No. 25-365

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners

v.

BARBARA, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICUS CURIAE ARTICLE III PROJECT IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF AMICUS CURIAE

The Article III Project ("A3P") is a nonprofit organization focused on advocating for constitutionalist judicial reform and fighting against the politicization and weaponization of the justice system.[1] Since it was founded in 2019, A3P has been a leader in defending the separation of powers and the Constitution while at the same time opposing lawfare and efforts to undermine the prerogatives of the Executive Branch, which is at issue here.

In this brief, A3P will bring before the Court an element of the legal question at hand not brought to its attention by the parties. This consists of extensive historical research that amplifies the original public understanding of the Citizenship Clause, including statutory history that preceded the proposal of the Fourteenth Amendment and statutory and treaty history that coincided with its ratification.

SUMMARY OF ARGUMENT

The Citizenship Clause of the Fourteenth Amendment declares persons (1) "born … in the United States *and* (2) "subject to the jurisdiction thereof" to be citizens of the United States. This is a conjunctive clause – both elements must be satisfied. Simply being born here does not suffice. Persons born

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[1] No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund the preparation or submission of this brief. No person other than this amicus curiae, its members, or its counsel made such a monetary contribution.

here of illegal aliens or temporary visitors, who have no allegiance to the United States, are not citizens.

The following traces the historical development of what became the Citizenship Clause to determine what it means to be born in and subject to the jurisdiction of the United States. This development may be traced in six basic stages.

First, the concept of natural-born citizenship was discussed briefly in debates in 1862 on the bill to abolish slavery in the District of Columbia. A child of parents owing allegiance to no other sovereignty was considered to be a citizen.

Second, the Civil Rights Act of 1866 provided 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…." (Emphasis added.) The Fourteenth Amendment was designed to constitutionalize the Civil Rights Act.

Third, the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Persons with allegiance to foreign states, and Indians with allegiance to their tribes, were not considered as being subject to the complete jurisdiction of the United States.

Fourth, the Expatriation Act of 1868 rejected the feudal, common-law concept of being a birth-place subject. Enacted a day before the Fourteenth Amendment was certified as ratified, it further

informed the understanding of the Citizenship Clause.

Fifth, the same day the Fourteenth Amendment was certified as ratified, China and the United States signed the Burlingame-Seward Treaty, which further rejected the English common law by recognizing the "inalienable right of man to change his home and allegiance," while adding that nothing in the accord conferred naturalization on a subject of China in the United States.

Sixth, the reenactment in 1874 of the Civil Rights Act's definition of citizenship after the ratification of the Fourteenth Amendment, and its inclusion in the Revised Statutes until 1940, settled the understanding that birth-right citizenship requires that the person is "not subject to any foreign power." During the years 1866-1940, no court suggested that the definitions of citizenship in the Civil Rights Act and the Fourteenth Amendment were inconsistent.

This Court should hold that under the Citizenship Clause, persons born here of illegal aliens or temporary visitors, who have no allegiance to the United States, are not citizens.

ARGUMENT

Introduction

As adopted in 1789, the original Constitution did not define citizenship. However, it provided, "No Person except a *natural born Citizen*, or a Citizen of the United States, at the time of the Adoption of this

Constitution, shall be eligible to the Office of President…."[2] Congress was empowered "To establish an uniform Rule of Naturalization,"[3] which allowed for the making of aliens into naturalized citizens. Representatives were apportioned among the states based on the number of "free persons" (a broader term than citizenship) excluding "Indians not taxed,"[4] which referred to Indians with allegiance to their tribes instead of to the United States.

The following traces the origins and understanding in Congress of the Citizenship Clause as proposed in 1866, and actions by Congress consistent therewith in the form of a statutory enactment and a treaty coinciding with the ratification of the Clause in 1868. Constitutional text is confirmed by "the original public understanding." *Currier v. Virginia*, 585 U.S. 493, 504 (2018). "When interpreting vague constitutional text, the Court typically scrutinizes the stated intentions and understandings of the Framers and Ratifiers of the Constitution (or, as relevant, the Amendments)." *United States v. Rahimi*, 602 U.S. 680, 719 (2024) (Kavanaugh, J., concurring).

Just as the meaning of the original Constitution "must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption," *Rhode Island v. Massachusetts*, 37 U.S. (12

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[2] U.S. Const., Art. II, § 1 (emphasis added).

[3] U.S. Const., Art. I, § 8.

[4] U.S. Const., Art. I, § 2. The number also included three-fifths of all other persons, i.e., slaves, but that was abrogated by the Fourteenth Amendment. U.S. Const., Amend. XIV, § 2.

Pet.) 657, 721 (1838), this Court has looked to the debates in Congress in 1866 and evidence thereafter to ascertain the meaning of section one of the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 771-78 (2010) (plurality op.). "When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted. Statements by legislators can assist in this process to the extent they demonstrate the manner in which the public used or understood a particular word or phrase." *Id.* at 828 (Thomas, J., concurring).

I. In Debate on the Bill to Abolish Slavery in the District of Columbia, Children of "Parents Owing Allegiance to No Other Sovereignty" were Characterized as "Natural-born Citizens"

The meaning of natural-born citizenship was discussed in Congress in 1862 during debates on a bill to abolish slavery in the District of Columbia. Rep. John Bingham of Ohio, who would later become "the author of § 1 of the Fourteenth Amendment," *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 685 n.45 (1978), quoted the "natural born Citizen" and naturalization clauses of the original Constitution, explaining: "To naturalize a person is to admit him to citizenship. Who are *natural-born citizens* but those born within the Republic? Those born within the Republic, whether black or white, are citizens by birth—natural-born citizens."[5]

[5] Cong. Globe, 37th Cong., 2d Sess., 1639 (April 11, 1862).

Bingham continued: "All from other lands, who, by the terms of your laws and a compliance with their provisions become naturalized, are adopted citizens of the United States; all other persons born within the Republic, of *parents owing allegiance to no other sovereignty*, are natural-born citizens."[6] The only exception concerned Indians, whose tribes were recognized as independent sovereignties. By contrast, Bingham cited Chancellor James Kent as declaring that "every person of African descent, born in this land, is a citizen of the United States, and although born in a condition of slavery under the laws of any State in which he might be held to service or labor, still he was a citizen of the United States under disabilities."[7]

While the Act rendered slaves into free persons, it was silent on citizenship.[8] That would await enactment of the Civil Rights Act of 1866.

II. The Civil Rights Act of 1866 Defined Citizens to be "Persons Born in the United States and Not Subject to Any Foreign Power"

The Civil Rights Act of 1866 "constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of 'incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land.'" *General Building Contractors Assn., Inc. v. Pennsylvania*, 458

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

[7] *Id.*

[8] *See* Act for the Release of Certain Persons held to Service or Labor in the District of Columbia, 12 Stat. 376 (1862).

U.S. 375, 389 (1982), quoting *Hurt v. Hodge*, 334 U.S. 24, 32 (1948). Thus, "the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866." *McDonald*, 561 U.S. at 775. The Act provided 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…."[9] Being "not subject to any foreign power" was considered by the Fourteenth Amendment's framers as the equivalent to being "subject to the jurisdiction" of the United States. Both phrases denoted full allegiance to the United States.

On January 5, 1866, Senator Lyman Trumbull of Illinois, Chairman of the Committee on the Judiciary, introduced S. 61, the Civil Rights Bill.[10] The bill had no citizenship clause.[11] He later introduced the following to be added to S. 61: "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, without distinction of color…."[12] In support, Senator Alexander Ramsey of Minnesota asked, "Was he [the negro] not born here? Does he owe any allegiance to a foreign Power? Is he not bound to bear arms in defense of his country?"[13]

Senator Trumbull desired "to make citizens of everybody born in the United States who owe

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[9] 14 Stat. 27 (1866).
[10] Cong. Globe, 39th Cong., 1st Sess. 129 (Jan. 5, 1866).
[11] *Id.* at 211 (Jan. 12, 1866).
[12] *Id.* at 569 (Feb. 1, 1866).
[13] *Id.* at 571.

allegiance to the United States. We cannot make a citizen of a child born of a foreign minister who is temporarily residing here."[14] He recognized that "a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens…."[15]

Debate on the Civil Rights Bill centered on whether citizenship would be race-neutral. Senator George H. Williams of Oregon argued that if Indians were citizens, then state laws that prohibited whites from selling arms and ammunition to Indians would be void.[16] The exclusion for "Indians not taxed" was thus voted to be included in the bill.[17] After further debate, the Civil Rights Bill passed the Senate.[18]

In the House, Rep. James Wilson of Iowa, Chairman of the Judiciary Committee, explained the first section of the bill defining citizenship to be "merely declaratory of what the law now is."[19] Wilson quoted Blackstone as follows: "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens are such as are born out of it."[20] That principle,

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[14] *Id.* at 572.
[15] *Id.*
[16] *Id.* at 573.
[17] *Id.* at 574-75.
[18] *Id.* at 606-07.
[19] *Id.* at 1115 (Mar. 1, 1866).
[20] *Id.* at 1116, quoting *Sharswood's Blackstone*, vol. 1, p. 364.

Wilson added, "makes a man a subject in England, and a citizen here…."[21]

Rather than being an endorsement of the English rule of allegiance to the king,[22] Wilson's comments were calculated to exclude citizenship based on race: "English law made no distinction on account of race or color in declaring that all persons born within its jurisdiction are natural-born subjects," and the same rule applied to the colonies and, later, to the United States.[23]

Thus, the U.S. Constitution recognized "natural-born and naturalized citizens."[24] As for the latter, Wilson quoted the naturalization act of 1802, declaring that an alien "residing within the limits, and under the jurisdiction of the United States," before January 29, 1795, may be admitted to citizenship.[25] This demonstrated that resident blacks under U.S. jurisdiction before 1795 were eligible to be citizens. Wilson asked:

> Well, if Africans naturalized under this law should have had children born to them, will any person say that such children would be less citizens than

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[21] *Id.*

[22] That doctrine was explicitly rejected by the Declaration of Independence (1776), which asserted that governments "deriv[e] their just powers from the consent of the governed" and declared that the colonies "are Absolved from all Allegiance to the British Crown."

[23] Cong. Globe, 39th Cong., 1st Sess., 1116 (Mar. 1, 1866).

[24] *Id.*

[25] *Id.* There was no discussion here of the meaning of "within … and under the jurisdiction of the United States."

> their parents? The parents being citizens of the United States by naturalization, would it not follow that children born to them would be citizens by birth? I apprehend that it will not be claimed by any one that the children of naturalized citizens of the United States do not partake of the citizenship of their parents.[26]

While the Constitution did not define citizenship, Wilson argued that, under general law recognized by all nations, "every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign Governments, are native-born citizens of the United States."[27] His exclusion of children of "temporary sojourners" from citizenship rejected a strict application of common-law birthplace citizenship as expressed by Blackstone.

Rep. Martin Thayer of Pennsylvania explained that "[t]he sole purpose of this bill is to secure to that class of persons [former slaves] the fundamental rights of citizenship…."[28] He added:

> To accomplish this great purpose, the bill declares, in the first place, that all persons born in the United States, and not subject to any foreign Power, are citizens of the United States…. That is,

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[26] *Id.*
[27] *Id.* at 1117.
[28] *Id.* at 1152 (Mar. 2, 1866).

> in my judgment, declaratory of the existing law. According to my apprehension, every person born in the United States, and not owing allegiance to a foreign Power, is a citizen of the United States.[29]

Paraphrasing the definition of citizenship in the bill, Rep. John Broomall of Pennsylvania asked, "What is a citizen but a human being who by reason of his being born within the jurisdiction of a Government owes allegiance to that Government?"[30]

Rep. Raymond proposed an amendment to the bill declaring: "That all persons born, or hereafter to be born, within the limits and under the jurisdiction of the United States, shall be deemed and considered, and are hereby declared to be, citizens of the United States, and entitled to all rights and privileges as such."[31] He explained: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and constitution of the United States…. He has defined *status*; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms…."[32]

Rep. John Bingham explained that the introductory clause "is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of

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[29] *Id.*
[30] *Id.* at 1262 (Mar. 8, 1866).
[31] *Id.* at 1266.
[32] *Id.*

parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen…."[33]

In opposition to section one, Rep. George R. Latham, a Unionist from West Virginia, averred: "Can Congress confer citizenship upon persons who are excluded by the Constitution? The courts have uniformly decided that negroes are not citizens under the Constitution."[34] That was exactly a major goal of the bill, to overturn the Supreme Court's decision in *Dred Scott*. The bill then passed the House.[35] President Johnson vetoed the Bill,[36] but both Houses overrode the veto.[37] As enacted, § 1 began: "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…."[38]

However, questions remained as to what power Congress had under the Constitution to regulate the subjects covered by the Civil Rights Act, which were matters traditionally left to the states. It was to remove any such uncertainty that the Fourteenth Amendment would be proposed.

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[33] *Id.* at 1291 (Mar. 9, 1866).

[34] *Id.* at 1295.

[35] *Id.* at 1367 (Mar. 13, 1866).

[36] *Id.* at 1679 (Mar. 27, 1866).

[37] *Id.* at 1809 (Apr. 6, 1866) (Senate), 1861 (Apr. 9, 1866) (House).

[38] 14 Stat. 27 (1866).

III. Citizenship Under the Fourteenth Amendment: "Persons Born … in the United States and Subject to the Jurisdiction Thereof"

In late 1865, the Senate concurred with a House resolution to appoint a Joint Committee of Fifteen to investigate the condition of the Southern States.[39] This committee would hear extensive testimony on the violations of freedmen's rights, and eventually drafted the Fourteenth Amendment.[40]

The Joint Committee initially recommended adoption of a constitutional amendment to read as follows: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property."[41] Rep. Frederick E. Woodbridge of Vermont characterized the sweep of the proposed Fourteenth Amendment as empowering Congress to protect "the natural rights which necessarily pertain to citizenship."[42]

Rep. Thayer stated that the proposed amendment "is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law," in order that the Act, "so necessary for the protection of the fundamental

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[39] Cong. Globe, 39th Cong., 1st Sess. 30 (Dec. 12, 1865).

[40] See Benjamin Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914).

[41] Cong. Globe, 39th Cong., 1st Sess. 806, 813 (Feb. 13, 1866).

[42] *Id.* at 1088 (Feb. 28, 1866).

rights of citizenship, shall be forever incorporated in the Constitution of the United States."[43] The House approved the proposed amendment, which included no citizenship clause.[44]

In May, Senator Jacob Howard of Michigan introduced the proposed amendment in the Senate.[45] Senator Benjamin Wade of Ohio offered a version prohibiting abridgment of privileges and immunities of "persons born in the United States" without qualification.[46] Senator William Fessenden of Maine offered: "Suppose a person is born here of parents from abroad temporarily in this country."[47] Senator Wade agreed that "a person may be born here and not be a citizen," such as children of foreign ministers, but he thought such exceptions were *de minimus*.[48] Wade's proposal would not be adopted.

Senator Howard proposed adding to § 1 of the proposed amendment: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[49]

Debate on the Citizenship Clause in the Senate took place primarily on May 30. Senator Howard explained:

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[43] *Id.* at 2465 (May 8, 1866).
[44] *Id.* at 2539, 2545 (May 10, 1866).
[45] *Id.* at 2765 (May 23, 1866).
[46] *Id.* at 2768.
[47] *Id.* at 2769.
[48] *Id.*
[49] *Id.* at 2869 (May 29, 1866).

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. *This will not, of course, include persons born in the United States who are foreigners, aliens*, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.[50]

The clause "subject to the jurisdiction thereof" necessarily excluded foreigners and aliens, precluding the common-law rule that being born on the soil subjected a person to allegiance to the king. The clause would have been unnecessary had it applied only to insignificant or unlikely classes that were already excluded by the law of nations. As Emer de Vattel wrote, "children born out of the country in the armies of the state, or in the house of its minister at a foreign court, are reputed born in the country; for a citizen, who is absent with his family on the service of the state, but sill dependent on it, and *subject to its jurisdiction*, cannot be considered as having quitted its territory."[51]

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[50] *Id.* at 2890 (May 30, 1866) (emphasis added).

[51] Emer de Vattel, *The Law of Nations* 103 (London 1797) (emphasis added). Vattel was "the founding era's foremost expert on the law of nations...." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 239 (2019). He was regularly cited as

Howard did not literally mean that "every other class of persons" born here are citizens, as later the same day he clarified that being subject to jurisdiction "impl[ied] a full and complete jurisdiction on the part of the United States, … that is to say, the same jurisdiction in extent and quality, as applies to every citizen of the United States now," which excluded Indians.[52] Howard did not consider the status of children born to illegal aliens, because "illegal aliens" did not exist in the law then.[53]

Senator Edgar Cowan of Pennsylvania asked whether "the child of a Chinese immigrant in California" or of "a Gypsy born in Pennsylvania" is a citizen.[54] He averred that a sojourner "has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word."[55] He maintained that a state had a right "of expelling a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no

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authority during this period. E.g., Cong. Globe, 39th Cong., 1st Sess., 2103 (April 21, 1866); *id.* at 2885 (May 29, 1866).

[52] Cong. Globe, 39th Cong., 1st Sess. 2895 (May 30, 1866).

[53] "Until 1875 alien migration to the United States was unrestricted. The Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. Act of Aug. 3, 1882, 22 Stat. 214." *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).

[54] Cong. Globe, 39th Cong., 1st Sess., 2890 (May 30, 1866). The term "Gypsy" was a derogatory term for Romani people. *See* Noah Webster, *American Dictionary of the English Language* (1828) ("The Gipseys are a race of vagabonds which infest Europe, Africa and Asia, strolling about and subsisting mostly by theft, robbery and fortune-telling.").

[55] Cong. Globe, 39th Cong., 1st Sess., 2890 (May 30, 1866).

authority in her government; … who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen and perform none of the duties which devolve upon him…."[56] Cowan added that "before we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States, we ought to exclude others besides Indians not taxed…."[57]

The classes Cowan described included persons who, he thought, would not be subject to the jurisdiction of the United States. Today's illegal aliens fit neatly within the categories he listed above, *i.e.*, those who invade the borders, owe no allegiance, recognize no authority, pay no taxes, and do no military service. Cowan's unfavorable views toward those he denigrated as "Gypsies"[58] should not distract from that.

Senator John Conness of California was favorable toward children born of Chinese in California being citizens, arguing:

> The proposition before us … relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens.… I am in favor of doing so.… We are entirely ready to accept the provision proposed in this constitutional amendment, that the

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[56] *Id.* at 2891.

[57] *Id.*

[58] Cong. Globe, 39th Cong., 1st Sess., 2891 (May 30, 1866).

> children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.[59]

In other words, citizenship should not be based on race. That did not mean, as Howard explained above, that citizenship would accrue to persons born here "who are foreigners [or] aliens," nor did it question that "a full and complete jurisdiction" was required.[60] It is also noteworthy that, since there were no restrictions on Chinese emigration to the United States at that time, Chinese residents were there lawfully.[61]

Senator James R. Doolittle of Wisconsin opined that "there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States."[62] He thus proposed amending the bill by inserting the following italicized language: "All persons born in the United States, and subject to the jurisdiction thereof, *excluding Indians not taxed*, are citizens of the United States and of the States wherein they reside."[63]

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[59] Id.

[60] *Id.* at 2890, 2895.

[61] The Treaty of Tien-Tsin between the United States of America and the Empire of China of 1858 did not address emigration. For the text of the treaty, see 6 Treaties & Other International Agreements of the United States 659 (1971).

[62] Cong. Globe, 39th Cong., 1st Sess., 2892 (May 30, 1866).

[63] *Id.*

Senator Reverdy Johnson of Maryland explained that "all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power … shall be considered as citizens of the United States…. I know of no better way to give rise to citizenship than the fact of the birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States."[64] To remove any ambiguity about the status of Indians, he supported Doolittle's amendment to insert "excluding Indians not taxed."[65]

Senator Lyman Trumbull explained that the clause "means 'subject to the complete jurisdiction thereof.'… Not owing allegiance to anybody else."[66] He averred that Indians "are not subject to our jurisdiction," and that "[i]t is only those persons who come completely within our jurisdiction, who are citizens…." [67] He noted that differences existed on the meaning of "Indians not taxed," and thus "the language proposed in this constitutional amendment is better than the language in the civil rights bill. The object to be arrived at is the same."[68] Indeed, Indians "are not subject to our jurisdiction in the sense of owing allegiance solely to the United States…."[69]

Howard responded that the existing language was clear, agreeing with Trumbull "that the word 'jurisdiction,' as here employed, ought to be construed

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[64] *Id.* at 2893.
[65] *Id.* at 2894.
[66] *Id.* at 2893.
[67] *Id.*
[68] *Id.* at 2894.
[69] *Id.*

so as to imply a full and complete jurisdiction on the part of the United States, …; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now." [70] That excluded Indians.[71]

Senator Doolittle expressed the general understanding that the proponents of the amendment "had doubts, at least, as to the constitutionality of the civil rights bill that this proposition to amend the Constitution now appears to give it validity and force."[72] He reminded his colleagues of the definition of citizenship in the Civil Rights Act.[73]

Senator George H. Williams of Oregon thought it unnecessary to refer explicitly to Indians not taxed, given that they were subject to the general exclusion of persons "not subject to the jurisdiction thereof." He analogized:

> All persons living within a judicial district may be said, in one sense to be subject to the jurisdiction of the court in that district, but they are not in every sense subject to the jurisdiction of the court until they are brought, by proper process, within the reach of the power of the court. I understand the words here … to mean fully and completely subject to the jurisdiction of the United States.[74]

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[70] *Id.* at 2895.
[71] *Id.*
[72] *Id.* at 2896.
[73] Id.
[74] *Id.* at 2897.

The Senate defeated Doolittle's amendment concerning "Indians not taxed" and then adopted the Howard text.[75] The Fourteenth Amendment then passed the Senate,[76] followed by the House.[77] As passed, § 1 of the Fourteenth Amendment provides in pertinent part: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[78]

In sum, the clause "subject to the jurisdiction of" the United States was thoroughly explained in the debates. Senator Howard, who introduced the Citizenship Clause, explained that three classes of persons born in the United States were excluded from citizenship—foreigners, aliens, and families of ambassadors or foreign ministers. The clause implied "a full and complete jurisdiction," which excluded Indians because of tribal allegiance. Senator Johnson included children "born of parents who at the time were subject to the authority of the United States." Senator Trumbull said that the clause means "subject to the complete jurisdiction thereof," *i.e.*, "[n]ot owing allegiance to anybody else." In short, "fully and completely subject to the jurisdiction of the United States," as Senator Williams put it.

It is noteworthy that the clause "subject to the jurisdiction thereof" was not a common-law concept. As was made clear in the debates on the Expatriation Act of 1868, *infra*, birth alone made a person a subject

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[75] *Id.*
[76] *Id.* at 3042.
[77] *Id.* at 3149 (June 13, 1866).
[78] U.S. Const., Amend. XIV, § 1.

of, with allegiance to, the Crown under the common law. Under the Citizenship Clause, both birth and being "subject to the jurisdiction" ("not subject to any foreign power" in the words of the Civil Rights Act) were required to be a citizen.

IV. Congress Rejected the English Common Law Of Citizenship in the Expatriation Act of 1868

Congress passed the Expatriation Act on July 27, 1868, the day before the Fourteenth Amendment was declared as ratified.[79] This Court often looks to laws enacted by Congress as evidence of the original understanding of the meaning of constitutional amendments. *See*, *e.g.*, *United States v. Villamonte–Marquez*, 462 U.S. 579, 585–6 (1983) ("the enactment of this statute by the same Congress that promulgated the constitutional amendments that ultimately became the Bill of Rights gives the statute an impressive historical pedigree.").

The Act provided that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and denied that naturalized citizens "are subjects of foreign states, owing allegiance to the governments thereof…."[80] It further provided that all naturalized citizens, when in foreign states, were entitled to "the same protection of

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[79] "14th Amendment to the U.S. Constitution," National Archives, March 6, 2024. https://www.archives.gov/milestone-documents/14th-amendment.

[80] An Act concerning the Rights of American Citizens in Foreign States, 15 Stat. 223 (July 27, 1868).

persons and property that is accorded to native-born citizens…."[81]

The Expatriation Act was a repudiation of the common-law doctrine of citizenship based solely on birthplace. It was passed in response to the arrest of naturalized citizens abroad by governments that refused to recognize the right of expatriation from those countries.

The impetus for the Expatriation Act was a joint resolution of the Committee on Foreign Affairs in January 1868 requesting the President to intercede with the Queen of Great Britain to secure the release of Rev. John M'Mahon, who was "convicted as a Fenian raider" and confined in Canada.[82] An emigrant from Ireland, M'Mahon was "found travelling in company with Fenians who design the invasion of Canada" (an episode of the movement for Irish independence).[83]

Rep. Godlove Stein Orth of Indiana explained that, because M'Mahon was "born on British soil," Britain "still claims him as one of her subjects," in disregard of his status as a naturalized citizen of the United States.[84] He continued: "The British Government … as well as most of the other European nations, hold to the doctrine of perpetual allegiance, while we maintain the doctrine of expatriation, or the right of a person to absolve himself from his allegiance

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[81] *Id.*

[82] Cong. Globe, 40th Cong., 2d Sess., 385 (Jan. 8, 1868).

[83] House Report No. 7, Committee on Foreign Affairs, 90th Cong., 2d Sess., at 2-3 (Jan. 8, 1868).

[84] Cong. Globe, 40th Cong., 2d Sess., 385 (Jan. 8, 1868).

whenever his interest or his fancy prompts him to do so."[85]

Compared to the sound view of "that great law writer,hat "various reasons may oblige a man to choose another country," Rep. Shelby M. Cullom of Illinois asked "what becomes of the driveled statement of Blackstone when he says that 'allegiance is a principle of natural law that cannot be absolved even by swearing allegiance to a foreign prince.'"[86] Cullom added, "That statement of Blackstone … was made under the clouds of the darkness of the Middle Ages, and in accord of the feudal dogmas of those times, which are in opposition to the plainest rights of man."[87]

On January 30, 1868, Rep. Nathaniel P. Banks of Massachusetts, chairman of the Committee on Foreign Affairs, reported House Bill No. 584, which would become the Act.[88] Rep. Ignatius L. Donnelley of Minnesota explained that a law was necessary to address the "arrests which are almost daily taking place of American citizens in the British islands."[89] The bill "is necessary, not alone to define the rights of American citizens abroad, native born and naturalized, but to arrest and resist the arrogant pretensions of the monarchial Governments of Europe on this question."[90]

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[85] *Id.*
[86] *Id.* at 388.
[87] *Id.*
[88] *Id.* at 865 (Jan. 30, 1868).
[89] *Id.* at 865
[90] *Id.* at 866.

Rep. Frederick E. Woodward of Vermont began by explaining "the English doctrine of allegiance" of *jus soli* (right of the soil) by quoting Blackstone as follows:

> Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is, therefore, a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot, by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be

> devested without the concurrent act of that prince to whom it was first due.[91]

"This doctrine," Woodward stated, "is unjust, unreasonable, and at war with the spirit of the present age."[92] He continued that "[i]t is high time that feudalism were driven from our shores and eliminated from our law, and now is the time to declare it."[93] In later debate, Rep. Alexander H. Baily of New York referred to it as "the slavish feudal doctrine of perpetual allegiance."[94]

Noting that the common law applied only when not abrogated by statute and not incompatible with American institutions, Rep. Orth explained that the common law was abrogated by the Declaration of Independence, the Constitution's provision on naturalization, the naturalization laws, and the government's consistent policy.[95] Rep. Frederick E. Woodbridge of Vermont added: "The proposition that once a citizen always a citizen is based on the feudal systems under which there were no free citizens…. [I]t was from this source and system that Blackstone derived his idea of indefeasible and perpetual allegiance to the English Crown."[96]

The House *Report of the Committee on Foreign Affairs Concerning the Rights of American Citizens in*

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[91] *Id.* at 868, quoting 1 Blackstone, Commentaries *357-58.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 967 (Feb. 4, 1868).

[95] *Id.* at 1104 (Feb. 11, 1868).

[96] *Id.* at 1130 (Feb. 12, 1868).

Foreign States was issued on February 27, 1868.[97] It detailed how naturalized citizens in Great Britain had been arrested, convicted, and punished as criminals "upon the ground that they were natural-born subjects of the Crown" whose "allegiance was perpetual."[98] The chief source for that doctrine was Blackstone's writing on "natural allegiance"[99] (the same paragraph quoted by Rep. Woodward above).

According to the *Report*, "the American Constitution is itself proof that Blackstone's theory of allegiance was not accepted by the American governments."[100] Under feudalism, "[a]llegiance was due to the Crown and controlled by the place of birth…."[101] By contrast, "the express or implied consent of both parties is necessary to the extinction of mutual obligations between a Government and its subject."[102]

Asked by Rep. Jenckes of Rhode Island whether "the common law respecting allegiance" was in force, Rep. Nathaniel P. Banks—who originally introduced the bill—replied "never," explaining that the Constitution, the Declaration of Independence, and the wars of the Revolution and of 1812, "all these have abrogated the English common law…."[103] After further remarks, the bill passed the House.[104]

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[97] *Id.*, App., 94 (Feb. 27, 1868).
[98] *Id.*
[99] *Id.* at 95.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 96.
[103] *Id.* at 2316 (April 20, 1868).
[104] *Id.* at 2317-18.

Debate in the Senate focused on the authority of the President to take action to assist naturalized citizens being held abroad by governments that denied expatriation.[105] Concern was expressed that the president should not be able to declare war.[106] The bill passed the Senate on July 25, 1868,[107] and was signed into law two days later.[108]

In sum, the Expatriation Act and the debates thereon brought into sharp relief the distinction between the concepts of citizenship under the common law, which was grounded on the place of birth as the basis for perpetual allegiance to the king, and under American law, which was based on both the place of birth and on complete jurisdiction, which the citizen could repudiate. Being enacted the day before the Fourteenth Amendment was declared to be ratified, it gives further insight into the meaning of the Citizenship Clause.

V. The Chinese-American Treaty of 1868 Recognized Allegiance as an Element of Citizenship and Did Not Confer Naturalization

On July 28, 1868, the same day that the Fourteenth Amendment was certified by the Secretary of State as ratified by the necessary number of states, China and the United States signed the

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[105] E.g., *id.* at 4358 (July 23, 1868) (Sen. Howard).
[106] E.g., *id.* at 4446 (July 25, 1868) (Sen. Howard).
[107] Id.
[108] 15 Stat. 223 (July 27, 1868).

Burlingame-Seward Treaty.[109] The Treaty included provisions that give further insight into the original public understanding of the nature of citizenship when the Fourteenth Amendment was ratified.

Entitled *Additional Articles to the Treaty Between the United States of America and the Ta-tsing Empire of the 18th of June, 1858*, two of the articles bore directly on the Citizenship Clause and the Expatriation Act, which was enacted on July 27, 1868,[110] a day before the Treaty was signed.

Article V of the Treaty began with familiar references to the right of expatriation, allegiance, and citizenship that had been recently heard in the Congressional proceedings described above:

> The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.[111]

The declared right to change one's "home and allegiance" repudiated the feudal concept that citizenship was inexorably bound to the soil on which

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[109] For the text, see 6 Treaties & Other International Agreements of the United States 680 (1971).

[110] 15 Stat. 223 (July 27, 1868).

[111] 6 *Treaties* at 682.

one was born, which required permanent loyalty to the sovereign who ruled that soil.

Based on the above premise, the parties joined "in reprobating any other than an entirely voluntary emigration for these purposes," and agreed to pass laws making it a crime to take Chinese subjects to the United States, or U.S. citizens to China, "without their free and voluntary consent respectively."[112]

Article VI declared that U.S. citizens visiting or residing in China, and Chinese subjects visiting or residing in the United States, "shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation…."[113] Besides the familiar reference to privileges and immunities, this "most favored nation" clause prohibited any restriction upon a right or activity of citizens of one country that was not applicable to the citizens of other foreign nations.[114]

Consistent with the prior article that tied citizenship with allegiance, Article VI further provided: "But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." [115] If nothing in the Treaty conferred naturalization on Chinese subjects in the United

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[112] *Id.*

[113] *Id.* at 683.

[114] *See* Samuel B. Crandall, "The American Construction of the Most-Favored-Nation Clause," 7 *American Journal of International Law*, No. 4, 708, 719 (Oct. 1913).

[115] 6 *Treaties* at 683.

States, surely it was not understood that a person born of Chinese subjects in the United States had birth-right citizenship under American law.

Senate debates on the Treaty were not recorded, as they took place in executive session.[116] It was later clarified that the provision against naturalization was critical to its ratification. In 1872, in debates on whether to extend the right of suffrage, Senator James Nye of Nevada recalled: "We all remember the exact circumstances under which this treaty was made. It was found that the treaty could not be made if it did not contain that provision.… If it had not contained what was supposed to be at that time an inhibition on naturalization, the treaty never could have been made"; "in order to take it out of the mouth of anybody to say that it was intended to open the flood-gates of citizenship, this provision was inserted in the treaty."[117]

In sum, as did the Expatriation Act, the Treaty recognized "the inherent and inalienable right of man to change his home and allegiance," which repudiated the English common-law rule of perpetual citizenship in the place where born. That nothing in the Treaty

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[116] Earl Maltz, "The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment," 17 Harvard J. of Law & Pub. Policy, no. 1, 223, 229 (1994).

[117] Cong. Globe, 42d Cong., 2d Sess. 910-11 (Feb. 9, 1872). Similar explanations were also set forth in earlier proceedings. Cong. Globe, 40th Cong., 3d Sess. 1011 (Feb. 8, 1869) ("when the treaty with China was confirmed the idea of admitting Chinamen to naturalization … was unanimously opposed by the majority of the Senate.") (statement of Senator James R. Doolittle of Wisconsin).

could "be held to confer naturalization … upon the subjects of China in the United States" surely implied that a person born of subjects of China in the United States was not entitled to birth-right citizenship. These provisions of the Treaty give further evidence of the original public understanding of the Citizenship Clause.

VI. The Reenactment of the Civil Rights Act's Definition of Citizenship After the Ratification of the Fourteenth Amendment, and its Inclusion in the Revised Statutes Until 1940, Settled the Understanding that Birth-Right Citizenship Requires that the Person be "Not Subject to Any Foreign Power"

The *Revised Statutes of the United States passed at the first session of the Forty-third Congress, 1873-74*, included all general and permanent statutes in force as of December 1, 1873. Title XXV, entitled "Citizenship," repeated the Civil Rights Act's definition of citizenship as "[a]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed…."[118] The Expatriation Act appeared a few sections below that, including its declaration that the United States "has freely received emigrants from all nations, and invested them with the rights of citizenship," and its rejection "that such American citizens, with their descendants, are

[118] R.S. §1992, in Revised Statutes of the United States Passed at the Forty-Third Congress, 1873-'74, 351(1875).

subjects of foreign states, owing allegiance to the governments thereof…."[119]

Such placement together in the Revised Statutes was fitting, as both statutes rejected the feudal, common-law concept that one's citizenship was based solely on the soil where the person is born and that such allegiance is perpetual. Reenactment of the definition of citizenship as being born in the U.S. and "not subject to any foreign power" is telling in that it took place after ratification of the Fourteenth Amendment and thereby was considered consistent therewith.

The definition of citizenship in the Civil Rights Act remained on the books until repealed in 1940, when the Nationality Act comprehensively amended existing statutes on citizenship, naturalization, and expatriation.[120] Repeating the language of the Fourteenth Amendment, the Nationality Act defined a citizen in part as "a person born in the United States, and subject to the jurisdiction thereof," which remains the law today.[121] During the years 1866-1940, no court suggested that the definitions of citizenship in the Civil Rights Act and the Fourteenth Amendment were inconsistent.

Accordingly, being "subject to the jurisdiction" of the United States was understood as being "not subject to any foreign power." Illegal aliens and temporary visitors are not subject to the jurisdiction

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[119] R.S. §1999, *id.* at 352.

[120] *See* Pub. L. 76-853, § 504, 54 Stat. 1137, 1172 (1940) (repealing R.S. § 1992).

[121] 8 U.S.C. § 1401(a).

of the United States because they are subject to a foreign power.

CONCLUSION

The Court should reverse the judgment of the court below and hold that under the Citizenship Clause of the Fourteenth Amendment, persons born here of illegal aliens or temporary visitors, who have no allegiance to the United States, are not citizens.

Respectfully submitted,

ARTICLE III PROJECT
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