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 Before Judgment to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD A. EPSTEIN IN SUPPORT OF THE PETITIONERS AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[*]

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SUMMARY OF ARGUMENT

The Fourteenth Amendment's Citizenship Clause says: "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." U.S. Const., Amdt. 14, §1. According to the conventional view, "subject to the jurisdiction thereof" means merely "within the jurisdiction and subject to the Nation's laws." On this view, the Clause confers citizenship on everyone born in this Nation—except, perhaps, to certain Indians, for whom the conventional view's

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[*] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 37.6.

proponents make an *ad hoc* exception. *See, e.g.*, James C. Ho, *Defining "American" Birthright Citizenship & the Original Understanding of the 14th Amendment*, 9 Green Bag 2d 367, 377 (2006). Under the conventional view, therefore, children born within the United States to illegal immigrants are automatically made citizens of the United States, entitled to the full panoply of "privileges or immunities" available to other citizens. U.S. Const., Amdt. 14, §1.

The conventional view is wrong. The phrase "subject to the jurisdiction thereof" excludes individuals subject to a foreign power, such as the children of illegal aliens. This follows from numerous sources, including the Fourteenth Amendment, which distinguishes people "subject to" sovereign jurisdiction from those merely "within" it. Additionally, the Fourteenth Amendment was widely understood as providing a firmer constitutional footing for the Civil Rights Act of 1866. And *that* law conferred citizenship on "all persons born in the United States *and not subject to any foreign power*, excluding Indians not taxed." Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, 27 (emphasis added).

But perhaps the strongest evidence against the conventional view comes from laws governing naturalization. Proponents of the conventional view largely or entirely ignore these acts. That is a grievous error. The naturalization acts, from the 1790s through the nineteenth century, bear two key attributes. *First*, any individual seeking to be naturalized had to take an oath renouncing all loyalties to any foreign sovereign. *Second*, these acts

provided that, when individuals became naturalized citizens, their children would become citizens with them. Nothing in the many naturalization acts confers any earlier citizenship on children born in America to not-yet-naturalized aliens—this despite the fact that, beginning in 1790, these laws *did* confer birthright citizenship on children who were born abroad to American citizens.

All told, these important, widely discussed federal laws conferred citizenship on aliens *and the children of aliens* only if they or their parents formally renounced all other foreign allegiances. That is important here because the "subject to the jurisdiction thereof" language in the Citizenship Clause applies to *both* naturalized *and* native-born individuals. Absent strong evidence to the contrary, the phrase should be understood as conferring automatic citizenship only on those who are able to satisfy the long-established prerequisites for naturalization.

Because "subject to the jurisdiction thereof" excludes individuals born owing allegiance to a foreign country, the phrase excludes children born to illegal immigrants. Even the most precocious newborn babies cannot renounce foreign ties. Only their parents can. And illegal aliens, by definition, have not done so; they have not gone through the naturalization process and remain subject to foreign authority. So too, then, do their children.

Against all this, proponents of the conventional view have strikingly little to say. They tend to rely on principles of British common law that America never adopted. *See below* 20–24. And they point

to a smattering of early American decisions seeming to endorse a *jus soli* view of citizenship. But those decisions—which are at odds with the naturalization acts for the reasons just discussed—are too sparse to reflect any widespread, shared understanding that would have informed the original understanding of the Fourteenth Amendment. *See below* 7–19. None of these sources, therefore, sheds much light on the meaning of the text. That leaves proponents to rely on this Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), which held incorrectly that children born in America to *legal* permanent residents are citizens under the Citizenship Clause. That case was wrongly decided, but does not address the issue presented here: whether the children of aliens *illegally* in the country become citizens upon birth. Because extending *Wong Kim Ark* to this context would contravene the Constitution, the Court should limit the decision to its facts.

ARGUMENT

This case asks whether the Citizenship Clause of the Fourteenth Amendment confers American citizenship on children born in America to alien parents. No, it does not.

I. The Fourteenth Amendment was originally understood to confer citizenship only on individuals not subject to any foreign power.

Section 1 of 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case concerns the meaning of the phrase "subject to the jurisdiction thereof." The defenders of birthright citizenship urge that "subject to the jurisdiction" of the United States means "within the jurisdiction," in the sense of being "subject to the authority of the U.S. Government." *See* Ho, *Defining "American"*, 9 Green Bag 2d at 368. Therefore, the argument goes, the Clause confers citizenship on everyone physically inside the United States and bound by its laws, including the children of illegal aliens.

The defenders of the conventional view, like the modern courts that follow their lead, confidently assert that their reading follows from the "plain meaning" of the text. *See, e.g.*, *id.* at 370; *Washington v. Trump*, 145 F.4th 1013, 1035 (9th Cir. 2025). But "subject to the jurisdiction thereof" has no plain meaning. It is an esoteric legal term with no historical antecedent that can be understood, one-and-a-half centuries after enactment, only with reference to the linguistic and historical context in

which it appeared. And that context does not support the conventional view. Instead, an intellectually rigorous effort reveals that the phrase would have been understood as referring to those individuals owing allegiance to America alone. Therefore, the phrase excludes people, like the children of aliens, born subject to the authority of another sovereign.

A. The Fourteenth Amendment distinguishes between people subject to and within a sovereign's jurisdiction.

"Subject to the jurisdiction," as it appears in the Fourteenth Amendment, cannot mean "within the jurisdiction" in the sense of being subject for a time to the sovereign's laws. This follows from the text of the Fourteenth Amendment itself.

The Citizenship Clause uses the phrase "subject to the jurisdiction thereof." That phrase appears nowhere else in the Fourteenth Amendment. And in fact, the Amendment's Equal Protection Clause uses a notably different phrase, providing that no State may "deny to any person *within its jurisdiction* the equal protection of the laws." U.S. Const., Amdt. 14, §1 (emphasis added). The latter phrase applies broadly to everyone within a State and subject to its laws; that is evident from the Clause's bestowing rights on "any person," *id.*, and from the fact that those *not* subject to the laws of a State can be neither granted nor denied equal protection of those laws.

This difference in words implies a difference in meaning. Thus, the phrase "subject to the

jurisdiction thereof" means something other than "within the jurisdiction." And that difference in meaning accords with the different functions these two clauses serve. The Citizenship Clause defines the scope of constitutionally conferred citizenship; it identifies the individuals whose relationship to the Nation entitles them to "the privileges or immunities of citizens of the United States." *Id.* That is, necessarily, a narrower class of people than those "within the jurisdiction" in the sense of being physically present and subject to the Nation's laws. The Equal Protection Clause, however, broadly prohibits States from unequally applying their laws to "any person." *That* function can be served only if the Equal Protection Clause applies broadly to anyone physically present and subject to the laws of a State. (The Due Process Clause operates similarly; it says that no State shall "deprive any person"—citizen or not—"of life, liberty, or property, without due process of law." *Id.*)

B. An allegiance-based reading of the Citizenship Clause accords with the most relevant pre- and post-ratification statutory law.

The just-concluded discussion reveals that "subject to the jurisdiction thereof" means something distinct from "within the jurisdiction." But that does not settle the more important question of what the first of these phrases means. That question is answered, however, by the history of American laws governing citizenship. Those laws show that the phrase would have been understood as encompassing only individuals owing no allegiance to any foreign power—a meaning that excludes

individuals born to parents owing allegiance to a foreign nation.

1. Begin with the Civil Rights Act of 1866. This law is critically important, as the People ratified the Fourteenth Amendment to "remove any doubts regarding Congress' authority to enact the" Civil Rights Act. *SFFA v. Harvard*, 600 U.S. 181, 241 (2023) (Thomas, J., concurring). And that Act explicitly denies citizenship to individuals subject to any foreign power:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* 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;

14 Stat. 27, 27 (Apr. 9, 1866) (second emphasis added). Because the Fourteenth Amendment was understood to place the Act on firmer constitutional footing, the Amendment should not be read in a manner that undermines the Act's constitutionality. But the conventional view of birthright citizenship does so: under the conventional view, the Fourteenth Amendment made the Act unconstitutional in its application to people in America and bound by its laws yet still subject to a foreign power. That problem is avoided if "subject to the jurisdiction thereof" encompasses only those owing allegiance exclusively to America.

2. Reading "subject to the jurisdiction thereof" to exclude those subject to foreign governments

finds further support in the Thirteenth Amendment. That Amendment prohibits slavery *both* "within the United States" *and* in "any place subject to their jurisdiction." U.S. Const., Amdt. 13, §1. The purpose of the latter phrase is to ensure the Amendment protects people outside the country yet still subject to its power, including those in embassies and military installations outside the United States. But the Amendment does not purport to operate in places subject to the control of a foreign power. Thus, areas "subject to their jurisdiction" means areas under the control of the United States, as opposed to the control of a foreign nation. Similarly, *people* subject to the jurisdiction of the United States are those not subject to any foreign power.

3. The Nation's history of naturalization laws points in the same direction. Remember, the Citizenship Clause confers citizenship on anyone "born *or naturalized* in the United States, and subject to the jurisdiction thereof." (emphasis added). The key phrase—"subject to the jurisdiction thereof"—thus modifies the word "naturalized" just as it does "born." That matters because before, during, and after the Fourteenth Amendment's ratification, America's naturalization laws made individuals *ineligible* for naturalization until they swore off all foreign allegiances. This suggests that the "subject to the jurisdiction thereof," in its application to *naturalized* citizens, was understood as encompassing only individuals owing no foreign allegiances; to borrow a phrase from this Court, the Citizenship Clause comprises those who are "not merely subject in some respect or degree to the

jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). Textually, the phrase cannot mean something different in its application to those "born" in the United States. The reams of academic articles and judicial opinions addressing the Clause's meaning largely or entirely ignore this important body of law, which contradicts the view they espouse.

The First Congress enacted the Naturalization Act of 1790. It provided:

> That 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, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, *and taking the oath or affirmation prescribed by law, to support the constitution of the United States*, which oath or affirmation such court shall administer; and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one

> years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.

1 Stat. 103, 103–04 (March 26, 1790) (first emphasis added). So, beginning with the very first Congress, only those able to affirm their loyalty to the Constitution could be naturalized.

In 1795, Congress beefed up the oath requirement to ensure that only those owing *no foreign allegiance* would be eligible for naturalization. The amendment required that the applicant "doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, whereof he was before a citizen or subject." 1 Stat. 414, 414 (Jan. 29, 1795).

Congress, in subsequent naturalization laws, retained similar requirements. The Act of 1802 imposes an identical oath requirement. 2 Stat. 153, 153 (Apr. 14, 1802). And the naturalization laws continued to require the renunciation of foreign allegiances as a condition for citizenship for years afterward. Congress made no change to this requirement when it amended the naturalization laws in 1870 (just two years after the Fourteenth

Amendment's ratification) to make "aliens of African nativity and persons of African descent" eligible for naturalization, and to adopt procedures aimed at warding off fraud in the naturalization process. 16 Stat. 254, 254–56 (July 14, 1870). And in 1906, the Fifty-Ninth Congress retained the requirement, though modifying some of the by-then-outdated language. *See* 34 Stat. 596, 597–98 (June 29, 1906) ("He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject.").

These laws are relevant because they reveal that, both before and after the Fourteenth Amendment's ratification, only those aliens who renounced their foreign allegiances were eligible for naturalization. (Remember, Congress alone has the power to define what it takes to become a naturalized citizen. *See* U.S. Const., art. I, §8, cl.4.) Thus, at the time of ratification, exclusive loyalty to the United States had long been a fundamental element of American citizenship. If the phrase "subject to the jurisdiction thereof" covers only those who never had or forswore foreign allegiances, then the Citizenship Clause aligns with that longstanding requirement. If the phrase applies to everyone subject to the laws *without regard* to their foreign loyalties, it does not.

The naturalization acts are critically relevant for another reason: under these laws, the citizenship of the child followed the citizenship of his parents. Thus, beginning with the 1790 Act, Congress conferred citizenship on children born to American citizens living abroad. *See* 1 Stat. at 103–04 ("And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born Citizens."). More relevant here, however, the 1790 Act expressly conferred citizenship on the children of naturalized citizens, provided those children were younger than 21 and living in America at the time of naturalization. *See id*. Similar provisions remained in effect through, and for years after, the Fourteenth Amendment's ratification. *See* Rev. Stat. §2172 (1875); *Zartarian v. Billings,* 204 U.S. 170, 173–74 (1907) (describing the law as largely unchanged in this regard from at least 1802 onward); *Nwozuzu v. Holder*, 726 F.3d 323, 329 (2d Cir. 2013) (tracing the history to the 1790s).

These laws, by their terms, entitled children born in America to aliens to *become* citizens at the same time their parents did. Nothing in the laws suggests that such children were *already* citizens by reason of birth and thus incapable of being naturalized. That silence is conspicuous, given that Congress *did* recognize the citizenship at birth of another class of children: namely, those born abroad to American citizens. *See* 1 Stat. at 103–04; David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801*, p.90 (1997) (in enacting this provision, the First Congress "appears to have interpreted" its exclusive "authority

to enact 'naturalization' laws to give it a general power to define or confer citizenship"); *Rogers v. Bellei*, 401 U.S. 815, 823 (1971) (discussing the history of laws bestowing citizenship on certain children born abroad to American parents). The naturalization laws thus suggest that children born in America to aliens eligible for naturalization, but not yet naturalized, did not become citizens at birth. At the very least, they *could* be interpreted in that way. *Lynch v. Clarke*, 1 Sand. Ch. 583, 679–80 (N.Y. Ch. 1844) (considering an argument based on this understanding, before declaring that the naturalization acts' "implication" could not displace the supposedly "established" *jus soli* principle); *see below* 25–26 (explaining that *Lynch* erred in describing *jus soli* principles as established). Thus, if the Citizenship Clause made the naturalization acts irrelevant to children born in America to later-naturalized citizens, one would expect to find some acknowledgement of that in the years surrounding ratification. We have not identified any.

It is important to bear in mind that America, at the time of ratification, labored under intense racial prejudices. This very Court held that the right to vote is not among the privileges or immunities of American citizens, thereby allowing States to deny the suffrage to women and non-whites. *See Minor v. Happersett*, 88 U.S. 162, 171 (1874). And Congress did not extend the naturalization laws to individuals of African descent until 1870, two years post-ratification. Even then, the laws did not allow other non-whites to apply for naturalization. It is not likely that the American people

understood the Fourteenth Amendment as *automatically* conferring *citizenship* on the children of aliens who, owing to racial prejudice, Congress did not deem worthy of naturalization.

The naturalization acts' focus on loyalty, and their linking the citizenship of children to that of their parents, accords with the view expressed in the most influential international-law treatise of the time: Emmerich de Vattel's eighteenth-century *Law of Nations or the Principles of Natural Law*. Here is what Vattel said about the topic of citizenship:

> The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The *natives*, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see, whether, on their coming to the years of discretion, they

> may renounce their right, and what they owe to the society in which they were born. *I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for if he is born there of a foreigner, it will be only the place of his birth, and not his country.*

Id., ch. 19 ¶212 (Liberty Fund ed. 2008) (1797) (emphasis added). This passage was well known in the antebellum period. Indeed, Justice Story cited this passage for the proposition "that children generally acquire the national character of their parents." *Inglis v. Trustees of Sailor's Snug Harbor in City of New York*, 28 U.S. 99, 169 (1830) (opinion of Story, J.). On that understanding of citizenship, individuals born to parents owing allegiance to other nations *did not* automatically become citizens of the country in which they were born. The naturalization acts track that understanding.

4. The debates surrounding the Fourteenth Amendment reveal that the allegiance-based theory of citizenship is the one that Americans, at least many Americans, believed they were ratifying with the Fourteenth Amendment.

For example, Senator Reverdy Johnson endorsed the allegiance-based reading when he explained: "[A]ll that this amendment provides is, that all persons born in the United States *and not subject to some foreign Power*—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States." Cong. Globe, 39th

Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson) (emphasis added).

Senator Lyman Trumbull of Illinois echoed the same sentiment: "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means." *Id.* (statement of Sen. Trumbull).

The oft-misconstrued words of Senator Jacob Howard are not to the contrary:

> 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, [or] 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.*

Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (emphasis added). Defenders of birthright citizenship often misuse this passage, which does not contain the bracketed "or" as it appears in the congressional record. Without the "or," the passage *could* be read as addressing only whether the American-born children of ambassadors or foreign ministers subject to diplomatic immunity are "subject to the jurisdiction thereof." But that cannot be what Senator Howard meant, because without the "or"

the description is not "simply declaratory of what … the law of the land" was already. *Id.* As the naturalization laws show, these longstanding, hotly debated laws allowed the children of aliens to *become* naturalized. And they made no distinction between those children born in America and those born elsewhere. Beyond that, it would have been pointless to insist that the children of foreign diplomats did not become citizens, as that background principle of international law was established long before the adoption of the Fourteenth Amendment. So, the missing "or" is apparently the result of either a botched transcription or misspeaking by the Senator.

These views soon found their way into judicial opinions. One of this Court's early cases addressing the Fourteenth Amendment had this to say about the Citizenship Clause: "The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." *Slaughter-House Cases*, 83 U.S. 36, 73 (1872). Admittedly that is *dicta*. But it is considered *dicta* from this Court in an opinion immediately following ratification. It cannot be easily dismissed, especially as there is no *dicta* in support of the opposite position.

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In sum, while "subject to the jurisdiction thereof" has no plain meaning, the phrase is best understood as excluding individuals born in the country to aliens, legal or otherwise. That interpretation accords with the text of the Fourteenth

Amendment (which distinguishes those *subject to* sovereign jurisdiction from those *within it* and bound by its laws); it supports the constitutionality of the Civil Rights Act of 1866 (which bestows birthright citizenship *only* upon those not subject to a foreign power); it fits with the naturalization laws (which from 1795 onward made everyone with foreign allegiances ineligible for naturalization); and it is reflected in contemporaneous statements made by members of Congress during the ratification debates and by this Court.

II. Neither British common law nor pre-ratification decisions suggest widespread adoption of *jus soli* principles before ratification.

Those supportive of the conventional view tend to assume that the Citizenship Clause incorporates principles of British common law. In particular, they point to the common law's embrace of *jus soli*, or citizenship based on the place of birth alone. These proponents also point to pre-ratification decisions seeming to endorse something like the common-law view.

That assumption fails. For one thing, the key phrase "subject to the jurisdiction thereof" does not come from common law or early American jurisprudence. Moreover, the British common law of citizenship was never adopted in America, while pre-ratification decisions from this country do not reflect any well-established treatment of children born in America to aliens. In the end, neither body of law provides evidence that overcomes the

textual, legislative, and linguistic evidence discussed above.

A. British common law.

When proponents of the conventional view invoke British common law, they typically turn to Blackstone's *Commentaries*.

Much of what Blackstone has to say *accords with* the position for which this brief advocates. Consider, for example, Blackstone's handling of the "allegiances" owed by subjects and visitors, which is analogous to the Fourteenth Amendment's distinction between those "subject to the jurisdiction" of the United States and those "within the jurisdiction" of the States. "Allegiance," Blackstone explained, is "distinguished by the law into two sorts or species, the one natural, the other local." William Blackstone, 1 *Commentaries on the Laws of England* 357 (1765). "Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth." *Id.* This permanent, irrevocable natural allegiance required not just obedience to the sovereign's laws, but also loyalty to the sovereign. *Id.* at 357–58. The "natural" allegiance owed by subjects is distinct from the "local" allegiance owed by visitors:

> Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases the instant the stranger transfers himself from this kingdom to another.

Id. at 358. This reflects the essential difference between being subject *to* a sovereign's jurisdiction (in the sense of being a subject or citizen) and being merely subject to its laws (as is true of many noncitizens).

But the British common law was never adopted wholesale in America. The most prominent difference is that British law treated the "natural allegiance" of those born within the King's dominions as *permanent*, impossible to renounce except with the sovereign's consent. *Id*. at 357–58. This "most vital constituent of the English common law rule" was "always … rejected" in this country. *Wong Kim Ark*, 169 U.S. at 714 (Fuller, C.J., dissenting). It had to be. The Revolutionary War prevented America from observing any such form of citizenship. Most early Americans were born as colonists within the King's dominions. Unless American citizenship was to depend on Britain's acquiescence, citizenship could not be so permanent. And so, unsurprisingly, courts treated American citizenship as extending to many Americans born as British subjects in the colonies. *See, e.g.*, *Gardner v. Ward*, 2 Mass. 244 (1805). Further, as detailed above, naturalization acts from 1795 and for years afterward required those seeking naturalization to reject all foreign allegiances, which would not have been possible under the Blackstonian scheme.

America's at-most partial embrace of British common law weakens the relevance of what Blackstone had to say about birthright citizenship: "The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such." 1 *Commentaries*

on the Laws of England at 361–62. As Vattel shows, that was *not* the approach to citizenship in most countries. Blackstone admitted as much, observing children "born of foreign parents" in France *were not* deemed French subjects under French law. *Id*. at 362.

It is unsurprising that other sovereigns rejected Blackstonian embrace of *jus soli*. For *jus soli* gives rise to serious problems in cases of children born to foreigners. As a matter of general legal theory, the sovereign-citizen relationship is a bilateral relationship dependent upon reciprocal duties of loyalty (by the subject or citizen) and protection (from the sovereign). *See Opinion of Attorney General Bates on Citizenship*, 10 Op. Att'y Gen. 382, 388 (Nov. 29, 1862). Just as a parent owes a natural duty only to his own children, so too, the thinking goes, a sovereign owes duties of protection only to its natural subjects. And citizenship, at least initially, must attach at birth, lest children be deemed to have no citizenship. So, in the case of children born to aliens abroad, the following question arises: To which sovereign does that child owe a duty of loyalty in his minority? Blackstone says that, in England, the domestically born children of aliens owed loyalty to the Crown. But what happens if the child's parents remain loyal to their home country? Does the law weaken the parent-child bond by mandating that the child act *solely* as a subject or citizen of his birth country? Or does it thrust him into the awkward position of owing dual loyalties that could expose him to inconsistent duties from rival sovereigns? Blackstone does not resolve these difficulties, though the only rule that

would is one under which the loyalties (and thus the citizenship) of the child follow that of his parents.

American law accounted for this, siding with Vattel. Most prominently, the First Congress declared that children living in America would (if under 21 years of age) become American citizens upon their parents' naturalization. *See* 1 Stat. at 103–04. Future naturalization laws operated similarly, as described above. This tying of the child's citizenship to that of his parents is at least consistent with early decisions. Consider, for example, *Inglis*, 28 U.S. 99. There, the Court considered whether John Inglis was an American citizen. He had been born in America to royalist parents around the time of independence; parents who eventually returned to Britain, taking John, still a minor, with them. The Court recognized that John's citizenship had to remain linked to that of his parents, at least during his minority: "John Inglis the son must be deemed to have followed the condition of his father, and the character of a British subject attached to and fastened on him also, which he has never attempted to throw off by any act disaffirming the choice made for him by his father." *Id*. at 124.

The key point is that America did not adopt wholesale the British common-law approach to citizenship. So, the doctrine as described by Blackstone is simply not helpful to assessing the background acceptance of *jus soli* that might have informed the views of the American public at ratification. Certainly, it is not nearly as helpful as the naturalization acts, which *do* reveal and adopt a

background principle relevant to naturalized citizens—a background principle the Fourteenth Amendment's text should be read to incorporate for the reasons laid out above.

B. American common-law decisions reveal no well-established tradition of *jus soli*.

Proponents of the conventional view also appeal to a smattering of judicial decisions that, they say, embrace Britain's *jus soli* view of citizenship, under which anyone born in the territory (with the exception of diplomats and foreign invaders) inherits citizenship automatically. Many of these cases do no such thing, and the small number of cases that embrace *jus soli* principles reveal no widely shared acceptance of *jus soli*.

Consider, for example, *Gardner v. Ward*. Some proponents of birthright citizenship describe this case as "embrac[ing] … *jus soli*." John Yoo & Robert Delahunty, *The Originalist Case for Birthright Citizenship*, 64 Nat'l Affairs (Summer 2025), https://perma.cc/CZY9-4G2L. In particular, they cite the following passage:

> I take it then to be established, with a few exceptions not requiring our present notice, that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance, which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the

> protection of that sovereign and to the other rights and advantages which are included in the term "citizenship." The place of birth is coextensive with the dominions of the sovereignty entitled to the duty of allegiance.

Id. (quoting *Gardner*, 2 Mass. 244) (opinion of Sewall, J.)). This establishes nothing relevant to the debate. The individual in question was born in the colonies before independence, and the question was whether his actions during the Revolution made him a British subject or an American citizen. The outcome did not turn on *jus soli*: everyone agreed that Gardner was born a British subject in the colonies, and that he may have (by word or deed) lost any right to claim American citizenship. As such, the case does not address whether, as the *jus soli* theory would have it, a child born in America to alien parents acquired citizenship by reason of his birthplace alone. It establishes only the undisputed proposition that, with undefined "exceptions not" relevant to the case, those born within a nation *typically* become citizens. That is just as true under a *jus soli* theory as it is under an approach to citizenship that denies citizenship to children born within the country while owing foreign allegiances.

That said, there is no denying that some pre-ratification sources *do* embrace birthright citizenship in its application to children born of aliens. One such decision is *Lynch v. Clarke*, 1 Sand. Ch. 583. But *Lynch* identifies no firmly established background principle. To the contrary, the case

acknowledges the absence of any "judicial decision upon this question." *Id.* at 663. Nonetheless, while riding circuit, Justice Swayne subsequently relied on *Lynch* in *United States v. Rhodes*, 27 F. Cas. 785 (C.C. D. Ky. 1866). That case concerned the citizenship of "those of the African race, who have been born and always lived within the United States," *id.* at 794; it did not address the citizenship of the children of aliens, illegal or otherwise. But the case contains some broad language supportive of a *jus soli* theory:

> All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons.

Id. at 788. Insofar as this case meant to suggest that those born in America to aliens possess the requisite allegiance, it is inconsistent with the Civil Rights Act of 1866. And that bill, passed by the People's representatives in hopes of codifying the requirements of citizenship, is a better indication of whether the public broadly embraced *jus soli*.

Justice Story's separate opinion in *Inglis* further shows that, in the years before ratification, *jus soli* was far from firmly established. That is because the opinion is internally inconsistent on this issue. At one point, Story embraces the common-law rule under which "the children even of aliens born in the country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." 28 U.S. at 164 (opinion of Story, J.); *see also id.* at 170. But elsewhere, he endorses Vattel's view "that children generally acquire the national character of their parents." *Id.* at 169 (citing Vattel, B.1, ch. 19, ¶¶212, 219). What is more, Justice Story subsequently rejected *jus soli*, at least in its purest form, in his *Commentaries on the Conflict of Laws, Foreign and Domestic* (1834). There, Story concluded that citizenship does not extend at least to *some* children born to aliens. Specifically, he endorsed a "reasonable qualification to the rule" that citizenship attaches to the place of birth in cases of children born domestically to parents "who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business." *Id.* §48. At the same time, Story conceded that the principles governing this situation were not "universally established." *Id.*

Further weakening any reliance on these sources, the historical record contains much evidence pointing in the opposite direction. The Solicitor General's brief collects many such examples. Consider also the *Opinion of Attorney General Bates on Citizenship*, prepared in 1862. Bates's opinion garnered substantial attention upon its

release. *See* Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause* at 33, 101 Notre Dame L. Rev. (forthcoming 2026), https://tinyurl.com/LashPrimaFacie. It begins by observing the dearth of authority on the topic of what it means to be a citizen; Bates found "no … definition, no authoritative establishment of the meaning of the phrase, neither by a course of judicial decisions in our courts, nor by the continued and consentaneous action of the different branches of our political government." 10 Op. Att'y Gen. at 383. Bates ultimately concluded that native birth makes one "*prima facie* a citizen"—in other words, people born in America are *presumptively* citizens, though the presumption may be rebutted by evidence that America, despite being the child's place of birth, is not "*his* country." *Id*. at 394–95. While Bates provides no exhaustive list of circumstances in which the presumption is rebutted, his opinion contradicts the *jus soli* approach, which grants birthright citizenship to everyone born here provided they are subject to the Nation's laws.

In the end, these pre-ratification statements are simply not of much use: they reveal no widely shared acceptance of *jus soli*. Nor do they diminish the significance of the naturalization acts or any of the other sources addressed above, in Section I.

III. *Wong Kim Ark* does not dictate a contrary answer.

The strongest argument for the conventional view rests not on the Constitution, but rather on this Court's flawed decision in *Wong Kim Ark*. 169

U.S. 649. That case involved a child born in the United States to permanent legal aliens from China. He traveled twice to China. *Id*. at 652–53. On his second return, the government forbade him from entry "upon the sole ground that he was not a citizen of the United States." *Id*. at 653. Wong Kim Ark sued, alleging that he acquired citizenship by reason of his birth alone. And this Court agreed. It construed the Fourteenth Amendment's Citizenship Clause as incorporating British common law. To quote the Court, the Citizenship Clause confers citizenship on everyone born in America, "with the exceptions or qualifications (as old as the rule itself) of children [1] of foreign sovereigns or their ministers, or [2] born on foreign public ships, or [3] of enemies within and during a hostile occupation of part of our territory, and [4] with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes." *Id*. at 693.

Wong Kim Ark was wrongly decided, as Chief Justice Fuller capably showed in his dissent. Indeed, the opinion rests on numerous faulty premises. Among them, the Court wrongly—and without any plausible justification—assumed that the Citizenship Clause "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *See id*. at 654. This makes little sense. The phrase "subject to the jurisdiction thereof" did not arise from the common law. There is, therefore, no reason to think the ratifying generation understood this novel phrase to incorporate common-law doctrine. And that is especially

true of the common-law rules regarding citizenship, which America *never* incorporated wholesale. *See above* 20–24.

Additionally, though *Wong Kim Ark* discussed the naturalization acts, it failed to appreciate the most important insight that those acts offer. For one thing, citizenship was understood to entail the renunciation of foreign allegiances, something no baby born to aliens can do. Beyond that, the naturalization acts all tied the citizenship of the child to the citizenship of the naturalized parents, *see above* 13–14, and never provided that different rules would apply to such children born in America. Beyond that, these laws at first made only white people eligible for naturalization, and in 1870 Congress removed this prohibition from *only* individuals of African heritage. People of Asian heritage had never been allowed to become naturalized citizens, and in fact did not gain that right for years afterward. It is simply not plausible that Americans, when they ratified the Fourteenth Amendment, believed they were conferring automatic citizenship on the native-born children of individuals who, because of their race, were ineligible to *apply for* citizenship.

To make matters worse, the Court gave short shrift to key evidence in its own decisions. Just four years after ratification, this Court said that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." *Slaughter-House*, 83 U.S. at 73. The *Wong Kim Ark* majority dismissed this statement as *dicta*—

and it is *dicta*, though *dicta* nearly contemporaneous with ratification and thus informative regarding the original understanding. *Wong Kim Ark* similarly contradicts the decision in *Elk v. Wilkins*, 112 U.S. 94. There, the Court held that certain Indians born members of an Indian tribe are not citizens. It reasoned that the phrase "subject to the jurisdiction thereof," covers *only* individuals born "completely subject to [the] political jurisdiction" of the United States, "and owing them direct and immediate allegiance." *Id*. at 102. Those born owing allegiance to quasi-sovereign tribes did not count. That holding squares with the understanding of "subject to the jurisdiction thereof" offered by this brief. The holding cannot be squared with the common-law principles *Wong Kim Ark* adopted. And indeed, the Court did not seriously try to harmonize *Elk* with the common law; it simply described the reasoning of *Elk* and treated the case as recognizing an *ad hoc*, Indian-specific exception to the Citizenship Clause.

But, even taken on its own terms, *Wong Kim Ark* does not resolve this case, because it did not decide whether children born to aliens *illegally* in the country automatically become citizens. Again, Wong Kim Ark's parents had "a permanent domicil[e] and residence in the United States." *Wong Kim Ark*, 169 U.S. at 653. The Court did not consider how or whether its decision would apply to the children of illegal immigrants. Indeed, its holding extends only to people born to aliens "permitted by the United States to reside here." *Id*. at 694. Thus, the question is not whether to apply *Wong Kim Ark*, but whether to extend it.

The Court should not extend *Wong Kim Ark* to cases involving children born to illegal immigrants. "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 195 n.16 (1999) (quoting Robert Bork, *The Tempting of America: The Political Seduction of the Law* 169 (1990)). And when a precedent contravenes the Constitution, as *Wong Kim Ark* does, "the rule of law may dictate confining the precedent, rather than extending it further." *NLRB v. Int'l Ass'n of Bridge Ironworkers, Local 229*, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing *en banc*).

Wong Kim Ark was wrongly decided. If it cannot be overruled, it must at least be cabined, lest the Citizenship Clause be neutered by judicial amendment. That is especially true regarding the Clause's application to the children of illegal immigrants. For if the Court extends *Wong Kim Ark* to cover their situation, it will, without constitutional justification, forever remove the issue from the democratic process, disabling "the people acting through their elected representatives" from addressing the citizenship of children born in America to illegal aliens. *Obergefell v. Hodges*, 576 U.S. 644, 688 (2015) (Roberts, C.J., dissenting). Since the Nation's founding, the American people have adopted laws designed to protect the country from individuals "unduly susceptible to foreign influence." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 869 n.11 (1995) (Thomas, J., dissenting). That is why the Constitution itself allows only natural-

born citizens to serve as President. *See* U.S. Const., art. II, §1, cl.5. Millions of Americans share these suspicions today. And many of them suspect that the children of parents who entered our country illegally, and who may retain foreign ties, are less likely, as a class, to put the well-being of our country first. Whatever the merits of that view, the Constitution does not deny the American people the right to address it through the democratic process. Lest they be denied that right, this Court should not extend *Wong Kim Ark* to the present context.

CONCLUSION

This Court should reverse the judgment below.

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