

## “SUBJECT TO THE JURISDICTION” AS LEGAL TEXT

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### INTRODUCTION

The Citizenship Clause of the Fourteenth Amendment defines natural-born citizens as “[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof.”<sup>1</sup> Although what it means to be born “in the United States” is fairly straightforward, the second qualification for citizenship status is much less clear. The question of what “subject to the jurisdiction thereof” means is now hotly contested.

The implications of the meaning of this phrase are significant. President Donald Trump’s Executive Order 14160 purports to exclude from the scope of birthright citizenship the children born in the United States to parents who are undocumented aliens or who are present in the United States on only a temporary basis.<sup>2</sup> The lawfulness of the Order depends on the claim that those born to alien parents in those circumstances are not actually “subject to the jurisdiction” of the United States and thus outside the scope of the Citizenship Clause.<sup>3</sup> Potentially, children born in the United States of alien parents in a wider range of other circumstances could also be understood to be outside the subject of the jurisdiction of the United States.<sup>4</sup>

Of course, the actual text of the Constitution does not refer to parents at all but rather applies to those “born” in the United States.<sup>5</sup> The restrictionist legal arguments simply conflate the parent and infant when determining who is subject to the jurisdiction of the United States and focus attention on the alleged allegiance of the parents.<sup>6</sup> Given that the restrictionists’ arguments assert that “subject to the jurisdiction” in this context means, in effect, “those who owe allegiance,” the lack of interest in how a newborn infant might acquire the requisite allegiance would seem to be a problem.<sup>7</sup> The awkwardness is itself indicative of the fact that “subject to the jurisdiction”

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<sup>1</sup> U.S. CONST. amend. XIV, § 1.

<sup>2</sup> See Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

<sup>3</sup> Brief for Petitioners at 11–12, *Trump v. Barbara*, No. 25-365 (Jan. 20, 2026).

<sup>4</sup> John C. Eastman, *The Significance of ‘Domicile’ in Wong Kim Ark*, 22 CHAP. L. REV. 301, 306 (2019).

<sup>5</sup> U.S. CONST. amend. XIV, § 1.

<sup>6</sup> See Brief for Petitioners, *supra* note 3, at 14–15.

<sup>7</sup> *Id.*

should not be translated into “those who owe allegiance” since an allegiance-based analysis necessarily draws one toward a consideration of the adult parents rather than toward a consideration of the actual subject of the constitutional text, the newborn infant. Ultimately, the Constitution directs us to determine whether a newborn is “subject to the jurisdiction” of the United States, and that directive is unlikely to be sensible if the key determinative factor is one of allegiance.

The birthright citizenship case has highlighted some potential points of divergence as to how originalist theory might be translated into practice.<sup>8</sup> A pure original intention approach would tend to emphasize that the text should be understood to mean what those who authored it intended for it to mean, and that in turn would prioritize historical evidence that can be gleaned from the discussions and debates surrounding the drafting and adoption of a given piece of constitutional text.<sup>9</sup> Thus, Professor Kurt Lash has asserted that in order to interpret this text one need read no more than “roughly *seven pages* in the Congressional Globe.”<sup>10</sup>

An original public meaning approach, on the other hand, would tend to emphasize how a specific text would have been understood at the time it was enacted into law.<sup>11</sup> That text might simply reflect general public and political discourse or it might embody legal terms of art and reference particular legal rules that could depart from ordinary meaning but makes sense of the Constitution as a public *legal* document. Such legal understandings of the constitutional text might likewise be informed by legal interpretive conventions and methodologies or legal background norms and principles familiar to sophisticated readers of legal documents at the time the text was drafted and ratified into authoritative law.<sup>12</sup> Thus, from this perspective, in order to understand the citizenship rule embodied in the Fourteenth Amendment, it would be useful to examine the extended history of the common law rule of birthright citizenship.<sup>13</sup>

For purposes of this article, we take an original public meaning approach that focuses on the extent to which the “subject to the jurisdiction” language invokes preexisting, conventional meaning that would have been familiar from congressional and legal practice at the time of Reconstruction. Were the drafters of the Fourteenth Amendment writing on a blank slate, or were they borrowing from sources that would have helped refine and clarify the meaning of the text they were adopting? Although the specific language that they eventually used in the final version of the Fourteenth Amendment was not simply pulled off the shelf, it was also not a complete

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<sup>8</sup> See John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1371, 1376 (2019). See generally Darrel A.H. Miller, *Originalism’s Selection Problem*, 33 WM. & MARY BILL RTS. J. 375 (2024) (describing the “family” of originalist theories); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999).

<sup>9</sup> See Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation is an Impossibility*, 41 S.D. L. REV. 967, 968 n.1 (2004); David Tan, *Objective Intentionalism and Disagreement*, 27 LEGAL THEORY 316, 322–23 (2021); David Austin Green, *Intention and Interpretation*, 43 QUINNIPIAC L. REV. 453, 466, 471 (2025).

<sup>10</sup> Eugene Volokh, *Prof. Kurt Lash Responds to Keith Whittington on Birthright Citizenship*, VOLOKH CONSPIRACY (Aug. 26, 2025), <https://reason.com/volokh/2025/08/26/prof-kurt-lash-responds-to-keith-whittington-on-birthright-citizenship/> [<https://perma.cc/DS9F-GH2F>].

<sup>11</sup> See Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807, 807; Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 268 (2019).

<sup>12</sup> See William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810–11 (2019).

<sup>13</sup> 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 460, 474 (2026).

innovation nor was it idiosyncratic to one congressional debate on a single day in May 1866. These are words and phrases that had a familiar meaning to legislative drafters in the mid-nineteenth century. It is theoretically possible that a constitutional drafter would mean to use legal terminology in an unconventional way, but such a possibility would seem to be unlikely and should require substantial evidence to demonstrate. When a constitution makes use of established legal terms, the most fruitful path for interpreting that language is to examine what meaning those legal terms would have had for competent lawyers at the time.

Evidence from treaties, statutes, and judicial opinions predating the Fourteenth Amendment should inform our understanding of the constitutional language. Critically for purposes of the current dispute over the status of the American-born children of aliens, those sources reinforce the conventional interpretation of the constitutionally embodied birthright citizenship rule. They indicate that “subject to the jurisdiction” did not suggest a rule of faithful allegiance to the political sovereign of the sort that revisionists have recently proposed in support of the administration’s policy proposals to narrow the scope of birthright citizenship.<sup>14</sup> Instead, those historical legal sources indicate that the proper rule for assessing the status of those born within the United States is whether those children were born subject to the governing authority and protection of the political sovereign.<sup>15</sup> Moreover, the standard use of legal language like “subject to the jurisdiction” did not require or imply exclusivity. Individuals and objects were frequently simultaneously subject to the jurisdiction of the United States and subject to the jurisdiction of other governments.

This Article canvasses the evidence across three parts. First, the Article examines how the terms “jurisdiction” and “subject to” were generally used in the law by the 39th Congress and in this time period. Second, the Article examines how “subject to the jurisdiction” as a phrase was used generally in the law prior to the drafting of the Fourteenth Amendment. Third, the Article examines how similar phrasing such as “within the jurisdiction” was used to convey the same idea as “subject to the jurisdiction” in the law during this period.

All of this evidence indicates that “subject to the jurisdiction” can be understood as a conventional piece of legal text in the context of the mid-nineteenth century, and as such it had an established meaning that is consistent with—and makes sense of—its usage in the context of the Fourteenth Amendment. The overwhelming weight of this evidence indicates that “subject to the jurisdiction” was not used to refer to, or make use of, concepts of “allegiance” but rather was routinely used to describe the circumstances in which individuals were under the governing authority of the sovereign. The most natural reading of the Citizenship Clause of the Fourteenth

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<sup>14</sup> On the revisionist “allegiance” view, see PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 90–115 (1985); John C. Eastman, *Born in the U.S.A?: Rethinking Birthright Citizenship in the Wake of 9/11*, 42 *RICH. L. REV.* 955, 960 (2008); Ilan Wurman, *Jurisdiction and Citizenship*, 49 *HARV. J.L. & PUB. POL’Y* 315 (2026); Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment’s Citizenship Clause*, 101 *NOTRE DAME L. REV.* (forthcoming 2026).

<sup>15</sup> On the conventional “governance” view, see James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 *GREEN BAG 2D* 367 (2006); Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 *AM. U. L. REV.* 331 (2010); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 *GEO. L.J.* 405 (2020); Evan Bernick, Paul Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 *CORNELL L. REV. ONLINE* 101 (2025); Benjamin Keener, *Calvin’s Case and Birthright Citizenship*, 174 *U. PA. L. REV. ONLINE* 17 (2025); Keith E. Whittington, *By Birth Alone*, *supra* note 13.

Amendment is that it is a legal text that possessed conventional legal meaning at the time of its adoption. This original meaning was that those “subject to the jurisdiction” of the United States were those who were within the governing authority of the United States. Accordingly, those who are *not* subject to the jurisdiction of the United States are simply those who cannot properly be subjected to the governing authority of the United States or bound by its laws and legal proceedings.

## I. THE MEANING OF “JURISDICTION” AND “SUBJECT TO” IN AMERICAN LAW

An obvious starting point for understanding the phrase “subject to the jurisdiction” as a legal text is to consider how its component parts were used in legal texts in the mid-nineteenth century. Both the words “jurisdiction” and “subject to” were common terms in law at the time the Fourteenth Amendment was drafted and ratified. As legal terms, their meaning was neither obscure nor subject to substantial ambiguity.

Legal dictionaries published in the 1860s consistently connected the word “jurisdiction” to the authority of a court to hear a case. For example, the legal writer John Bouvier defined it as the “power constitutionally conferred upon a judge or magistrate to take cognizance of and decide according to law, and to carry his sentence into execution.”<sup>16</sup> Likewise, John Jane Smith Wharton defined it as “legal authority: extent of power; declaration of the law.”<sup>17</sup> The legal scholar Alexander Burrill, too, defined jurisdiction as the “[a]uthority to judge, or administer justice; power to act judicially; power or right to pronounce judgment,” but also noted that it can take on a “more general sense,” namely, the “power to make law; power to legislate or govern; [or the] power or right to exercise authority.”<sup>18</sup>

The phrase “subject to” is a standard legal connector that marks subordination: it means to be governed by, constrained by, placed under, or made legally liable to some identified power, rule, authority, or condition.<sup>19</sup> The 39th Congress used the phrase in this way literally hundreds of times in dozens of statutes enacted in 1866 and 1867.<sup>20</sup> This includes the Civil Rights Act of 1866, which extended citizenship to all persons born in the United States and *not subject to any foreign power*.<sup>21</sup>

The 39th Congress used the term “jurisdiction” routinely in its legislation. That statutory phrase, used by the same Congress that drafted the Fourteenth Amendment, regularly conveyed

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<sup>16</sup> 1 JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 554 (1st ed. 1839).

<sup>17</sup> J.J.S. WHARTON, LAW-LEXICON: OR, DICTIONARY OF JURISPRUDENCE 442 (2d ed. 1860).

<sup>18</sup> 1 ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY 112–13 (1860).

<sup>19</sup> See, e.g., *Wilkes v. Dinsman*, 48 U.S. 89, 90 (1849) (equating an obligation to “comply with” laws and being “subject to” those laws); *Bank of the United States v. Halstead*, 23 U.S. 51, 56, 61 (1825) (using the phrases “property made *subject to* execution” and “lands . . . *liable* to be taken and sold on execution” interchangeably).

<sup>20</sup> See, e.g., Act of March 21, 1866, ch. 21, § 9, 14 Stat. 10, 11 (stating that disabled soldiers in an asylum remain “subject to the rules and articles of war”); Act of April 5, 1866, ch. 25, 14 Stat. 13 (stating that the Smithsonian library was “subject to the same regulations as the library of Congress”); Act of March 2, 1867, ch. 176, 14 Stat. 517 (stating that discharge of bankrupt individuals was “subject to the order of the court”).

<sup>21</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (“That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”).

the conventional meaning of the term and identified persons, objects, and places within the scope of the governing authority of some particular governmental entity or government official.

The most common and familiar usage of “jurisdiction” came in the context of judicial bodies. For example, Congress extended the authority of the Court of Claims by specifying that it “shall have jurisdiction to hear and determine the claim of any paymaster, quartermaster,” or the like.<sup>22</sup> Similarly, Congress directed that the “justices of the peace in the District of Columbia shall have jurisdiction in all cases where the amount claimed or due” was under one hundred dollars.<sup>23</sup> Likewise, Congress created a uniform code of bankruptcy that vested in the federal district courts “original jurisdiction in their respective districts in all matters and proceedings in bankruptcy.”<sup>24</sup> More unusually, Freedmen’s Bureau commissioners were to “extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment” of civil rights in states in which “the ordinary course of judicial proceedings” had been “interrupted.”<sup>25</sup> The civil courts of the United States were likewise prohibited from “hav[ing] or tak[ing] jurisdiction of, or in any manner reverse any of the proceedings had or acts done” under the President’s military commissions orders.<sup>26</sup> When creating a criminal statute regulating the transportation of nitroglycerin, Congress gave district courts jurisdiction over acts committed “within the district” but also specified which courts “shall have jurisdiction to try and punish the offender” in cases involving vessels “beyond the territorial limits of any district.” The statute regulating the transportation of volatile explosives simultaneously declared that the act did not prevent states from acting on the same subject matter against persons and places “lying or being within their respective territorial limits.”<sup>27</sup>

“Jurisdiction” was also used by the 39th Congress to refer to the governing authority of the United States generally.<sup>28</sup> Congress authorized the creation of military cemeteries, and specified that the United States would take ownership over that real estate and “its jurisdiction over said real estate shall be exclusive and the same as its jurisdiction over” the land used for forts and navy yards.<sup>29</sup> In a criminal statute, Congress created a catch-all to specify that criminal acts “committed in any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States” would be subject to the same punishment as if such an act had been committed in the State “in which such place is, or may be situated” and “within the jurisdiction of such State.”<sup>30</sup> Congress granted a telegraph company the right to lay cables on coastal land that was “within the jurisdiction of the United States.”<sup>31</sup> Congress excluded from its appropriations

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<sup>22</sup> Act of May 9, 1866, ch. 75, 14 Stat. 44.

<sup>23</sup> Act of February 22, 1867, ch. 63, 14 Stat. 401–402.

<sup>24</sup> Act of March 2, 1867, ch. 176, 14 Stat. 517.

<sup>25</sup> Act of July 16, 1866, ch. 200, 14 Stat. 173, 177.

<sup>26</sup> Act of March 2, 1867, ch. 155, 14 Stat. 432, 433.

<sup>27</sup> Act of July 3, 1866, ch. 162, 14 Stat. 81, 82.

<sup>28</sup> Alternatively, the relevant jurisdiction might be a foreign sovereign. In a statute adjusting private land claims, Congress included a provision addressing titles “emanating from some foreign government which held or claimed sovereignty or jurisdiction over the territory in which the lands claimed are situated.” Act of June 22, 1860, ch. 188, 12 Stat. 85, 86. Asserted sovereignty and jurisdiction were functionally the same.

<sup>29</sup> Act of February 22, 1867, ch. 61, 14 Stat. 399, 401.

<sup>30</sup> Act of April 5, 1866, ch. 24, 14 Stat. 12, 13.

<sup>31</sup> Act of March 29, 1867, ch. 15, 15 Stat. 10.

to Indian tribes any tribes which “shall have engaged in hostilities against the United States, or against its citizens peacefully and lawfully sojourning or travelling within its jurisdiction at the time of such hostilities.”<sup>32</sup>

The 39th Congress likewise uniformly used “subject to” in a conventional manner in its legislative activity. Steam vessels in American waterways were made “subject to the navigation laws of the United States.”<sup>33</sup> A statute creating a new set of federal land officers read that the officers “shall be subject to the same laws and responsibilities” as “other land officers in said State.”<sup>34</sup> The selection of lots of federal lands to be used for a railway were “subject to the approval of the Secretary of the Interior.”<sup>35</sup> New bridges that were constructed under authorization of Congress were “subject to the same restrictions” as those imposed on other authorized bridges.<sup>36</sup> The Secretary of Interior was authorized to set aside some land in the federal public domain for sale to settlers and made the land “subject to all the laws and regulations applicable to the same.”<sup>37</sup> Emancipated slaves in the District of Columbia could be deemed married and made “subject to the duties and obligations of that relation in like manner as if they had been duly married according to law.”<sup>38</sup>

Against this legal backdrop, the original public meaning of Section 1 of the Fourteenth Amendment becomes clear: A person is “subject to the jurisdiction” of the United States if they are *governed by, constrained by, placed under* American judicial process and hence “subject to” American law at the time they were born in the United States.

Congress referenced the jurisdiction of the United States in scores of statutes prior to the drafting of the Fourteenth Amendment. Such legislative language was routinely used to describe places, persons, and objects that fell within the governing authority of the federal government and were therefore subject to federal law. Such phraseology was used to distinguish between places and situations where American law governed and places where it did not. The first statute providing for naturalization created a path for citizenship for “any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years.”<sup>39</sup> The congressional debate surrounding this measure revolved around the question of whether any requirement of prior residency should be necessary at all.<sup>40</sup> There is no indication that Congress meant “under the jurisdiction of the United States” to mean anything more than those residing in the country and being subject to its laws. Certainly, it could not have meant individuals who already possessed even a partial allegiance to the United States since the entire purpose was to cover aliens who were present in the country but who owed primary allegiance to some foreign sovereign while they awaited taking an oath of allegiance to the United

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<sup>32</sup> Act of Mar. 2, 1867, ch. 173, 14 Stat. 492, 515.

<sup>33</sup> Act of February 25, 1867, ch. 83, 14 Stat. 411, 412.

<sup>34</sup> Act of July 3, 1866, ch. 164, 14 Stat. 82, 83.

<sup>35</sup> Act of July 4, 1866, ch. 165, § 1, 14 Stat. 83, 83 (granting land for construction of a railway).

<sup>36</sup> Act of July 25, 1866, ch. 246, § 5, 14 Stat. 244, 245 (authorizing construction of certain bridges).

<sup>37</sup> Act of July 26, 1866, ch. 262, § 11, 14 Stat. 251, 253 (granting right of way to ditch and canal owners).

<sup>38</sup> Act of July 25, 1866, ch. 240, 14 Stat. 236 (legalizing common law marriages made prior to emancipation).

<sup>39</sup> Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795).

<sup>40</sup> 1 ANNALS OF CONG. 1147 (1790).

States.<sup>41</sup> Federal naturalization law addressed the problem of children of American citizens who were “out of the limits and jurisdiction of the United States” and indicated that such children “shall be considered as citizens of the United States.”<sup>42</sup> Of course, such language did not suggest that American citizens abroad were no longer under the allegiance of the United States but merely that they were outside the territorial borders of the United States. Being “out of the . . . jurisdiction” simply meant being out of the country, and conversely returning home meant coming back within the jurisdiction of the United States.

As the problem of alien enemies raised its head in 1798, Congress rewrote the naturalization law to extend the time of residency “within the limits, and under the jurisdiction of the United States,” while adding a separate proviso that “no alien, who shall be a native, citizen, denizen, or subject of any nation or state with whom the United States shall be at war, at the time of his application, shall be then admitted to become a citizen.”<sup>43</sup> The separate proviso for alien enemies emphasizes the point that one could simultaneously be a long-term resident “under the jurisdiction of the United States” and still be an alien enemy, that is, a subject or citizen of a nation with whom the United States was then at war. A separate proviso excluding alien enemies from applying for naturalization would be nonsensical if the requirement that those same aliens must have already been living “under the jurisdiction of the United States” came with an implication of complete allegiance to the United States. Resident alien enemies were “under the jurisdiction of the United States” but not eligible for naturalization into citizenship so long as the war persists.

Jurisdiction was similarly deployed to identify those who were newly made subject to federal authority. When Congress adopted its first criminal statute, it included a provision for murder committed in any “place or district of country, under the sole and exclusive jurisdiction of the United States,” as distinguished from places that were under the concurrent authority of a state government and as a consequence covered adequately by state criminal law.<sup>44</sup> The first federal copyright law included a provision clarifying that it did not prevent the importation of books published by “any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.”<sup>45</sup> The Embargo Act of 1808 authorized American war ships to inspect any vessel owned by an American citizen, whether on the high seas or “within the jurisdiction of the United States,” as well as “any foreign vessel within the jurisdiction of the United States.”<sup>46</sup> A foreign vessel made itself subject to American jurisdiction and potential federal inspection and seizure simply by entering American territorial waters, even when such a

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<sup>41</sup> Of course, in the language of the early modern English law that defined the birthright citizenship rule, aliens within a sovereign’s territory owed that sovereign, what Blackstone viewed as a “local” allegiance of a “temporary” character or, what Coke called, “local obedience or ligeance.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*358; Calvin’s Case (1608), 77 Eng. Rep. 377, 383–84. This duty of local, temporary obedience was quite different from the oath “to support the constitution of the United States” that marked the transition from alien to citizen under the Naturalization Act of 1790. In 1795, Congress added a further requirement to the oath that the newly naturalized citizen “doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever.” Naturalization Act of 1795, § 1, ch. 20, 1 STAT. 414, 414 (repealed 1802).

<sup>42</sup> *Id.* §3, at 415.

<sup>43</sup> Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, 567 (repealed 1802).

<sup>44</sup> Crimes Act of 1790, ch. 9, § 3, 1 Stat. 112, 113.

<sup>45</sup> Copyright Act of 1790, ch. 15, § 5, 1 Stat. 124, 125.

<sup>46</sup> Act of Apr. 25, 1808, ch. 66, § 7, 2 Stat. 499, 501 (supplementing 1807 appropriations).

foreign vessel was engaged in smuggling activities that were criminal under American law and that were thus unwelcome within American territory. When regulating trade with the Indian tribes, Congress provided that federal criminal law as it operated “in any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country,” while specifically excluding crimes committed among the Indians themselves.<sup>47</sup> Americans who committed crimes in “Indian country” were “subject to the jurisdiction” of the United States, but individuals within that territory were otherwise “subject to the jurisdiction” of the tribes. In accepting the dissolution of the Stockbridge Indian tribe in Wisconsin, Congress “deemed” and “declared” every tribe member simultaneously to be a citizen of the United States “to all intents and purposes” and to be “subject to the laws of the United States and the Territory of Wisconsin, in the same manner as other citizens of said Territory.”<sup>48</sup> At the same time, the “jurisdiction of the United States and said Territory” was “extended over the township or reservation now held by them . . . in the same manner as over other parts of said Territory” and the tribe’s “power of making and executing their own laws” necessarily “shall cease.”<sup>49</sup> When the Stockbridge Indian tribe ceased to exist as a rival political entity and governing authority, its members and lands became subject to the jurisdiction of the United States and the relevant state where the individuals or land was located.

Physical presence within a territory subject to governing authority has been sufficient to establish jurisdiction over an individual since the earliest days of the Republic. Indeed, the First Congress, as part of the Judiciary Act of 1789, made physical presence *the* hallmark of federal jurisdiction: “[N]o person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought . . . against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.”<sup>50</sup> In an early jurisdiction case, Chief Justice John Marshall even went as far as to say that “the principles of equity give a court jurisdiction wherever the person may be found,” even if the property at the heart of the case lies in another state.<sup>51</sup> Governing jurisdiction attaches when an individual is present. Entering into the territory under the authority of a court or a government means becoming subject to that court or government’s commands.

Further analysis was sometimes necessary to determine who might exercise governing authority over an individual within a particular territory. American federalism was distinctive in creating concurrent jurisdiction by two distinct sovereign governments over individuals located in the same territory. That constitutional arrangement could also create complications in identifying who was subject to the jurisdiction of which sovereign. In attempting to sort out that

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<sup>47</sup> Indian Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 729, 733.

<sup>48</sup> Act of March 3, 1843, ch. 101, § 7, 5 Stat. 645, 647 (allotting lands of the Stockbridge Tribe).

<sup>49</sup> *Id.*

<sup>50</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (emphasis added); *see also* *Picquet v. Swan*, 19 F. Cas. 609, 614 (C.C.D. Mass. 1828) (finding that the Judiciary Act “contemplates no effective exercise of jurisdiction by the circuit court, except in cases where the party defendant is an inhabitant of, or found within, such district, at the time of serving the writ”).

<sup>51</sup> *Massie v. Watts*, 10 U.S. 148, 158 (1810); *see also* *Toland v. Sprague*, 37 U.S. 300, 327 (1838) (limiting even attachment of a person’s property where “defendant is domiciled abroad, or not found within the district in which the process issues, so that it can be served upon him”).

question in one case, Chief Justice John Marshall asked, “What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.”<sup>52</sup> The states exercised a “general jurisdiction” over individuals within their territory, subject only to that “portion of sovereignty” that might have been entrusted to the federal government.<sup>53</sup> The Constitution might have given the federal government maritime jurisdiction over some American waterways, but it did not follow that Congress had “general jurisdiction” over places that were still within the territorial jurisdiction of an individual state.<sup>54</sup> In the midst of the Civil War, the Supreme Court of Pennsylvania observed that “[t]houghtless men sometimes allege that people cannot be subject to two sovereignties,” but American federalism made such a situation routine.<sup>55</sup> Multiple governments “existing for different purposes and clothed with different powers may both be sovereign to the extent of their respective powers and to the advantage of those who are subject to both jurisdictions.”<sup>56</sup> There are circumstances in which one sovereign must have sole and exclusive jurisdiction over a particular individual, but being subject to the jurisdiction of more than one sovereign power simultaneously was the default situation for Americans.

Influential treatise writers in the early and mid-nineteenth century routinely used this language in the conventional way to express the idea that governing authority. William Rawle pointed out that “the geographical limits of the United States and those of the territories, are subject to the jurisdiction of all the courts of the United States, in all matters within the scope of their authority.”<sup>57</sup> In discussing the relative authority of the states and federal government and his understanding of the enumerated powers of Congress, St. George Tucker noted that since each state “retains an uncontrolled jurisdiction over all cases of municipal law, every grant of jurisdiction to the confederacy, in any such case, is to be considered as special, inasmuch as it derogates from the antecedent rights and jurisdiction of the state making the concession, and therefore ought to be construed strictly.”<sup>58</sup> In discussing the rules of citizenship at the beginning of the republic, Tucker similarly observed that each state began with the authority to confer citizenship on any of the “inhabitants within its jurisdiction,” which created the possibility that the conferral of citizenship by one state would have extraterritorial force as individuals moved within the Union such that individual states could, for certain purposes, extend the privileges of citizenship “within the jurisdiction of such other.”<sup>59</sup> Justice Henry Baldwin’s treatise on the Constitution used “jurisdiction” as the preferred term to describe the scope of governing authority and particularly a state government’s “general jurisdiction over the whole territory.”<sup>60</sup>

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<sup>52</sup> *United States v. Bevens*, 16 U.S. 336, 386–387 (1818).

<sup>53</sup> *Id.* at 389.

<sup>54</sup> *Id.* at 388.

<sup>55</sup> *Fifield v. Ins. Co. of Pa.*, 47 Pa. 166, 171 (1864).

<sup>56</sup> *Id.* at 171.

<sup>57</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 236 (1825). Rawle also notes that the decisions and actions of inferior governmental officials are “subject to” the control and revision of superior officials such as appellate courts or Congress. *Id.* at 112, 257, 268.

<sup>58</sup> 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 152 (1803).

<sup>59</sup> *Id.* at 255.

<sup>60</sup> HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 99 (1837).

## II. THE MEANING OF “SUBJECT TO THE JURISDICTION” IN AMERICAN LAW

In order to support an allegiance interpretation of the “subject to the jurisdiction” language, it has been suggested that “subject to the jurisdiction” of the United States is best read as equivalent to “not subject to any foreign power.”<sup>61</sup> If Congress meant to express that legal rule, it knew how to do so. If the language it chose to use in the Fourteenth Amendment was equivalent to “not subject to any foreign power,” then we should expect to find other examples in the law of the two phrases being used interchangeably to express the same idea.

But a review of statutes, treaties, and caselaw from the decades leading up to the passage of the Fourteenth Amendment reveals that over and over again, “subject to the jurisdiction” meant simply being subject to the authority of courts and required to follow the law. It did not require or imply the absence of any further or overlapping obligations to also obey the laws of other countries or governmental entities to which you are connected.

The phrase “subject to the jurisdiction thereof” is an unlikely choice of language to convey the thought “not subject to any foreign power.” Neither component of the phrase taken in isolation suggests such a linguistic construction. Moreover, the phrase as a whole did not have an established meaning that might suggest such an idea. The phrase was, in fact, regularly and exclusively used to convey a quite different idea, an idea that is naturally consistent with the component linguistic parts.

The phrase “subject to the jurisdiction” was used in statutes passed by Congress before the drafting of the Fourteenth Amendment, including in statutes drafted in close proximity to the Fourteenth Amendment. That statutory usage in earlier statutes is consistent with the conventional reading of the language of Citizenship Clause. The phrase was used by Congress in legislation to cover situations in which a person or object was within the governing authority of the United States.

Congress used the phrase in two statutes adopted before the 39th Congress. In regulating public records, the 8th Congress specified the scope of the act’s application as including not only the courts and offices within the United States but also all those in territories that are “subject to the jurisdiction of the United States.”<sup>62</sup> The 27th Congress adopted legislation regulating the recovery of merchandise from shipwrecks that applied to “any river, harbor, bay, or waters, subject to the jurisdiction of the United States, and within its limits.”<sup>63</sup>

The 39th Congress itself used the phrase “subject to the jurisdiction” in its own legislation, and in doing so indicated it knew how to exclude when it wanted to do so. A law providing for the safety of steamship passengers applied to all vessels navigating the waters of the United States, “except vessels subject to the jurisdiction of a foreign power and engaged in foreign trade and not owned in whole or in part by a citizen of the United States.”<sup>64</sup> It is worth noting that in this steamship regulation law Congress clearly used appropriate language to exclude those “subject to the jurisdiction of a foreign power” from the scope of its legislation. In doing so, it

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<sup>61</sup> Brief for Petitioners at 18, *Trump v. Barbara*, No. 25-365 (Jan. 20, 2026).

<sup>62</sup> 2 Stat. 299 (1804).

<sup>63</sup> 5 Stat. 609 (1843).

<sup>64</sup> 14 Stat. 228 (1866); 14 Stat. 412 (1867).

simultaneously recognized that “subject to the jurisdiction” conveyed a positive, not a negative, relationship. In this case, vessels designated as “subject to the jurisdiction” were recognized *by the use of language* as being affirmatively under the governing authority of a foreign power. Finally, in the steamship passenger law, Congress recognized that “subject to the jurisdiction” was not necessarily exclusive. A vessel could simultaneously be subject to the jurisdiction of a foreign power *and* subject to American jurisdiction and regulation, as was the case when it was owned in part by an American citizen. American-owned foreign vessels were simultaneously subject to the jurisdiction of two sovereign authorities. This would have been unsurprising since the same was true of American vessels given the context of federalism; the statute was amended a few months later to make explicit that Congress had not intended to preempt the concurrent jurisdiction of the states when those vessels were entering or leaving ports.<sup>65</sup> A vessel could be subject to the jurisdiction of the United States while simultaneously being subject to the jurisdiction of other sovereign entities as well.

The specific language of “subject to the jurisdiction” was more common in treaties entered into by the United States prior to the drafting of the Fourteenth Amendment. Those bilateral agreements with foreign sovereigns regularly used “subject to the jurisdiction” to apply to people rather than territories, institutions, or vessels, and those operated in a context closely analogous to the Fourteenth Amendment. The use of the “subject to the jurisdiction” phrasing within those agreements also amply illustrates that such jurisdiction was often understood to be non-exclusive. Individuals were explicitly recognized as being “subject to the jurisdiction” of more than one sovereign power. Being “subject to the jurisdiction” of a foreign power did not intrinsically preclude the possibility of being subject to the jurisdiction of the United States, and the use of that legal phrasing did not even imply an exclusive jurisdiction. Indicating that an individual was subject to the jurisdiction of the United States simply meant that the individual was at least subject to the jurisdiction of the United States, and the possibility of dual jurisdiction was assumed. This usage in treaties also illustrates the fact that “subject to the jurisdiction” had no allegiance component and no durable domicile requirement. Individuals were recognized to be subject to the jurisdiction of a country simply by their temporary presence within that country.

An 1824 agreement between the United States and Colombia appears to be the earliest usage of the “subject to the jurisdiction” language in a treaty. In that treaty, “subject to the jurisdiction” was used in three separate articles, and each time it was used to specify governing authority. The two countries “promise[d] and engage[d], formally to give their special protection to the persons and property of the citizens of each other of all occupations, who may be in the territories subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial recourse, on the same terms which are usual and customary, with the natives or citizens of the country in which they may be.”<sup>66</sup> The two countries agreed to allow “merchants . . . and other citizens of both countries” to be free “to manage themselves their own business in all ports and places subject to the jurisdiction of each other.”<sup>67</sup>

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<sup>65</sup> 14 Stat. 412 (1867).

<sup>66</sup> 8 Stat. 310 (1824).

<sup>67</sup> *Id.* at 308.

Finally, both countries agreed to recognize “the most perfect and entire security of conscience” of each other’s citizens when “in the countries subject to the jurisdiction of one and the other.”<sup>68</sup>

This treaty language then became the model for future American negotiations with other countries and was repeated in multiple international agreements signed by the United States in the years running right up to the drafting of the Fourteenth Amendment. This became the standard form for treaties with the newly independent countries of Latin America and the Caribbean, including Brazil,<sup>69</sup> Chile,<sup>70</sup> Venezuela,<sup>71</sup> the Peru-Bolivian Confederation,<sup>72</sup> and Haiti.<sup>73</sup> In each case, “subject to the jurisdiction” had nothing to do with allegiance and spoke entirely to the question of the people and places under the governing authority of the respective governments. When the citizens of one country entered into the territory and became “subject to the jurisdiction” of the other country, such treaties guaranteed travelers their basic rights of life, liberty, and property.

Some of the treaties made closest in time to Reconstruction were even clearer in affirming that foreign individuals within a nation’s territory were under the governing authority and subject to the laws of that nation. In expressing that understanding, they relied on the language of “subject to the jurisdiction.” An 1860 treaty with Venezuela, for example, secured the right of citizens of each nation to travel or reside in the other nation freely so long as “they conform to the laws and regulations in force” and in manner that was “subject to the jurisdiction” of the nation in which they were located.<sup>74</sup> Such treaties did not alter the allegiance of the individuals in question nor did they anticipate that such individuals were not subject to any foreign power. On the contrary, the treaties were specifically concerned with cases of concurrent jurisdiction, such as when an American living in Caracas was “subject to the jurisdiction” of Venezuela for such purposes as local criminal and civil law but was still “subject to the jurisdiction” of the United States for purposes of some extraterritorial obligations, such as the law of treason.<sup>75</sup> Mere presence made the American in Caracas subject to the jurisdiction of Venezuela, but allegiance made that American still also subject to the jurisdiction of the United States.<sup>76</sup>

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<sup>68</sup> *Id.* at 310.

<sup>69</sup> *Id.* at 390 (1828).

<sup>70</sup> *Id.* at 434 (1832).

<sup>71</sup> *Id.* at 466 (1836).

<sup>72</sup> *Id.* at 487 (1836).

<sup>73</sup> Treaty of Amity, Commerce, Navigation, and Extradition, U.S.–Haiti, Nov. 3, 1864, 18 Stat. 412, 413 (proclaimed July 6, 1865).

<sup>74</sup> Treaty of Amity, Commerce, Navigation, and For Surrender of Fugitive Criminals, U.S.–Venezuela, Aug. 27, 1860, 18 Stat. 797 (proclaimed Sept. 25, 1861); *see also* Treaty of Amity (Haiti), *supra* note 73.

<sup>75</sup> In the case of China, the treaty of 1840 specified that in disputes of “property or person” arising between American citizens who were located in China, those disputes “shall be subject to the jurisdiction and regulated by the authorities of their own Government” and not the Chinese government. While disputes between Americans and individuals of other nationalities that arose in China were regulated separately, Americans in China were subject to the jurisdiction of the United States for certain purposes, but not for others. Treaty with China, July 3, 1844, 8 Stat. 592, 597 (proclaimed Apr. 18, 1846).

<sup>76</sup> The treaties made during this period frequently used both “subject to the jurisdiction” and “within the jurisdiction” language. The usage of the terms is functionally synonymous and consistently refer to governing authority over a territory and those who come within the scope of that governance. “Subject to the jurisdiction” is frequently used to describe locations and/or people within a sovereign’s territory, while “within the jurisdiction” is frequently used to describe property within a sovereign’s territory. *See, e.g.*, 18 Stat. 150, Art. X (“give their special protection to the persons and property of the citizens of

This language was also common in treaties between the United States and Indian tribes in the years leading up to Reconstruction. The 1855 Treaty with the Choctaws and Chickasaws established the model. The Treaty provided that only individuals employed by the American government “or subject to the jurisdiction and laws of the Choctaws, or Chickasaws, shall be permitted to farm or raise stock” within the limits of the land being partly ceded by the tribes.<sup>77</sup> A treaty made the next year with the Creeks and the Seminoles included a similar provision.<sup>78</sup> Rather differently, the “Sans Arcs band of Dakota or Sioux Indians” sued for a separate peace with the United States government and in doing so “acknowledge[d] themselves to be subject to the exclusive jurisdiction and authority of the United States” and no longer allied with or under the jurisdiction of other Indian tribes.<sup>79</sup> This, too, was standard language used in such situations.<sup>80</sup> The Utah Indians had previously signed a peace treaty in which they “acknowledge[d] and declare[d] they [were] lawfully and exclusively under the jurisdiction of said States,” that is the “United States,” and submitted to its “power and authority.”<sup>81</sup>

The Supreme Court similarly and exclusively used the “subject to the jurisdiction” language to refer to contexts involving governing authority. In a case involving a suit by residents of the District of Columbia, Chief Justice John Marshall observed that the District “is subject to the jurisdiction of Congress.”<sup>82</sup> In dissent in *Cherokee Nation v. Georgia*, Justice Thompson observed that Georgia had asserted that the tribe was “subject to the jurisdiction of that State,” which the Justice thought would be “directly repugnant to the various treaties entered into between the United States and the Cherokee Indians” and incompatible with the “condition and character of the Cherokee Nation” that was “living under the government of their own laws, usages, and

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each other of all occupations, who may be in the territories subject to the jurisdiction of one or the other, transient or dwelling therein”); Art. IX (“citizens of each of the contracting parties shall have the power to dispose of their personal goods within the jurisdiction of the other”); 8 Stat. 466, Art. 7 (“free for all merchants, commanders of ships and other citizens of both countries, to manage themselves their own business, in all the ports and places subject to the jurisdiction of each other”); Art. 12 (“citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other”). The 1858 treaty with Bolivia, for example, described articles using the “subject to” language as being concerned with “privileges of residents” (Art. VII), “citizens of each nation to be protected” (Art. XIII), and “religious freedom” (Art. XIV), while the article using “within the” language is concerned with “disposal and inheritance of personal property” (Art. XII). 18 Stat. 68. Similarly, the 1860 treaty with Venezuela described the article using the “subject to” language as being concerned with the “privileges of residence” (Art. III), while the articles using the “within the” language involved the “disposal of inheritance and personal property” (Art. V), “wrecked or damaged vessels” (Art. XI), and “extradition of criminals” (Art. XXVII). 18 Stat. 797. The inclination for using “within the jurisdiction” in treaty provisions regarding extradition might reflect a preference for describing fugitives who flee into a territory as being “within” that territory, but who nonetheless remain “subject to” the laws of the country whose criminal proceedings they are fleeing.

<sup>77</sup> Treaty with the Choctaws and Chickasaws, Jun. 22, 1855, 11 Stat. 611, 615 (proclaimed Mar. 4, 1856).

<sup>78</sup> Treaty with the Creek and Seminole Tribes of Indians, Aug. 7, 1856, 11 Stat. 699, 704 (proclaimed Aug. 28, 1856).

<sup>79</sup> Treaty Between the United States of America and the Sans Arc Band of Dakota or Sioux Indians, Oct. 20, 1865, 14 Stat. 73 (proclaimed Mar. 17, 1866).

<sup>80</sup> See, e.g., Treaty Between the United States of America and the Minneconjon Band of Dakota or Sioux Indians, Oct. 10, 1865, 14 Stat. 695 (proclaimed Mar. 17, 1866); Treaty Between the United States of America and the Two Kettles Band of Dakota or Sioux Indians, Oct. 19, 1865, 14 Stat. 723 (proclaimed Mar. 17, 1866); Treaty Between the United States of America and the Yanktonai Band of Dakota or Sioux Indians, Oct. 20, 1865, 14 Stat. 735 (proclaimed Mar. 17, 1866); Treaty Between the United States of America and the Onkpahpah Band of Dakota or Sioux Indians, Oct. 20, 1865, 14 Stat. 739 (proclaimed Mar. 17, 1866).

<sup>81</sup> Treaty Between the United States of America and the Utah Indians, Dec. 30, 1849, 9 Stat. 984 (proclaimed Sept. 9, 1850).

<sup>82</sup> *Hepburn & Dundas v. Ellzey*, 6 U.S. 445, 453 (1805).

customs and in no sense under the ordinary jurisdiction of the State of Georgia.”<sup>83</sup> Notably, Chief Justice Roger Taney later disagreed with Justice Thompson’s assessment of the status of the Indian tribes but understood what it meant to be “subject to the jurisdiction” of the United States in exactly the same way. Chief Justice Taney contended that the Cherokee “hold and occupy” land only under the authority of the United States.<sup>84</sup> Both the European powers and the United States, he asserted, held the Indian tribes to be—and treated them as if they were—“subject to their dominion and control.”<sup>85</sup> According to Chief Justice Taney, the very fact that Indian tribes were “residing within the territorial limits of the United States,” meant that they were “subject to their authority” and as a consequence the inhabitants of Indian lands could be drawn into the specific jurisdiction of federal courts.<sup>86</sup> In a disputed land case, Chief Justice Taney pondered whether “the land in controversy was subject to the jurisdiction of both states, and might be appropriated by either.”<sup>87</sup> In a case involving a maritime insurance claim, Justice Joseph Story characterized a port as being situated “at the mouth of the Elbe, and subject to the jurisdiction of Hamburg.”<sup>88</sup>

Identifying those who have allegiance to a state is radically underinclusive of those who are subject to the jurisdiction of a state. In a dissenting opinion in a case involving the receipt of records in courts, Justice Johnson differed from his colleagues on how to treat the records of a foreign judgment. In doing so, he pointed to “certain eternal principles of justice” that included the proposition that “jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subject to their jurisdiction by being found within their limits.”<sup>89</sup> Notably, one could become “subject to the jurisdiction” of a state either by being within its domain *or* by having some preexisting tie of allegiance to that state that has extraterritorial force. One can be “subject to the jurisdiction” of a state because one possesses an obligation of allegiance that extends beyond the reach of the state, but being subject to a state’s jurisdiction was *not* a synonym with owing allegiance to that state. Furthermore, allegiance is only one way, and a less common way, by which one might become subject to the state’s jurisdiction. To say that one is “subject to a jurisdiction” of a state is to say that one is *either* present within that state’s domain or has allegiance to that state, for both presence and allegiance create a jurisdictional hook for the state over an individual.

It is worth noting that the lawyers arguing cases before the Court used the language in the same way. The future Ohio Supreme Court Justice John C. Wright argued in *Osborn v. Bank of the United States* that “a sovereign State, who is within reach of process,” was nonetheless “not subject to the jurisdiction, and cannot be brought before the Court.”<sup>90</sup> Thomas Emmett urged the Court in *Gibbons v. Ogden* to recognize that waterways were no different than the land and “[b]oth are equally subject to the jurisdiction of the general government, for the exercise of all powers

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<sup>83</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 73, 74 (1831) (Thompson, J., dissenting).

<sup>84</sup> *United States v. Rogers*, 45 U.S. 567, 572 (1846).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Marlatt v. Silk*, 36 U.S. 1, 23 (1837).

<sup>88</sup> *Peters v. Warren Ins. Co.*, 39 U.S. 99, 107 (1840).

<sup>89</sup> *Mills v. Duryee*, 11 U.S. 481, 486 (1813).

<sup>90</sup> *Osborn v. Bank of the United States*, 22 U.S. 738, 803 (1824).

delegated to it by the constitution, and both equally subject to State jurisdiction, for the exercise of all powers connected with State sovereignty.”<sup>91</sup> In *Davis v. Packard*, Joseph M. White urged the Court to reject New York State’s effort to “subject to the jurisdiction of the courts of a state” a foreign consular.<sup>92</sup>

In the important Civil War case of *The Brig Amy Warwick*, Richard Henry Dana Jr. began his defense of the Union blockade on the Confederacy with the uncontroversial proposition that property on the high seas that was “subject to the ownership and control of persons who themselves reside in the territory of the enemy, and thus subject to the jurisdiction and control of the enemy” can be treated as a prize of war.<sup>93</sup> Individuals who were present in an enemy nation were “subject to the jurisdiction” of that enemy nation, even if those individuals were American citizens. It was, Dana emphasized, “immaterial” whether such individuals were actively aiding the enemy, a citizen of the enemy nation, loyal to the enemy sovereign, or even resident in that enemy country by accident or force.<sup>94</sup> Regardless of his allegiance or loyalties, his presence rendered him and his property “subject to the jurisdiction” of that enemy nation and “under [its] power”<sup>95</sup> or “control.”<sup>96</sup> No matter what the Union might think about the lawfulness of the Confederate government, it “exercises jurisdiction and control *de facto*” and “compels obedience” from all those within its domain.<sup>97</sup> Whether an individual is “subject to the jurisdiction” of the enemy was entirely a question of whether the individual was subject to the enemy’s effective governing power, and it made no difference whatsoever whether the individual subject to that power “owes general allegiance” to it.<sup>98</sup> For the Court, Justice Grier agreed with these propositions, adding that in the “peculiar” situation of American federalism, Americans owed “supreme allegiance to the Federal government” and also a “qualified allegiance to the State” in which they were present.<sup>99</sup> No matter whether American citizens owed primary allegiance to the Union (or whether foreign citizens owed primary allegiance to some foreign sovereign), their “persons and property” were necessarily “subject to” the laws of the state in which they were present.<sup>100</sup> Being “subject to the jurisdiction” of a governing power followed from being present within its domain, not from any broader ties of allegiance that one might have to that or some other governing power.

Of course this was not legal language unique to the federal courts. The same language was used in the same way throughout the American legal system. Lawyers and judges in state courts understood these terms in the same way as lawyers and judges in federal courts and routinely deployed them or interpreted them in manner consistent with what we have seen in other contexts.

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<sup>91</sup> *Gibbons v. Ogden*, 22 U.S. 1, 92 (1824).

<sup>92</sup> *Davis v. Packard*, 31 U.S. 41, 46–47 (1832).

<sup>93</sup> *The Prize Cases*, 67 U.S. 635, 650 (1862).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 653.

<sup>97</sup> *Id.* at 655.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 673.

<sup>100</sup> *Id.*

The most common usage of such language in state courts, as in federal courts, was in the context of being subject to the jurisdiction of a particular court or judge; the contours of the jurisdiction of a court were often in part territorial and in part related to subject matter or the legal role of individuals who might be parties to a case. Those who could be brought within the scope of the authority and processes of a court could be identified by various characteristics, but the language lawyers used to express that idea was one of being subject to the jurisdiction of a court.

State courts did sometimes need to discuss jurisdiction and those subject to it outside the specific context of judicial jurisdiction. But whether discussing those subject to the jurisdiction of a court or those subject to the jurisdiction of some other government entity, the meaning was always the same. Those subject to the jurisdiction of an officer, a governing body, or a sovereign state were those who were exposed to its governing authority.

In 1859, the Supreme Court of California was called upon to interpret an American treaty with China and its terms specifying that Americans within China were subject to the jurisdiction of the United States for purposes of disputes among themselves. The court observed that “it seems that American citizens residing for the purpose of trade in the ports of China are not regarded as subjects of that government, but that for purposes of government and protection, they constitute a kind of colony, subject to the laws and authority of the United States.”<sup>101</sup> The jurisdiction established by treaty between America and China carved out an exception to the general legal principles regarding who would be subject to the jurisdiction of the local government. Americans in China were “subject to the jurisdiction and regulated by the authorities” of the United States only by virtue of a treaty between the two sovereigns and only to the extent of the terms of that treaty.<sup>102</sup> The treaty “withdraw[s] our citizens domiciled in unchristian nations from the jurisdiction of such governments” and leaves to the discretion of Congress the details as to how the jurisdiction of the American government will be exercised over them.<sup>103</sup>

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<sup>101</sup> *Forbes v. Scannell*, 13 Cal. 242, 279 (1859).

<sup>102</sup> *Id.* at 280.

<sup>103</sup> *Id.* at 282. This arrangement was not uncommon. At the time the Fourteenth Amendment was adopted, the United States had entered into similar treaties with at least eleven countries: Treaty of Peace and Friendship, U.S.–Morocco, June 28, 1786, 8 Stat. 100; Treaty of Peace, U.S.–Morocco, Sep. 16, 1836, 8 Stat. 484; Treaty of Peace and Amity, U.S.–Algiers, Sep. 5, 1795, 8 Stat. 133; Treaty of Peace and Friendship, U.S.–Tunisia, Aug. 28, 1797, 8 Stat. 157; Treaty of Commerce and Navigation, U.S.–Ottoman Empire, May 7, 1830, 8 Stat. 408; Treaty of Amity and Commerce, U.S.–Muscat, Sep. 21, 1833, 8 Stat. 458; Treaty of Peace, Amity, and Commerce (Treaty of Wanghia), U.S.–China, July 3, 1844, 8 Stat. 592; Treaty of Peace, Amity, and Commerce (Treaty of Tientsin), U.S.–China, June 18, 1858, 12 Stat. 1023; Treaty of Peace, Friendship, Commerce and Navigation, U.S.–Borneo, June 23, 1850, 10 Stat. 909; Treaty of Amity and Commerce, U.S.–Siam, May 29, 1856, 11 Stat. 683; Treaty, U.S.–Japan, June 17, 1857, 11 Stat. 723; Treaty, U.S.–Persia, Dec. 13, 1856, 11 Stat. 709; Treaty, U.S.–Madagascar, Feb. 14, 1867, 15 Stat. 491. Britain likewise negotiated similar extraterritorial rights. See Foreign Jurisdiction Act of 1843, 6 & 7 Vict. ch. 94 (“Whereas by Treaty, Capitulation, Gramt, Usage, Sufferance, and other lawful Means Her Majesty hath Power and Jurisdiction within divers [sic] Countries and Places out of her Majesty’s dominions . . .”)

It is worth noting that when the United States eventually abrogated these treaties, it used “subject to the jurisdiction” language. For example, the 1920 treaty with Siam made Americans in that country “subject to the jurisdiction of Siamese Courts,” Treaty Revising Treaties, U.S.–Siam, Dec. 16, 1920, 42 Stat. 1928, and the 1946 treaty with China stated that Americans there would now “be subject to the jurisdiction of the Government of the Republic of China,” Treaty of Friendship, Commerce and Navigation, U.S.–China, Nov. 4, 1946, 63 Stat. 1299.

More commonly, state courts were called upon to determine who was subject to the jurisdiction of various governing authorities within the United States. The Supreme Court of Louisiana concluded that the United States government itself was “subject to the jurisdiction of the sovereign, within whose territory it owns property, as to such property.”<sup>104</sup> In this case, Louisiana was the “sovereign State” that possessed jurisdiction over the federal government’s alleged property.<sup>105</sup> The Supreme Court of Iowa concluded that a tract of land “within the territory of Iowa” was subject to the jurisdiction of the Iowan government “unless jurisdiction of it actually belonged to some other existing political community.”<sup>106</sup> An Indian tribe that had ceded the land, dissolved, and departed “might . . . have clothed themselves with jurisdiction of their territory,” but they had not, in fact, done so and thus the “political jurisdiction” fell to some other, existing governing authority.<sup>107</sup> The tribal members were no longer legally treated “as a people” but rather as “natural persons, subject to our national government.”<sup>108</sup> The Supreme Court of Texas found that a territory remained “subject to the jurisdiction” of the old county government until a new county government created by the state legislature had organized itself and became capable of exercising government authority over the people and property within the new county lines.<sup>109</sup> Cattle that had strayed into town became subject to the jurisdiction of town officials, for “he who comes within the limits is no longer a stranger, but for the time being is subject to the jurisdiction as an inhabitant.”<sup>110</sup> The sojourning cattle were “within a local jurisdiction, upon the same footing as persons.”<sup>111</sup> The cattle (or their owner) bore no allegiance to the town in which they had strayed, but they were subject to its governing authority due to its physical presence.

Mere presence within the limits of a sovereign’s jurisdiction made one subject to its jurisdiction. The converse emphasized the point—those who were not present in the sovereign’s domain were not subject to its jurisdiction. For the Court of Appeals of Maryland, this basic principle had important implications for the power of taxation. “The interest upon which the tax in this case was imposed, was the private property of a citizen of Maryland, living within her territory, subject to her jurisdiction, protected by her laws, and bound in common with other citizens, to contribute to her support.”<sup>112</sup> Those “residing within the limits of her sovereignty and jurisdiction” were subject to having their property taxed.<sup>113</sup> Those who did not reside in the limits of the state were subject to its taxes for their property that was within the limits of the state. Thus, the Kentucky Court of Appeals observed that “it is true that the persons of non-resident infants are not within the jurisdiction of the State, and the powers and duties consequent upon their

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<sup>104</sup> *Dreux v. Kennedy*, 12 Rob. 489, 494 (La. 1846).

<sup>105</sup> *Id.* at 493.

<sup>106</sup> *Telford v. Barney*, 1 Greene 575, 579 (Iowa 1848). As the court reporter summarized, the lands in question were no longer “under Indian government” but were now “subject to the jurisdiction of the state or territory in which they lie.” *Id.* at 575.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 580.

<sup>109</sup> *Clark v. Goss*, 12 Tex. 395, 397 (1854).

<sup>110</sup> *Whitfield v. Longest*, 6 Ired. 268, 271 (N.C. 1846).

<sup>111</sup> *Id.* at 273.

<sup>112</sup> *Howell v. State*, 3 Gill. 14, 24 (Md. 1845).

<sup>113</sup> *Id.*

personal presence do not attach. But their lands are here, subject to the jurisdiction of this State and no other, and the interests of the non-resident owners in these lands is subject to the jurisdiction of this State.”<sup>114</sup> One remained subject to the jurisdiction of a state even if one left its territory in the midst of a legal process.<sup>115</sup> By contrast, “a foreign citizen . . . is not whilst abroad personally subject to the jurisdiction of a State.”<sup>116</sup> If an individual moved within the bounds of a state and became subject to its jurisdiction, it did not follow that the individual could dissolve a marriage contract involving a spouse who remained outside the state. Moving to a new state did not place the non-resident spouse or the marriage contract itself within the jurisdiction of new state.<sup>117</sup>

The point is not how courts, legislators, or lawyers applied the jurisdictional rule and what conclusions they might reach about who was or was not subject to the jurisdiction of a particular government or government official. The question for purposes of this Article is not the application but the *meaning* of the language. Lawyers might well disagree about applications in particular cases. What they did not disagree about was what “subject to the jurisdiction” meant.

“Jurisdiction” and “subject to the jurisdiction” had well understood meanings. They meant those who fell within the governing authority of a particular sovereign or officer. There were multiple ways in which an individual or entity might become subject to the jurisdiction of a particular government or official, and there were situations in which the proper scope of jurisdiction was not always clear. But the concept being conveyed by that language was always the same—being subject to the jurisdiction of a sovereign meant being susceptible to its governing authority and particularly its courts.

### III. UNDER, WITHIN, AND SUBJECT TO THE JURISDICTION

“Subject to the jurisdiction” was a less common legal phrase prior to the adoption of the Fourteenth Amendment than were other phrases used to discuss the jurisdiction of the United States, but there is little indication that the “subject to” modifier significantly altered the meaning relative to other more common modifiers.

“Within the jurisdiction” and “under the jurisdiction” were frequent and familiar phrases within American law at the time of the drafting of the Fourteenth Amendment. The “within the” and “under the” phrasings were not perfectly synonymous with “subject to” phrasing in its legal usage, and a legislative draftsman would likely find the “subject to” language more natural for the particular purpose of the Fourteenth Amendment. But the usage of these phrases in mid-

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<sup>114</sup> *Nelson’s Heirs v. Lee*, 49 Ky. 495, 507 (1850).

<sup>115</sup> *Burns v. Belknap*, 22 Vt. 419, 428 (1850).

<sup>116</sup> *Dearing v. Bank of Charleston*, 5 Ga. 497, 510 (1848).

<sup>117</sup> *See, e.g., Forrest v. Forrest*, 2 Edm. Sel. Cas. 180, 186–187 (N.Y. Sup. Ct. 1850) (holding that “the change, if it really existed, was only for the purpose of giving the authorities of that State jurisdiction over his conjugal relations. No doubt he supposed he had a perfect right to do so; but in this he is mistaken. The law does not warrant such a proceeding, but, on the other hand, demands of our courts that they should protect his wife from being thus subject to a jurisdiction foreign both to her legal domicil, and to his.”); *Todd v. Kerr*, 42 Barb. 317 (N.Y. Gen. Term. 1864) (“This case does not require, nor indeed admit of, a very protracted or elaborate investigation. It involves the power of the legislature of a foreign state to dissolve the marriage contract, when the wife alone is resident within the state and subject to its jurisdiction, so as to affect rights of property in another state, where the husband is actually resident.”).

nineteenth-century legal discourse indicates the extent to which they were closely analogous and conveyed the same basic concept and could be used interchangeably. The fact that all these near synonyms were used interchangeably is, in fact, additional evidence that the phrase “subject to the jurisdiction” could not possibly have meant “not subject to a foreign power.” When a phrase is merely the sum of its parts, you expect variation. It is not necessary to use the exact phrase to communicate the precise idea you are wishing to convey. It is when a phrase is a term of art—when it communicates some special meaning as the government suggests—that you are locked into the magic words.

Given the intellectual and political context of the Fourteenth Amendment, it might be particularly notable to consider how those within the antislavery legal movement used such phrases. The abolitionist attorney Joel Tiffany in his influential antebellum treatise on the unconstitutionality of slavery answered simply the question of “how do men become citizens of the United States” by observing that “all persons, *born within the jurisdiction of the United States*, since the adoption of the Federal Constitution, became citizens by birth.”<sup>118</sup> It was unnecessary to have provided for the naturalization of residents because “those who have been born within its jurisdiction since that time, for the plain reason that they were already citizens.”<sup>119</sup> At the same time, Tiffany contended, “a man can only be considered a slave while he remains within the jurisdiction of the authority that makes him such.”<sup>120</sup> A slave who had escaped across state lines, “escaped beyond its jurisdiction,”<sup>121</sup> and was only “subject to the jurisdiction” of the slave state to the extent that this was agreed to by state comity.<sup>122</sup> To be “subject to the jurisdiction” of a slave state was most naturally to be within its territorial bounds, though the governing authority of the slave state could have extraterritorial reach such that an individual remained subject to it as a consequence of specific legal arrangement.<sup>123</sup>

Similarly, the abolitionist attorney John Codman Hurd in his treatise on the law of freedom and bondage took care to understand the scope of jurisdiction. He characterized “jurisdiction” simply as “sovereign or political power, or, more properly speaking of the law proceeding from that power.”<sup>124</sup> The jurisdiction of the United States was complicated by federalism but extended “for certain purposes, over all the territorial (geographical) dominion of the United States, whether States or Territories, and over all persons within that dominion, whether also subject to a State dominion, or to the powers held by a State or not.”<sup>125</sup> When new territory was brought within the bounds of the United States, the government exercised a “right of dominion or jurisdiction” over those lands and their inhabitants.<sup>126</sup> The national government of the United

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<sup>118</sup> JOEL TIFFANY, TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 88 (1849) (emphasis added).

<sup>119</sup> *Id.* at 92.

<sup>120</sup> *Id.* at 68.

<sup>121</sup> *Id.* at 74.

<sup>122</sup> *Id.* at 68.

<sup>123</sup> Such interstate comity arrangements were increasingly breaking down, with the consequence that the usual rule might more often be applied in practice. “You may carry your property where you please, but it must be subject to the jurisdiction of the State” that you enter. CONG. GLOBE, 30th Cong., 1st Sess. 883 (1848).

<sup>124</sup> JOHN CODMAN HURD, LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 438 (1858).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 439.

States thus made law “which has national extent and jurisdiction over all persons and things within the domain of the United States.”<sup>127</sup>

The federal structure of the American government and its division of sovereignties between the state and nation meant that the law made “a distinction of persons as native or alien subjects of these various jurisdictions,” and the “native inhabitant of any one of the States is also, of necessity, subject to the national powers vested in the Government of the United States.”<sup>128</sup> “Within the limits of any one of the United States, all persons are subject to a sovereignty divided between the national Government and the State.”<sup>129</sup> All persons within the territory of a given political sovereign, whether an individual state or the country as a whole, are “subject to” that sovereign’s “dominion” or “jurisdiction.”<sup>130</sup> Thus, an individual located within an American state was subject to the concurrent jurisdiction of both that state government and the United States. By contrast, an individual located within a federal precinct, such as a fort, was subject to the sole and exclusive jurisdiction of the United States. An individual who left the country entirely would naturally become subject to the jurisdiction of the foreign sovereign whose territory he entered.<sup>131</sup>

More general treatise writers of the period likewise took it as axiomatic that all persons within the dominion of a sovereign were subject to that sovereign’s jurisdiction unless a specific exception could be identified. It is simply a basic principle of government that “each government has complete and absolute control over all persons and things within its territorial limits, exclusive of every other government.”<sup>132</sup> Aliens who enter into the territory of a government are “subject to the jurisdiction of the government” of that territory unless they enjoy some exceptional immunity to that local jurisdiction, as foreign ambassadors do.<sup>133</sup> To be within the territory of a state is to be “within the jurisdiction of that state,” for “the jurisdiction of a State is co-extensive with its territory.”<sup>134</sup>

The constitutional duty of extradition was to this degree a “diminution of the sovereignty” of the state within which the fugitive was to be found. An individual who fled the territory of a state would normally be placing himself beyond its jurisdiction, but the Constitution in this case recognized that an individual could be “legally subject to the jurisdiction of a particular state” despite no longer being within it.<sup>135</sup> The fugitive was generally subject to the jurisdiction of the state whose territory he was within, but he was, for certain limited purposes, additionally subject to the jurisdiction of the state from which he had fled.<sup>136</sup> But the general constitutional rule was that a man “becomes subject to the jurisdiction and protection the state in which he is, and also

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<sup>127</sup> *Id.* at 440.

<sup>128</sup> *Id.* at 444.

<sup>129</sup> *Id.* at 446.

<sup>130</sup> *Id.* at 438.

<sup>131</sup> *Id.* at 440.

<sup>132</sup> TIMOTHY WALKER & EDWARD LILLIE PIERCE, *INTRODUCTION TO AMERICAN LAW* 720 (4th ed. 1860).

<sup>133</sup> *Id.* at 727; *see also* SIMON GREENLEAF, *TREATISE ON THE LAW OF EVIDENCE* 728 (10th ed. 1866) (referring to “the acknowledged jurisdiction over persons and things within their territory”).

<sup>134</sup> NATHAN DANE, *GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW* 395 (1824).

<sup>135</sup> CHARLES B. GOODRICH, *THE SCIENCE OF GOVERNMENT AS EXHIBITED IN THE INSTITUTIONS OF THE UNITED STATES OF AMERICA* 292 (1853).

<sup>136</sup> DANIEL RAYMOND, *THE ELEMENTS OF CONSTITUTIONAL LAW* 89–90 (1845).

of the United States.”<sup>137</sup> Simply being within a government’s territory was generally enough to make one “subject to the jurisdiction” of that government.

American federalism could complicate how this general principle might be applied in particular cases. In the specific context of the United States, territories and those within them are “under the dominion and jurisdiction of the Union” and not “subject to the jurisdiction of any state.”<sup>138</sup> Similarly, “forts, arsenals, dock-yards,” and the like were “subject to the jurisdiction of the United States” and not the individual states within which they were located.<sup>139</sup> The Secretary of War likewise explained that the “navigable waters of the United States” were “not subject to the jurisdiction” of the individual states though they might pass through the territory of those states.<sup>140</sup> Those rivers were within the exclusive jurisdiction of the federal government, and individuals traveling on these rivers were subject to the jurisdiction of the United States.<sup>141</sup>

American vessels at sea were understood to be “within” or “subject to” the jurisdiction of the United States. By being subject to American jurisdiction, those vessels were under both the regulatory authority and the protection of the United States. Vessels “of a nation on the high seas are considered, in respect to jurisdiction, as a part of her territory,” and “bound by its laws, in like manner as they are within its territory.”<sup>142</sup> It went practically without saying that “all persons within the territorial limits of a nation are subject to its jurisdiction.”<sup>143</sup> Consequently, individuals and vessels within a port were “subject to the jurisdiction of the ruling power,” for ports are within that territorial jurisdiction.<sup>144</sup>

Territory, people, and property could all be brought “within” or “under” the jurisdiction of a government or a governmental officer or made “subject to” that government’s, or governmental officer’s, authority. That jurisdiction might be exclusive or it might be concurrent and shared.

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<sup>137</sup> *Id.* at 89.

<sup>138</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 384 (6th ed. 1848); *see also* Greenleaf, *supra* note 133, at 678 (observing that the statute extends faith and credit of judicial records “to the Courts of all Territories, subject to the jurisdiction of the United States”).

<sup>139</sup> CONG. GLOBE, 36th Cong., 1st Sess. 95 (1859)

<sup>140</sup> UNITED STATES WAR DEP’T, ANNUAL REPORT OF THE SECRETARY OF WAR 28 (1853). Indian reservations could create similar complexities, as when Senator Stephen Douglas contended that Indian reservations governed by treaty “shall never be included within the limits or be subject to the jurisdiction of any State.” CONG. GLOBE, 36th Cong., 1st Sess. 445 (1861).

<sup>141</sup> In the extraordinary circumstances of the Civil War, some members of Congress argued that “the people residing within the limits of these so-called States [or ‘within the territorial jurisdiction known on the map’] will be under the exclusive jurisdiction of Congress, because in point of fact they cannot be subject to the laws of a State which has no State government known to the national Constitution.” CONG. GLOBE, 38th Cong., 1st Sess. 140 (1865).

<sup>142</sup> J.A.G. DAVIS, TREATISE ON CRIMINAL LAW 125 (1838); *see also* THOMAS COOPER, LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY 172 (4th ed. 1826) (“[A] neutral vessel is the property exclusively, and exclusively subject to the jurisdiction of the nation whose citizens own and navigate it. It is part of the national territory.”).

<sup>143</sup> *Id.* But again, “a public vessel of war of a foreign sovereign at peace with the United States” was differently situated than a private vessel. Even upon “coming into our ports,” such a vessel is “not subject to the jurisdiction of our courts or country.” A foreign warship was like a foreign ambassador in being under the extraterritorial jurisdiction of a foreign sovereign even when present within the boundaries of the United States. NATHAN DANE, GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 393 (1824). Even this immunity might be quite limited, however. The “internal military command” of a foreign warship in a friendly port or a foreign army that “passes through, or stops in the territory of another sovereign” is recognized, but “in every other respect, she and her company, are subject to the jurisdiction of the sovereign of the place.” D.A. AZUNI, MARITIME LAW OF EUROPE 247 (1806).

<sup>144</sup> Azuni, *supra* note 143, at 233.

That jurisdiction most frequently turned on mere presence within a domain under the control of a governmental authority.<sup>145</sup> The New York Court of Appeals pointed out the “elementary doctrine” that as a “general rule” the laws of a given government “have no force beyond the limits” of that government’s territory.<sup>146</sup> “*Prima facie* all laws are coextensive, and only coextensive with the political jurisdiction of the law-making power.”<sup>147</sup> But individuals might become subject to the jurisdiction of a government, even regarding actions committed elsewhere, if they enter into the domain of that government.<sup>148</sup> There were also circumstances in which a government might have extraterritorial reach and be able to subject people or property to its jurisdiction even when they were beyond its territorial borders. Allegiance to the sovereign might be one such circumstance in which extraterritorial jurisdiction applied, but it was not the only one. As importantly, allegiance was never a necessary condition for being subject to the jurisdiction of a sovereign authority.

People regularly found themselves within, under, and subject to the jurisdiction of a sovereign to whom they owed no general allegiance. Indeed, one of the earliest actions taken by the First Congress was to grant federal courts jurisdiction over suits involving foreigners (and hence over foreign parties themselves). The Judiciary Act of 1789 gave the federal “circuit courts . . . original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or equity where . . . an alien is a party.”<sup>149</sup> There is no shortage of cases—stretching back to the earliest days of our Constitutional system—that fell in this bucket, even though none of the aliens involved owed their so-called “primary allegiance” to the United States.<sup>150</sup> Likewise, federal and state courts frequently heard cases involving slaves as parties<sup>151</sup> even though it was

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<sup>145</sup> This general rule also had exceptions. Justice Wayne pointed out that the jurisdiction of a nation or state includes “all persons and things when they come or are brought within the territory of a state,” but there were, for example, “international exceptions” to that general rule. *Passenger Cases*, 48 U.S. 283, 421 (1849). The key question was always whether a person or thing is “under the sovereignty or political jurisdiction of the state,” which generally but not always mapped on to whether the person or thing “is within the territory.” *Id.* at 421–422. Significantly, the territorial and political jurisdiction did not come apart simply in cases involving aliens or those without allegiance to the state but rather in cases such as when a portion of a state’s sovereign authority over its territory had been ceded to a different sovereign. Such was the case with federal forts within the bounds of a state or a foreign embassy within the bounds of a country, for example, or even in the case of an article of foreign commerce within a port in a state.

<sup>146</sup> *Whitford v. Panama Ry. Co.*, 23 N.Y. 465, 470 (1861).

<sup>147</sup> *Id.* at 471.

<sup>148</sup> *Id.*

<sup>149</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The Court soon recognized that this jurisdictional language could not be constitutionally applied literally since two foreigners outside of the United States could not create a lawsuit that would be subject to the jurisdiction of the United States. *See Mossman v. Higginson*, 4 U.S. 12 (1800).

<sup>150</sup> *See, e.g., Bradstreet v. Thomas*, 37 U.S. 59 (1838) (involving an alien land claimant); *Mayor of New York v. Miln*, 36 U.S. 102 (1837) (involving a foreign ship captain challenging the constitutionality of a New York immigration law); *Fisher v. Consequa*, 9 F. Cas. 120 (C.C.D. Pa. 1809) (involving a breach of contract claim against Hong merchant).

<sup>151</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 420 (1857); *see also, e.g., United States v. Amy*, 24 F. Cas. 792 (C.C.D. Va. 1859) (opinion of Taney, C.J.) (explicitly rejecting the argument that federal courts do not have jurisdiction over cases against slaves and upholding the conviction); *United States v. Clark*, 2 Cranch C.C. 620 (C.C.D.C. 1825) (finding slave guilty of manslaughter). *See generally* A.E. Keir Nash, *A More Equitable Past-Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197 (1970) (collecting state cases).

It is worth noting that the cases involving slaves tried for treason (such as when a slave took up arms on the side of the British during the Revolutionary War or participated in Nat’s Rebellion), judges sometimes concluded that slaves could not be guilty of treason because they owed no allegiance to the state or country as a slave. But that discussion went to the element

clearly farcical to claim that kidnapped individuals owed *anything* approaching allegiance to a nation that allowed them to be forced into involuntary servitude.

#### CONCLUSION

If one were a lawmaker in 1866 wanting to write an important piece of legislation to be sent out to a community of lawyers and judges to interpret and apply, one would make use of conventional legal language to convey conventional legal meaning. If one were to wish to depart from those ordinary understandings, one would take a great deal of care to say so—or most likely adopt the appropriate legislative language so that one’s meaning would not be misunderstood.

If such a lawmaker were to want to draft a piece of legislation conveying the idea that the terms of a legislative grant extended and applied to anyone subject to the governing authority of the United States, its laws, and legal processes and excluded those who were not subject to American governing authority, that lawmaker would have obvious and familiar linguistic tools available to him to express such an idea. The lawmaker would use something like the phrase “subject to the jurisdiction of the United States” or a variant such as “within the jurisdiction of the United States” or “under the jurisdiction of the United States.” Such phrasing would have been common and familiar and easily understood by legal interpreters of the day.

If, by contrast, the lawmaker wanted to draft a legislative text expressing the idea that its terms applied solely to those who owed allegiance to the United States, there would have been natural legal language available to express that idea as well. The lawmaker would have drafted legislation that simply said “those who owed allegiance to the United States” or perhaps if the lawmaker wanted to be more restrictive, those who were “not subject to any foreign power,” as they did with the Civil Rights Act of 1866. Lawmakers in the mid-nineteenth century knew how to denote allegiance when that is what they meant, and they simply did not use the term “jurisdiction” to convey that thought.

Perhaps the drafters of the Fourteenth Amendment were unconventional or sought to make a new departure in the language of the law. This would be a strange and surprising thing for a constitutional draftsman to want to do, but perhaps they nonetheless did. Perhaps they did not want to use conventional legal language to express their ideas and yet also did not want to make up their own new terms and language to convey their meaning. Perhaps they intentionally set out to subvert conventional meaning and to use familiar legal phrases in unfamiliar ways.

That is at least a theoretical possibility. The evidentiary bar before a faithful interpreter concludes that this is the case should be extremely high, however. When lawmakers use language that is familiar to the law, we should assume that they did so to convey the ordinary ideas that lawyers express with such language. Of course, that assumption is all the stronger when we are surrounded by evidence that those lawmakers very much intended to do just that.

The task of this Article is a narrow one. We do not investigate the specific intentions of the drafters of the Fourteenth Amendment or examine their specific purposes in including the

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of the crime, not to the jurisdiction of the court to hear the case. See, e.g., Philip Schwarz & Dictionary of Virginia Biography, *Billy (fl. 1770s-1780s)*, ENCYC. VA. (Dec. 7, 2020), <https://encyclopediavirginia.org/entries/billy-fl-1770s-1780s> [<https://tinyurl.com/nhzaddhm>] (discussing cases addressing the allegiance of a slave as a predicate for treason charges).

Citizenship Clause. We simply ask to what degree did the drafters of that Clause use familiar legal terms and what would have been the ordinary meaning of those terms as used in a legal text. The evidence is overwhelming that the phrase “subject to the jurisdiction” would have had a natural and obvious meaning to mid-nineteenth century American lawyers. These were ordinary legal terms that regularly appeared in legal discourse.

Moreover, the evidence is overwhelming as well as to what the substantive content of that language would have been in 1866. In the legal language of the mid-nineteenth century, “subject to the jurisdiction” of the United States simply meant governed by the United States. That governing authority might have been exclusive or shared, and those subject to that governing authority might have owed a duty of allegiance or they might merely have owed a duty of obedience. Those governed by the United States might be subject to American jurisdiction on a more permanent basis or they might only be subject to that governing authority on a contingent and temporary basis. Those governed by the United States might only be subject to its authority for limited purposes or they might be governed by it more comprehensively. When lawyers wanted to restrict the scope of jurisdiction, they used appropriate modifiers to do so. Using the language of the Fourteenth Amendment to express any idea other than “within the governing authority” would have been creative to the point of absurdity.