc/6VN3-9L4W].

[196] *Id.* at 5.

> [And fourth,] that the individual claiming another nationality has never exercised the rights of citizenship, claimed the protection of a citizen, or declared himself a citizen.[197]

Again, none of this analysis would have mattered if birth alone were determinative. The second proof in particular distinguished between long-term residence and more temporary residence of the parents. And the first three proofs all emphasized the status of the parents. This is not to say the provost judge's opinion or the Major General's opinion is determinative. But along with all the other evidence presented, they suggest that the most that can be fairly said is that "the issue of temporary visitors remained somewhat unsettled in the mid-nineteenth century,"[198] and more seriously contested than scholars have previously appreciated.

D. Summary

This Part sought to establish that birthright subjectship or 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. Alien parents who visited a sovereign's dominions and who had not received that sovereign's protection in infancy entered into a mutual compact with the sovereign—whether through safe-conducts, statutory permission, or implicit authorizations to enter and remain in the sovereign's territory—to exchange allegiance and protection. Moreover, the very foundation of the doctrine of birthright citizenship—this exchange of allegiance and protection—was firmly social contractarian by the time of the American Revolution.

The question remains: what does the exchange of allegiance and protection have to do with jurisdiction? The next Part addresses antebellum understandings of jurisdiction, particularly as

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[197] *Id.* at 7.

[198] Ramsey, *supra* note 1, at 416 n.43.

informed by the law of nations, and reveals the connection between jurisdiction, allegiance, and protection, that may have informed the choice of the Amendment's drafters to use the language of jurisdiction.

II. JURISDICTION

In *United States v. Wong Kim Ark*,[199] the Supreme Court majority, in holding that a child born in the United States of Chinese immigrants was a birthright citizen, observed, "Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and *consequently* subject to the jurisdiction, of the United States."[200] In explaining the common-law exclusion of ambassadors and invaders, the Court stated that such children were "not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king."[201]

The Supreme Court in *Wong Kim Ark* connected the concepts of allegiance and protection on the one hand and jurisdiction on the other because, in the nineteenth century and earlier, it appears that being outside the protection of the sovereign—and outside the sovereign's allegiance—made one not "subject to the jurisdiction" of the sovereign. One might be within the territory of the sovereign and might even be subject to the sovereign's power, including the reach of its courts. But the jurisdiction to which such an individual was subject was that of the law of nations, not to the sovereign's municipal or domestic jurisdiction. At least, such an individual was not fully subject to the municipal jurisdiction, being unable, for example, to sue in court or enforce contracts. The common law rules of birthright citizenship and the law of nations rules of jurisdiction were thus intimately connected, both rooted in protection and allegiance.

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[199] 169 U.S. 649 (1898).

[200] *Id.* at 693 (emphasis added).

[201] *Id.* at 655.

This Part seeks to establish evidence for the connection between allegiance, protection, and being subject to the nation's municipal jurisdiction. Part II.A describes the dual meaning of the term "allegiance:" it meant both faith and obedience to the sovereign, but also being within the sovereign's power, that is, its jurisdiction. It illustrates that foreign armies and ambassadors—to whom birthright citizenship did not apply because they were not under the sovereign's protection or within the sovereign's allegiance—also were not subject to that sovereign's jurisdiction.

Part II.B illustrates more generally the jurisdictional rules respecting aliens. Nineteenth-century thinkers routinely asserted that foreign merchants and visitors were subject to the jurisdiction of the United States *because* they received a local protection and gave a local allegiance. Aliens from nations at war with the United States but who were permitted to stay were also under the protection of, and subject to, its jurisdiction. "A lawful residence implies protection," Chancellor Kent held in one case respecting a British subject during the War of 1812, "*and a capacity to sue and be sued*."[202] An alien from such a nation who was excludable by presidential order, in contrast, "has no municipal rights to expect from us," a judge wrote in another case, because "[w]e gave him no invitation, and promised him no protection."[203]

Part II.C considers the examples of Indian tribes, distressed vessels, consular jurisdiction, and postliminy, all of which involve the exercise of one sovereign's legislative jurisdiction within the territory of another. It also addresses the law of extraterritorial jurisdiction over the personal status rights of temporary sojourners. These examples suggest there are circumstances in which individuals can be within the territorial jurisdiction of the sovereign but *not* subject to its municipal jurisdiction in some respects. Although the language of protection is less common in these sources, it is present, suggesting the municipal law of the local

[202] Clarke v. Morey, 10 Johns. 69, 72 (N.Y. 1813) (emphasis added).

[203] See *infra* notes 262–263 and accompanying text.

sovereign did not apply because the individuals in question continued to draw protection from another sovereign.

A. Relation to Protection and Allegiance

1. Dual Meaning

The Supreme Court, as noted above, connected allegiance and protection to jurisdiction in *Wong Kim Ark*. It is perhaps not surprising that it did so because the word "allegiance" itself implied a kind of jurisdiction. It had a dual meaning: the word meant faith, obedience, and loyalty to the sovereign, and at the same time it meant the sovereign had power over, and a right to control, the subject.

Start with *Calvin's Case*: Coke routinely referred to "natural ligeance" as the "faith" a subject owes the sovereign,[204] but also to the "actual obedience" owed the king while the king was in physical possession of territory.[205] The term had all of these meanings: "By all which it evidently appeareth, that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens."[206] Blackstone was even more explicit. "[T]he term of allegiance," he wrote, "was soon brought to signify all . . . engagements" and "duties" that "are due from the subjects to their prince."[207] When discussing the children born abroad to English parents, he described such parents as "in allegiance" to the king of England.[208] In both instances, allegiance meant duty. Elsewhere, however, allegiance was tied to the power

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[204] Calvin v. Smith (1608) 77 Eng. Rep. 377, 383, 385, 391 (KB).

[205] For the connection of "actual obedience" to physical possession, see *id*. at 387, 399. For example: the term "actual obedience" applies to territories where the king is in "actual possession thereof." *Id.* at 399.

[206] *Id.* at 383.

[207] 1 WILLIAM BLACKSTONE, COMMENTARIES *367.

[208] *Id.* at *373.

and authority of the king. The allegiance due derives from the "subjection" to the sovereign.[209]

Chief Justice Matthew Hale focused on loyalty and fealty: "an implicit faith [exists] between the governor and governed, *viz.* of the part of the former, protection, on the part of the latter, allegiance or fealty."[210] He also, however, connected the concept to power: "As to local allegiance *or subjection*, every person that comes within the king's dominions owes a local subjection and allegiance to the king, for he hath here the privilege of protection."[211] As one scholar explained, "Before *ligeance* was employed to refer to a tract of land, the term had already been used to refer to a certain quality of interpersonal relationship."[212] The term thus "carried a certain amount of ambiguity with it."[213]

Justice Story also used the term allegiance in the sense of power and jurisdiction. In *United States v. Rice*, the Court concluded that residents of Maine for the duration of the British occupation during the War of 1812 were not subject to the jurisdiction of the United States, save for the rights of postliminy that would apply upon reconquest.[214] "The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there," Justice Story held with respect to the customs duties at issue.[215] "By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose."[216] No other laws were "obligatory" because "where there is no protection or allegiance or sovereignty, there can be no claim to obedience."[217] Here, the

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[209] *Id.* at *366.

[210] HALE, PREROGATIVES, *supra* note 53, at 59.

[211] *Id.* at 56 (emphasis added).

[212] KIM, *supra* note 40, at 137; *see also id.* at 138–39 (providing examples).

[213] *Id.* at 139.

[214] *See supra* note 122 and accompanying text.

[215] United States v. Rice, 17 U.S. 246, 254 (1819).

[216] *Id.*

[217] *Id.*

various uses of the term "allegiance" connoted sovereignty, power, and jurisdiction as well as faith and obedience. What also becomes clear from Justice Story's opinion is that protection and allegiance were necessary for the exercise of a nation's municipal jurisdiction. If one is under the protection of the sovereign, one is subject to that sovereign's jurisdiction for the benefit of both the individual and the nation.

2. Ambassadors and Armies

The rules for ambassadors and foreign armies supply further evidence for the proposition that one must be under the protection of the sovereign to be subject to its municipal jurisdiction. That is not to say ambassadors and foreign enemies cannot be subject to the sovereign's power or to the sovereign's courts; it is to say that the jurisdiction to which they would be subject is that of the law of nations or a mere subset of the sovereign's domestic jurisdiction.

"[I]t is *nec cœlum*, *nec solum*, neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born," Coke wrote in *Calvin's Case* with respect to invaders:

> [F]or if enemies should come into the realm, and possess town or fort, and have issue there, that issue is no subject to the King of England, though he be born upon his soil, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the King.[218]

Coke then explained that an alien who was invited into the realm through a safe-conduct could be charged with treason—under the municipal law—because the alien was under the protection and within the allegiance of the sovereign. "But if an [] alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason," Coke wrote, "for the indictment cannot

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

conclude *contra ligeant' suæ debitum*, for he never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he shall be put to death by martial law."[219] Which is to say, alien enemies who engage in hostile acts are not subject to the municipal jurisdiction of the sovereign because they are not under the protection, and within the allegiance, of the sovereign. They are instead subject to the jurisdiction of the laws of war, a branch of the law of nations. Of some importance, Coke never described the soil on which the invading army was present as "foreign soil." There was no fiction of extraterritoriality. The child born to an invader was still "born upon his [the king's] soil."[220]

As for ambassadors, Blackstone explained that the child of an English ambassador born abroad would be a birthright subject of the English king, but not of the local sovereign, because the ambassador "owes not even a local allegiance to the prince to whom he is sent."[221] That is also why, he explained, they were not subject to the municipal jurisdiction of the receiving nation. Rather, they were subject to the law of nations: "The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions," Blackstone wrote.[222] Because they "owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside."[223] Ambassadors owe "not even a local allegiance"—they "owe no subjection" to the laws—and so they are not subject to the municipal jurisdiction of the receiving nation. As another English judge, Michael Foster, wrote in the 1760s, ambassadors can, at best, be sent home and "are to be considered at the worst but as Enemies subject to the Law of Nations; never as Traitors subject to our

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[219] *Id.*

[220] *Id.*

[221] 1 WILLIAM BLACKSTONE, COMMENTARIES *373.

[222] *Id.* at *253.

[223] *Id.*

Municipal Laws, and owing Allegiance to the Crown of *Great Britain*."[224]

Chancellor James Kent, on the other side of the Atlantic, similarly wrote that ambassadors "owe not even a local allegiance to any foreign power," which is why any children born to them are natural subjects of the sending nation.[225] When discussing ambassadorial immunities and the question of jurisdiction, he similarly stated that "[a]mbassadors form an exception to the general case of foreigners resident in the country, and they are exempted absolutely from all allegiance, and from all responsibility to the laws of the country to which they are deputed."[226] The most a nation can do is send an ambassador away because "ambassadors cannot, in any case, be made amenable to the civil or criminal jurisdiction of the country," which is the "settled rule of public law."[227] Although neither Kent nor Blackstone explicitly connected jurisdiction to birthright subjectship, it is evident from both that the relevant exceptions stemmed from the same source: not being within the allegiance, or not being under the protection, of the sovereign.[228]

B. Aliens, Protection, and the Law of Nations

The previous section demonstrated through materials on birthright subjectship that the term "allegiance" had a dual meaning: both loyalty or faith and obedience, power, or jurisdiction. It further demonstrated that the reason children of ambassadors and invading armies were not birthright subjects was the same reason ambassadors and armies were not subject to the

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[224] Foster, *supra* note 74, at 182, 187.

[225] 2 KENT, *supra* note 99, at *50.

[226] 1 KENT, *supra* note 99, at *38.

[227] *Id.* at *39; *see also id.* at *15 ("It became at last to be a definitive principle of public law, that ambassadors were exempted from all local jurisdiction, civil and criminal.").

[228] It is interesting to observe that one can therefore be under the protection of the sovereign at least to some extent—as ambassadors were—but not within its allegiance. Thus, protection of the laws appears to have been a mere subset of the broader protection contemplated by the birthright rule.

municipal jurisdiction of the nation: neither was under the protection and within the allegiance of the sovereign.

Although outside the context of birthright citizenship, other discussions and decisions respecting foreigners generally, and foreign vessels and merchants particularly, establish the connection between protection and allegiance on the one hand and jurisdiction—and specifically one's amenability to the municipal law—on the other.

1. Alien Friends

In one illustrative newspaper essay from 1785 Massachusetts, which Philip Hamburger uncovered, the essayist wrote that "[t]he duties of protection and submission are reciprocal," such that every foreigner, "the moment he enters and breathes the free air of our land, becomes subject to the penalties and punishment of our laws; and, of course, is entitled to the full benefit and protection of them."[229] Whether an alien was subject to the municipal jurisdiction of the nation depended on his being under the protection and within the allegiance of the sovereign. As Chancellor Kent stated in his commentaries: "During the residence of aliens amongst us, they owe a local allegiance, and are equally bound with natives to obey all general laws," and therefore "they are amenable to the ordinary tribunals of the country."[230] In short, with allegiance comes both legislative and judicial jurisdiction.

Vattel similarly wrote that as soon as the sovereign "admits" foreigners, "he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him."[231] But this comes with the condition that the foreigner be subject to the local jurisdiction: "even in those countries which every foreigner may freely enter, the sovereign is supposed to allow him access only

[229] Hamburger, *supra* note 73, at 1849 (quoting A Citizen (Written for the Chronicle of Freedom), INDEP. GAZETTEER, Feb. 5, 1785).

[230] 2 KENT, *supra* note 99, at *63–64.

[231] 2 VATTEL, *supra* note 7, at *173.

upon this tacit condition, that he be subject to the laws."[232] "In virtue of this submission, foreigners who commit faults are to be punished according to the laws of the country."[233] Although Vattel does not use the word "allegiance," the idea is present: because one is entitled to protection while in the sovereign's territory, one is required to give allegiance: one must submit to the laws and jurisdiction of the nation.

Chief Justice Matthew Hale noted the connection between jurisdiction, protection, and allegiance in his discussion of birthright subjectship. "As to local allegiance or subjection, every person that comes within the king's dominions owes a local subjection and allegiance to the king, for he hath here the privilege of protection," Hale wrote.[234] "If he have issue here, his issue is a denizen," he stated, somewhat inaccurately (the child would have been a natural born subject).[235] Then Hale immediately added, "He may maintain actions if he be an alien friend, and in this respect he owes a local allegiance to the king so long as he is within the king's dominions and protection."[236] An alien being within the local allegiance and under the local protection of the king not only receives the benefits of birthright subjectship for his children, but also may maintain actions—that is, may rely on, and is subject to, the local, municipal jurisdiction of the kingdom.

In a particularly informative decision involving a foreign war vessel, the Supreme Court put the connection between jurisdiction, allegiance, and protection into sharp relief. In *The Schooner Exchange v. McFaddon*,[237] the vessel in question had belonged to American citizens and had been seized by French forces some years prior.[238] The vessel, now under the control of Napoleon's government,

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[232] *Id.* at *172 (§ 101).
[233] *Id.* at *172 (§ 102).
[234] HALE, PREROGATIVES, *supra* note 53, at 56.
[235] *Id.*
[236] *Id.*
[237] 11 U.S. 116, 117 (1812).
[238] *Id.* at 117.

entered the port of Philadelphia in 1811, probably in distress.[239] The ship's former owners filed a libel against the ship, seeking to regain control.[240] The circuit court had allowed the libel to proceed, necessitating expeditious treatment by the Supreme Court.[241]

Chief Justice Marshall, writing for the Court, held that the vessel, as a foreign public ship of war from a friendly nation, was not subject to the jurisdiction of U.S. courts or laws during its stay in port.[242] One of the attorneys for the libellants openly admitted that jurisdiction followed allegiance and protection, but argued that the ship was *property* within the jurisdiction, and so a different rule applied. "You cannot draw to your jurisdiction those who owe you neither a local nor an absolute allegiance," counsel argued, but "you may enquire into the validity of every claim to a thing within your jurisdiction."[243] Chief Justice Marshall, in discussing ambassadors, also connected jurisdiction to allegiance and protection. "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad," he wrote.[244] "His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission."[245]

Chief Justice Marshall explained why private individuals and merchants are subject to the municipal jurisdiction of the nation—to both its laws and its courts—again connecting it to allegiance and protection. "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or

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[239] *Id.*

[240] *Id.* at 117–22.

[241] *Id.* at 120.

[242] *Id.* at 147.

[243] *Id.* at 130 (argument of counsel).

[244] *Id.* at 138–39 (opinion of the Court).

[245] *Id.* at 139.

when merchant vessels enter for the purposes of trade," he wrote, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."[246] Chief Justice Marshall added that "[t]he implied license . . . under which they enter can never be construed to grant such [an] exemption" from jurisdiction, suggesting that being subject to the jurisdiction of the nation is the condition on which aliens are permitted to enter.[247]

Chief Justice Marshall then held that "the situation of a public armed ship" is altogether different because "[s]he constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; [and] is employed by him in national objects."[248] To be sure, Chief Justice Marshall does not mention allegiance and protection, but the connection is clear from negative implication. It is true that ambassadors, armies, and foreign public vessels are "under the immediate and direct command of the sovereign," and for that reason might be exempt from jurisdiction. Yet their being under that direct command is simply another illustration that they are not under the protection or within the allegiance of the local sovereign.[249]

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[246] *Id.* at 144.

[247] *Id.*

[248] *Id.*

[249] To be sure, Chief Justice Marshall seems to use the word jurisdiction in a territorial sense as well. "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute," he wrote. *Id.* at 136. "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* Yet if taken literally, then jurisdiction would extend to ambassadors as well. The question rather is to what exceptions nations have consented as a matter of the law of nations, which is nothing but the practice and consent of the community of nations.

2. Alien Enemies

Aliens from enemy nations who were not part of any hostile force further exemplify the connection between protection and jurisdiction. The law of nations, as elaborated and developed during the War of 1812, provided that such aliens were entitled to protection from, and were within the allegiance of, the United States if they had implicit or explicit authorization to remain. They were therefore also amenable to the legislative and judicial jurisdiction of the United States. Alien enemies present without such permission, or contrary to the laws of Congress or executive regulations, were subject to the laws of war rather than the municipal jurisdiction of the nation. They did not enjoy the right to sue in the nation's courts.

The English rule respecting safe-conducts or licenses for aliens was noted above.[250] Well before the eighteenth century, the reader will recall, safe-conducts were no longer required for alien friends because statutes authorized aliens to visit the realm and extended the sovereign's protection. Safe-conducts specifically authorizing an individual alien and extending that alien protection were still, however, necessary for alien enemies.

To the present point, being under the protection of the sovereign subjected the alien to the sovereign's municipal jurisdiction. As with ambassadors, alien enemies such as spies or prisoners of war—who have no license to remain—are "to be considered at the worst but as Enemies subject to the Law of Nations; never as Traitors subject to our Municipal Laws, and owing Allegiance to the Crown of *Great Britain*."[251] An alien enemy without safe-conduct "shall have no advantage of the law of England."[252] Giles Jacob summarized: "An *Alien* Enemy coming into this Kingdom, and taken in War, shall . . . not be indicted at Common Law, for the Indictment must conclude *contra Ligeantiam suam, &c*. And such

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[250] *See supra* Part I.A.3.

[251] Foster, *supra* note 74, at 187.

[252] Sylvester's Case (1703) 87 Eng. Rep. 1157, 1157 (QB).

was never in the Protection of the King."[253] In other words, alien enemies were not subject to the municipal jurisdiction of the nation unless they had permission to stay in the realm. Without such permission, they were subject to the laws of war.

This understanding crossed the Atlantic and was of great importance during the War of 1812. In *Clarke v. Morey*,[254] Chancellor Kent addressed a defendant's argument that he did not have to repay a debt because the plaintiff was an enemy alien, being a British subject during the War of 1812. "[I]f the plaintiff came to *England* before the war, and continued to reside there, by the license and under the protection of the king, he might maintain an action upon his personal contract," said Kent, summarizing the English rule, "and that if even he came to *England* after the breaking out of the war, and continued there under the same protection, he might sue upon his bond or contract."[255] Alien enemies with permission to stay, in other words, were subject to the municipal jurisdiction of the nation and could sue and be sued like anyone else. Thus, being subjected to the nation's jurisdiction meant not only that aliens were subject to the criminal laws, but also that they were entitled to the *benefits* of the nation's jurisdiction, such as the right to sue in the nation's courts.

The general rule that alien enemies may not sue, moreover, had softened.[256] "[T]he plaintiff came to reside here before the war, and no letters of safe conduct were, therefore, requisite, nor any license from the president," the court held.[257] The court went on to say:

> The license is implied by law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the executive shall think proper to order the plaintiff out of the *United States;* but no such

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[253] Hamburger, *supra* note 73, at 1878 (quoting JACOB, *supra* note 8, at entry for "Alien").

[254] 10 Johns. 69 (N.Y. 1813).

[255] *Id.* at 71.

[256] *Id.* at 72.

[257] *Id.*

> order is stated or averred. . . . Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us. A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.[258]

A "lawful residence," meaning a residence with the permission of the sovereign, subjects even enemy aliens to the municipal jurisdiction.[259] Having no lawful residence, however, implies that the alien is outside the protection and allegiance of the sovereign, even if physically present in the sovereign's territory. In that situation, there would be no right to sue or be sued; the alien would be within the United States, but not subject to *the benefits* of its jurisdiction.

Chancellor Kent seemed to generalize the rule to all aliens, not just enemy aliens: "By the law of nations, an alien who comes to reside in a foreign country, is entitled, so long as he conducts himself peaceably, to continue to reside there, under the public protection; and it requires the express will of the sovereign power to order him away."[260] The implication appears to be that, even as to alien friends, one who is ordered away or is present without permission would be outside the public protection, and therefore outside the municipal jurisdiction. That would be consistent with the common law rule, and the rule of Magna Carta: that friendly aliens are under the protection of the king unless their presence had been previously prohibited.[261]

In the case of Charles Lockington, the Chief Justice of Pennsylvania—subsequently affirmed unanimously by the full

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[258] *Id.*

[259] *See also id.* at 73 (observing that in Europe, "the subjects of the enemy, (without confining the rule to merchants,) so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued").

[260] *Id.* at 72.

[261] *See supra* Part I.A.3.

state Supreme Court—also addressed the rights of enemy aliens during the war.[262] Lockington was a British subject who, pursuant to presidential proclamation under the Alien Enemies Act of 1798 and the rules of the local marshal, was required to remove to Reading, away from the coast. He was found in Philadelphia, however, and did not want to continue residing in Reading because he lacked the funds to subsist there.

The Chief Justice denied Lockington's writ of habeas corpus. As an alien enemy, even one who came to the United States prior to the commencement of the war, he was in the same position as a prisoner of war. "A prisoner of war is subject to the law of war; he is brought among us by force; and his interests were never, in any manner, blended with those of the people of this country. He has no municipal rights to expect from us. We gave him no invitation, and promised him no protection."[263] Here, again, the connection between permission, protection, and a nation or state's municipal jurisdiction becomes evident. The other Justices on appeal rejected the prisoner-of-war analogy but nevertheless agreed with the result.[264] One Justice explained, intriguingly, that such an alien was subject to the municipal law to *some degree*—an "alien enemy is not out of the law so far as to claim protection from the law against trespasses; or, so far as to be liable to prosecutions for trespasses done by him"—but the alien "is to be considered as out of the municipal law" for purposes of the habeas proceeding.[265]

Chancellor Kent summarized the doctrine in his subsequent treatise, after citing additional cases: "Even alien enemies, resident in the country, may sue and be sued as in time of peace, for protection to their persons and property is due, and implied from the permission to them to remain, without being ordered out of the country by the president of the United States," he wrote. "The

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[262] Lockington's Case, 1 Brightly (Pa.) 269 (Nov. 23, 1813), *aff'd*, Lockington v. Smith, 15 F. Cas. 758 (C.C.D. Pa. 1813).

[263] *Lockington's Case*, 1 Brightly (Pa.) at 276.

[264] *Id.*

[265] *Id.* at 298.

lawful residence does, *pro hac vice*, relieve the alien from the character of an enemy, and entitles his person and property to protection."[266] *Even* as to alien enemies, Kent wrote—and thus to aliens friends, too—a lawful residence and permission to remain implied the sovereign's protection, which in turn, subjected an alien to the municipal jurisdiction of the nation.

C. Extraterritorial Jurisdiction

Several further jurisdictional exemptions and rules warrant attention; all arise where the law of one sovereign—its legislative jurisdiction—continued under the law of nations to operate in the territorial jurisdiction of another. Although the language of allegiance and protection is less common in these materials, it is still present. These examples are explicable within that framework and follow from the proposition that one is subject to the legislative jurisdiction of a nation when one receives protection from that nation.

First, domestic dependent nations—the Indian tribes—physically occupy the territory of the United States. Their tribal members were even subject to a degree of the United States' municipal jurisdiction. But their members ultimately drew protection from the sovereign tribes for most of their municipal rights. Even prior to the Fourteenth Amendment, it was presumed that children born under the authority of the tribes were not U.S. citizens merely by virtue of being born within its territorial jurisdiction.

Second, distressed vessels were considered to continue under the protection of the flag nation. Third, at least after the Civil War, foreigners who remained on their foreign vessels more generally began to be governed by their flag nation even when in the ports of another nation. Fourth, the jurisdictional rule of postliminy, described in a previous part, may be explicable on similar grounds. Postliminy applies where two sovereigns simultaneously operate

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[266] 2 KENT, *supra* note 99, at *63.

in a given territory, namely in a temporary occupation. At least some of the municipal rights of the residents remained under the protection of the original sovereign until a permanent acquisition. Fifth, the law of nations seemed to provide that a sovereign more generally continued to exercise a partial legislative jurisdiction over its own citizens while temporarily sojourning abroad.

What this section aims to show is that under the law of nations the individuals in these categories could be physically present in the territory of one sovereign but subject to some degree to the municipal jurisdiction of another.

1. Indian Tribes

The question to what extent the Indian tribes retained their sovereignty is complex and contested, and the treatment here will necessarily be abbreviated. It was widely acknowledged that the tribes existed within the territorial jurisdiction of the United States but maintained their own legislative and judicial jurisdiction over the municipal rights and relations of their own members. The United States, however, could, and frequently did, exercise some degree of jurisdiction, partially by treaty and partially by statute. The status of the tribes and tribal members would become important to discussions over the Fourteenth Amendment's language. Their status suggests that one can be within U.S. territory and subject to some degree to its municipal jurisdiction, but not subject to its complete jurisdiction. The reason the tribes had legislative jurisdiction over their members' municipal rights is because those members continued to draw protection for those rights from those sovereigns and continued to be within their allegiance.

"They have always been, and are still, considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection, and subject to our coercion so far as the public safety required it, and no further," Chancellor Kent stated in reference to the Indian tribes in a case involving a land

grant to an Oneida tribal member.[267] "Though born within our territorial limits, the *Indians* are considered as born under the dominion of their tribes."[268] This was a pre-Fourteenth Amendment acknowledgement that persons born under the authority of a tribe—although born within the *territory* of the United States—were not natural-born citizens of the United States. Chancellor Kent continued: neither the states nor the United States interfere "with the disposition, or descent, or tenure of their property, as between themselves," or "prove their wills," or apply the school and poor laws, or subject them to the "laws of marriage and divorce" or to the "laws of the *United States*, against high treason."[269] Here, the connection between protection, jurisdiction, and birthright citizenship seems to be that U.S. jurisdiction extended only to the extent U.S. protection did, and birthright citizenship did not apply where that *full* protection and jurisdiction did not exist. The tribes were "placed under our protection, and subject to our coercion," but only to a limited extent.

It is well-known that the Supreme Court adopted the controversial doctrine of discovery in *Johnson v. M'Intosh* in giving priority to a land grant from the United States over one from a tribe.[270] The tribes "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it," Chief Justice Marshall wrote for the Court, "but their rights to complete sovereignty, as independent nations, were necessarily diminished."[271] "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves."[272] This dominion gave "a right to

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[267] Goodell v. Jackson *ex dem.* Smith, 20 Johns. 693, 710 (N.Y. 1823).

[268] *Id.* at 712.

[269] *Id.* at 710.

[270] 21 U.S. 543 (1823).

[271] *Id.* at 574.

[272] *Id.*; *see also id.* at 584–85 ("It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.").

such a degree of sovereignty, as the circumstances of the [American] people would allow them to exercise."[273] The tribes still enjoyed some degree of municipal jurisdiction, however, such that anyone "who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."[274] Again, jurisdiction flowed from protection; tribal members were partially under the protection of the United States and partially under the protection of their tribes.

In *Cherokee Nation v. Georgia*, the Supreme Court held that the Cherokee nation could not sue in the federal courts because they were not a "foreign nation" within the meaning of Article III.[275] "The Indian territory is admitted to compose a part of the United States," Chief Justice Marshall again held for the majority.[276] The tribes were not, however, entirely absorbed within the American polity, either; they were "domestic dependent nations," he wrote, who "occupy a territory to which we assert a title independent of their will" and they were "completely under the sovereignty and dominion of the United States."[277]

In *Worcester v. Georgia*, the Court addressed the merits of the argument that Georgia's attempt to exercise jurisdiction over the Cherokee Nation was unconstitutional.[278] Chief Justice Marshall, once again writing for the Court, explained that the doctrine of discovery "shut out the right of competition . . . among the European discoverers" but did "not affect the rights of those already in possession."[279] Various treaties with tribes recognized "their right of self government,"[280] and their "having territorial

[273] *Id.* at 587.
[274] *Id.* at 593.
[275] 30 U.S. 1, 17 (1831).
[276] *Id.*
[277] *Id.*
[278] 31 U.S. 515 (1832).
[279] *Id.* at 544.
[280] *Id.* at 556.

boundaries, within which their authority is exclusive."[281] Under the "law of nations," Chief Justice Marshall wrote, "a weaker power does not surrender its independence—its right to self government, by associating with a stronger [power], and taking its protection."[282] The Cherokee nation was therefore "a distinct community occupying its own territory."[283] Only to the extent the United States accorded protection to the tribes could it exercise jurisdiction.

These decisions generally affirm, in short, that tribal members were within the territorial jurisdiction of the United States and, to some degree, subject to its legislative and judicial jurisdiction. Indeed, in the General Crimes Act of 1817, Congress established federal court jurisdiction over crimes committed within tribal territory where one of the parties was a non-tribal member.[284] Importantly, however, the General Crimes Act provided that nothing in the statute should be construed "to affect any treaty now in force between the United States and any Indian nation."[285] Thus, the relationship of U.S. jurisdiction and tribal sovereignty was complex. Tribal members could be subject to the municipal jurisdiction of the United States to some extent while remaining subject to the municipal jurisdiction of the tribes otherwise. This jurisdiction was to some degree governed by treaty. But it also appeared to follow from the proposition that tribal members drew protection for most of their *municipal rights*—the private law between tribal members—from their tribal sovereigns.[286]

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[281] *Id.* at 557.

[282] *Id.* at 561.

[283] *Id.* The language of the Court in *Worcester v. Georgia* might lead to the impression that its holding was inconsistent with the holding of prior cases as to the question of territory. It is most sensibly interpreted to mean territorial possession to the exclusion of Georgia and its citizens; it does not undermine the previous recognition that ultimately title to the land belonged to the United States.

[284] General Crimes Act of 1817, ch. 92, 3 Stat. 383.

[285] *Id.* § 2.

[286] This hybrid jurisdictional approach was consistent with the jurisdiction exercised by royal commissions and the Privy Council before the American Revolution. KETTNER, *supra* note 18, at 289–90. In a series of land disputes between Mohegan Indians, private landowners, and the Connecticut government, the question arose as to what

2. Distress and Shipwrecks

It was well established that "the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong."[287] Many litigants and judges presumed that distressed vessels in another nation's ports remained subject to its home jurisdiction and were not amenable to the port nation's jurisdiction, except insofar as it was necessary to maintain the port's peace and order. An international arbitral panel in the mid-nineteenth century involving Great Britain and the United States concluded that the law of nations governed such situations and such vessels were exempt from the municipal jurisdiction of the nation in whose territory the vessel was forced to land. The local, municipal laws did not apply. This category is particularly informative because it suggests not only that the consent of the sovereign was necessary to extend protection and jurisdiction, but also the voluntary actions of the alien.

a. Vattel

Vattel's influential treatise on the law of nations discussed the situation of shipwrecked vessels. He wrote that strangers are

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substantive law governed the disputes. As James Kettner has written, the commissions exercised jurisdiction, but the applicable substantive law was debated. In the words of one of the commissioners in 1743: "Indians, though living amongst the king's subjects in these countries, are a *seperate* [*sic*] *and distinct people from them*," such that a dispute between them and English subjects "cannot be determined by the laws of our land, but by a law *equal to both parties*, which is the law of *nature* and *nations*." *Id.* at 290 (quoting Op. of Comm'r Horsmanden) (emphasis added); *see also id.* at 126–127. It is unclear whether the full Privy Council agreed or disagreed with this view of the applicable law, as another commissioner had argued the relevant substantive law was that of the colony. *Id.* at 290–91. Surveying the historical record, James Kettner nevertheless concluded that the Indian tribes "retained a subordinate jurisdiction and a separate legal existence under the crown." *Id.* at 289.

[287] 2 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 106 (1836).

ordinarily treated as the sovereign's "own subjects," because "as soon as he admits them, he engages to protect them."[288] Yet Vattel objected to the historical practice of some nations that treated shipwrecked persons as "subjects." "The state, which ought to respect the rights of other nations, and in general those of all mankind, cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject."[289] In the same paragraph, Vattel then observed that to "forcibly detain foreigners who are shipwrecked on their coast" was "a custom so contrary to the law of nations" and was "at once a violation of the rights of individuals, and of those of the state to which they belong."[290] Too much should not be made of this discussion, but it suggests that foreigners who enter into a sovereign's realm by accident—without the permission of the sovereign, and without exchanging allegiance and protection—may be governed by the law of nations rather than the municipal, legislative jurisdiction of the nation.

b. International Arbitration

An interesting illustration of the problem was presented in the 1830s and 1840s when at least three American slave ships (engaging in the interstate, not international, slave trade) entered British ports in distress or were shipwrecked in British territory.[291] The leading case centered on the vessel *Enterprise*, which had made its way to the Bahamas in distress. The local authorities seized and liberated the enslaved individuals on board. The British refused

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[288] VATTEL, *supra* note 7, at *173.

[289] *Id.* at *174.

[290] *Id.*

[291] U.S. Dep't of State, S. Doc. No. 216, at 1 (1839), *in* 19 DOCUMENTS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH OTHER COUNTRIES DURING THE YEARS FROM 1809 TO 1898 [hereinafter 19 DRFR [216]]; 4 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, at 4349–78 (Wash., D.C., U.S. Gov't Printing Off. 1898).

compensation on the ground that slavery had been abolished throughout the empire in 1833.[292]

The British admitted that generally "the forcible application of the municipal law of a State to which [a person] had not voluntarily submitted himself" was contrary to the law of nations, but argued that slavery was so unjust that it could be deemed an exception to the ordinary rule against municipal jurisdiction.[293] In the language of the conflict of laws, the forum state might apply foreign law, or even international law, but not if doing so violated the fundamental public policy of the forum state. U.S. diplomats argued that "aliens who are forced within" the reach of one nation's municipal laws were subject to the jurisdiction of the law of nations only, and could not be deprived of their property "by the operation of any municipal law."[294] "The question of property must, therefore, be determined by some other test than the municipal law, to which he has never voluntarily submitted himself," wrote Secretary of State John Forsyth. "It can only be justly determined with reference to a period antecedent to his entry within the foreign jurisdiction, and, under the law of nations, by the laws of the country to which he belongs, and where he acquired his right of property."[295]

The Senate agreed, resolving that "a vessel on the high seas, in time of peace, engaged in a lawful voyage, is, according to the law of nations, under the exclusive jurisdiction of the state to which her flag belongs," and more pertinently "[t]hat if such ship or vessel should be forced, by stress of weather, or other unavoidable cause, into the port of a friendly power," then "all the rights belonging to their personal relations, as established by the laws of the state to which they belong, would be placed under the protection which the laws of nations extend to the unfortunate under such circumstances."[296] Here, it would seem, it is the *law of nations* that

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[292] 19 DRFR [216], *supra* note 291, at 3.

[293] *Id.* at 4, 14.

[294] *Id.* at 4–5.

[295] *Id.* at 5.

[296] SPEECHES OF JOHN C. CALHOUN: DELIVERED IN THE CONGRESS OF THE UNITED STATES FROM 1811 TO THE PRESENT TIME 378 (H.E. Barker, ed., N.Y., Harper & Bros.,

gives "protection" to the individuals, and therefore the jurisdiction of that body of law is applicable.

The Senate's statement, to be sure, was made in a political context generally supportive of slaveholder interests. There is further evidence of this view, however. In 1853, the United States and Great Britain signed a convention agreeing to arbitrate the compensation claims in the case of the *Enterprise* and the two other vessels.[297] In the report of the arbitration, all sides agreed that vessels in distress were not, as a general matter, subject to the "municipal jurisdiction" of the nation into which they were forced, but they disagreed on the scope of the exceptions to this general rule.[298] All seem to have agreed that the *extent* to which the municipal law

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1843); *see also* CONG. GLOBE, 26th Cong., 1st Sess. 266 (Mar. 18, 1840). The U.S. Senate adopted this resolution, apparently with slight alterations in language, the subsequent month. *See* CONG. GLOBE, 28th Cong, 1st Sess. app'x 503 (Apr. 1844) (referring to their adoption); A SENATOR OF THIRTY YEARS, THIRTY YEARS' VIEW: A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, at 182–83 (N.Y., D. Appleton & Co. 1883) (same); MOORE, *supra* note 291, at 4351. The resolution is only slightly altered in Moore.

[297] MOORE, *supra* note 291, at 4349–78. These occurrences were also discussed in correspondence between Secretary of State Daniel Webster and Lord Ashburton in the leadup to the Webster-Ashburton treaty of 1842; Webster expressed agreement that the British could not exercise municipal jurisdiction in such instances. *See* CORRESPONDENCE BETWEEN MR. WEBSTER AND LORD ASHBURTON 16–21 (U.S. Dep't of State ed., 1842).

[298] For example, the American commissioner found, "It is expressly admitted in the argument that the law of nations may be appealed to, as exempting property, other than slaves, in cases of shipwreck and disaster, and exempting vessels of war from ordinary municipal jurisdiction; and this is done by giving to the law of nations, in such case, the force and effect of municipal law, which is all that is asked to be done in this case." MOORE, *supra* note 291, at 4353. The British commissioner agreed that, "as a general proposition, that a vessel driven by a stress of weather into a foreign port is not subject to the application of the local laws, so as to render the vessel liable to penalties which would be incurred by having voluntarily come within the local jurisdiction." *Id.* at 4363. Yet, "it by no means follows," he argued, "that it is entitled to absolute exemption from the local jurisdiction; as, for example, it can scarcely be contended that persons on board the vessel would not be subject to the local jurisdiction for crimes committed within it." *Id.*

should apply was itself a question for the law of nations.[299] Ultimately, the "umpire" arbitrator concluded that the British's actions had violated the law of nations—which allowed a nation "to retain over the ship, her cargo, and passengers the laws of her own country" in cases of distress.[300]

c. American Judges and Lawyers

More generally, in America, judges and lawyers appear to have assumed that vessels in distress were not subject to the municipal jurisdiction of the nation in the same way other merchants or vessels were. "As to those thrown on foreign coasts by shipwreck, taking refuge from pirates, driven by some overwhelming necessity, or perhaps those passing through a foreign territory on a lawful journey," the Supreme Court of Louisiana stated in 1847, "their personal condition may remain unchanged; but this is the extent to which an immunity from the effect of the foreign law could be maintained under the laws of nations."[301] It is also notable that the Louisiana Supreme Court suggested there might be some exemptions from the application of the local municipal laws for temporary sojourners, too.

In *Lynch v. Clarke*, one of the advocates made the same point in arguing against Julia Lynch's citizenship.[302] The "case must be referred to the same principle that would govern when the birth was while the parents were . . . being cast in shipwreck or through mistake of the latitude in navigation, on shore, fortuitously and *nolens volens* detained in the country until they could re-embark," counsel argued, "or where it may have occurred on the high seas while making the foreign port; in all which cases, can it be pretended that the birth out of the allegiance of the parents, would

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[299] See *id.* at 4364–65. The question was therefore "to determine . . . whether the law of nations requires that the local law, which ignores and forbids slavery, shall admit within its jurisdiction the foreign, which maintains slavery." *Id.* at 4365.

[300] *Id.* at 4378.

[301] Arsene v. Pigneguy, 2 La. Ann. 620, 621 (1847).

[302] 1 Sand. Ch. 583, 597 (N.Y. Ch. 1844) (argument of counsel).

render the child a citizen or subject of the country of which they may have thus been the mere temporary and *involuntary* sojourners?"[303]

The U.S. Attorney in the *Schooner Exchange* case, Alexander Dallas, similarly argued that because the ship "arrived in distress . . . [n]o assent to submit to the ordinary jurisdiction of the country, can be presumed in such a case as that."[304] Perhaps because the French and U.S. governments both argued that the ship had entered port in distress, Chief Justice Marshall addressed the matter, while reserving the Court's judgment. He observed that treaties ordinarily granted "immunity from local jurisdiction" in such cases.[305] More generally, Chief Justice Marshall argued, reasons existed for "according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes."[306]

In summary, the material on safe-conducts suggests that the sovereign's consent was required to extend protection to aliens, which, in turn, subjected them to the benefits and burdens of the sovereign's municipal jurisdiction. The material on distressed vessels further suggests that the alien's consent may have been necessary to subject him to the sovereign's municipal jurisdiction, too. These materials suggest that a kind of mutual agreement may have been necessary for jurisdiction—an idea supported by Blackstone and others who wrote that allegiance and protection were at the heart of a mutual compact between sovereign and subject.

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[303] *Id.*

[304] The Schooner Exch. v. McFaddon, 11 U.S. 116, 122 (1812) (reciting the argument of Dallas).

[305] *Id.* at 141 (opinion of the Court).

[306] *Id.* at 142.

3. Consular Jurisdiction

The internal affairs of a ship are a more general form of the problem presented by distressed vessels. In the latter case, both American and British representatives agreed that, as a general matter, it would be contrary to the law of nations to apply municipal law to vessels that involuntarily made their way to the ports of a particular nation.[307] By the late nineteenth century, nations began resolving by treaty to require consular jurisdiction over matters of internal affairs on board ships.

An international law treatise authored by the soon-to-be Civil War General Henry Halleck explained the origins of these practices in the consular jurisdiction of the earlier Middle Ages, where commercial agents would be dispatched to adjust "disputes between sailors and merchants of their own country."[308] These commercial agents, in the absence of a regular diplomatic presence, "not unfrequently assumed and exercised jurisdiction and authority over the merchants and citizens of their own countries."[309] This "extra-territorial jurisdiction" exercised by these consuls was "found to be wholly at variance with the recognized principles of public law" in Europe.[310] It remained an open question, however, what rule should apply to seamen who stayed on board their vessels.

A treatise from 1884 suggested that foreign private vessels "are exempt" from the local jurisdiction "only in so far as admitted by international comity or stipulations made by treaties of commerce and Consular conventions."[311] Henry Wheaton's influential antebellum treatise on international law described the practice of making "treaties by which the consuls and other commercial agents

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[307] *See supra* Part II.C.2.

[308] H.W. HALLECK, INTERNATIONAL LAW: OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 239–40 (S.F., H.H. Bancroft & Co. 1861).

[309] *Id.* at 240.

[310] *Id.*

[311] 2 JAN HELENUS FERGUSON, MANUAL OF INTERNATIONAL LAW 455 (The Hague, Martinus Nyhoff; London, W.R. Whittingham & Co.; Hong Kong, Noronha 1884).

of one nation are authorized to exercise, over their own countrymen, a jurisdiction within the territory of the State where they reside."[312] "The nature and extent of this peculiar jurisdiction," Wheaton wrote, "depend[s] upon the stipulations of the treaties between the two States."[313]

The Supreme Court explained the general rule in 1887.[314] The Court concluded that general treaty practice established that there was no jurisdiction over foreigners on foreign vessels in port, except as far as was necessary to deal with public safety and order. At issue was an affray on board a Belgian vessel between members of its crew, leading to the death of a crewmember. The assailant was arrested by New Jersey authorities and confined to the common jail.[315] A treaty provision between Belgium and the United States provided for consular jurisdiction over matters "of the internal order of the merchant vessels of their nation" and relating to the "adjustment of wages and the execution of contracts" among other "differences" that may arise between crewmembers; "[t]he local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore or in the port."[316] The question was whether the arrest violated the treaty.

"It is part of the law of civilized nations," the Court began, that a merchant vessel "subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement."[317] In England, "judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship" because "the owner has voluntarily taken his vessel, for his own private purposes, to a place within the dominion of a government other

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[312] WHEATON, *supra* note 287, at 110.

[313] *Id.*

[314] Mali v. Keeper of the Common Jail (Wildenhus's Case), 120 U.S. 1 (1887).

[315] *Id.* at 2–3.

[316] *Id.* at 4.

[317] *Id.* at 11.

than his own, and from which he seeks protection during his stay," and therefore "he owes that government such allegiance, for the time being, as is due for the protection to which he becomes entitled."[318] Once again, the connection between allegiance and protection on the one hand and jurisdiction on the other becomes evident.

The Court then explained that experience taught that local governments should "abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves."[319] Thus, "by comity it came to be generally understood among civilized nations that all matters" not involving "the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged."[320] If crimes "disturb the peace and tranquillity of the country to which the vessel has been brought," however, the offenders are not "entitled to any exemption from the operation of the local laws."[321] That was "the general public law on this subject," and "treaties and conventions have been entered into by nations having commercial intercourse" for the purpose of clarifying the exercise of "conflicting jurisdictions."[322]

The Court held that the affray in question *did* affect the public peace and order; it was "of a character to awaken public interest when it becomes known," and therefore was "a 'disorder,' the nature of which is to affect the community at large," which "invoke[s] the power of the local government whose people have been disturbed by what was done."[323] "Disorders which disturb only the peace of the ship or those on board," the Court summarized, "are to be dealt with exclusively by the sovereignty of

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[318] *Id.* at 12.
[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *Id.* at 18.

the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction."[324]

The Court's reasoning is illuminating. Ordinarily, merchants on board receive protection from, and therefore owe allegiance to, the local authorities; that is why the local authorities exercise jurisdiction over them. But as to those purely internal matters on board, there is no expectation of protection from the country in whose territorial jurisdiction the ship happens to be present. As the Supreme Court said in a subsequent case, a foreign seaman on an American ship looks to America for protection during his period of service and owes the country a temporary allegiance;[325] the ship itself is like a "floating island" of the flag nation.[326] As to matters on board that disturb the peace of the community in the port, however, it is the protection to which *that community* is entitled that warrants the exercise of jurisdiction.

4. Postliminy

A previous section described the presumption that the Roman law of postliminy would govern the citizenship status of Americans born during a hostile occupation.[327] That rule may be explicable on similar grounds as the rules respecting tribal and consular jurisdiction. The rule of postliminy applies because, upon

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[324] *Id.*

[325] Ross v. McIntyre, 140 U.S. 453, 472 (1891) ("He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born." The Court continues, "He owes for that time to the country to which the ship on which he is serving belongs a temporary allegiance, and must be held to all its responsibilities.").

[326] *Id.* at 477; Patterson v. Eudora, 190 U.S. 169, 176 (1903). The phrase appears to have originated in an 1868 British case quoted both times by the U.S. Supreme Court. *See* R. v. Anderson (1868) 1 L.R.C.C. 161. The fiction of extraterritoriality makes sense once more in this context because the question is from whom the sailors can expect protection, and therefore to whom they owe allegiance.

[327] *See supra* Part I.B.3.

reconquest of occupied territory, the municipal rights of the residents are presumed to remain unchanged.[328] Thus, even during the occupation, the residents ultimately continue to draw protection for their municipal rights from the original sovereign. They have a partial allegiance to the occupiers—as the Supreme Court held, the customs laws of the original sovereign no longer apply[329]—but their personal, municipal rights remain untouched. They therefore retain protection from, and allegiance to, their original sovereign until a permanent cession of territory. The implication would seem to be that, under international law, an occupying sovereign did not have the right to legislate over the personal municipal rights of the residents until the acquisition of territory had been completed.[330]

5. General Extraterritorial Jurisdiction

Postliminy may be a specific example of a more general extraterritorial jurisdiction exercised over the personal status rights of citizens temporarily sojourning in a foreign nation. As Professor Ramsey has observed, "jurisdiction over citizens abroad was well established."[331] Or, as Justice Story wrote for the Supreme Court,

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[328] *See supra* note 114. Grotius explained that "by the law of postliminium," an individual's "rights are restored as fully, as if he had never been in the hands and power of the enemy." GROTIUS, *supra* note 114, at 354.

[329] *See supra* note 122 and accompanying text; United States v. Rice, 17 U.S. 246, 254 (1819).

[330] That seems to be the implication of what Justice Story held for the Court in *United States v. Rice*; he held that the rules of postliminy do not apply to customs duties. The occupying sovereign can legislate in certain respects, but not with respect to the personal rights of the residents, which return to their former condition upon recapture. *Rice*, 17 U.S. at 254–55.

[331] Ramsey, *supra* note 1, at 440. Legislative jurisdiction over one's citizens travelling abroad remains uncontroversial today. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 410 (AM. L. INST. 2018) ("International law recognizes a state's jurisdiction to prescribe law with respect to the conduct, interests, status, and relations of its nationals outside its territory."); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 443 (9th ed. 2019) ("Nationality, as a mark of allegiance and an aspect of sovereignty, is also recognized

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."[332]

Henry Wheaton's influential antebellum treatise on international law stated that "[t]here are also certain cases where the municipal laws of the State, civil and criminal, operate beyond its territorial jurisdiction," and noted in particular that the laws relating to "civil condition and personal capacity of its citizens operate upon them even when resident in a foreign country."[333] Included among these conditions "are those universal personal qualities which take effect either from birth, such as citizenship, legitimacy, and illegitimacy; at a fixed time after birth, as minority and majority; or at an indeterminate time after birth, as idiocy and lunacy, bankruptcy, marriage, and divorce."[334] There is an exception, however, to this general rule. Wheaton wrote that "every independent sovereign State" has a right "to naturalize foreigners, and to confer upon them the privileges of their acquired domicil[e]."[335]

One prominent example of this principle was the famous Martin Kostza affair, during which the United States asserted its jurisdiction over a domiciled foreigner who had not yet been naturalized. The Secretary of State argued that once foreigners "acquire a domicil[e], international law at once impresses upon them the national character of the country of that domicil[e]," such that other countries must treat Kostza "*as* an American citizen."[336]

Part IV shall explore these matters in more detail. For now, it is sufficient to see that under the law of nations and customary international practice, the host nation may not have exercised a

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as a basis for jurisdiction over extraterritorial acts."); *see also* Curtis A. Bradley, *Sovereign Power Constitutionalism*, 92 U. CHI. L. REV. 1807, 1846–47 n.174 (2025).

[332] The Apollon, 22 U.S. 362, 370 (1824).

[333] WHEATON, *supra* note 287, at 100.

[334] *Id.*

[335] *Id.* at 101.

[336] Mr. Marcy to Mr. Hulsemann (Sep. 26, 1853), *in* CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND THE CHARGE D'AFFAIRES OF AUSTRIA RELATIVE TO THE CASE OF MARTIN KOSZTA 18 (U.S. Dep't of State trans., 1853) (emphasis added). I am indebted to Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of 'Citizens' in Article III*, 72 U.C. L.J. 169, 208–09 (2020), for this citation.

complete, legislative jurisdiction over a temporary sojourner. There also may have been exceptions to the exercise of complete judicial jurisdiction.[337] Once a foreigner was domiciled, however, the law of nations provided for no exceptions to the exercise of legislative and judicial jurisdiction commensurate with what the nation exercised over its own citizens.

D. Summary

This Part has aimed to show that the framework of allegiance and protection explains not only the condition for birthright citizenship, but also the applicability of municipal jurisdiction. Ambassadors and armies were exempt from a nation's municipal jurisdiction for the same reason any child born in that context would not be a birthright citizen: because the parents owed no allegiance to—or were not under the protection of—the local sovereign. More generally, aliens with permission to stay, even if from enemy nations, were amenable to the nation's municipal jurisdiction; otherwise, they were subject, at least if enemy aliens, to the laws of war; at a minimum, they could not have the benefit of accessing the courts or suing upon their contracts. Finally, notions of protection explain why dependent or foreign nations could continue to exercise some degree of sovereignty and jurisdiction over their own citizens, even when physically present in the territory of another sovereign.

That is not to say that other explanations are unavailable. But a theory of allegiance and protection is consistent with the repeated use of that language in the historical sources and evidence. It is also the theory that makes the most sense of the legislative history of the Citizenship Clause, in which jurisdiction and allegiance were connected. It is to that history that Part III turns.

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[337] *See infra* Part IV.B.3.

III. THE FOURTEENTH AMENDMENT

When the Thirty-Ninth Congress convened, its members confronted three central problems related to the newly freed people.[338] First, at least since 1820, southerners had denied that free black persons were citizens of the United States entitled to comity rights under Article IV of the Constitution. On this view, a free black person may have been a citizen of Massachusetts, but he was not a citizen *of the United States* within the meaning of the Constitution such that he would be entitled to travel to other states and enjoy the privileges and immunities of those states' citizens.[339] In *Dred Scott v. Sandford*, the Supreme Court notoriously and erroneously concluded that free black persons were neither citizens nor aliens, but rather a perpetually inferior and subordinate class, entitled to none of the privileges and immunities the Constitution grants to citizens.[340]

Second, even if the newly freed people were citizens, they did not receive equal rights with other citizens, even in the northern states; and southern states systematically denied basic civil rights in the Black Codes.[341] Third, with respect to the rights these individuals did have, the southern states failed to supply sufficient legal protection. The newly freed people, and the unionists in the South, were subjected to mob violence that the local authorities made no efforts to prevent.[342] The Thirty-Ninth Congress legislated against

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[338] *See* ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 71–101 (2020).

[339] *Id.* at 71–80; MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 24–27 (2018).

[340] 60 U.S. 393, 393–94 (1857); WURMAN, *supra* note 338, at 81–83.

[341] WURMAN, *supra* note 338, at 91–92; *see also* KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 200, 223, 225 (2021) (describing the struggles against the Black Codes in the northern and western states); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 198–216 (1988) (describing the Black Codes in the South).

[342] WURMAN, *supra* note 338, at 85–91.

these horrors and drafted the Fourteenth Amendment to address them permanently.[343]

Both the Civil Rights Act and the first clause of the Fourteenth Amendment directly address the question of citizenship. Four points emerge from the legislative discussions of both provisions. The first is that the newly freed people and others of African descent were not aliens and had no allegiance to any other sovereign: they were under the protection and within the allegiance of the United States. Second, native people subject to tribal authority were excluded because the United States did not exercise a complete legislative or judicial jurisdiction over their municipal relations. Third, there was significant concern with native people not subject to any tribal authorities, who were sometimes described as "wild" or "roaming." They, too, appear to have been excluded because, although physically present in the United States, they had never recognized U.S. authority and derived no protection from it. They were consequently not subject to its legislative or judicial jurisdiction. Fourth, the children of aliens generally were to be included, although some representatives appear to have thought there was an exception for temporary sojourners. The record on this point is suggestive but not definitive.

A. The Civil Rights Act

The Civil Rights Act of 1866 provided "[t]hat 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."[344] Most of the debate over the bill focused on two issues: the constitutional power of Congress to enact this law in light of the Supreme Court's holding in *Dred Scott*, and its implications for tribes. The initial bill as introduced by Senator Lyman Trumbull had merely declared all persons born in the United States "and not

[343] *Id.* at 93–103.

[344] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

subject to any foreign power" to be citizens.[345] After the discussions on that second issue, the phrase "excluding Indians not taxed" was added. The language was eventually replaced altogether by the Fourteenth Amendment's jurisdictional phrase.

1. The Freed People

In arguing against the bill, Senator Garrett Davis of Kentucky argued that Congress did not have the power to naturalize the freed people. The naturalization laws, he argued, apply only to a "foreigner who owes allegiance to another potentate or to another Government."[346] "We all know that a foreigner is one who owes allegiance to another Government," Davis added, before asking: "Can the negro here, born within the United States, be said to be a foreigner? Does he owe any allegiance to another Government? Is he an alien and a stranger to our country and our laws and our Government? Not at all."[347] Of course, Davis was right: the freed people were *not* aliens. They had no other allegiance. They were born under the protection of, and within the allegiance of, the United States—subject completely to its legislative and judicial jurisdiction. Although Davis made the point to argue against naturalization, it is for this very reason that the freed people were already citizens. That is why *Dred Scott* was wrong. They were natural-born citizens of the United States whose parents were under the protection of, and within the allegiance of, the United States.

As Senator Trumbull said: "My own opinion is that all these persons"—whether of African or Native American descent—"born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress."[348] Yet not

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[345] CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).

[346] *Id.* at 525.

[347] *Id.*; *see also id.* at 528 (reiterating the point); *id.* at 500 (recording Sen. Cowan making the same argument).

[348] *Id.* at 527.

everyone in the Senate agreed, and "the courts in the southern States have held differently."[349] Senator Trumbull then disputed those holdings by citing to a decision from North Carolina, which had followed the British rule and held that once an enslaved person becomes free, that person becomes automatically a citizen of the country where he was born.[350]

Senator Reverdy Johnson agreed with Senator Davis that the naturalization power applied only to foreigners, and that the freed people were not foreigners.[351] "They are not foreigners, because they were born in the United States. They have no foreign allegiance to renounce, because they owed no foreign allegiance. Their allegiance, whatever it was, was an allegiance to the Government of the United States alone."[352] Senator Johnson found it absurd that the government would not have the power to declare such persons citizens. The real point is that they already were citizens by virtue of birth within the allegiance and under the protection of the United States. Their "ancestors were brought into the United States as chattels," and it was due to "that condition that they were considered as not entitled to the rights of citizenship"; but "[w]e have put an end to that condition."[353]

Senator Morrill similarly responded to Senator Davis's objection by pointing out that any person of African descent born in the United States "owes allegiance to the country of his birth, and that country owes him protection."[354] Senator Morrill thus articulated a more territorial, ascriptive view of allegiance. Senator Trumbull reiterated, however, that the freed people are citizens because they were "born in the United States and owing no allegiance to any foreign Power."[355] Representative Shellabarger argued that, under the law of nations, slaves were "not citizens" and "yet . . . not

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[349] *Id.*

[350] *Id.* (quoting State v. Manuel, 4 Dev. & Bat. 20, 24–25 (N.C. 1838)).

[351] *Id.* at 529–30.

[352] *Id.* at 530.

[353] *Id.*

[354] *Id.* at 570.

[355] *Id.* at 574.

foreigners"; they occupy an "intermediate" position as "being born in a given country and under a given Government," but "do not owe an allegiance to any other Government."[356]

It is important to understand this point. Aliens with foreign allegiance, and who had not received any protection in infancy, could only receive protection in exchange for allegiance if the sovereign agreed. That is, for an alien to be under the protection of the sovereign required a kind of mutual compact between sovereign and alien, the former extending the protection and the latter promising allegiance. At minimum, the sovereign's consent was required.[357] Yet enslaved individuals certainly did not enter into any such compact. Unlike the situation of distressed vessels, however, enslaved individuals were carried into the United States against their will. The sovereign, at least, did consent to their presence. As a result, obedience and allegiance had always been demanded of them.[358] And they had no other allegiances and received no protection from any other sovereign.[359] The sovereign's consent and the sovereign's exercise of jurisdiction over them would seem sufficient for the purpose of birthright citizenship. Some representatives even argued that if a freed person remained in the country after emancipation, that was an act of consent—suggesting a mutual compact after all.[360]

Even if it could be argued that the enslaved parents were not under the protection of the sovereign or somehow owed no

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[356] *Id.* at 1160.

[357] *See, e.g.*, *supra* Part I.A.3.

[358] As the abolitionist William Yates wrote in 1838 of free black persons, "He is not a citizen to obey, and an alien to demand protection." WILLIAM YATES, RIGHTS OF COLORED MEN TO SUFFRAGE, CITIZENSHIP AND TRIAL BY JURY 37 (Phila., Merrihew & Gunn 1838).

[359] On this point, consider also JONES, *supra* note 339, at 63–64, which demonstrates that claims of birthright citizenship were often made in opposition to colonization and expatriation movements.

[360] ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 307 (1997); CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (statement of Rep. Shellabarger) ("[T]heir being domiciled in our own country and continuing here to reside is the individual election of each [person] to accept our nationality.").

allegiance to the United States, it must be reiterated that enslavement and alienage were different conditions. Aliens had another allegiance, which is why the status of the parents became a prominent desideratum if not by Coke's time, then certainly by the time of the early American republic. To repeat the point, parental status is what allowed American jurists to negotiate the problem of revolution and election, and what further allowed some to question whether the common law rule applied to temporary sojourners in an age of increasing international travel.

These considerations simply do not apply to the condition or institution of slavery. As Representative Shellabarger argued, slaves were neither citizens nor foreigners, yet also owed no allegiance to any other government. The status of the parents, in the case of slavery, simply seems immaterial. The framers in the Thirty-Ninth Congress seemed to understand as much. Because the freed people were born in the United States and owed no allegiance to any other government by virtue of their parents' alienage, they constituted a different class and a different problem. One can, of course, argue that the parents were under the protection and within the allegiance of the United States, and under the protection and within the allegiance of no other government—a point several representatives did in fact make. But one need not accept that argument to accept that formerly enslaved individuals with no allegiance to any other government were fully subject to the jurisdiction of the nation in which they had been enslaved. Certainly, they were not, in the language of the Civil Rights Act, "subject to any foreign power."[361]

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[361] Some slavery existed by virtue of the illegal international slave trade. Chin & Finkelman, *supra* note 3. The children of such persons, by no later than the third generation, would not have been aliens and would have been in the same position as any other freed person. It could be argued, however, that the second generation would not be citizens because neither the parents nor the sovereign consented to the presence of the parents. The argument that parental status made sense for alienage but not necessarily for slavery is a complete answer to this objection. But even on the objection's own terms, there is no evidence that the drafters had this small group (relative to the four million freed men and women) in mind. A textual theory of the Civil Rights Act and the Fourteenth Amendment simply does not have to account for these few

2. Tribal Authority

As noted, the issue of native people subject to tribal authority was also discussed. The concern was that they were not excluded by the initial language because the tribes were only "quasi-foreign" nations, and therefore the tribal members arguably were not "subject to any foreign power" and hence would be included within the grant of citizenship. When asked whether he intended "to naturalize all the Indians," Senator Trumbull responded that the U.S. treated with them as "foreigners, as separate nations": "We deal with them by treaty, and not by law, except in reference to those who are incorporated into the United States as some are, and are taxable and become citizens."[362] When asked about the Native Americans in Kansas who have accepted land allotments, Senator Trumbull observed, "They are already citizens of the United States if they are separated from their tribes and incorporated in your community."[363]

Senator Lane of Kansas proposed to add "and not subject to tribal authority" as a clarifying qualifier.[364] Senator Trumbull initially agreed. Senator Lane subsequently proposed to state expressly that "Indians holding lands" by "allotment" were citizens, but Senator Trumbull objected that such lands might be held "outside of the organized jurisdiction of the United States in the Indian country," and preferred the language excluding all "who owe allegiance to any tribal authority."[365] Senator Pomeroy supported the existing language, and argued it would naturalize all Native Americans "except in regard to such Indians as have tribal relations, and are

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individuals because no relevant actor divided the formerly enslaved population in such granular terms. To require a theory of the Act or the Amendment to fit this particular group would be ahistorical and atextual.

[362] CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).

[363] *Id.* at 498–99.

[364] *Id.* at 504.

[365] *Id.* at 525.

responsible and amenable to a government of their own."[366] The question of the status of Native Americans still subject to their tribes was not seriously debated. All assumed that they would not be citizens, and the bill as amended made that assumption express. The question would arise again with the language of the Fourteenth Amendment, the first section of which did not expressly mention tribes or native peoples.[367]

3. No Tribal Authority

The more seriously debated question was the status of native peoples not subject to tribal authority but who may not have assimilated into broader American society. Senator Conness, to the surprise of some in the Senate, suggested there were Indians living on "public reservations" but without any organized tribal government.[368] Senator Ramsey of Minnesota also reminded the members that "there have been large numbers of roving Indians on our frontier," who were "refugees from all tribal authority, and recognized no such authority."[369] To meet the problem, he proposed to exclude Native Americans "not admitted to citizenship by the laws of any of the States."[370]

Senator Trumbull worried about making so many specific provisions for the various categories and descriptions of Native Americans. Regarding these particular groups, he stated:

> Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one

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[366] *Id.* at 526.
[367] *See infra* Section IV.A.
[368] CONG. GLOBE, 39th Cong., 1st Sess. 526 (1866).
[369] *Id.* at 527.
[370] *Id.*

> upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted.[371]

Senator Trumbull then proposed to add to the bill an exclusion for "Indians not taxed," which is the category excluded from the census.[372] The proposal had general agreement. Senator Hendricks of Indiana, however, thought it improper to make citizenship depend on taxation.[373] Senator Trumbull insisted the constitutional language was necessary to address the concerns that had been raised.[374] Senator Hendricks renewed the objection; "property" should not be a "test of citizenship."[375] Senator Henderson raised the same objection the next day.[376]

Henderson's objection is important because it puts into sharp relief the question whether mere territorial presence within the nation is sufficient to be within the power or allegiance of the United States. Henderson argued that any Native American in U.S. territory, "if he is connected with no tribe, whether he is taxed or not, ought to be a citizen of the United States."[377] Such persons were "born here" and do not "owe any allegiance to a foreign Power."[378]

Senator Doolittle of Wisconsin insisted that the constitutional language of "Indians not taxed" was necessary.[379] He thought any attempt to include within citizenship Native Americans "who may not be for the time being incorporated in any tribe" would compel some senators to vote against the bill.[380] Although they may be "disconnected from their tribes, and may be wandering in bands and in families," they are not "yet in a condition to be incorporated

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[371] *Id.*

[372] *Id.*; *see also* U.S. CONST. art. I, § 2, cl. 3.

[373] *See* CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866).

[374] *Id.* at 527–28.

[375] *Id.*

[376] *See id.* at 571.

[377] *Id.*

[378] *Id.*; *see also id.* at 573 ("The Indian, like the negro, was born upon our soil, and I say let him be declared a citizen also.") (statement of Sen. Henderson).

[379] *Id.* at 571.

[380] *Id.* at 572.

as part of the citizens of the United States and made liable to be bound by the contracts which they may make and to be sued upon their contracts."[381] Senator Ramsey agreed that some Native Americans, even if "no longer connected with their tribes or under a tribal government," were nevertheless still "wild" and "untamed," and that it was not "the intention of the Senate" to admit them into citizenship.[382] Senator Williams of Oregon agreed that many Native Americans were "not subject to tribal authority" but also not "competent" to citizenship.[383]

When Senator Trumbull again stepped in, he explained that "[t]he objection" to the original language was "that there were Indians not subject to tribal authority who yet were wild and untamed in their habits, who had by some means or other become separated from their tribes and were not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction."[384] It was for that reason that the "Indians not taxed" language was introduced. Senator Trumbull insisted that this was *not* a property qualification. It was merely the constitutional language that "designate[s] a class of persons who were not a part of our population."[385] If Native Americans are separated from their tribes and "come within the jurisdiction of the United States so as to be counted," they are citizens, whether or not they have property and pay taxes.[386] Senator Williams supported this interpretation, although he was less certain whether or not property would, in fact, become a qualification if the amendment were adopted.[387] Senator Trumbull then reiterated that because it seemed "impossible to satisfy" all concerns, "we had better stand by the constitutional phrase 'excluding Indians not taxed,'" which

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[381] *Id.*
[382] *Id.*
[383] *Id.* at 573.
[384] *Id.* at 572.
[385] *Id.*
[386] *Id.*
[387] *Id.* at 573.

is "not a property qualification at all."[388] Ultimately, the Senate agreed: it rejected reverting to the previous language and adopted the constitutional language of "Indians not taxed."[389]

The discussion of Indians not subject to any tribal authorities is difficult to explain under conventional understandings of sovereignty, jurisdiction, and allegiance. They were within U.S. territory, not subject to any other allegiance, but also not within the "allegiance" of the United States. Although anti-Native bigotry undoubtedly had something to do with the concerns of various senators, the reasoning suggests that these classes of Native Americans were not within the allegiance of the United States—and not subject to its jurisdiction—because they did not derive protection for their municipal rights from the United States. The U.S. did not legislate for or over them. This example also strongly suggests once again that for *aliens*—or in this case, quasi-foreigners—to be within the allegiance and under the protection of the nation may require an agreement between alien and sovereign, or at least may require the sovereign's consent.

4. Aliens and Sojourners

Finally, there was some discussion of aliens generally. "I will ask whether it will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?" Senator Trumbull was asked of the bill, to which he replied, "Undoubtedly."[390] In the subsequent discussion over the status of Native Americans not subject to tribal authority, Senator Trumbull explained the general course of the bill's language. The objective was to make citizens of everybody born in the United States who owe allegiance to the United States. He continued:

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[388] *Id.* at 574 (quoting U.S. CONST. art. I, § 2, cl. 3.).

[389] CONG. GLOBE, 39th Cong., 1st Sess. 574–75 (1866) (quoting U.S. CONST. art. I, § 2, cl. 3.).

[390] CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866). The child of "Asiatic parents" is just as much a citizen as the child born of "German parents," he said. *Id.* (statement of Sen. Trumbull).

> We cannot make a citizen of the child of a foreign minister who is temporarily residing here. There is a difficulty in framing the amendment so as to make citizens of all the people born in the United States and who owe allegiance to it. I thought that might perhaps be the best form in which to put the amendment at one time, "That all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;" but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens, and that that form would not answer.[391]

Senator Trumbull's language demonstrates that allegiance was always at the forefront of citizenship, and that the bill's language may have been intended to narrow the common-law rule. He may have opted for the language "subject to a foreign power" merely to address the situation of ambassadors—in which case he wrongly believed ambassadors owed a "sort of allegiance" to the country. Yet, it is also possible that he was referring to temporary visitors more generally, who undoubtedly did owe a "sort of allegiance" when visiting the country. The passage is too opaque to draw any definitive conclusions. Senator Trumbull did, however, explain the bill in a letter to President Andrew Johnson in which he wrote that it "declares 'all persons' born of parents domiciled in the United States, except untaxed Indians, to be citizens of the United States."[392] This letter also confirms that the relevant status was that of the parents.

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[391] *Id.* at 572.

[392] The discovery of this letter is credited to Mark Shawhan. Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L.J. 1351, 1352 n.7 (2010) (citing Letter from Sen. Lyman Trumbull to President Andrew Johnson, *in* ANDREW JOHNSON PAPERS, Reel 45, LIBR. OF CONG. MANUSCRIPT DIV. (2009)). The letter can be accessed online here: https://www.tifis.org/Trumbull.pdf [https://perma.cc/RU6Z-3AH7].

The Chair of the House Judiciary Committee, Representative James Wilson, did moreover suggest that temporary sojourners were excluded. When introducing the bill (with the Senate's language) in the House, he stated: "We must depend on the general law relating to subjects and citizens recognized by all nations for a definition, and that must lead us to the conclusion that every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign Governments, are native-born citizens of the United States."[393] Professor Kurt Lash has recently shown that the exclusion for temporary sojourners was mentioned in at least one newspaper.[394] Senator Fessenden, the Chair of the Joint Committee on Reconstruction, in a later debate, similarly doubted whether "a person . . . born here of parents from abroad temporarily in this country" would be a citizen.[395]

Other representatives suggested excluding anyone owing any allegiance whatsoever to any foreign government, but it is hard to know what they meant by that qualification. Representative Thayer, for example, suggested that the meaning of the bill was that "every man born in the United States, and not owing allegiance to any foreign power, is a citizen of the United States."[396] Temporary

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[393] CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). There is some grammatical confusion in this passage from the reporter. Wilson likely said all persons born in the United States, excepting temporary sojourners or representatives of foreign governments, are natural-born citizens "of such States . . . *and* are native-born citizens of the United States."

[394] Lash, *supra* note 5, at 46.

[395] CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866). Others, however, doubted that such persons should be exempted. *Id.* (statement of Sen. Wade). Senator Fessenden's remark was made in response to a proposal by Senator Wade to amend the draft Privileges or Immunities Clause to provide that no state "shall abridge the privileges or immunities of persons born in the United States or naturalized by the laws thereof[.]" *Id.* at 2768. Wade said that "[T]he Senator from Maine [Fessenden] suggests to me, in an undertone, that persons may be born in the United States and yet not be citizens of the United States." *Id.* at 2769. Wade denied the proposition, to which Fessenden responded: "Suppose a person is born here of parents from abroad temporarily in this county." *Id.*

[396] *Id.* at 1152.

sojourners, of course, continued owing a permanent allegiance to their place of domicile or citizenship. Representative John Bingham, the influential drafter of the first section of the Fourteenth Amendment, stated that the Act was "simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen."[397] The relevance of parental status is noteworthy. This qualification might have excluded temporary sojourners, but it may have been intended only to exclude ambassadors who owed an allegiance to a foreign power in a more direct and immediate sense. In 1859, Representative Bingham did, however, state his understanding that, under the common law rule, "[a]ll free persons born and domiciled within the jurisdiction of the United States" were citizens.[398]

Not too much can be made of these statements. Many members, including Representatives Bingham, Wilson, and Thayer, assumed the bill was merely declaratory of existing law[399]—although, to be sure, the status of temporary sojourners remained unsettled.[400] And some other representatives put the proposition in the affirmative: anyone born in the United States and owing allegiance to the government would be a citizen, which would have included all temporary visitors.[401] For present purposes, it is enough to

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[397] *Id.* at 1291.

[398] CONG. GLOBE, 35th Cong., 2nd Sess. 983 (1859). The statement seems to suggest the parents had to be domiciled, since the domiciliary of the child followed that of the parent. Bingham could have meant that anyone born in the United States is a citizen so long as he remains domiciled but loses that citizenship upon leaving. The result, it seems, would be the same, unless one could reclaim birthright citizenship after losing it.

[399] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Sen. Bingham); *id.* at 1115 (statement of Sen. Wilson); *id.* at 1151 (statement of Sen. Thayer); *see also id.* at 1262 (statement of Sen. Broomhall).

[400] *See supra* Part I.C.

[401] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866) (statement of Rep. Cook: "This bill provides that all persons born within the United States, excepting those who do not owe allegiance to the United States Government . . . shall be citizens of the United States.").

understand that Congress in no way rejected the importance of allegiance to the question of citizenship, and the leading drafters generally assumed that children born at least of domiciled immigrants of any race would be citizens.

B. The Fourteenth Amendment

1. Complete Jurisdiction

The draft amendment to the Constitution that would become the Fourteenth Amendment did not initially contain a clause defining citizenship. When such a clause was introduced, it read, "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."[402] The addition was subsequently amended to include those naturalized.[403] The question that arises is the meaning of "subject to the jurisdiction thereof" and whether it reaches more, fewer, or the same classes of persons as the Civil Rights Act of 1866. The debate suggests that the difference in language was intended to have the same effect as the Act, but to make clearer that there were no property qualifications for citizenship—addressing the concern with the language of "Indians not taxed." The discussion further reveals that the drafters understood the language to mean subject to the complete jurisdiction of the United States. Consistent with the antebellum legal rules described in Part II, that would have excluded not only ambassadors and invading armies—the traditional exceptions because the law of nations applied instead—but also Native Americans still subject to tribal authority and even those not subject to any tribal authority.

There was only a single substantive discussion on the Clause in the Senate. After the Clause was introduced, Senator Conness of California confirmed that the Citizenship Clause would confer

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[402] *Id.* at 2869.

[403] *See* U.S. CONST. amend. XIV, § 1.

citizenship on the children born to Chinese parents in California.[404] Connecting the amendment to the Civil Rights Act, he explained, "We have declared that by law; now it is proposed to incorporate the same prevision in the fundamental instrument of the nation."[405] Senator Reverdy Johnson agreed that the amendment meant to refer to those "not subject to some foreign Power—for that, no doubt, is the meaning of the committee who have brought the matter before us."[406] The reason for the difference in language, Senator Trumbull explained, was that "I am not willing to make citizenship in this country depend on taxation."[407] Senator Trumbull had presumed during the debate over the civil rights bill that the phrase "Indians not taxed" was a constitutional term of art to distinguish between "civilized" and other Native Americans. But he wanted to avoid all doubts. The "object to be arrived at is the same" as that of the Civil Rights Act, he insisted.[408]

Most of the discussion was about the implication for Native Americans. Senator Jacob Howard, the leading drafter of the Clause, explained that "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States."[409]

Senator Doolittle, however, preferred retaining the language of the Civil Rights Act because he thought "[a]ll the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military."[410] Reverdy Johnson also raised the point, observing that the Indian tribes "are within the territorial limits of the United States," and "[w]e punish murder committed

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[404] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

[405] *Id.*

[406] *Id.* at 2893.

[407] *Id.* at 2894.

[408] *Id.* Other scholars agree that the Amendment was intended simply to constitutionalize and clarify the Act. *See, e.g.*, Shawhan, *supra* note 5, at 203, 228.

[409] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

[410] *Id.* at 2892.

within the territorial limits in which the tribes are to be found."[411] Even if the government generally refrained from legislating for the tribes, he thought the courts "would have no doubt" of Congress's power to do so.[412] Senator Hendricks raised the same concerns.[413] Senator Doolittle repeated the point later in the debate. "[W]hat does it mean," he asked, "when you say that a people are subject to the jurisdiction of the United States? Subject, first, to its military power; second, subject to its political power; third, subject to its legislative power; and who doubts our legislative power over the reservations upon which these Indians are settled?"[414]These were express suggestions that the term in the Fourteenth Amendment might mean simply being within the territory and subject to the power of the United States.

These suggestions were rejected. Senator Fessenden agreed that a "serious doubt" would be created if the "wild Indians" were included by this language, and he invited Senator Trumbull to explain the language.[415] He answered: the language meant "subject to the complete jurisdiction" of the United States.[416] Senator Trumbull then explained what he meant by "complete" jurisdiction. He first suggested that it meant "[n]ot owing allegiance to anybody else." He then suggested that Native Americans were not subject to the jurisdiction because they could not be sued in court. Finally, he suggested that they were not subject to the jurisdiction because the United States makes "treaties" with them. "Do we pass a law to control them?" he asked.[417]

Senator Trumbull stated that this proposition also applied to the "wild Indians" for whom the states also do not legislate.[418] Would

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[411] *Id.* at 2893.
[412] *Id.*
[413] *Id.* at 2894–95.
[414] *Id.* at 2896.
[415] *Id.* at 2893.
[416] *Id.*
[417] *Id.*
[418] *Id.*

a state "think of punishing them for instituting among themselves their own tribal regulations?" Does the United States "pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another?" "They are not subject to our jurisdiction," he concluded; "[i]t is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens."[419] The Amendment could not "embrace the wild Indians of the plains or any with whom we have treaty relations, for the very fact that we have treaty relations with them shows that they are not subject to our jurisdiction. We cannot make a treaty with ourselves; it would be absurd."[420] Senator Trumbull agreed that "there are decisions that treat" the Native Americans "as subjects in some respects."[421] But, he insisted, they are not "subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here."[422]

The thrust of Senator Trumbull's argument is unmistakable. One had to be subject to the complete legislative and judicial jurisdiction of the nation. So long as the municipal relations among tribal members or the non-tribal Native Americans were not governed by U.S. law, such persons were not subject to U.S. jurisdiction in the relevant sense. And it is quite evident that he thought the United States did not have such control over the municipal law of the tribes because of the prevailing rules under the law of nations. The United States might try to interfere with their municipal relations, but that would not be "legitimate." As Chief Justice Marshall had said, dependent nations do not lose all sovereign rights.[423]

In one of the most telling statements from the legislative history, Senator Howard's defense of the language made the same point. The phrase implies "a full and complete jurisdiction," a jurisdiction

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[419] *Id.*

[420] *Id.*

[421] *Id.* at 2894.

[422] *Id.*

[423] Cherokee Nation v. Georgia, 30 U.S. 1, 52–54 (1831).

that is "coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now."[424] Native Americans, at least those subject to tribal authority, "although born within the limits of a State," are not "subject to this full and complete jurisdiction." He added, in a statement that makes the connection to municipal jurisdiction even more evident: "The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe."[425]

Senator Williams piled on. "In one sense, all persons born within the geographical limit of the United States are subject to the jurisdiction of the United States," he said, "but they are not subject to the jurisdiction of the United States in every sense." A child born in the United States of an ambassador, for example, "is subject to the jurisdiction of the United States, because if that child commits the crime of murder, or commits any other crime against the laws of the country, to a certain extent he is subject to the jurisdiction of the United States, but not in every respect," he argued. "[A]nd so with these Indians. . . . I understand the words here, 'subject to the jurisdiction of the United States,' to mean fully and completely subject to the jurisdiction of the United States."[426]

2. Original Meaning

What was the original meaning of the Citizenship Clause in the period from 1866 to 1868, when it was drafted and then ratified by the states? And what relationship did that meaning have to the common law? In a nutshell, it seems that the original meaning of the Clause largely encapsulated the common law. All of the traditional rules at common law related to jurisdiction because, as

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[424] CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866).

[425] *Id.*

[426] *Id.* at 2897.

Part II observed, one generally had to be under the protection and within the allegiance of the sovereign to be subject to that sovereign's jurisdiction—and certainly to be subject to its complete jurisdiction. Ambassadors and foreign armies were subject to the law of nations. Alien enemies without permission to remain were subject to the laws of war, or at a minimum could not have the benefits of the sovereign's municipal jurisdiction. The word "jurisdiction" was used, rather than "allegiance" or "protection," because that was the best term the drafters could summon to exclude the relevant portion of the native peoples while permitting citizenship for those who had fully assimilated into American society. Under Chancellor Kent's ruling in the Oneida tribe case, tribal members would not be birthright citizens precisely because they continued to at least some degree under the protection—and jurisdiction—of their own tribes.[427] Whether other terms could have been used seems immaterial; the legislative record is abundantly clear that the intention was to codify the common law while using clear terms as to which groups of Native Americans were excluded.

It is important to recognize that there was no specific original understanding on the questions of temporary sojourning and unlawfully present aliens, although the little evidence that exists regarding temporary sojourners suggests more evidence for their exclusion than previously appreciated. Discussion of how to apply the original meaning of the Amendment to these situations is deferred to the Conclusion, after relevant post-ratification evidence is considered. It is no objection to an originalist methodology to say that the framers had no specific intent or the public had no specific understanding about a particular problem. Originalism is concerned with identifying the sense or meaning of a constitutional provision, and the referents or applications may be unanticipated.[428]

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[427] Goodell v. Jackson *ex dem.* Smith, 20 Johns. 693, 710 (N.Y. 1823).

[428] *See* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L. REV. 555, 559 (2006); *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004) ("The scope beliefs that particular drafters might

It may be further objected that the analysis thus far is not consistent with originalist methodology more generally, focused as it is on legal history and on the framers' intent. Yet most originalists examine text, structure, intent, and early historical practice to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision.[429] After all, the framers are likely to have used language that accomplishes their objectives and effectuates their intent. Resort to legislative intent and legal history is particularly useful where the term in question is open to varying interpretations—as certainly the word "jurisdiction" is.[430]

Here, moreover, recent scholarship has suggested that many of the speeches inserted into the Congressional Globe were uniquely aimed at convincing constituents on the campaign trail.[431] To that extent, the framers' intent and discussions would have been well known to the public. The public also would have understood that the language used was *legal* in nature; after all, the leading drafters insisted that phrases like "Indians not taxed" were legal terms of art.[432] Certainly the term "jurisdiction" was. They also would have

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have had about the application of [a] constitutional principle may be useful to understanding what principle they actually intended to convey with their language, but the textual principle should not be reduced to the founders' scope of beliefs about that principle.").

[429] *See, e.g.*, ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 18–20 (2017); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3–8 (2019); Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1298–301 (2019).

[430] Which is why Senator Trumbull had to explain "the sense that the language is used here." CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866). The modern law student will surely be familiar with the point. A domiciled resident is subject to the "general jurisdiction" of a court in his state while a resident of another state might only be subject to the "specific jurisdiction" of that state's courts. Both are subject to the "jurisdiction" of the state, but not in the same sense. More generally, as the modern Supreme Court has observed, "Jurisdiction . . . is a word of many, too many, meanings." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (internal citation omitted).

[431] Rachel A. Sheldon, *Finding Meaning in the* Congressional Globe*: The Fourteenth Amendment and the Problem of Constitutional Archives*, 2 J. AM. CONST. HIST. 715, 718 (2024).

[432] *See supra* Part III.A.3.

known that the members of Congress used the common law as a point of departure. Many newspapers discussed the common law rules, cases such as *Lynch*, and the legalistic congressional debates.[433] In sum, an analysis that begins with the common law rules, antebellum legal history, and the framers' debates—especially where those debates were widely discussed by newspapers and on the campaign trail—is consistent with an originalist approach to constitutional interpretation.[434]

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[433] Kurt Lash helpfully collects several newspaper examples on several issues, including the common law and the discussion of "complete" jurisdiction. Lash, *supra* note 5, at 7 n.13, 20 n.77, 32 n.153, 42 n.211, 44 n.219, 45 n.228, 54 n.291, 55 n.299, 85 n.462, 88 n.478.

[434] Of course, intra-textualism and parallel debates would also inform constitutional meaning. It might be asked what connection the Citizenship Clause has to the Equal Protection Clause. The Supreme Court has held in dicta that the term "jurisdiction" in each must have commensurate meaning. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 211 & n.10 (1982); United States v. Wong Kim Ark, 169 U.S. 649, 687 (1898). Yet, there is reason to doubt this conclusion. The term *within* a jurisdiction more naturally connotes geographic boundaries. Treating the two as identical would be illogical, moreover, because Indian tribes were most commonly thought to be *within* the jurisdiction of the United States—within the territory of the United States—but not *subject to* the jurisdiction of the United States. Moreover, it is perfectly sensible to say a state cannot deny the protection of the law to anybody, including to ambassadors who may be within their borders. Ambassadors are entitled to protection from the host nation, but that is not the same thing as saying ambassadors are "subject to the jurisdiction" of the state, as of course they are not because they owe not even a local allegiance. *See supra* note 228 and accompanying text (explaining that ambassadors may be entitled to protection but owe no allegiance to the host nation).

One might also ask about the children of Confederate rebels, who were considered citizens. That is perfectly consistent with the understanding of the Citizenship Clause advanced in this Article. As Coke and others long ago explained, the rebels were subject to treason laws and the municipal jurisdiction of the nation, rather than the laws of war, precisely because they were under the protection and within the allegiance of the sovereign. *See supra* Part II.A.2; *see also* Lash, *supra* note 5, at 57–60. To be sure, during active hostilities they may also have been subject to the laws of war, but the municipal laws no less applied to them than to any loyal citizen. Rebels thus seem to present a hybrid case in which the laws of war and the complete municipal jurisdiction apply.

Finally, another relevant piece of evidence is the Expatriation Act, contemporaneously enacted with the adoption of the Fourteenth Amendment. *See* Act of July 27, 1868, ch. 249, § 1, 15 Stat. 223. The Act rejected the right of foreign governments to claim the services of their former citizens who had been naturalized in the United States. Robert Mensel has observed that the Committee report proposing

Another set of materials in any originalist inquiry is post-ratification evidence. The later in time such evidence occurs, the less probative of original meaning. It is to post-ratification evidence that Part IV turns. This evidence is less interesting for what it suggests about original meaning—there is not much new on that score—but rather how post-enactment interpreters thought domicile and lawful residence might relate to the nation's exercise of jurisdiction.

IV. POST-RATIFICATION EVIDENCE

The conceptual framework uncovered and advanced thus far explains much post-ratification history. That history falls generally into two buckets: discussions relating to Native Americans and those relating to domicile. As to the former, it continued to be a widely shared view that Native Americans were not born subject to the jurisdiction of the United States if tribal authorities legislated for their municipal rights and relations. As to the latter, it was a surprisingly widely held view that parental domicile was necessary for one to be born subject to the jurisdiction of the United States in the sense of the Fourteenth Amendment. Some held the view, however, that a child born of temporary sojourners could elect U.S. citizenship if the child abjured the allegiance of the parents, relocated to the United States, and chose to reside there permanently within a reasonable time of reaching the age of majority.

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the legislation described the principle that "[a]llegiance was . . . controlled by the place of birth" as "feudalistic." CONG. GLOBE, 40th Cong., 2d Sess. 95 (1868); Mensel, *supra* note 6, at 377. That is some additional evidence that the drafters might have rejected a purely territorial theory.

A. Native Americans

1. Cooley and *Elk*

An 1880 treatise by the influential jurist Thomas Cooley explained that "subject to the jurisdiction thereof" meant "that full and complete jurisdiction to which citizens generally are subject, and not any qualified of partial jurisdiction, such as may consist with allegiance to some other government."[435] Cooley's discussion focused on tribal members who maintain their "tribal relations" even though "they reside within a State or an organized Territory, and owe a qualified allegiance to the government of the United States." Such persons cannot be subject to the "complete rights" or "full responsibilities of citizens." But once such a person subjects "himself fully to the jurisdiction, his rights to protection in person, property, and privilege becomes as complete as that of any other native-born inhabitant."[436] The relevant consideration was once again which sovereign supplied *protection* for municipal rights. So long as the Indian tribes continued to legislate for the municipal relations among their own members and sought to vindicate those rights in their own tribunals, those members were not subject to the complete jurisdiction of the United States.

On this understanding, *Elk v. Wilkins* was rightly decided, and obviously so.[437] John Elk had been "born a member of one of the Indian tribes within the United States," and subsequently "voluntarily separat[ed] himself from his tribe and [took] up his residence among white citizens."[438] The question was whether that was sufficient to make him a citizen eligible to vote. The majority said no: the tribes were "dependent" on but also "alien" to the United States, and so the only way for tribal members to become

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[435] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (Bos., Little, Brown & Co. 1880).

[436] *Id.*

[437] 112 U.S. 94 (1884).

[438] *Id.* at 99.

citizens was through naturalization, the same way all foreigners became citizens.[439] Justice Harlan dissented because he thought Elk was "born within the territorial limits of the United States" and "had severed all relations with his tribe, and . . . fully and completely surrendered himself to the jurisdiction of the United States."[440] It is true that that made Elk born in the United States and *now* subject to its jurisdiction. But Elk had to be *born* subject to the complete jurisdiction of the United States.

2. Legislation

After the adoption of the Fourteenth Amendment, the United States began to exercise more legislative jurisdiction over the tribes. In 1871, Congress declared an end to treaty practices with them, but nothing in the statute impaired existing treaty obligations.[441] The Major Crimes Act of 1885 provided for exclusive federal jurisdiction over significant crimes committed entirely between two tribal members on tribal lands; there was no escape clause for honoring existing treaty obligations.[442] The Major Crimes Act was a significant step toward subjecting the tribes to the complete jurisdiction of the United States, although many municipal relations still remained entirely a matter of tribal authority.

There are two possible interpretations therefore of the Indian Citizenship Act of 1924.[443] One is that the Act was unnecessary and merely confirmatory because the Indian tribes were already largely subject to the municipal jurisdiction of the United States; on this

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[439] *Id.* at 100–01.

[440] *Id.* at 110 (Harlan, J., dissenting).

[441] Act of Mar. 3, 1871, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71) ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.").

[442] Act of Mar. 3, 1885, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153).

[443] Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

view, the Act was, at most, necessary to naturalize an older generation of tribal members who had been born prior to 1885 or 1871. Another interpretation is that the Act was necessary because although the Indian tribes were subject to increasing U.S. jurisdiction, so long as the tribal relations continued to exist, they were not subject to the complete municipal jurisdiction of the United States. In the present author's view, the latter is the better interpretation. It supports the proposition that one is "subject to the jurisdiction" of the United States only if the United States exercises a complete legislative, executive, and judicial jurisdiction under the law of nations.

B. Domicile and Consent

The most intriguing development subsequent to the adoption of the Fourteenth Amendment was the emergence of a prominent view that parental domicile was necessary for, or at least relevant to, birthright citizenship. The matter was relatively unsettled prior to 1868. Judge Sandford in *Lynch v. Clarke* had held that the children of temporary sojourners qualified unequivocally for birthright citizenship.[444] Two appellate judges in *Ludlam* strongly suggested the opposite rule.[445] Justice Story had suggested an exception would be "reasonable" but the exception was not "universally established."[446] And the New York Court of Appeals unanimously suggested a rule of election within a reasonable time of attaining majority.[447] Representative Philemon Bliss and Henry St. George Tucker also suggested an exception for temporary sojourners—as did the Louisiana military authorities when they only conscripted children born to domiciled, French parents.[448]

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[444] *See supra* Part I.C.1.

[445] *See supra* Part I.C.2.

[446] STORY, *supra* note 130, at 48.

[447] *See supra* notes 171–181 and accompanying text.

[448] *See supra* notes 186–198 and accompanying text.

Several members of Congress in 1866 also appear to have presumed that temporary sojourners would be excluded, at least from the Civil Rights Act. Senator Trumbull's letter to President Johnson suggested a domicile requirement.[449] In the *Slaughter-House Cases*, Justice Miller wrote for the majority, albeit in dicta, that the jurisdictional phrase "was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."[450]

After the adoption of the Amendment, the view that domicile was required appears to have become somewhat conventional. Other scholars have adduced this evidence already.[451] This section will briefly summarize the evidence. What this section supplies that other scholars have not is the theoretical framework for why domicile might have mattered. Several antebellum rules adduced in previous parts, for example those relating to conscription or personal status rights, suggest that transient visitors may not have been subject to the complete jurisdiction of the United States.

An alternative account was also available: any children born to temporary sojourners who then removed back home with their parents could elect to reside in the United States and become permanent members of the community, provided they did so within a reasonable time after reaching the age of majority. Otherwise, the right was lost.

Throughout these materials, a lawful residence was often presumed to be relevant. The presumption seems to have been based on the idea that protection and allegiance derive from the sovereign's consent to the alien's presence—just as had been the case in England since the Middle Ages.

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[449] *See supra* Part III.A.4.

[450] 83 U.S. 36, 73 (1872). Chief Justice Morrison Waite's opinion for the Court in a subsequent case that there were "doubts" whether citizenship attached to "children born within the jurisdiction without reference to the citizenship of their parents" seems clearly mistaken, at least if read to exclude domiciled aliens. Minor v. Happersett, 88 U.S. 162, 167–68 (1874).

[451] In particular, a thoughtful student note by Justin Lollman canvasses much of the evidence. Lollman, *supra* note 5. This section draws partly from his evidence.

1. *Wong Kim Ark*

The Supreme Court in *United States v. Wong Kim Ark* did not address the case of temporary sojourners.[452] "The question presented by the record," the Court stated explicitly, "is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States," and where the parents "are not employed in any diplomatic or official capacity," is a citizen of the United States.[453] In its holding, the Court mentioned domicile twice: "The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States." The majority held that "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."[454] It then repeats: Wong Kim Ark's parents "are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States."[455]

These passages from the Court's opinion make more sense in light of the law of nations framework. First, jurisdiction follows ("consequently") from allegiance and protection. Second, protection requires a mutual compact between alien and sovereign, or at least the sovereign's consent ("so long as they are permitted . . . to reside here"). Indeed, in another case involving Chinese exclusion, the Supreme Court explained that while an alien "lawfully remains here, he is entitled to the benefit" and

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[452] *Id.*at 464–71.

[453] United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898).

[454] *Id.* at 693.

[455] *Id.* at 694.

"guaranties" of the Constitution and law, and his personal and property rights "are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States."[456] These decisions, although not involving the precise point at issue, presume that Chancellor Kent's dictum regarding alien enemies—"[a] lawful residence implies protection"[457]—applied more broadly.

Third, domicile was presumed relevant. On this point, the dissent was emphatic, and agreed with the majority's presumption. Although it might have been the rule in England that the children born of temporary sojourners were natural-born subjects, "a different view as to the effect of permanent abode on nationality has been expressed in this country."[458] The dissent then cited Justice Story and other post-ratification treatises and executive branch practice, to be discussed presently.

In short, *Wong Kim Ark* seems an easy case under the antebellum framework because of the convergence of lawful presence and domicile. The only reason the case was difficult is because an existing treaty with the Chinese emperor provided that Chinese persons who migrated to the United States would always remain his subjects.[459] Did the existence of a treaty with the emperor suggest that the United States had "treaty relations" with his subjects, in the way it had treaty relations with Indian tribes? Even the majority seemed to recognize that treaties could derogate from the default birthright citizenship rule.[460]

One answer is that treaty practices might alter the birthright citizenship rule *to the extent* treaties provide for the municipal jurisdiction of another sovereign to operate, such as in the case of

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[456] Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

[457] Clarke v. Morey, 10 Johns. 69, 72 (N.Y. 1813).

[458] *Wong Kim Ark*, 169 U.S. at 718 (Fuller, C.J., dissenting).

[459] *Id.* at 701 (majority opinion).

[460] *Id.* at 660 ("But Mr. Justice Story certainly did not mean to suggest that, independently of treaty, there was any principle of international law which could defeat the operation of the established rule of citizenship by birth within the United States.").

consular jurisdiction. The reason *Wong Kim Ark* was likely correctly decided, however, was because the treaty with the Chinese emperor in no way derogated from the rule that his subjects' domicile in the United States determined their municipal rights and relations. In no sense were any of the municipal rights and relations of Wong Kim Ark's parents exempted from a complete U.S. jurisdiction. The United States exercised a complete legislative and judicial jurisdiction over his parents, commensurate with precisely the same legislative and judicial jurisdiction the nation exercised over its own citizens. No known rule under the law of nations provided for any carveout.[461]

2. Treatises and Executive Practice

Previous parts have demonstrated that at least a few antebellum thinkers and writers, and several members of the Thirty-Ninth Congress, thought temporary sojourners were excluded from the birthright rule. Numerous post-ratification treatises and commentaries also presumed that domicile was necessary for birthright citizenship.[462] For example, Francis Wharton wrote in his conflict of laws treatise that persons "born of Chinese non-naturalized parents, such parents not being here domiciled, are not citizens of the United States."[463] This language would turn out to be a bit imprecise because *Wong Kim Ark* would subsequently demonstrate that it was possible to have a domicile but for whatever reason of law or treaty not to be naturalized. Wharton's treatise nevertheless emphasized the importance of domicile. Moreover, Wharton presumed that children born to foreigners

[461] At a minimum, as should now be clear, *Wong Kim Ark* does not establish that birth alone is sufficient for citizenship, and does not by its own terms extend to aliens temporarily in the United States or present there unlawfully.

[462] Lollman, *supra* note 5, at 480–83.

[463] FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW 41 (Phila., Kay & Brother, 2d ed. 1881).

temporarily in the United States could "elect one allegiance and repudiate the other" upon "reaching full age."[464]

In his influential digest of international law, Wharton wrote that "it may be argued" that the jurisdictional phrase of the Fourteenth Amendment "would exclude children born in the United States to foreigners here on transient residence, such children not being by the law of nations 'subject to the jurisdiction of the United States.'"[465] The invocation of the law of nations is telling because under public international law, the child's domicile followed the father's. "The words 'subject to the jurisdiction thereof,'" another 1881 treatise on the subject of citizenship concluded, "exclude the children of foreigners transiently within the United States, as ministers, consuls, *or* subjects of a foreign nation."[466] Numerous other legal commentators thought domicile was relevant to the inquiry.[467] And in 1872, California enacted a law defining citizenship; the law excluded the children born of transient aliens.[468]

There are also prominent executive branch precedents to the same effect. In 1885, Secretary of State Frelinghuysen determined that Ludwig Hausding was not a U.S. citizen despite having been born in the United States.[469] Ludwig's father was a "Saxon subject" temporarily sojourning in the United States at the time of Ludwig's birth. He then took Ludwig back with him to Germany.[470] Secretary Frelinghuysen concluded that Hausding was born "subject to [a]

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[464] *Id.* at 35.

[465] 2 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 393–94 (Francis Wharton ed., W.H. Lowdermilk & Co. 1887).

[466] ALEXANDER PORTER MORSE, A TREATISE ON CITIZENSHIP 248 (Bos., Little, Brown & Co. 1881) (emphasis added). I am indebted to Lollman, *supra* note 5, at 482 for this citation.

[467] Lollman, *supra* note 5, at 482–83.

[468] 1 THE POLITICAL CODE OF THE STATE OF CALIFORNIA § 51, at 18 (Sacramento, T.A. Springer 1872).

[469] 2 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 465, at 397–99.

[470] *Id.* at 397.

foreign power."[471] He also rejected the proposition that Hausding would have the right to elect U.S. citizenship without going through the naturalization process.[472]

In the same year, Secretary of State Bayard denied a passport to Richard Griesser, who had been born in Ohio, on the same grounds.[473] Citizenship was denied because the father had been "domiciled in Germany," and therefore, under international law, Richard's personal (and therefore political) status followed the domicile of his father.[474] Bayard did, however, recognize some right of election to citizenship; but he suggested it would have required the child to remain in the United States until reaching the age of majority.[475]

Other executive branch decisions did, however, presume some broader right of election. For example, Wharton's international law digest reports the determination of Secretary of State Evarts in 1880 that "[a] person born in the United States has a right, though he has intermediately been carried abroad by his parents, to elect the United States as a nationality when he arrives at full age."[476] He similarly concluded that U.S.-born children who returned to the native country of the parents, but who returned to the United States before reaching the age of majority, were citizens if they "elect[ed]" the United States "as their domicil[e] when arriving at full age."[477] But a child staying in the parents' native country after reaching the age of majority may have forfeited citizenship.[478]

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[471] *Id.* at 398. Senator Frelinghuysen relied on the 1866 civil rights statute, but there is no reason to think his answer would have been any different under the Fourteenth Amendment.

[472] *Id.*

[473] *Id.* at 399–400.

[474] *Id.* at 399.

[475] *Id.* ("Had he remained in this country till he was of full age and then elected an American nationality, he would on the same general principles of international law be now clothed with American nationality.").

[476] *Id.* at 397.

[477] *Id.*

[478] *Id.* at 396.

Justice Samuel Miller's constitutional law lectures, published in 1893, similarly hints at both the importance of domicile and the right of election. "If a stranger or traveler passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government," Miller wrote, and who "has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction."[479] If that child had not gone "out of the country with its father," perhaps a route to claim birthright citizenship remained open, although this passage might also be read as a denial of the right of election altogether.[480]

3. Domicile and Jurisdiction

Although some observers have pointed out the presumed connection of domicile to birthright citizenship in this period, none has offered a theory as to *why* domicile might be relevant. And to be sure, none of the sources presuming the relevance of domicile offered an explanation either. One possibility, of course, is that the children of temporary sojourners *are* birthright citizens for reasons of the common law rule. Again, that view was not a settled one. It is also unclear why such birthright citizens would lose their citizenship status by not returning by the age of majority, a rule not applicable to other birthright citizens who leave the country. After all, if they were no less subject to U.S. jurisdiction than other persons born in the United States, the same expatriation rules should apply to them as to children born of domiciled foreigners (and even citizens).

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[479] SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 279 (N.Y., Banks & Brothers 1893).

[480] Congress may be able to determine the effect of temporary sojourning through expatriation legislation. In 1907, Congress provided that American citizens would be "deemed" to have "expatriated" when naturalized in any foreign state. Act of Mar. 2, 1907, § 2, ch. 2534, 34 Stat. 1228 (repealed 1940). A similar act was upheld in 1950. *See* Savorgnan v. United States, 338 U.S. 491 (1950).

The answer may instead be related to the jurisdictional rules regarding extraterritoriality. As Mark Moller and Lawrence Solum have written in the context of corporate citizenship, around the time of the Fourteenth Amendment courts began to develop a concept of citizenship that depended not on "a status entitling one to privileges and immunities under the domestic law," but rather on "subjection to what we would term the state's 'general jurisdiction'" in the "eyes of international law."[481] The applicability of general jurisdiction, in turn, depended on domicile. The Kostza affair was one spectacular example.[482] One could therefore reason that temporary sojourners are at best subject to the *specific* jurisdiction of the country in which they are traveling, but not its *general* jurisdiction—and therefore the United States would not exercise a "complete jurisdiction" over them in the way they could exercise such jurisdiction over domiciled foreigners.[483]

There is more evidence of this view. In his antebellum international law treatise, Henry Wheaton had written that a nation's municipal law operates upon the citizen's "civil condition and personal capacity," such as marriage, divorce, bankruptcy, and "citizenship," even "when resident in a foreign country."[484] Henry Halleck's 1866 abridgment of his larger international law treatise reported this rule as well: "The right of municipal legislation of a sovereign state extends to everything affecting the state and capacity of its own subjects," and the "laws of a state, with respect to these qualities or capacities of its subjects, travel with them wherever they go, and attach to them in whatever country they are resident."[485] These include qualities of marriage, divorce, legitimacy, majority, and citizenship.

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[481] Moller & Solum, *supra* note 336, at 204.

[482] *See supra* note 336 and accompanying text.

[483] In other words, at least once a temporary sojourner had left, the courts of the country could not exercise a general jurisdiction over that sojourner, whereas the courts could always exercise a general jurisdiction in the place of domicile.

[484] WHEATON, *supra* note 287, at 100.

[485] H.W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 87 (Phila., J.B. Lippincott & Co. 1866)

"It is a general rule, that the laws of a state apply to all who are within its limits; and those who have a temporary residence are considered as subjected to the laws of the state, while their residence continues," the high court of Massachusetts declared in 1817. "This applies, however, to laws made for the preservation of the peace of the state, and does not extend to rights and duties arising from the laws of the state where such persons have their domicile. These remain obligatory upon the subject, notwithstanding a temporary absence."[486] As noted previously, this extraterritorial reach of municipal jurisdiction over one's citizens terminates with naturalization or when the other nation chooses "to confer upon them the privileges of their acquired domicil[e]."[487]

Domicile might therefore fit within the law of nations framework because the United States did not exercise a "complete" legislative jurisdiction over non-domiciled foreigners.[488] Nevertheless, this exception to the exercise of legislative jurisdiction was not firmly rooted. There was no question under the law of nations that local sovereigns could exercise a legislative jurisdiction in such circumstances, even if they usually did not. Justice Story's treatise on the conflict of laws, for example, generally supports the proposition that a local sovereign does not legislate over the personal status rights of non-domiciled foreigners, insofar as the fundamental policy of the local sovereign is not injured; but he makes clear this is a matter of comity.[489] That does not defeat the

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[486] Inhabitants of Hanover v. Turner, 14 Mass. 227, 231 (1817); *see also* Ditson v. Ditson, 4 R.I. 87, 93–94 (1856); Dorsey v. Dorsey, 7 Watts 349, 350 (Pa. 1838); Harteau v. Harteau, 31 Mass. 181, 186–87 (1833).

[487] WHEATON, *supra* note 287, at 101.

[488] To be clear, this is not to say that to be subject to jurisdiction of the United States in the complete sense one could not have one's rights in some degree determined by the substantive law of another nation. Ordinary conflicts of law rules still applied. Whatever jurisdiction the United States did exercise over its citizens is what is meant by the nation's "complete" jurisdiction. To the extent the nation exercised less than that jurisdiction over foreign visitors, those visitors would not have been subject to the jurisdiction of the United States in the relevant sense.

[489] STORY, *supra* note 130, at 19–20 (arguing there is an absolute right to regulate all persons in the territory, including with respect to the condition, capacity, and state of

larger point, however, because whether or not to exercise jurisdiction over ambassadors was also understood to be a matter of the nation's own consent and comity.[490]

Perhaps it could be argued that this rule regarding personal status was merely a choice-of-law rule. But there are several reasons to think that is immaterial. First, the choice to apply martial law for enemy aliens (rather than municipal law) would also be a choice-of-law rule in that sense. It was a choice of law rule compelled by the law of nations. Second, Wheaton's and Halleck's treatises suggested that one of the personal status conditions that continued to be governed by the nation of one's domicile was citizenship. Thus, if this rule was a choice-of-law rule, that rule would nevertheless compel the application of the citizenship laws of the country of domicile. Third, the rule seems different than other choice-of-law rules. The sovereign could legislate with respect to all contracts, torts, crimes, or property made, performed, committed, or existing within its territory, irrespective of the domicile of the parties. The only field within a sovereign's borders for which, under the law of nations, the sovereign was prohibited from legislating was the personal status rights of non-domiciled foreigners. In other words, just as the application of diplomatic or martial law is compelled by the law of nations, so too is the application of this particular choice-of-law rule.

Another sense in which non-domiciled foreigners may not have been subject to the "complete" jurisdiction of the United States is

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such persons); *id.* at 20 (citing another authority for the proposition that "[t]he sovereign may in like manner make laws for foreigners, who even pass through his territories; but these are commonly merely laws of police, made for the preservation of order within his dominions, whether they are perpetual or temporary" and arguing this position is "conceded" by all authorities); *id.* at 22 (acknowledging the view that "although the laws of a nation have no direct, binding force, or effect, except upon persons within its territories; yet every nation has a right to bind its own subjects by its own laws in every other place," and stating that in "one sense" this is "correct" and "founded in the practice of nations," but requires "qualification" because the extent foreign law is applicable is ultimately a matter of comity).

[490] *See supra* note 245 and accompanying text; *see also supra* note 249 and accompanying text.

the law of nations rule allowing a local sovereign to decline to exercise judicial jurisdiction over transient foreigners. The general rule was that all sovereigns exercised a complete judicial jurisdiction over residents, whatever the applicable law.[491] "The operation of the general rule of international law as to civil jurisdiction, extending to all persons, who owe even a temporary allegiance to the state," Wheaton wrote, "may be limited by the positive institutions of any particular country," and "there is no uniform and constant practice of nations as to taking cognizance of controversies between foreigners."[492] A related jurisdictional rule is that courts exercise general jurisdiction over domiciled residents even if they are abroad, a rule that obviously would not apply to temporary visitors who have transacted business in the territory but then left.[493]

Still another sense in which domicile might have mattered is that domiciled foreigners were subject to militia service.[494] Indeed, recall

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[491] WHEATON, *supra* note 287, at 121–22; HALLECK, *supra* note 485, at 92.

[492] WHEATON, *supra* note 287, at 122. Halleck, however, states the following: "All persons found within the limits of a government, (unless specially excepted by the law of nations,) whether their residence is permanent or temporary, *are subject to its jurisdiction*; but it may or may not, as it chooses, exercise it in cases of dispute between foreigners." HALLECK, *supra* note 485, at 92 (emphasis added). In Halleck's telling, then, domicile may not have been relevant to the authority of the sovereign to decline to exercise jurisdiction over disputes. However, the general rule was still that a defendant could always be sued in his place of domicile. *Id.* at 91.

[493] *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile.").

[494] *See* HALLECK, *supra* note 485, at 174; 2 FERGUSON, *supra* note 311, at 292; 1 PAPERS RELATING TO FOREIGN AFFAIRS ACCOMPANYING THE ANNUAL MESSAGE OF THE PRESIDENT TO THE SECOND SESSION 38TH CONGRESS 859 (Wash., D.C., Dep't. of State 1865); *In re* Pille, 39 Ala. 459, 460 (1864). More research is needed in this regard. An interesting debate took place between Senators Jacob Howard and Lyman Trumbull in 1864 over whether foreigners could be conscripted. Senator Howard thought it would be contrary to international law to conscript foreigners. Senator Trumbull thought foreigners who voted in elections or declared their intent to become citizens could be conscripted. Either way, the relevance of international law—and of domicile—is apparent. CONG. GLOBE, 38th Cong., 1st Sess. 228–29 (1864). In a similar debate the year before, one Senator argued that "comity" among nations dictated exemptions for

that several decisions from military officers regarding draft exemptions appeared to distinguish between the children born in the United States to temporary visitors and those born of permanent residents.[495]

It is likely that such international rules explain why so many writers seemed to think domicile mattered: whatever legislative, executive, or judicial jurisdiction the United States exercised over its own citizens and domiciled foreigners, it exercised less jurisdiction over transient foreigners. In that sense, its jurisdiction was less "complete" over such foreigners. Another scholar has observed this point.[496]

Assuming that transient sojourners do—for whatever reason—fall outside the rule of "subject to the jurisdiction," that does not fully make sense of the suggestion of some contemporaries that a child born to temporary sojourners could elect an allegiance to the United States within a reasonable time of attaining majority. Perhaps there was no such right. But if there was, an analogy presents itself: postliminy. The idea of postliminy was that the personal rights and statuses of individuals were presumed to remain at all times governed by the laws of the original sovereign. Personal rights do not change merely because another sovereign temporarily physically controls the territory. Only when there is a *permanent* cession of territory does the law applicable to personal

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temporary visitors for this purpose. CONG. GLOBE, 37th Cong., 3rd Sess. 992 (1863) (statement of Sen. McDougall).

[495] *See supra* Part I.C.4.

[496] "States had affirmative legislative jurisdiction over their citizens outside the territory of the state, to a vastly greater extent than one might think today," Professor Mensel has written. "This jurisdiction arising from allegiance went far beyond the imposition of duties on citizen and sovereign" and "the law of the state of allegiance was recognized as defining the status of its citizens abroad with respect to their age of majority, their marital eligibility and status, their competency to contract, and their eligibility to inherit, even when they acted within the territory of another state. By the late eighteenth century a rough system of comity had arisen," Mensel explains, "by which host sovereigns with territorial jurisdiction acknowledged such rules governing foreigners. The local sovereign with territorial jurisdiction thus accommodated distant sovereigns with the jurisdiction arising from allegiance." Mensel, *supra* note 6, at 342–43.

rights shift to the new sovereign's law.[497] That fits with the proposition that the law of personal status is determined by domicile. Until there is a permanent acquisition of territory, residents in occupied territory remain "domiciled" in their previous country and are only temporarily present in the territory of a new sovereign. Perhaps, through a kind of postliminy, the child of a temporary sojourner who returns can be deemed to have always been subject to the complete municipal jurisdiction of the United States.

V. CONCLUSION

The aim of this Article has been to supply a series of interventions into the scholarly debate over birthright citizenship. It has sought to establish that, at common law, the relevant rule was not mere birth on soil, but birth on soil to parents who were under the protection, and therefore within the allegiance, of the sovereign. It sought to demonstrate that in England, the king's permission granted in a safe-conduct, or in parliamentary legislation, was necessary to authorize foreigners to enter the realm and to confer upon them the king's protection. And it sought to establish that parental allegiance became even more important in the revolutionary and post-revolutionary eras, and in particular that several authorities suggested an exception to the general rule for the children of aliens temporarily visiting the United States.

The aim of this Article has also been to advance an underappreciated account of what it means to be "subject to the jurisdiction" of the United States for purposes of birthright citizenship, an account generally consistent with the common law rules but that allowed the framers to exclude the Indian tribes. Its thesis is that by "subject to the jurisdiction" the framers intended—and the public understood—the term to refer to the complete municipal legislative, executive, and judicial jurisdiction of the

[497] *See generally supra* Part I.B.3 & Part II.C.4.

United States. If there was a law of nations exception to the sovereign's exercise of a such a complete jurisdiction over an alien, or if the law of nations itself applied, then the alien was not subject to the jurisdiction in the relevant sense, even if geographically within U.S. territory. The jurisdiction which the United States exercised over such an alien would be less complete than the jurisdiction—whatever its extent—that the nation exercised over its own citizens.[498]

The law of nations framework fits the data better than alternative existing accounts. A territorial theory of jurisdiction is necessarily incomplete because it cannot account for Indian tribes, whether or not subject to tribal authority, nor even invading armies or ambassadors. The most plausible alternative account provides that these groups are not covered by the birthright rule at common law or under the Fourteenth Amendment because another nation retains "sovereignty" over them. As an initial matter, the original sources do not use that terminology; they use "protection" and "allegiance." More generally, that account begs the question of what is "sovereignty." Under the law of nations, a foreign nation retained "sovereignty" over the personal status conditions of their citizens residing temporarily abroad. That nation retained "sovereignty" to exercise a judicial jurisdiction over disputes between two of its nationals arising from an occurrence in another country. That nation retained "sovereignty" to conscript its non-domiciled residents abroad. Sovereignty, in other words, is a spectrum, ranging from ambassadors and foreign armies at one end, members of domestic dependent nations somewhere in the middle, to temporary sojourners at the other end. Sovereignty-based theories of jurisdiction cannot explain where on the spectrum the rule shifts from including to excluding birthright citizenship.

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[498] Professor Kurt Lash has recently proposed three possible readings of the phrase "subject to the jurisdiction." "It could refer to physical territory, or to persons or areas within the reach of law enforcement and judicial process, or to persons who have subjected themselves to the law-speaking sovereign (the allegiance reading)." Lash, *supra* note 5, at 70. The first two readings do have significant flaws, but it remains unclear whether the third reading is supported by the historical record.

The law of nations framework, in contrast, better explains much of the evidence. It explains why ambassadors and armies were not subject to the jurisdiction of the local sovereign but rather to the jurisdiction of the law of nations. It explains why the Indian tribes, as domestic dependent nations, were not subject to the complete jurisdiction of the United States, even if within its territory. It provides an explanation for why so many treatise writers, Supreme Court Justices, executive branch officials, and the author of the Civil Rights Act thought that domicile was a requirement. And it can explain the right of postliminy, which cannot be explained under any other territorial- or sovereignty-based theory. Under the law of nations, the personal status conditions of residents in temporarily occupied territory continue to be governed by the original sovereign until a permanent acquisition of territory.

This account, to be sure, still has its questions. If international law is just customary international practice, including treaty practice, can the relevant jurisdictional rules change over time? If so, the case for excluding temporary sojourners or unlawfully present aliens might be even stronger if the United States entered into treaties limiting jurisdiction in such circumstances, or if international conventions provide for the applicability of international legal rules. Yet, it is also possible that the relevant rules do *not* change because the law of nations was understood by antebellum and Reconstruction-era Americans to be based in natural law. At the time, the law of nations was understood as part of the common law of the United States, and it was "found" rather than "made."[499] Resolving this question is beyond the scope of the present Article and does not seem necessary to resolve the present questions with which modern-day judges are confronted.

Applying the original meaning of the Fourteenth Amendment under the then-prevailing jurisdictional rules under the law of nations is not straightforward. There is no clear original intent or understanding on the specific question of temporary sojourners.

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[499] *See supra* note 12.

This Article has demonstrated, however, that several judges and writers thought an exception should apply to this group and that the leading drafters of the Civil Rights Act intended to exclude them. It has also supplied an explanation for how such individuals may not have been subject to the complete jurisdiction of the United States, a view shared by post-enactment interpreters.

Nor was there an original intent or understanding specifically as to whether aliens from friendly nations would have been covered if they came to the United States contrary to its laws. There is some reason to doubt: under English law, protection came with grants of safe conduct or statutory permission. It is also doubtful that one who entered without the king's consent at common law would have been considered a local "subject" of the king's,[500] or could be said to have successfully entered into the mutual compact with the sovereign, the exchange of allegiance and protection.[501]

In what sense such aliens may not be subject to the complete jurisdiction of the United States is less obvious, but one possible answer presents itself. As Chancellor Kent and others had written, a lawful residence implied protection, which in turn made one amenable to the municipal jurisdiction of the nation.[502] An alien caught at the border may be subject to the criminal laws—the Indian tribes were to some extent—but it does not mean the nation must allow him to sue on his contracts. Whether Congress has, in fact, subjected such aliens to the complete U.S. jurisdiction by allowing them to sue in its courts is another matter. As a

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[500] To repeat, Coke described aliens who came in amity as local and temporary "subjects" of the king. *See supra* notes 32–38 and accompanying text. As *Craw v. Ramsey* confirmed, aliens were "local subjects" of the king. (1668) 124 Eng. Rep. 1072, 1074 (KB).

[501] There is a difference between failing to enter into the social compact (a failure of contract formation, so to speak) and breaching the terms of that compact (a breach of contract). The failure to enter into the social compact altogether—such as in the case of ambassadors or foreign armies or alien enemies who come without authorization—means the sovereign's laws do not apply, but the law of nations applies instead. A breach of the social compact, on the other hand, subjects one to the penalty of the municipal laws. *See generally supra* Part II.

[502] Clarke v. Morey, 10 Johns. 69, 72 (N.Y. 1813).

constitutional default rule, Congress is hardly required to open the nation's courts in this way.[503]

It should also be noted that whether the children of unlawfully present aliens were subject to U.S. jurisdiction when born might further depend on whether the laws and regulations of Congress and the executive department created an implicit license for the parents to remain in the country.[504] It might depend on whether there is a removal order applicable to a particular individual, and whether the alien is excludable, rather than removable, under the immigration laws. It might depend, as already noted, on the extent to which Congress has allowed a category of aliens to maintain actions and to be sued in court. And, if birthright citizenship is inapplicable to transient sojourners, then it might also be inapplicable to certain classes of unlawful entrants, depending on

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[503] Significantly, it was also a violation of the law of nations to enter another into another country illegally. 1 WILLIAM BLACKSTONE, COMMENTARIES *259 ("Upon exactly the same reason stands the prerogative of granting safe-conducts, without which, by the law of nations, no member of one society has a right to intrude into another."); VATTEL, *supra* note 7, at *162–70 (suggesting a violation of the law of nations for on nation to suffer its subjects to injure another sovereign or that sovereign's subjects, including by making "inroads into the neighbouring countries"). *See generally* Robert G. Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause*, 11 BR. J. AM. LEG. STUD. (2022) (arguing that illegal immigration violates the law of nations and that Congress has power to restrict immigration under the clause empowering it to define offenses against the law of nations). That suggests an additional reason why the law of nations might be applicable rather than the municipal law, even if there was no question that illegal entrants could be subject to the sovereign's criminal jurisdiction. It is not unworthy of observation that migration in general is governed in several respects by modern-day international conventions. *See, e.g.*, Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, 149; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3.

[504] Whether the President can unilaterally extend such permission and protection contrary to Congress's laws, such as the President arguably did in implementing the Deferred Action for Childhood Arrivals (DACA) or Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policies, is a difficult question beyond the scope of this Article. The author suspects that to the extent such policies were unlawful, see, for example, United States v. Texas, 809 F.3d 134 (5th Cir. 2015), they cannot grant the necessary permission and protection.

whether they can be considered as having established a domicile. Further, after the second generation, the analysis might change: the grandchildren of those who came to this country unlawfully, and who were born to parents themselves born in the United States, would fit more comfortably within the analysis previously applicable to the newly freed people.[505] In no sense are they "aliens" or "foreigners"; relying on the status of the parents in such cases would not establish any other allegiance but to the United States.

Irrespective of these particular applications—with which one might reasonably disagree—the ideas and legal doctrines underlying birthright citizenship are more nuanced than has been traditionally believed. Any claims to such citizenship should be examined carefully, and often upon the facts of individual cases. In whatever context such claims are presented, the law of nations framework will have significant explanatory power.

[505] *See supra* Part III.A.1.