ADDRESSING SOME PERCEIVED ANOMALIES REFERENCED IN THE *TRUMP V. BARBARA* ORAL ARGUMENT

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We have written previously of our disagreement with the conventional (or expansive) view that the Citizenship Clause of the Fourteenth Amendment automatically grants U.S. citizenship, without need for naturalization, to children born here of parents unlawfully in the country or here as visitors.[1] President Trump's executive order on birthright citizenship has it right as a constitutional matter. We also agree with the President than any change has to be prospective only and ground this on estoppel principles in view of the many years of State Department statements repeating the conventional view[2] and also on implications of the Supreme Court's 1976 decision in *Afroyim v. Rusk*,[3] that citizenship once obtained cannot be relinquished involuntarily or impliedly. We write here only to address certain perceived anomalies noted by some the Justices during the oral argument in *Trump v. Barbara*[4] in the hope that it will help the Court's deliberations.

I. WHY THE EMPHASIS IN *WONG KIM ARK* ON THE U.S. DOMICILE OF WONG'S PARENTS?

One apparent anomaly lies in the more than occasional reference in the Court's landmark decision in *United States v. Wong Kim Ark*[5] to the fact (stipulated or otherwise) that Wong's parents were permanently domiciled in the United States, even though they presumably remained subjects of China. Justice Gray declared the question presented to the Court at the outset of the opinion:

> The question presented by the record 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 are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment

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[1] *See generally* Samuel Estreicher & Rudra Reddy, *Revisiting the Scope of Constitutional Birthright Citizenship*, 24 GEO. J. L. & PUB. POL'Y (forthcoming Summer 2026).

[2] *See* 22 C.F.R. § 33.23(a)-(c) (1938).

[3] *See* 387 U.S. 253, 267–68 (1967).

[4] *See* Transcript of Oral Argument at 24, Trump v. Barbara, No. 25-365 (Apr. 1, 2026).

[5] 169 U.S. 649 (1898).

> of the constitution: '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.'[6]

Thus, at the start of the opinion, Justice Gray for Court states the case concerns the claim to citizenship of an individual born in the United States to parents having a "permanent domicile and residence" in this country.[7] "Domicile" meant then and now, residence and intention to remain indefinitely in that place.

The "domicile" limitation in *Wong*'s holding is especially significant as Wong's counsel urged the Court to extend citizenship to all children born in the United States, including those born to temporary sojourners. In briefing before the Court, Wong's counsel argued that "a child born in the territory of the United States of alien parents, not exempted by the law of nations from the territorial sovereignty of the United States, and whether domiciled or settled, or merely temporarily sojourning therein, is born therein 'subject to the jurisdiction' of the United States, and of no other power."[8] It was evident, Wong's lawyer contended, that "the question of the natural-born citizenship, or alienage, of any persons born in the United States of alien fathers, *cannot be made to depend, under the Fourteenth Amendment, upon the 'domicile' of their parents at the time of their birth in the United States*."[9] But Justice Gray's opinion did not adopt this argument and indeed incorporated a domicile requirement in his formulation of the issue presented, while noting several times that Wong's parents were permanently domiciled in the United States.

The reference to Wong's parents' domicile was not accidental. Justice Gray's opinion in Wong favorably referenced the 1895 New Jersey Supreme Court decision in *Benny v. O'Brien*.[10] In *Benny*, the state high court held that a person born of Scottish parents who were domiciled in the United States but who were never naturalized was "subject to the jurisdiction" of the United States within the meaning of the Citizenship Clause and "not subject to any foreign power" within the meaning of the 1866 Civil Rights Act.[11] The *Benny* court concluded that birth within the United States established citizenship *"when the parents are domiciled here . . . ."*[12]

The principal basis for viewing *Wong Kim Ark* as supporting the expansive conception of birthright citizenship is the Court's discussion of historic exceptions to citizenship at birth:

> The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. … To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to

[6] *Id.* at 653 (emphasis added.
[7] *Id.* at 652.
[8] See Brief for Respondent at 71, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)
[9] *Id.* at 87 (emphasis added).
[10] 58 N.J.L. 36 (N.J. 1895).
[11] *Id.* at 39.
[12] *Id.* at 40 (emphasis added).

> thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.[13]

These were the historic exceptions, but did, as counsel for Respondents in *Trump v. Barbara* argued, the Fourteenth Amendment contain only a "closed set" of exceptions for persons born here who are not "subject to the jurisdiction" of the United States?[14] This contention is misplaced for at least three reasons. First, Justice Gray himself counseled against such a broad reading by approvingly quoting in *Wong* the following language from Chief Justice Waite's 1874 opinion for the Court in *Minor v. Happersett*:[15]

> At common law, with the nomenclature of which the framers of the constitution were familiar, it was never doubted that all children, born in a country, of parents who were its citizens, became themselves, upon their birth, citizens also. These were natives or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further, and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. *As to this class there have been doubts, but never as to the first*. For the purposes of this case, it is not necessary to solve these doubts. It is sufficient, for everything we have now to consider, that all children, born of citizen parents within the jurisdiction, are themselves citizens.[16]

Second, the insistence on a limited class of common law exceptions conflicts with the Court's earlier ruling in *Elk v. Wilkins*,[17] also authored by Justice Gray. There, the Court held that members of Native American tribes did not become citizens of the United States by birth. The Court assigned no significance to the fact that the plaintiff John Elk had "severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States" at least a year prior to the case.[18] Quoting from an Oregon district court decision in a similar case, the Court explained that ''an Indian cannot make himself a citizen of States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form."[19]

Relevant to contemporary immigration debates, the Court observed that the "alien and dependent" condition of the Indian tribes could not "be put off at their own will without the action or assent of the United States."[20] Similarly, the Court clarified that "an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old alle-

[13] *Wong Kim Ark*, 169 U.S. at 693.
[14] Transcript of Oral Argument at 81, Trump v. Barbara, No. 25-365 (Apr. 1, 2026).
[15] 88 U.S. 162 (1874).
[16] *Id.* at 167–68 (emphasis added).
[17] 112 U.S. 94 (1884).
[18] *Id.* at 95.
[19] *Id.* at 109.
[20] *Id.* at 100.

giance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law."[21] In both passages, Justice Gray made clear that a unilateral declaration of allegiance did not suffice to confer citizenship on an applicant without some form of acceptance from the United States.

Third, the Court's statement in *Wong Kim Ark* does not make clear that the reference to "thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States" does not include only persons domiciled here or naturalized citizens.[22]

It should also be noted that in the *Slaughterhouse Cases*,[23] Justice Miller noted for the Court that the phrase "subject to the jurisdiction thereof" was "intended to exclude from its operation children of ministers, consuls, and citizens or *subjects of foreign States born within the United States*."[24] While this statement was dicta, which Justice Gray appeared to repudiate in *Wong Kim Ark*, this was a Justice's interpretation of the Citizenship Clause issued soon after the adoption of the Fourteenth Amendment.

Justice Kagan rightly asked during the oral argument whether domicile necessarily spoke to citizenship.[25] But at a time when immigration to the United States was not regulated, domicile was a critical factor in determining the allegiance, even if subject to change, of foreign persons residing here. As Justice Washington stated for a majority of the Court in its 1814 decision in *The Venus* (in an opinion expressly endorsed by Justice Story even though he was not sitting on the case):

> The writers upon the law of nations distinguish between a temporary residence in a foreign country for a special purpose and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, domicil[e], which he defines to be, 'a habitation fixed in any place, with an intention of always staying there.' Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens, but is nevertheless united and subject to the society without participating in all its advantages. This right of domicile, he continues, is not established unless the person makes sufficiently known his intention of fixing there, either tacitly or by an express declaration.[26]

A person retained his domicile until that person established another. Thus, it was important to the *Wong* Court that Wong's parents had not established a new domicile. The Court expressly noted that Wong's parents "were at the time of [Wong's] birth domiciled residents of the United States, having previously established and are still enjoying a permanent domicile and residence therein at San Francisco."[27] At the very least, the *Wong*

[21] *Id.* at 101.
[22] 169 U.S. 649, 694 (1898).
[23] 83 U.S. 36 (1872)
[24] *Id.* at 73 (emphasis added).
[25] *See* Transcript of Oral Argument at 24, Trump v. Barbara, No. 25-365 (Apr. 1, 2026).
[26] The Venus, 12 U.S. (8 Cranch) 253, 278 (1814).
[27] 169 U.S. 649, 652 (1898).

Court's emphasis on domicile speaks to the claimed birthright citizenship of temporary sojourners, as Professor Thomas Lee's recent article explains.[28]

II. IS THERE A DIFFERENCE BETWEEN THE 1866 CIVIL RIGHTS ACT'S "SUBJECT TO A FOREIGN POWER" AND THE CITIZENSHIP CLAUSE'S "SUBJECT TO THE JURISDICTION THEREOF"?

In an interesting colloquy with the Solicitor General, Justice Kavanaugh asked whether the entire debate would have been substantially different had the same Congress that drafted the Civil Rights Act of 1866 and the Citizenship Clause of the Fourteenth Amendment used the same "subject to a foreign power" exclusion in each.[29] This is an intriguing question, for other than a desire to use a positive formulation and delete the confusing "Indians not taxed" clause, there is simply no evidence that the Amendment's framers intended a substantive change in the scope of the exclusion from birthright citizenship from the one set forth in the 1866 law.

As our colleague Professor Richard Epstein emphasizes,[30] the "subject to any foreign power" exclusion in the 1866 Civil Rights Act has to be read in tandem with and is informed by the text of naturalization laws, which from 1790 on, at least until the Court's 1976 *Afroyim* decision, invariably required applicants for naturalization to disavow any allegiance to another country. Is it to be assumed that this repeated concern simply dropped out of the picture when the same Congress a month or two later turned to the Citizenship Clause? Surprisingly, neither the Solicitor General nor respondents in the *Trump v. Barbara* argument spent any time discussing the immediate post-ratification history of the Citizenship Clause, which would seem highly relevant to the issue of the Clause's original meaning.

A. Contemporaneous Post-Ratification Executive Practice

After the ratification of the Fourteenth Amendment, several legal scholars and commentators took the position that being "subject to the complete jurisdiction" of the United States required undivided allegiance to the United States, a position Senators Trumbull and Johnson took in the Senate debates.[31] Thomas Cooley, a leading jurist on the Michigan Supreme Court, dean of the University of Michigan Law School, and preeminent legal scholar of the time, wrote the following in his influential treatise *The General Principles of Constitutional Law in the United States of America* in 1880:

> The fourteenth amendment indicates the two methods in which one may become a citizen: first, by birth in the United States; and, second, by naturalization therein. But a citizen by birth must not only be born within the United States, but he must also be subject to the jurisdiction thereof; and by this is meant that full and complete jurisdiction to which citizens generally are subject, and not

[28] *See generally* Thomas H. Lee, *The Citizenship Clause's Residence Requirement* (Fordham L. Legal Stud., Rsch. Paper No. 6468663, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6468663.

[29] Transcript of Oral Argument at 54–56, Trump v. Barbara, No. 25-365 (Apr. 1, 2026).

[30] *See* Brief of Professor Richard A. Epstein Amicus Curiae in Support of Petitioners and Reversal at 9–16, Trump v. Barbara, No. 25-365 (Jan. 27, 2026).

[31] *See* CONG. GLOBE, 39th Cong., 1st Sess., at 2893–94 (1866).

> any qualified and partial jurisdiction, such as may consist with allegiance to some other government.[32]

Francis Wharton, a leading authority on criminal international law and former Assistant Attorney General of Pennsylvania, emphasized in his 1884 treatise *Commentaries on Law* the main purpose of the Citizenship Clause: "But the object of the clause now specifically before us is (1) to confer citizenship on the negro race, excluding Indians and Chinese, and (2) to give equal civil rights, in terms hereafter to be more fully discussed, to all persons in the United States of whatever race."[33]

Contemporaneous executive branch interpretations are consistent with these views. In a 1873 letter to President Ulysses S. Grant, Attorney General George H. Williams interpreted the Citizenship Clause in the following manner:

> [T]he word "jurisdiction" must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent. *Political and military rights and duties do not pertain to them.*[34]

Williams's interpretation of the Citizenship Clause is entitled to significant weight because he voted for both the 1866 Civil Rights Act and the Fourteenth Amendment in his prior role as a Senator from Oregon. Also, his letter provides the clearest definition of what it means to be subject to the "absolute or complete jurisdiction" of the United States, a formulation used extensively in the congressional debates.[35]

During the Reconstruction era, the State Department had to adjudicate claims of U.S. citizenship made by persons living abroad. The records of these adjudications provide strong evidence of how State Department officials interpreted the Citizenship Clause at a time fairly contemporaneous to its adoption. One such case was that of Ludwig Hausding, who was born here to persons living temporarily in the United States.[36] His parents were not born in the United States and had never applied for naturalization.[37] Frederick Theodore Frelinghuysen, Secretary of State in the Arthur administration, concluded that even though Hausding was born in the United States, his claim for citizenship by birth was "untenable, for by section 1992, Revised Statutes, it is made a condition of citizenship by birth that the person be not subject to any foreign power."[38] He explained further:

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[32] THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 242–43 (1880) (emphasis removed).

[33] Francis Wharton, COMMENTARIES ON LAW: EMBRACING CHAPTERS ON THE NATURE, THE SOURCE, AND THE HISTORY OF LAW 666 (7th ed.1884)

[34] Letter from George H. Williams, Attorney General, to President Ulysses S. Grant (August 20, 1873), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, TRANSMITTED TO CONGRESS WITH THE ANNUAL MESSAGE OF THE PRESIDENT (1873) at 1216, https://history.state.gov/historicaldocuments/frus1873p1v2/d196 [hereinafter PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES) (emphasis added).

[35] *Id.*

[36] Letter from Frederick Theodore Frelinghuysen to John A. Kasson (Jan. 15, 1885), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES (1885) at 395.

[37] *Id.*

[38] *Id.*

> Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation: that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute.[39]

By contrast, the State Department acknowledged the citizenship of Alfred P. Jacob, who hoped to be struck from French military rolls on the grounds that he was born an American citizen.[40] Secretary Frelinghuysen accepted his claim of citizenship and stated his grounds for doing so as follows:

> It appears from these papers the father was naturalized during the son's minority. This made the son an American citizen without regard to place of birth. His American birth at Philadelphia is not pertinent, it being asserted that his father registered him in the French consulate as a Frenchman, and so his case may be considered precisely as though he had been brought to this country while a minor. But this gave no claim to military service.[41]

Despite being born in Philadelphia to a non-diplomat residing in the country legally, Jacob was not a citizen by birth because his registration in a foreign consulate as a foreigner exempted him from military service in the United States. As a result, he was not subject to all the duties of an American citizen and thus, not "subject to the jurisdiction" of the United States under the Fourteenth Amendment. Jacob only later became a citizen when his father was naturalized as an American citizen when Jacob was seventeen years of age, still a minor.[42]

The interplay between American and international law on citizenship is apparent in Secretary Bayard's disposition of Richard Greisser's claim to American citizenship.[43] Greisser was born in Ohio to a German father domiciled in Germany.[44] When he was under two years old, he moved to be with his father in Germany.[45] Following his father's death, he moved with his mother to Switzerland. Unmoved by Greisser's American birth, Bayard concluded that, under international law, Greisser's nationality followed his father during his minority, i.e., he was German until his father's death and Swiss afterward.[46] After setting forth the text of the 1866 Civil Rights Act and the Citizenship Clause of the Fourteenth Amendment one after the other, Bayard reasoned:

> Richard Greisser was no doubt born in the United States, but he was on his birth "subject to a foreign power" and "not subject to the jurisdiction of the United States." He was not, therefore, under the statute and the Constitution a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship.[47]

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[39] *Id.* Those provisions of the Revised Statutes of 1874 referenced here reenacted the Civil Rights Act of 1866, including its exclusion from birthright citizenship of persons born here to parents "subject to any foreign power."

[40] Letter from Frederick Theodore Frelinghuysen to L.P. Morton (Jan. 21, 1884), reprinted in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES (1884), at 135.

[41] *Id.*

[42] *Id.*

[43] Letter from Thomas F. Bayard to Boyd Winchester (Nov. 28, 1885), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES (1885) at 814.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

Tellingly, Bayard observed that there was one circumstance in which Greisser's American birth would have conferred U.S. citizenship: "Had he [Greisser] 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."[23] Far from automatically enjoying the sovereign's protection after his birth in Ohio, Greisser's claim to citizenship by birth was defeated by his father's foreign domicile and his failure to elect American nationality upon attaining majority. Needless to say, Bayard's analysis cannot be reconciled with automatic birthright citizenship.

In 1889, the State Department considered the passport application of Rudolph Ernest Brünnow, a noted German-American orientalist and philologist, who was born in Michigan in 1858.[48] In 1863, his family moved back to Germany and did not return to the United States thereafter.[49] At the time of his application, Brünnow stated that he intended to become a semi-official instructor at the University of Heidelberg and had no concrete plans to reside in the United States in the next five years.[50] U.S. Ambassador to Great Britain Robert Lincoln denied Brünnow's application, reasoning:

> [H]is own failure, during the ten years which have elapsed since he attained his majority, to assume any of the duties of our citizenship, and his present utter lack of a reasonably definite purpose ever to assume them, and, more, his declared purpose of its renunciation if necessary to obtain a petty office in Germany, make me reluctant to give him a badge of the citizenship he appears to value so lightly.[51]

The Department's practice of inquiring into whether U.S.-born persons were discharging the duties of citizenship appears to have survived the Supreme Court's opinion in *Wong*.[52] In 1901, the State Department denied a passport to Carl Schimaneck, who was born here to alien parents.[53] After his father's death, his mother moved him to Bohemia at the age of four, where he remained ever after.[54] Quoting from a Department circular, Secretary of State John Hay stated:

> When a person who has attained his majority removes to another country and settles himself there, he is stamped with the national character of his new domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period, and the presumption of law with respect to residence in a foreign country, especially if it be protracted, is that the party is there animo manendi [intention to establish a permanent residence] and it lies with him to explain it.[55]

While proponents of birthright citizenship point to executive branch practice embracing that view later in the twentieth century, the record is mixed there, too. In the latter part of the

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[48] Letter from Robert T. Lincoln to James G. Blaine (Jul. 10, 1889), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES (1889) at 450.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *See* Letter from Elihu Root, Secretary of State, transmitting REPORT ON THE SUBJECT OF CITIZENSHIP OF THE UNITED STATES, EXPATRIATION, AND PROTECTION ABROAD, H.R. DOC. NO. 326, at 73–74 (Dec. 20, 1906).

[53] Letter from John Hay to Charles V. Herdliska (Aug. 20, 1901), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES (1901) at 13.

[54] *Id.*

[55] *Id.*

century, the executive branch generally took the view that birth within the United States conferred citizenship, regardless of the circumstances. For much of the twentieth century, however, federal regulations required a U.S.-born applicant for a passport to provide not only his own name, date, and place of birth, but also that of his father.[56] If the applicant's father was foreign-born, the applicant had to provide the date of the father's emigration to the United States, the period of his residence in the United States, and, if naturalized, the date and place of his naturalization as a citizen of the United States.[57] The regulations also required applicants to furnish "[s]uch further information as the Secretary of State may require to establish satisfactorily the American citizenship of the applicant."[58] If birth within the United States was itself sufficient as per se evidence establishing citizenship, the requirements for an applicant's father's place of birth and residence, and further information as may be required by the Secretary of State, would have been entirely unnecessary.

The executive branch practice record following the Fourteenth Amendment's ratification establishes two clear points. First, it confirms what it means to be subject to the "complete" jurisdiction of the United States: being subject to all political and military duties that a citizen would have before the adoption of the Amendment. And second, it seriously undermines the view that birth within the United States inexorably and automatically conferred citizenship after 1868.

We are not certain of the precise date, or of the reasons for the change, but towards the latter half of the twentieth century, the State Department took a more expansive view of birthright citizenship. The modern State Department position supports a claim of executive estoppel requiring prospective application only of a rule withholding automatic citizenship for children born to parents unlawfully or temporarily in this country, but that does not gainsay the relevance of executive interpretation of the Citizenship Clause contemporaneous with its ratification.

[56] *See* 22 C.F.R. § 33.23(a)-(c) (1938).
[57] *See* 22 C.F.R. § 33.23(g).
[58] *See* 22 C.F.R. § 33.23(i).