No. 25-365

In the Supreme Court of the United States

DONALD TRUMP, 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 ILAN WURMAN IN SUPPORT OF PETITIONERS

ILAN WURMAN*
University of Minnesota Law School
229 S 19th Ave.
Minneapolis, MN 55455
(612) 624-8816
iwurman@umn.edu

**Counsel of Record*

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[*]

Amicus is the Julius E. Davis Professor of Law at the University of Minnesota Law School, where he teaches and writes about constitutional law and the Fourteenth Amendment. He is the author of THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020), the article *Jurisdiction and Citizenship*, 49 Harv. J.L. & Pub. Pol'y 315 (2026), and several other articles on the original meaning of the Fourteenth Amendment. He is interested in the sound development of the common law of birthright citizenship. The University of Minnesota is mentioned for identification purposes only.

SUMMARY OF THE ARGUMENT

This brief explains the common law of birthright subjectship and its application to unlawfully present aliens and temporary sojourners. It further explains the connection between the common-law rule and the jurisdictional language of the Fourteenth Amendment. It makes four principal points.

First, mere birth on the sovereign's soil has never been the rule for birthright subjectship or citizenship. Rather, the rule has always been birth in the realm to *parents under the sovereign's protection*, in exchange for which the parents owed the sovereign allegiance. "Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, *while the parents are resident there*

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[*] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission.

under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." *Inglis* v. *Trustees of Sailor's Snug Harbor*, 28 U.S. 99, 164 (1830) (concurring opinion of Story, J.) (emphasis added). This exchange of allegiance and protection was often described as a "mutual compact." Lawful aliens generally fell within the scope of the rule, while foreign soldiers and ambassadors did not.

Second, illegally present aliens would likely have fallen outside the scope of the rule. Throughout English history, aliens, to be under the king's "protection," required the sovereign's express permission to enter the realm through a formal "safe-conduct" or through statutory permission. For example, Magna Carta extended protection to all aliens from friendly nations, but not if "they have been previously and publicly forbidden." Magna Carta ch. 30 (1297). The bottom line: without safe-conduct or statutory permission, aliens would not have been under the protection of the king and would not have entered a mutual compact with the sovereign. Any child born would not have been a birthright subject.

Third, the case of temporary sojourners is more difficult. Temporary sojourners were under the protection of the king and therefore their children would arguably have been considered birthright subjects. Leading up to the Fourteenth Amendment, however, several American authorities argued the common law did not or should not apply to temporary visitors, particularly because increased international travel resulted in many double allegiances. Justice Joseph Story and Henry St. George Tucker, in treatises, suggested that the rule should, or did, exclude temporary visitors. Others thought so, too, including Louisiana

military authorities during the Civil War and the leading drafters of the Civil Rights Act and Fourteenth Amendment.

Fourth, the legal effect of the jurisdictional language of the Fourteenth Amendment is likely consistent with the narrower rule. Many officials and commentators thought that temporary visitors were not subject to the "complete" jurisdiction of the United States in the sense of the amendment. Antebellum evidence also suggests some respects in which unlawfully present aliens are not fully subject to U.S. jurisdiction in the sense of the constitutional rule. That is because protection was a condition precedent to jurisdiction.

ARGUMENT

I. The common-law rule: the parents must have been under the protection of the sovereign.

The common-law rule of birthright subjectship (later birthright citizenship) has never been mere birth on the sovereign's soil. The rule has always been birth on the sovereign's soil to parents under the sovereign's protection. In exchange for that protection, the parents owed the sovereign allegiance. The parents and sovereign were thus in what was frequently described as a mutual compact. Lawfully present aliens generally fell within the scope of this rule, while foreign soldiers and ambassadors did not.

A. Coke

The common-law rule of birthright subjectship was first articulated in detail in *Calvin's Case*, a 1608 decision reported by Sir Edward Coke. *Calvin* v. *Smith*, 77 Eng. Rep. 377 (K.B. 1608). Robert Calvin's guardians brought suit to inherit lands in England.

Calvin had been born in Scotland after James VI of Scotland ascended to the throne of England; the question was whether Calvin was a natural-born subject of James in his political capacity as ruler of Scotland, or in his natural capacity and thus as ruler of all his realms.

Coke began by explaining the mutual and reciprocal obligations of protection and allegiance. "[B]etween the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects." 77 Eng. Rep. at 382. This creates a "duplex et reciprocum ligamen"—a dual and reciprocal tie. *Ibid.* "[P]rotectio trahit subjectionem, et subjectio protectionem," that is, protection draws subjection, and subjection draws protection. *Ibid.* Allegiance here meant both loyalty and fidelity to the sovereign as well as subjection, that is, being within the sovereign's power and control.

Generally, this allegiance followed from the fact of birth because from that moment the infant was under the protection of, and therefore would owe an allegiance to, the king. *Cf. id.* at 382-83 ("ligeance doth not begin by [an] oath"). A child born in the realm to a natural-born subject would thus also be a natural-born subject because his parents would have been under the sovereign's protection and within the sovereign's allegiance. The child would therefore receive protection at birth, owe future allegiance, and any child born in the next generation would also receive protection in turn.

An alien born in a foreign land did not, however, receive any protection in infancy; the alien owed a lo-

cal allegiance immediately upon entering the realm in exchange for a local protection he was to receive while present there. This "local ligeance," Coke explained, applied "when an alien that is in amity cometh into England, because as long as he is within England, *he is within the King's protection*; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other." *Id.* at 383-84 (emphasis added).

This local allegiance and protection, Coke explained, was sufficiently strong to make natural-born subjects of children born to the alien while in the realm. This "local obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is a natural born subject." *Id.* at 384. In other words, an alien who exchanged allegiance for protection becomes a *subject* of the king while in the king's lands. And that alien's child becomes a natural-born subject.

Coke then explained why the rule did not extend to invading armies: It is "nec cœlum, nec solum"—neither the climate nor soil—that makes a subject, but rather being born "under the ligeance of a subject" and "under the protection of the King." *Ibid.* To be a natural born subject, then, one must be born under the ligeance—connection—*of a subject*. That is, the child had to be born to parents under the king's protection, which protection made the parents subjects of the king. Soldiers of invading armies were not under the king's protection and any child born was not a birthright subject of the king's, "though he be born upon his soil." *Ibid.*

In short: Under the common-law rule as articulated by Coke, mere birth on the sovereign's soil was insufficient. One had to be born to parents who were at the time of the child's birth under the sovereign's protection. This rule extended to alien parents who, although not having been protected since infancy, nevertheless exchanged a local protection for a local allegiance. It did not extend to parents in foreign armies.

B. Blackstone

William Blackstone's commentaries, influential on the American founding generation, repeated these same themes. "Allegiance is the tie, or *ligamen*, which binds the subject to the king, *in return for* that protection which the king affords the subject." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *366 (George Sharswood ed., 1866) (emphasis added). "[A]llegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully." *Id.* at *370.

Blackstone emphasized the immediate nature of this exchange with aliens. "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." *Ibid.* As Coke had, Blackstone also wrote that this exchange was sufficient to confer natural-born status on any children born to such aliens. *Id.* at *373 ("The children of aliens, born here in England, are, generally speaking, natural-born subjects.").

The commentaries go on to emphasize that the reason for this rule is because of the parents' status—namely, whether they were under the sovereign's protection. The widely read Sharswood edition, promi-

nent in the years leading up to the adoption of the Fourteenth Amendment, contains a note to this discussion from a previous editor: "Unless the alien parents are acting in the realm as enemies; for my lord Coke says, it is not *coelum nec solum*, but their being born within the allegiance and under the protection of the king." *Id.* at *373 n.15. Once again, the allegiance and protection of the parents—here, the enemy invaders—determined the status of the child born within the sovereign's domains.

Blackstone then made the point about ambassadors: "[T]he children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent," Blackstone wrote, "so, with regard to the son also, he was held . . . to be born under the king of England's allegiance, represented by his father the ambassador." *Id.* at *373. Once again one sees that the desideratum for the birthright rule was that the parents of any child born must have been under the protection (and therefore within the allegiance) of the sovereign. Foreign soldiers and ambassadors had not entered this this mutual compact and their children were excluded from the rule of birthright subjectship.

C. American authorities

American authorities discussed the birthright rule in the context of revolution, war, and occupation. These discussions all centered on the status of the parents and the sovereign from whom they drew protection.

John Inglis was born in New York City in 1776, but it was unclear if he was born prior to Independ-

ence, between Independence and the British occupation of the city, or after the British occupation. John Inglis's father was the infamous royalist, Charles Inglis. It was known that with or just prior to the British departure from New York in 1783, Charles and his son returned to Great Britain, and John never returned to the United States. The relevant question this Court had to decide was whether John Inglis was a citizen who could inherit land in New York or an alien who could not. *Inglis* v. *Trustees of Sailor's Snug Harbor*, 28 U.S. 99, 100-02, 123-26 (1830).

"[T]he doctrine of allegiance," the Court explained, "rests on the ground of a *mutual compact* between the government and the citizen or subject . . . . It is the tie which binds the governed to their government, in return for the protection which the government affords them." *Inglis*, 28 U.S. at 124-25 (discussing *M'Ilvaine* v. *Coxe's Lessee*, 8 U.S. 209 (1808)) (emphasis added). The Court's decision was significant because it held that during a revolution in government, each subject had the right to elect an allegiance. *Inglis*, 28 U.S. at 121.

Given this right of election, the Court decided that it did not matter precisely when John Inglis had been born. That is because his condition necessarily followed that of his father: "[H]is infancy incapacitated him from making any election for himself," and therefore John's "election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority." *Id.* at 121-22, 126. In other words, the status of the parents is what mattered, and, at least during a revolution, the relevant question was with whom the parents had exchanged protection and allegiance.

Justice Story, in a separate opinion in the case, explicitly stated the role of the parents and the relevant status more generally: "Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, *while the parents are resident there under the protection of the government*, and owing a temporary allegiance thereto, are subjects by birth." *Inglis*, 28 U.S. at 164 (concurring opinion of Story, J.) (emphasis added). That restatement of the common-law rule puts beyond doubt that birth alone was insufficient; rather, birth to parents who were under the sovereign's protection was the decisive consideration.

Additionally, Story maintained that even during temporary enemy occupation, the children born of native parents retain their native allegiance at least until a permanent cession of territory. "[T]he children of the natives, born during such temporary occupation by conquest, are, upon a reconquest or reoccupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy." *Inglis*, 28 U.S. at 156. In other words, children born to the enemy in occupied territory, as Coke had said, are not birthright subjects; but children born to natives in such territory are.[1] The status of the parents is what mattered.

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[1] Coke wrote that if an enemy force occupies a town and the soldiers have issue there, *their* issue are not birthright subjects. Coke did not say anything about the children born to the natives during such occupation. *Calvin* v. *Smith*, 77 Eng. Rep. 377, 384 (K.B. 1608).

Although Story did not explain why the rule of postliminy applied, native residents surely continue to look to their original sovereign for protection and continue to owe that sovereign allegiance, even if they are temporarily under the power of an occupying force. The mutual compact between natives and their sovereign is not dissolved by mere temporary occupation. Story made the very point for this Court in a related context: the allegiance to the occupier "was a temporary allegiance, which did not destroy, but only suspend their former allegiance"; "[i]t did not annihilate their allegiance" to their original sovereign. *Shanks* v. *Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830).

Story applied these rules to the case of John Inglis. Because his "parents were under the protection of, and adhering to the British government de facto," Story concluded, he "was to all intents and purposes an alien born." *Inglis*, 28 U.S. at 167. Parental status—whether the parents were under the protection (and thus within the allegiance) of the sovereign—is what mattered.

Two scholars recently summarized the importance of parental status under both British and French law: "British and French jurists and commentators . . . invoked the father's legal power over his minor children to explain why his allegiance determined that of his child. The father's power within the family meant that he could compel his family to move or act in ways that affected subjecthood." Nathan Perl-Rosenthal & Sam Erman, *Inventing Birthright: The Nineteenth-Century Fabrication of* jus soli *and* jus sanguinis, 42 L. & HIST. REV. 421, 427 (2024).

Focusing on the status of the parents makes sense not only for this reason—no rule of allegiance can su-

persede that natural relationship between parent and child—but also because it is the only explanation faithful to the sources for why birthright subjectship did not apply to the children born of ambassadors or invading soldiers.

II. Safe-conducts: the sovereign's protection extended only to aliens with permission to be in the realm.

The next question is whether the common-law rule applied, or would have applied, to unlawfully present aliens. As far as this author is aware, no decision in England or America addressed this question prior to 1868. (Nor have any of this Court's decision squarely addressed it since.)

The rule is unlikely to have applied because such parents would not have been under the protection of the king. As an initial matter, it should be recalled that, as Coke explained, a child born to aliens was a natural-born subject because his *parents* were subjects of the king while in the realm. Or as this Court has explained, protection and allegiance constituted a mutual compact between parent and sovereign. It may be doubted whether aliens who come to the realm unlawfully against the king's wishes would be considered "subjects" of the king and to have entered a mutual compact.

More specific evidence also suggests that the rule would not have applied to unlawfully present aliens. Until the fourteenth century or so, all aliens required a "safe-conduct" to enter the realm. A safe-conduct expressly extended the king's protection. In the thirteenth and fourteenth centuries, statutes replaced individual safe-conducts, although such passes were

still required for enemy aliens. The bottom line: without the permission of the sovereign in a safe-conduct or a statute extending protection, an alien would not have been under the protection of the king.

A. Safe-conducts

In the twelfth and thirteenth centuries, merchants generally required a grant of "safe-conduct" to enter and engage in trade in England. *See, e.g.*, KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 25-29 (2001). These safe-conducts guaranteed the bearer the king's "protection."

The language was so common that a few examples suffice to illustrate. A safe-conduct issued to merchants from Cologne in 1157 guaranteed they would be in the king's "custody and protection" as if they "were my men and friends." KIM, *supra*, at 27. In 1316, the king issued letters of safe-conduct to two French knights; the letter stated, the knights were taken "en nostre protection." 2 THOMAS RYMER, FOEDERA, CONVENTIONES, LITERAE, ET CUJUSCUNQUE GENERIS ACTA PUBLICA INTER REGES ANGLIAE 104 (3d ed. 1739). The *Foedera* is littered with such safe-conducts, often described as "protectione & conductu." Another example from the patent rolls: "William of Wynum, provost of Barbeflet, has letters of protection for himself and his men when they come into the land and power of the king with their goods and merchandise." PATENT ROLLS OF THE REIGN OF HENRY III, 1225–1232, at 324 (London: 1903) (author's translation from Latin).

The relevant passes were often described as "*Conductu, litteras de conductu, litteras de protection.*"

Laurence Jean-Marie (Susan Nicholls trans.), "Close Relations? Some Examples of Trade Links Between England and the Towns and Ports of Lower Normandy in the Thirteenth and Early Fourteenth Centuries," in C.P. LEWIS ED., ANGLO-NORMAN STUDIES XXXII. PROCEEDINGS OF THE BATTLE CONFERENCE 2009, at 96, 104 (2010).[2] Another scholar has described these various letters as "letters of protection and safe-conduct," and notes they were the "forms of written permission . . . issued by the English crown to aliens since the thirteenth century." W. Mark Ormrod, *Enmity or Amity? The Status of French Immigrants to England during an Age of War c.1290–c.1540*, 105 HIST. 28, 41, 56 (2020).

A more general study of safe-conducts in the medieval period concludes such conducts were "a protection granted to an individual or group traversing a region or travelling to a particular destination." Christiane de Craecker-Dussart, "L'evolution du saufconduit dans les principautés de la Basse Lotharingie, du Ville au XIVe siècle," MOYEN AGE: REVUE D'HISTOIRE ET DE PHILOGIE, vol. LXXX, at 185, 185-86 (1974) (author's translation). One of the two elements in the notion of safe-conducts was "protection." *Id.* at 188.

Returning to English authorities, Blackstone summarized safe-conducts as follows: "[D]uring the continuance of any safe-conduct, either express or implied, the foreigner is under the *protection* of the king and the law." 4 BLACKSTONE, *supra*, at *69 (em-

[2] For specific "letters of protection," see also *id.* at 102 & n.49, 110 & n.118, 111 & n.121.

phasis added). One scholar has explained that a safe-conduct "was the protection extended to alien merchants under the English domestic law of Magna Carta." Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 874-75 (2006).

B. Statutes

Eventually, the king's protection was granted statutorily and more generally to aliens from friendly nations. Magna Carta guaranteed to friendly aliens "safe and secure conduct" to engage in trade "unless they have been previously and publicly forbidden." Magna Carta, Ch. 30 (1297). The Carta Mercatoria of 1303 was a general grant of safe-conduct to merchants from several European provinces. KIM, *supra*, at 37. The charter specifically guaranteed them "protectione nostra." NORMAN GRAS, THE EARLY ENGLISH CUSTOMS SYSTEM 260 (1918). A 1353 statute provided clearly and unequivocally: "Merchant Strangers . . . may safely and surely *under our Protection* and safe-conduct come and dwell in our said Realm." 27 Edw. III, Stat. 2, c. 2, 1 STATUTES OF THE REALM 333 (emphasis added).

It is no surprise, then, that Coke and Blackstone presumed that friendly aliens were under the protection of the king. Such aliens no longer needed specific safe-conducts to ensure they were within the king's protection. The sovereign's consent, expressed in various statutes, already guaranteed that protection. Their children born in the realm, as a result, were birthright subjects.

C. American authorities

The above sources strongly suggest that aliens who came unlawfully would not have been under the king's protection. There is more specific evidence of this proposition stemming from the War of 1812. In *Clarke v. Morey*, Chancellor Kent addressed a defendant's argument that he did not have to repay a debt because the plaintiff was an enemy alien, being a British subject during the War of 1812. *Clarke* v. *Morey*, 10 Johns. 69 (N.Y. 1813).

"[I]f the plaintiff came to *England* before the war, and continued to reside there, by the license and under the protection of the king, he might maintain an action upon his personal contract," Kent summarized the English rule, "and that if even he came to *England* after the breaking out of the war, and continued there under the same protection, he might sue upon his bond or contract." *Id.* at 71. Alien enemies with permission to stay, in other words, were under the protection of the nation—and subject to its municipal jurisdiction and could sue and be sued like anyone else. (Part IV shall revisit this jurisdictional connection.) The court applied the rule to the case:

> The license is implied by law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the executive shall think proper to order the plaintiff out of the *United States;* but no such order is stated or averred. . . . Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us. *A lawful resi-*

> *dence implies protection, and a capacity to sue and be sued.*

Id. at 72 (emphasis added); *see also id.* at 73 (observing that in Europe "the subjects of the enemy, . . . *so long as they are permitted to remain in the country*, are to be protected in their persons and property, and to be allowed to sue as well as to be sued" (emphasis added)). A "lawful residence," meaning a residence with the permission of the sovereign, places even an enemy alien under the protection of the sovereign and subjects him to the nation's municipal jurisdiction.

In the case of one Charles Lockington, the Chief Justice of Pennsylvania, subsequently affirmed unanimously by the full state supreme court, also addressed the rights of enemy aliens during the war. Lockington was a British subject who, pursuant to presidential proclamation under the Alien Enemies Act of 1798 and the rules of the local marshal, was required to remove to Reading, away from the coast. He was found in Philadelphia, however, and arrested.

The Chief Justice denied Lockington's writ of habeas corpus. Because his presence was forbidden, he was not under the sovereign's protection: "He has no municipal rights to expect from us. We gave him no invitation, and promised him no protection." *Lockington's Case*, 5 AM. L.J. 92, 97 (1814) (Pa. 1813), *aff'd*, *Lockington* v. *Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1813), 5 AM. L.J. 301 (1814). Here again the connection between permission to be present, protection, and jurisdiction is evident.

Chancellor Kent summarized the doctrine in his subsequent treatise: "Even alien enemies, resident in the country, may sue and be sued as in time of peace;

for protection to their persons and property is due, and *implied from the permission to them to remain*, without being ordered out of the country by the president of the United States," he wrote. "The lawful residence does, *pro hac vice*, relieve the alien from the character of an enemy, and entitles his person and property to protection." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *63 (5th ed. 1844) (emphasis added). *Even* as to alien enemies, Kent wrote, a lawful residence and permission to remain imply protection.

This Court seems to have agreed with this rule. In *Wong Kim Ark*, it held that Wong Kim Ark's parents "are entitled to the protection of and owe allegiance to the United States, *so long as they are permitted by the United States to reside here*; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 694 (1898) (emphasis added).

To summarize: the relevant rule was whether alien parents were under the protection of the sovereign. Ambassadors, foreign soldiers, and enemy aliens without permission to be in the realm had no such protection in the relevant sense. No case specifically addressed the question of an alien friend—an alien from a friendly nation—who nevertheless came illegally. But the sources suggest that such aliens also would not have been under the sovereign's protection because without safe-conduct or statutory permission to be in the realm.

III. The relevance of domicile: the uncertainty in the common-law rule prior to the Fourteenth Amendment.

American judges and treatise writers rarely discussed birthright citizenship in the context of temporary sojourners. In an era with effectively no immigration restrictions and relaxed naturalization rules, most aliens who came to the United States came to settle. The evidence that does exist, however, suggests that whether temporary sojourners were included in the rule of birthright citizenship was at best unsettled.

A. Court decisions

On the one hand, temporary visitors were under the temporary and local protection of the sovereign. That is why the Assistant Vice Chancellor of New York's Court of Chancery concluded in 1844 that a child born to temporary sojourners—temporary because, although they had lived in the United States for several years, they had never expressed an intent to domicile—was a birthright citizen. *Lynch* v. *Clarke*, 1 Sand Ch. 583 (N.Y. Ch. 1844). "By the common law," Judge Sandford concluded, "all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the *status* or condition of their parents." *Id.* at 639.

Although it may appear that the judge held that the only material point is the fact of birth in a particular territorial jurisdiction, that reading would be mistaken. Judge Sandford recognized, for example, that the status of one's parents as ambassadors would render one not a birthright citizen. *Id.* at 658. The point he was making was simply that the status

of the parents as *citizens* or *aliens* was irrelevant. The entire discussion was in the context of the parents' "political" condition—that is, their citizenship or alienage. *See id.* at 644; *see also id.* at 589-90, 596-96 (argument of counsel). He did not question that the parents still had to be under the protection and within the allegiance of the sovereign. The decision is, nevertheless, important evidence for the proposition that temporary sojourners would have been included under that common-law rule.

Sandford's opinion on the merits of that question was "in considerable tension," however, with subsequent decisions by the New York courts. Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 415 n.39 (2020). In *Ludlam v. Ludlam*, the intermediate appellate court addressed the common-law rule applicable to a child born to an American citizen sojourning abroad, the mirror image of the problem at issue in *Lynch*. *Ludlam* v. *Ludlam*, 31 Barb. 486 (N.Y. Gen. Term 1860), *aff'd*, 26 N.Y. 356 (1863). At issue was the right of inheritance as of 1847, a few years prior to the enactment in 1855 of a statute specifically providing that children born abroad to U.S. citizen parents were themselves citizens. Hence the common-law rule, whatever it was, was determinative.

The judges concluded in a 2-1 decision that the child was an American citizen. "By the common law when a subject is traveling or sojourning abroad, either on the public business, or on lawful occasion of his own, with the express or implied license and sanction of the sovereign, and with the intention of returning," the majority concluded, that subject "continues under the protection of the sovereign power" of

his permanent allegiance and "so he retains the privileges and continues under the obligations of [that] allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship." *Ludlam*, 31 Barb. at 503.

The child had returned to the United States before the age of majority; the court presumed that the foreign country would not treat such a child as being a citizen of that foreign country. By this logic, its ruling would apply equally to a temporary sojourner in the United States. *Id.* at 503-04 ("It may be objected that the country in which such children are born, might claim them as citizens by reason of their birth. I apprehend not, when the residence of the parents was merely temporary, and when the children were removed before their majority.").

The New York Court of Appeals unanimously affirmed the majority's decision, but it "supposed" that a child born of temporary sojourners might be able to elect citizenship in one of the two countries when reaching the age of majority. *Ludlam* v. *Ludlam*, 26 N.Y. 356 (1863).

These court decisions thus reflected three possibilities: that children born to temporary visitors were birthright citizens; that such children were not birthright citizens; or that such children could elect U.S. citizenship by renouncing their parents' allegiance upon reaching the age of majority.

B. Other evidence

Other antebellum and postbellum evidence demonstrates that several scholars, judges, and offi-

cials thought that temporary sojourners were excluded from birthright citizenship. Justice Story, in his commentaries on conflict of laws, wrote that a "reasonable qualification" to the rule of birthright citizenship is "that it should not apply to the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 48 (1834). He admitted that such a rule was not "universally established." *Ibid*.

In another antebellum treatise, by Henry St. George Tucker, the son of the more famous Virginian, law professor, and constitutional commentator St. George Tucker, the author discussed the "common law doctrine of allegiance and alienage." 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 57 (1836). He then stated the traditional birthright rule. "But," he added,

> though a child be born in the country, yet if both his parents were strangers not designing a permanent change of country, it would be sufficiently obvious, that, as he must follow the condition and succeed to the rights of his parents, he would on the principles of natural reason be considered as much a stranger to the country as his father.

Ibid.

The Texas Supreme Court addressed birthright citizenship in the context of Texas's war for independence against Mexico. *Hardy* v. *De Leon*, 5 Tex. 211 (1849). At issue was a tract of land in Texas that had belonged to one Sylvester De Leon, who was for-

cibly removed to Louisiana by the Government of Texas during the war. The infant plaintiff was born in Louisiana, and the question was his right to inherit as a citizen of Texas. The Court held that (1) the status of the child followed that of the parents, and (2) because the parents were involuntarily removed from Texas, the child born would be considered as having citizenship in Texas, where the parents had been legally domiciled. *Id.* at 237.

There is still more evidence. In responding to the *Dred Scott* decision in Congress, Ohio congressman Philemon Bliss argued that the "few exceptions" to birthright citizenship were for "children of foreign ministers or temporary sojourners." CONG. GLOBE, 35th Cong. 1st sess. 210 (Jan. 6, 1858) (Rep. Bliss). The speech was reprinted in Ohio and Washington newspapers, and as a pamphlet also in the nation's capital.[3]

One postbellum example is provided by the funeral oration the famous historian George Bancroft delivered after Lincoln's death. "[E]very one born on [United States] soil, with the few exceptions of the children of travellers and transient residents, owes them a primary allegiance." George Bancroft, *Oration at Obsequies of Abraham Lincoln,* PULPIT AND

[3] "Speech of Hon. P. Bliss, In the House of Representative on the 6th of January," *The Ashland Union*, Feb. 3, 1858, Vol. XII, No. 35, at 1 (Ohio); "Citizenship: State Citizens, General Citizens, Speech of Hon. Philemon Bliss," *The National Era*, Feb. 11, 1858, Vo. XII, No. 580, at 23 (Washington, D.C.); PHILEMON BLISS, CITIZENSHIP: STATE CITIZENS, GENERAL CITIZENS: SPEECH OF HON. PHILEMON BLISS, OF OHIO; DELIVERED IN THE HOUSE OF REPRESENTATIVES, JANUARY 7, 1858 (1858).

ROSTRUM, Nos. 34 & 35, Apr. 25, 1865, at 5. The oration was also reprinted in several newspapers.[4]

Perhaps most significantly, the Department of the Gulf during the Civil War had to determine whether children of French nationals born in Louisiana could be conscripted. The commanding general stated that his opinion "has always been that when parents of foreign birth become permanently domiciled in the U.S. that children born in this country are citizens by birth and liable to the duties and entitled to the privileges of American Citizens."[5]

Similarly, in 1863, the judge of the provost court in the Department of the Gulf wrote that to avoid conscription despite birth on U.S. soil, petitioners would have to establish that neither parent "was born in the United States" nor "resided in the United States more than twenty-one years."[6]

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[4] "Oration by the Honorable Geo. Bancroft," *The New York Herald*, No. 10,467, Apr. 26, 1865, at 8 (N.Y.); "Funeral Address," *Bedford Inquirer*, Vol. 38, No. 19, May 5, 1865, at 1 (Pa.); "Abraham Lincoln," *The Xenia Sentinel*, Vol. 2, No. 24, May 5, 1865 at 1 (Ohio); "Miscellaneous," *Ellsworth American*, Vol. 11, No. 17, May 12, 1865, at 1 (Me.).

[5] Note of Major General Hurlbut, Feb. 5, 1865, in Report of the Acting French Consul at New Orleans, Feb. 25, 1865, in Notes from the French Legation in the United States to the Department of State, 1789-1906, National Archives Microfilm Publications, Microcopy No. 53, Roll 16, Volumes 27-29, March 19, 1865-February 4, 1867, NAID: 188124588, at 70, available at https://catalog.archives.gov/id/188124588?objectPage=70.

[6] Judge of the Provost Court to the Provost Marshal General, Department of the Gulf, Nov. 12, 1863, NARA Record Group 94: Records of the Adjutant General's Office, Series: Letters Received, File Unit: 1863 - Atocha, A A - File No. G480,

The question of conscription was raised in several newspapers. The *New York Times* in 1862 suggested an even broader exemption for children born to foreigners: "The children of these foreigners"—of a foreigner "who has not thrown off his nationality"—"even if born within the United States, necessarily follow the condition of their parents, and cannot be compelled to assume the title and obligation of an American citizen." Such children can be conscripted only if they had undertaken "formal naturalization" or had exercised "the rights of the American citizens," presumably if it could be proved that they had voted in an election. "Concerning Drafting, Again," THE N.Y. TIMES (Aug. 6, 1862), at 5.[7]

Several newspapers reprinted this argument,[8] though the argument was disputed by a subsequent letter to the *Times*.[9] These newspapers are not as probative as treatises and adjudications, whether ju-

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NAID: 85651033, available at https://catalog.archives.gov/id/85651033?objectPage=7.

[7] Available at: https://timesmachine.nytimes.com/timesmachine/1862/08/06/78694899.html?pageNumber=5.

[8] Including the *Boston Evening Transcript* (Aug. 22, 1862), *The Providence Daily Evening Press* (Aug. 8, 1862), *Hartford Weekly Times* (Aug. 16, 1862), *Dubuque Daily Herald* (Aug. 17, 1862), *The Louisville Daily Journal* (Aug. 28, 1862), *The Sioux City Register* (Sep. 13, 1862), and *The Democratic Press* (Sep. 4, 1862).

[9] "Naturalized Citizens and the Draft," THE N.Y. TIMES (Aug. 10, 1862), at 8, available at https://timesmachine.nytimes.com/timesmachine/1862/08/10/78990736.html?pageNumber=8.

dicial or military. But they again tend to show that although temporary visitors were under the protection of the United States, whether the birthright rule did or ought to apply to them under the common law was contested by the time of the Civil War.

IV. The Fourteenth Amendment

A. The requirement of a complete jurisdiction

The Fourteenth Amendment's jurisdictional phrase, "subject to the jurisdiction" of the United States, likely had similar legal effect to the understanding of the birthright rule articulated here.

The Fourteenth Amendment was intended to have identical effect to the Civil Rights Act of 1866, which provided citizenship to persons born in the United States "and not subject to any foreign power," but to clarify that Native Americans still subject to tribal authority were excluded. Specifically, the Civil Rights Act excluded "Indians not taxed," which was a constitutional term taken from the Census and Apportionment Clause. U.S. CONST. art. I, § 2, cl. 3. This created confusion as to whether this was a property requirement, leading the drafters of the Fourteenth Amendment to simplify the citizenship language to "subject to the jurisdiction thereof." *See* Wurman, *Jurisdiction and Citizenship*, *supra*, at Parts III.A.2, III.B.1.

The Indian tribes were, however, subject to U.S. jurisdiction in many respects. They were within U.S. territory, and they were even subject to some degree of U.S. criminal jurisdiction. For example, the General Crimes Act of 1817 established federal court jurisdiction over crimes committed within tribal terri-

tory in which one of the parties was a non-tribal member. 3 Stat. 383 (Mar. 3, 1817). They were also subject to the U.S. government's military powers.

Thus, Senators Trumbull and Howard, the leading drafters, explained that the phrase meant a "full and complete jurisdiction," a jurisdiction "coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now." CONG. GLOBE, 39th Cong., 1st sess. 2895 (May 30, 1866) (Sen. Howard). Tribal members were excluded because "although born within the limits of a State," they were not "subject to this full and complete jurisdiction." *Ibid*. For example, "The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe." *Ibid*.

This jurisdictional language was consistent with a prominent antebellum, common-law case by Chancellor Kent. The Indian tribes are "placed under our protection, and subject to our coercion, so far as the public safety required it, and no further," Kent wrote, demonstrating again the connection between protection and jurisdiction (coercion). Neither the states nor the United States, he continued, interfere "with the disposition, or descent, or tenure of their property, as between themselves," or "prove[] their wills," or apply the school and poor laws, or subject them to the "laws of marriage and divorce" or to the "laws of the *United States,* against high treason." *Goodell v. Jackson ex dem. Smith*, 20 Johns. 693, 710 (N.Y. 1823). Thus, "[t]hough born within our territorial limits, the *Indi-*

ans are considered as born under the dominion of their own tribes." *Id.* at 712. They were under the partial protection and partial jurisdiction of the United States, but not its full and complete protection and jurisdiction.

The jurisdictional language was also consistent with the birthright rule respecting ambassadors and invading armies. Ambassadors were subject at best to the law of nations, not to the municipal (domestic) law. Similarly, foreign armies and enemy aliens were subject to martial rather than municipal law. The reason was neither group was under the protection of the sovereign. Wurman, *supra*, at Parts II.A-B. Thus neither group was subject to the complete, municipal jurisdiction of the United States in the sense of the amendment.

B. Application to temporary sojourners

Interestingly, more than one Secretary of State after the Fourteenth Amendment's adoption thought that temporary visitors and their children were not subject to the jurisdiction of the United States in the relevant sense. Wurman, *Jurisdiction and Citizenship*, *supra*, at Part IV.B.2. How might temporary sojourners not have been subject to this full and complete jurisdiction? The sources did not say. One possible answer, however, is conscription: the Louisiana military authorities thought it impermissible to conscript temporary visitors or their U.S.-born children. Temporary visitors were thus not subject to the complete executive (or perhaps legislative) jurisdiction of the United States.

Another is supplied by analogy to general and specific jurisdiction of courts: domiciled residents are

subject to the general—the complete—jurisdiction of the courts in their place of domicile, whether they are present there or not, a jurisdiction that does not extend to temporary visitors. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile.").

Still another sense is that the law of nations provided that the sending nation continues to exercise a legislative jurisdiction over the personal status rights—such as marriage, legitimacy, and citizenship—of their citizens temporarily abroad. *See, e.g.*, HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 100 (1836) ("There are also certain cases where the municipal laws of the state, civil and criminal, operate beyond its territorial jurisdiction," and in particular the laws relating to "civil condition and personal capacity of its citizens operate upon them even when resident in a foreign country."); *see generally* Wurman, *supra*, at Part IV.B.3.

Once a foreigner became domiciled, however, there was no exception to a complete jurisdiction. As Wheaton wrote, "every independent sovereign state" has a right "to naturalize foreigners, and to confer upon them the privileges of their acquired domicil." WHEATON, *supra*, at 101. One prominent example of this principle was the famous Martin Kostza affair, during which the United States asserted its jurisdiction over a domiciled foreigner who had not yet naturalized. The Secretary of State argued that once foreigners "acquire a domicil, international law at once impresses upon them the national character of the country of that domicil," such that other countries

must treat Kostza "*as* an American citizen." Mr. Marcy to Mr. Hulsemann (Sept. 26, 1853), in CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND THE CHARGE D'AFFAIRES OF AUSTRIA RELATIVE TO THE CASE OF MARTIN KOSZTA 18 (U.S. Dep't of State trans., 1853).

These possibilities might explain why the leading drafters of the citizenship clauses of the Civil Rights Act and the Fourteenth Amendment presumed that domicile mattered for birthright citizenship. Lyman Trumbull, the leading drafter of the Civil Rights Act, summarized the bill in a letter to Andrew Johnson as giving birthright citizenship to all persons "born of parents domiciled in the United States." Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L.J. 1351, 1352 n.7 (2010).

And the Chair of the House Judiciary Committee, James Wilson, stated when introducing the bill: "We must depend on the general law relating to subjects and citizens recognized by all nations for a definition, and that must lead us to the conclusion that every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign Governments, are native-born citizens of the United States." CONG. GLOBE, 39th Cong., 1st sess. at 1117 (1866) (Rep. Wilson).

C. Application to unlawfully present aliens

Whether unlawfully present aliens are subject to the complete jurisdiction of the United States is less clear, but three reasons suggest they are not. First, as noted previously, and as Chancellor Kent and oth-

ers had written, a lawful residence implied protection, which in turn made one amenable to the municipal jurisdiction of the nation. *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813). An alien caught at the border may be subject to the criminal laws—as the Indian tribes were to some extent—but it does not follow that the nation must allow him to sue on his contracts. As a constitutional default rule, Congress is hardly required to open the nation's courts in this way. In other words, merely being subject to the criminal jurisdiction of the nation does not imply one has access to the *benefits* of the sovereign's jurisdiction more generally, such as the right to sue and be sued in the nation's courts.

Second, it was a violation of the law of nations to enter another country illegally. 1 BLACKSTONE, *supra*, at *259 ("Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another."); *see also generally* Robert G. Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause*, 11 BR. J. AM. LEG. STUDIES 209 (2022). That suggests an additional reason why the law of nations might apply rather than municipal law, even if there is no question that illegal entrants are subject to the sovereign's criminal jurisdiction. Migration is in several respects governed by modern-day international conventions. *See, e.g.*, Convention Relating to the Status of Refugees (July 28, 1951); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990).

Third, it is at least questionable whether all persons who come unlawfully can unilaterally establish a domicile. Br. Pet. 30. Any jurisdictional exceptions applicable to temporary sojourners might also apply.

CONCLUSION

The common-law rule of birthright subjectship was never mere birth on the sovereign's soil. The rule was always birth on the sovereign's soil to parents under the sovereign's protection. That rule almost certainly excluded the children born to unlawfully present aliens. The rule as applied to temporary visitors was at best unsettled. And, on that point, the leading drafters of the Civil Rights Act and the Fourteenth Amendment appear to have presumed temporary visitors would be excluded. The Fourteenth Amendment's jurisdictional phrase must be interpreted against this common-law background. Protection was essential to jurisdiction, and permission was necessary for protection. This background context also suggests several ways in which temporary sojourners and even unlawfully present aliens might not be subject to the complete jurisdiction of the United States in the sense of the amendment.

Respectfully submitted,

ILAN WURMAN*
University of Minnesota
Law School
219 S 19th Ave.
Minneapolis, MN 55455
(612) 624-8816
iwurman@umn.edu

**Counsel of Record*

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