

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 KEITH WHITTINGTON
SUPPORTING RESPONDENTS
AND AFFIRMANCE**

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Commentaries on the Laws of England
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Edward Coke,
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- Felix S. Cohen's *Handbook of Federal
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- George Hansard,
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- James Kent,
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- James Kent,
Commentaries on American Law
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- James Kent,
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Alexander Cockburn, <i>Nationality</i> (London, Wm. Ridgway 1869).....	19
Cong. Globe, 39th Cong., 1st Sess. (1866).....	16-18, 22-23
Emer de Vattel, <i>The Law of Nations</i> (6th ed., 1844)	8, 12
John C. Eastman, <i>Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11</i> , 12 Tex. Rev. L. & Pol. 167 (2007)	20
John C. Eastman, <i>Legal Mem. No. 18, From Feudalism to Consent: Rethinking Birthright Citizenship</i> , Heritage Found. (Mar. 30, 2006).....	24, 25

John C. Eastman, <i>The Significance of ‘Domicile’ in Wong Kim Ark</i> , 22 <i>Chapman L. Rev.</i> 301 (2019).....	22
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Papers Relating to the Foreign Relations of the United States, H. Ex. Doc. 1, 43rd Cong., 1st Sess. (1873)	7, 18
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Mark Shawhan, <i>Comment, The Significance of Domicile in Lyman Trumbull’s Conception of Citizenship</i> , 119 Yale L.J. 1351 (2010).....	22
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Keith E. Whittington, <i>Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review</i> (1999)	3
Richard Wooddesson & W.R. Williams, <i>Lectures on the Law of England</i> (Phila., John S. Littell 1842)	8, 26
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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*¹

Conventional wisdom about the original meaning of the Fourteenth Amendment’s citizenship clause is clear—citizenship is vested in those who are born in and subject to the United States. But the current moment is not the first time the conventional wisdom has been questioned. The dissenting view now informs President Donald Trump’s Executive Order purporting to strip citizenship from children born in the United States whose parents are unauthorized aliens.² Unsurprisingly given the appearance of the Executive Order, some new defenders of its legality have emerged.

But the conventional wisdom is right, and the Executive Order is wrong. Children born within the territory of the United States are natural-born citizens except under very narrow exceptions. Those historically recognized exceptions do not include the case of unauthorized aliens, and there is nothing about the logic of those exceptions that make them analogous to the modern situation of unauthorized aliens. Still, enactors know that things will change

¹This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief’s preparation or submission.

²Exec. Order No. 14160, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (Jan. 20, 2025).

over time and “do not suppose that their enactments will lose relevance as a result of that change.”³

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ARGUMENT

The first sentence of section 1 of the Fourteenth Amendment says, “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

³ Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 *Geo. L.J.* 405, 466-467 (2020) (citing *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“bordering on the frivolous” that arms not in existence in the eighteenth century are not protected by the Second Amendment))).

⁴ Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 *Harv. J.L. & Pub. Pol’y* 459 (2026).

State wherein they reside.” U.S. Const. amend. XIV, §1, cl. 1. By this constitutional language, birthright citizenship is vested in those who are born “in the United States” and who are “subject to the jurisdiction thereof.” As is generally the case, modern interpreters must consider the original meaning of the text and the legal rule it embodies.⁵

Although the constitutional text embodying this rule was new with the Fourteenth Amendment, the rule itself was not new and was understood to be the longstanding rule in the United States before its enactment. Before an individual is even capable of choosing to be a citizen and to offer allegiance through explicit oath, he already possesses a natural relationship to the sovereign of his birth.

After the Civil War, the Fourteenth Amendment reaffirmed the common law rule regarding birthright citizenship and was not meant to modify it in any important way. Admittedly, there is no specific intention on the part of the Reconstruction Congress to extend citizenship to the children of unauthorized aliens. That was not their problem to consider.⁶ But faced with the pro-slavery views of those like Chief Justice Roger Taney, the conventional view remained that “*prima facie*, every person in this country is born

⁵ See, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 35 (1999); Lawrence B. Solum, *Original Public Meaning*, 2023 Mich. St. L. Rev. 807, <https://tinyurl.com/bdeecbav>; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 1 (2015), <https://tinyurl.com/yvdx428h>.

⁶ See Ramsey, *supra* note 3, at 463-464.

a citizen.”⁷ Thus, the Fourteenth Amendment cut off the ability for the political process to determine whether some natural-born inhabitants could not be citizens. The Reconstruction Congress thought it necessary to entrench the common-law rule into constitutional text precisely because the desirability of that policy choice in the mid-nineteenth century had become increasingly contested.

Still over one hundred and fifty years later, revisionist theory ignores or distorts that common-law rule entrenched in the Fourteenth Amendment. Disagreement between the conventional and revisionist views is less about contested applications than about the meaning of the rule itself. The suggestion that divided loyalty means no citizenship is deeply at odds with how the common-law rule developed. Likewise, that children of unlawful entrants are not under the jurisdiction of the United States is a mischaracterization of the common law rule, and it effectively reverses the order of operation for those born within American territory.

Now that the conventional view is enshrined in the constitutional text, its original meaning informs its application to modern puzzles.⁸ It has been argued that adherence to the original meaning of written constitutional provisions is a method by which we “lock-in” the “legitimacy-enhancing features of a

⁷ *Citizenship*, 10 Op. Att’y Gen. 382, 396 (1862), <https://tinyurl.com/3ztrxxcn> (Att’y Gen. Edward Bates).

⁸ Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 2, 16-25 (unpublished manuscript Apr. 3, 2019), <https://tinyurl.com/53x6x957>.

constitution,” most notably the features by which it “protects individual rights.”⁹ Construing children born of unauthorized aliens as outside the jurisdiction of the United States would undo the Fourteenth Amendment and reopen the door for political manipulation of the qualifications of birthright citizenship that the Reconstruction Congress definitely shut.

I. President Trump’s Interpretation Contradicts the Longstanding Rule of Birthright Citizenship from the Founding.

The common law rule regnant in both England and America from the founding through the Civil War was well-known and clear. Reflecting its precursor from England, American common law has long relied on *jus soli*, Latin for “right of the soil,” and on *jus sanguinis* (“right of blood”) only in exceptional circumstances for foreign parents whose home countries would not allow them to owe allegiance to the sovereign of the soil.¹⁰ Those born within “actual

⁹ Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. Cin. L. Rev. 7, 17-18 (2006).

¹⁰ See, e.g., Ramsey, *supra* note 3, at 424-461; Gerald L. Neuman, *Strangers to The Constitution* (1996); Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 Am. U. L. Rev. 331 (2010), <https://tinyurl.com/4w4wda53>; James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 Green Bag 367 (2006), <https://tinyurl.com/25wjv3sb>; Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. Pa. J. Const. L. 499 (2008), <https://tinyurl.com/mt8wa7tc>; Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 Akron L. Rev. 719 (2012), <https://tinyurl.com/2h7x9nta>; Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong*

obedience” of the local sovereign—meaning within territory actually governed by the purported sovereign—are natural born citizens. Those born “out of the limits and jurisdiction” of the United States are aliens. Under the common law, then, the children of aliens ungoverned by American law are not natural-born Americans, but only very few aliens walking on American territory can assert the claim of not being subject to the jurisdiction of American law.

A. English common law afforded birthright citizenship for nearly all, excluding only ambassadors and invaders.

William Blackstone stated the issue plainly—“The first and most obvious division of the people is into aliens and natural-born subjects.”¹¹ “Natural-born subjects” are “born within the dominions of the crown of England, that is, within the ligeance, or, as it is generally called, the allegiance of the king[.]”¹² Natural “[a]llegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.”¹³

Kim Ark, 37 *Cardozo L. Rev.* 1185 (2016); Evan D. Bernick et al., *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 *Cornell L. Rev. Online* 101 (2025), <https://tinyurl.com/2nbp7dnz>.

¹¹ 1 William Blackstone, *Commentaries on the Laws of England* 366 (1771), <https://tinyurl.com/ysw2c9fd>.

¹² *Ibid.*

¹³ *Ibid.*

In contrast, aliens “are born out of” “the dominions” and “allegiance” of sovereign.¹⁴ But among aliens, there are two kinds. On one hand, some adopt “[l]ocal allegiance”—a term of art for the duty of most foreign-born individuals temporarily within a sovereign’s realm to obey the local law “only during his residence in th[e] realm.”¹⁵

On the other hand, very few aliens owe no allegiance while within the dominion of the sovereign and thus neither offer obedience nor receive protection.¹⁶ The guiding principle for identifying aliens who fall within such an exception is that those who enter into a king’s domain in service of a foreign prince do not owe local allegiance but are simply under the obedience and protection of the foreign prince, such as ambassadors.¹⁷ Those in diplomatic or consular service are at “home” even when they are abroad.¹⁸

This body of English law had a clear and important implication: “The children of aliens, born here in England, are, generally speaking, natural-born

¹⁴ *Ibid.*

¹⁵ *Id.* at 369-370.

¹⁶ *Id.* at 373.

¹⁷ *Ibid.*

¹⁸ *E.g.*, statutes granting citizenship to the children of American citizens born outside the territory of the United States because these children are not American citizens under the common law. See 1 St. George Tucker, *Blackstone’s Commentaries*, pt. 2, at 101 (eds. app.) (1803), <https://tinyurl.com/4jaeme97>. See also 2 Papers Relating to the Foreign Relations of the United States, H. Ex. Doc. 1, 43rd Cong., 1st Sess., pt. 1, p. 1208 (1873), <https://tinyurl.com/m457eaf> (“Cong. Serial Set”).

subjects, and entitled to all the privileges of such.”¹⁹ Because an infant benefits from the “protection” granted from sovereign when they “are incapable of protecting themselves,” “there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form.”²⁰

Thus, according to Blackstone, most aliens within the realm owed local allegiance, or obedience, to the sovereign, and the sovereign in turn owed them protection so long as they were within his dominion. An alien with local allegiance “whilst resident here, is subject to and protected by the municipal law.”²¹ With

¹⁹ Blackstone, *supra* note 11, at 373-374.

²⁰ *Id.* at 368-369; see also *id.* at 370.

²¹ Joseph Chitty, *A Treatise on the Laws of Commerce and Manufactures* 167 (London, A. Strahan 1820). See also George Hansard, *A Treatise on the Law Relating to Aliens, and Denization and Naturalization* 103-104 (London, V. & R. Stevens & G. S. Norton 1844) (“An alien, whilst he resides here, is generally subject to our laws, and owes a local and temporary allegiance to the sovereign by whose authority those laws are administered, and by whom his person and property is protected.”); 1 Richard Wooddesson & W.R. Williams, *Lectures on the Law of England* 217 (Phila., John S. Littell 1842) (“An alien while he resides here, is generally subject to our laws, and owes a local and temporary allegiance to our sovereign, by whose authority those laws are administered, and by whom, therefore, he is protected in the enjoyment of such rights as are indulged to him.”), <https://tinyurl.com/3rtrddaj>; Emer de Vattel, *The Law of Nations* 101, §213 (6th ed., 1844) (“The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country. Bound to the society by the residence, they are subject to the laws of the state while they reside in it; and they are obliged to defend it, because it grants

few exceptions, children born to such aliens were situated exactly the same as children born to natural-born subjects—they were immediately under the sovereign’s protection, but unlike their parents that protection was not merely local and temporary. And the natural debt of gratitude for such protection offered by the sovereign in infancy is fulfilled through natural allegiance. In contrast, children born to the small group of aliens who do not owe local allegiance have no mutual and natural claims of protection and obedience to the sovereign over the territory of their birth, and the duties of protection for them in their infancy fall entirely on the alien parents’ own sovereign. Thus, the “general principle” of the English law is “that every man owes natural allegiance where he is born.”²²

Another source of the common-law rule is the work of Chief Justice Sir Edward Coke, particularly his opinion in *Calvin v. Smith (Calvin’s Case)* (1608) 77 Eng. Rep. 377, 7 Co. Rep. 1a (KB).²³ Addressing whether Robert Calvin, born in Scotland in 1607, qualified as an English natural-born subject after King James I united the Scottish and English thrones in 1603, Coke explained that broadly, there are “three incidents to a subject born”: (1) “the parents be under the actual obedience to the King”; (2) “the place of his birth be within the King’s dominion”; and (3) “[t]he

them protection, though they do not participate in all the rights of citizens.”).

²² Blackstone, *supra* note 11, at 373.

²³ See also Benjamin Keener, *Calvin’s Case and Birthright Citizenship*, 174 U. Pa. L. Rev. Online 17 (2025).

time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom[.]” *Id.* at 18b.

Regarding the first, as Coke noted in his *Institutes*, alien parents can only negate the extension of jurisdiction by their foreign sovereigns’ holding their citizens “out of the ligeance of the king,” by being actively in the service of a foreign power at the time and place of the child’s birth.²⁴ To do so requires an exercise of sovereignty by a foreign power over American soil that does not inhere in the private activities of foreign nationals residing in the United States. Like Blackstone, Coke pointed out that ambassadors’ and invaders’ children would take on the citizenship of their parents rather than of the territory where they were born. *Calvin’s Case*, 7 Co. Rep. at 18b.²⁵

And regarding the second and third, because the sovereign is in “actual possession” of its territory, *id.*, the sovereign is the “guardian of all infants,” “afford[ing protection] from the instant of his birth.”²⁶

²⁴ 2 Edward Coke, *The First Part of The Institutes of The Lawes of England* 129a (1633) (“Coke, *Institutes*”).

²⁵ *Id.* at 129a. See also *Inglis v. Trustees of Sailor’s Snug Harbour*, 28 U.S. 99, 156 (1830) (Story, J., dissenting).

²⁶ Chitty, *supra* note 21, at 109; see also *Eyre v. Countess of Shaftsbury* (1722) 24 Eng. Rep. 659, 666 (Ch.); 8 Matthew Bacon, *A New Abridgment of the Law* (Phila., T. & J.W. Johnson & Co. 1861) (“The king, as *parens patriae*, * * * is to take care of all those who by reason of their want of understanding are incapable of taking care of themselves[.]”); John Adams, *The Doctrine of Equity* 87 (4th ed. 1859) (duty of protection extended to “any

Thus, Calvin was a natural-born subject because he was born within the allegiance of the new king, because it is “neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born.” *Id.* at 6b.

B. Evidence from the Founding Era substantiates birthright citizenship derived from English common law.

Except for fervently embracing the right of expatriation from England—meaning the ability of former foreign subjects to renounce their foreign citizenship in favor adopting American citizenship²⁷—the new Americans largely adopted the English common law on the question of citizenship. As detailed by the “American Blackstone” James Kent, “[n]atives are all persons born within the jurisdiction and

infant residing temporarily or permanently within” the sovereign’s jurisdiction).

²⁷ See *Doe v. Acklam* (1824) 107 Eng. Rep. 572, 575 (KB) (“There was nothing in the claim of their independence by which they could be rendered aliens, they could not of their own accord, and by their own act throw off their allegiance, *nemo potest exuere patriam.*”); *Juando v. Taylor*, 13 F. Cas. 1179, 1181 (S.D.N.Y. 1818) (“modern doctrine of perpetual allegiance”—“which grew out of the feudal system”—replaced with “the fundamental right” of “expatriation”); Isaac Franklin Russell, *Outline Study of Law* 128 (N.Y., L. K. Strouse 1894) (“The right of voluntary expatriation is now universally recognized as a natural and inherent right of all people, indispensable to the right of life, liberty and the pursuit of happiness.”); Edward Channing, *The Jeffersonian System, 1801-1811*, at 170 (1906) (“All European nations in the eighteenth century were united in holding the doctrine of indefeasible allegiance; once a Frenchman, always a Frenchman; once an Englishman, always an Englishman. The United States occupied an anomalous position”).

allegiance of the United States.”²⁸ The “rule of the common law” gives no “regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent,”²⁹ and the “children born in the armies of a state while abroad, and occupying a foreign country, [who] are deemed to be born in the allegiance of the sovereign to whom the army belongs.”³⁰

To these two common exceptions was added a third unique to America: children born within U.S. geographic territory but in a Native American tribe. Tribes as political entities were understood to be quasi-foreign in character, and thus despite being

²⁸ 2 James Kent, *Commentaries on American Law* 62 & n.a (14th ed., 1896). This language and the attached footnote first appeared in the posthumous sixth edition of the Commentaries. 2 James Kent, *Commentaries on American Law* 38 & n.a (6th ed., 1848). The fifth edition stated only that natives are “all persons born within the jurisdiction of the United States.” 2 James Kent, *Commentaries on American Law* 38 (5th ed., 1844). It is not obvious that the addition of “allegiance” altered Kent’s basic point, but it was more technically consistent with *Calvin’s Case*.

²⁹ Kent, *Commentaries* (1896), *supra* note 28, at 62(a).

³⁰ *Id.* at 65; 2 James Kent, *Commentaries on American Law* 4 (10th ed., 1860). As the international law theorist Emer de Vattel summarized, “children born out of the country, in the armies of state, or in the house of its minister at a foreign court, are reputed born in the country; for, a citizen who is absent with his family, on the service of the state, but still dependent on it, and subject to its jurisdiction, cannot be considered as having quitted its territory.” de Vattel, *supra* note 21, at 102, §217.

within the territory, children born within the jurisdiction of a tribe were outside U.S. jurisdiction.³¹

But Kent, like Blackstone, did *not* recognize an exception to birthright citizenship for the children of “aliens among us, [who] owe a local allegiance, and are equally bound with natives to obey all general laws for the maintenance of peace and the preservation of order, and which do not relate specially to our own citizens.”³² Addressing the civil disobedience of those with local allegiance, Kent explained “if they are guilty of any illegal act, or involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country.”³³ Kent’s *Commentaries* and federal officials alike relied on *Lynch v. Clarke*, the leading antebellum decision regarding citizenship status of children born of alien parents while on a temporary sojourn in the United States. 1 Sand. Ch. 583 (N.Y. Ch. 1844). “[E]very person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.” *Id.* at 663. “[B]irth in this country[] does of itself constitute citizenship. * * * No one asks whether his parents were citizens or foreigners. It is enough that *he was born here*,

³¹ See Epps, *supra* note 10, at 362-363 (quoting *Felix S. Cohen’s Handbook of Federal Indian Law* 641 (Rennard Strickland et al. eds., 1982)); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 243 (Boston, Little, Brown & Co. 1880) (suggesting Indians but not those with perpetual allegiance to another country generally are in this “anomalous condition”).

³² Kent, *Commentaries* (1860), *supra* note 30, at 26.

³³ *Ibid.*

whatever were the *status* of his parents.” *Id.* at 663-664.³⁴ Temporary “visitors and their children were part of the existing citizenship debate, and they were undoubtedly subject to U.S. jurisdiction in the meaning of that phrase at the time,” as Chief Justice John Marshall indicated directly in *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 144 (1812).³⁵ This “general rule” was likewise “the governing principle or common law of the United States” and the “system of national jurisprudence.”³⁶

II. President Trump’s Interpretation Ignores the Original Meaning of the Fourteenth Amendment.

Though controversial in its day, the new constitutional text made plain that native, as opposed to naturalized, citizens were created by birth alone. Legislatures no longer have the authority, if they ever did, to impose additional qualifications to achieving that status. This is not an insignificant feature of the constitutional rule—it did important political work by leaving open the question of what privileges and immunities might be entailed by citizenship but slamming the door on the possibility of politicians imposing additional requirements beyond the mere fact of birth within American jurisdiction.

³⁴ See also *Citizenship*, 9 Op. Att’y Gen. 373, 374 (1859) (Att’y Gen. Jeremiah S. Black) (citing *Lynch* to explain “a free white person born in this country, of foreign parents, is a citizen of the United States”), <https://tinyurl.com/4rj366db>.

³⁵ Ramsey, *supra* note 3, at 464.

³⁶ Kent, *Commentaries* (1860), *supra* note 30, at 1 n.(a).

A. The Fourteenth Amendment was a direct response to *Dred Scott*.

The first clause of the Fourteenth Amendment is a direct response to Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Whether the Republican Congress needed to “overturn” the decision through a constitutional amendment or merely needed to clarify and settle the law in the aftermath of the jumble of opinions in the case, there is no doubt that the citizenship clause of the Fourteenth Amendment was a rebuke to Taney.

Dred Scott reflected the view in the antebellum years that race or slave status created another exception to the common law. Compare 60 U.S. at 403-405 (“subjugated” race could never be citizens with “all the rights and privileges of a citizen of a State”) with *id.* at 572 (Curtis, J., dissenting) (when the Constitution was adopted, “free persons, descended from Africans held in slavery” were regarded as citizens); *id.* at 531 (McLean, J., dissenting) (to be a citizen, one only needed to be free and born subject to U.S. jurisdiction). This debate reflected a complexity of transforming the old English language of “natural-born subjects” into the new American language of “natural-born citizens.” In other words, anyone could be a ruled subject, but not just anyone could exercise the highest political privilege of citizenship including voting and serving in political office.³⁷

³⁷ Rights of Free Virginia Negroes, 1 Op. Att'ys Gen. 506, 507 (1821) (Att'y Gen. William Wirt), <https://tinyurl.com/28anuwd6>; Right of Expatriation, 8 Op. Att'ys Gen. 139, 142 (1856) (Att'y Gen. Caleb Cushing), <https://tinyurl.com/mubjvnza>.

It was a conceptual puzzle over which Americans divided in the antebellum years.³⁸ Southerners, on one hand, stressed that legal restrictions imposed by legislatures on blacks implied or required a lack of citizenship.³⁹ Northerners, on the other hand, typically asserted blacks were citizens but their citizenship did not indicate they could govern or vote.⁴⁰

Ultimately, the extended debate over black citizenship that led to *Dred Scott* was put to rest by the Fourteenth Amendment, rejecting the view that “nobody but white people” can be U.S. citizens.⁴¹ That Congress was responding to *Dred Scott* in drafting the new constitutional language has three significant

³⁸ Rogers M. Smith, *Civic Ideals* 255 (1997). See also Mark Shawhan, “By Virtue of Being Born Here”: Birthright Citizenship and the Civil Rights Act of 1866, 15 Harv. Latino L. Rev. 1 (2012); Amanda Frost, *Dred Scott’s Daughter: Gradual Emancipation, Freedom Suits, and the Citizenship Clause*, 35 Yale J. L. & Hum. 812 (2024).

³⁹ See, e.g., Address of Sen. Jefferson Davis to U.S. Senate (May 7, 1860), reprinted in 1 Jefferson Davis, *The Rise and Fall of the Confederate Government* 569-591, app. F (1880).

⁴⁰ For example, as Edward Bates, U.S. Attorney General in President Lincoln’s team of rivals, declared—the “true principle” is “that every person born in the country is, at the moment of birth, *prima facie*, a citizen”—a historical and political truth so old and so universally accepted that it is needless to prove it by authority.” Citizenship, 10 Op. Att’y’s Gen., supra note 10, at 394. “It is an error to suppose that citizenship is ever hereditary. It never ‘passes by descent.’ It is as original in the child as it was in his parents.” *Id.* at 399. Warning those who would add exceptions to disenfranchise individuals from their natural-born citizenship, Bates cautioned that he “who denies it in individual cases assumes the burden of stating the exception to the general rule.” *Id.* at 396-397.

⁴¹ Cong. Globe, 39th Cong., 1st Sess. 530 (Jan. 31, 1866).

features for present purposes. First, Congress decisively excluded race as a relevant criterion for birthright citizenship. Second, Congress entrenched in the constitutional text the common law rule. Third, Congress effectively settled a legal debate over whether birthright citizenship rested on “birth alone” or if legislatures could define, qualify, and restrict who of the children born on American soil and under American governing authority could be counted as natural-born citizens.

B. The Civil Rights Act of 1866 set the stage for the adoption of the Fourteenth Amendment.

It is uncontroversial that the Fourteenth Amendment was inspired in part by the desire of the Reconstruction Congress to put the Civil Rights Act of 1866 on firmer constitutional footing. Indeed, some have argued that the Fourteenth Amendment did nothing other than constitutionalize the terms of the earlier statute.⁴²

The Civil Rights Act of 1866 stated 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.”⁴³ The Reconstruction Congress sought to put it beyond question that “birth entitles a person to citizenship, that every free-born person in this land is, by virtue of

⁴² Raoul Berger, *Government by Judiciary* 30 (1977); see also Cong. Globe, 39th Cong., 1st Sess. 514 (Jan. 30, 1866) (suggesting that a constitutional amendment would be needed to overcome the Supreme Court).

⁴³ Civil Rights Act of 1866, 14 Stat. 27, Ch. 31.

being born here, a citizen of the United States.”⁴⁴ President Andrew Johnson, who vetoed the bill, disagreed, arguing that mutual consent was necessary to citizenship, with the choice to consent belonging to individual states.⁴⁵ But the dissenting view that the existing political community must consent to accept those born among them as citizens lost with the passage of the Fourteenth Amendment.

C. The Fourteenth Amendment reaffirms the common law rule regarding birthright citizenship and not to modify it in any important way.

The Fourteenth Amendment was understood by its proponents, courts, and abroad to be declaratory of a preexisting common-law rule derived from England and continued in America regarding birthright citizenship.⁴⁶ As the Fourteenth Amendment was being adopted, British Lord Chief Justice Alexander

⁴⁴ Cong. Globe, 39th Cong., 1st Sess. 600 (Feb. 2, 1866); see Cong. Globe, 39th Cong., 1st Sess. 1756 (Apr. 4, 1866). See also Cong. Globe, 39th Cong., 1st Sess. 2890 (May 30, 1866) (Sen. Jacob Howard regarded Civil Rights Act of 1866 and Fourteenth Amendment “simply declaratory” of “the law of the land already”—that all born in U.S. are citizens except “families of ambassadors or foreign ministers” and Indians “who maintain their tribal relations”).

⁴⁵ Cong. Globe, 39th Cong., 1st Sess. 1775-1777 (Apr. 5, 1866).

⁴⁶ Cong. Globe, 39th Cong., 1st Sess. 600 (Feb. 2, 1866) (“declaratory of what the law now is”). Shortly after the passage of the Fourteenth Amendment, then Secretary of State Hamilton Fish stated “[t]he child born of alien parents in the United States is held to be a citizen thereof and to be subject to duties with regard to this country which do not attach to the father.” Cong. Serial Set, *supra* note 18, at 1192.

Cockburn wrote a study on nationality and aliens and observed simply and uncontroversially, “The law of the United States of America agrees with our own.”⁴⁷

For example, in 1871 a federal district court clarified that the Fourteenth Amendment was “nothing more than declaratory of the rule of the common law.” *McKay v. Campbell*, 16 F. Cas. 161, 165 (D. Or. 1871) (because Oregon was a shared territory of Great Britain and parents were not Americans, child born in Oregon was not American by birth despite being born on American soil). “To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience.” *Ibid.*

In 1898, the U.S. Supreme Court’s decision in *United States v. Wong Kim Ark* allowed the government to deny citizenship to U.S.-born children *only* to children born to foreign diplomats and to enemy forces engaged in hostile occupation of the country’s territory. 169 U.S. 649, 705 (1898).⁴⁸

If the Reconstruction Congress had left the qualifications for citizenship undefined, it would have left the door open to the views once again gaining political power to consign some of those born in the United States to a permanent inferior caste. But in drafting the Fourteenth Amendment, Congress closed that door and declared the ancient rule of birthright

⁴⁷ Alexander Cockburn, *Nationality* 12 (London, Wm. Ridgway 1869).

⁴⁸ See also Carol Nackenoff & Julie Novkov, *American By Birth: Wong Kim Ark and the Battle for Citizenship* (2022).

citizenship the law of the land beyond the reach of future lawmakers who might think birth alone insufficient to justify inclusion within the ranks of American citizens.⁴⁹

III. Revisionist History Cannot Hold Water.

Attempting to bypass the Fourteenth Amendment and common law, revisionist theory relies on two key claims, neither of which is consistent with the original meaning of the Fourteenth Amendment. The first is that individuals are only subject to the jurisdiction of the United States if they owe no allegiance to any foreign sovereign. The second is that individuals are outside U.S. jurisdiction if they are not sufficiently obedient to American law.

The revisionist view points out that immigration restrictions were uncommon up through the time of the adoption of the Fourteenth Amendment, and thus would not have been straightforwardly accounted for by the discussions of the time. Revisionists have

⁴⁹See, e.g., Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent* (1985); Patrick J. Charles, *Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 Washburn L.J. 211 (2012); Shawhan, "By Virtue", supra note 38; John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 Tex. Rev. L. & Pol. 167 (2007); William Ty Mayton, *Birthright Citizenship and the Civil Minimum*, 22 Geo. Immigr. L.J. 221 (2008); Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance, and the Fourteenth Amendment's Citizenship Clause*, 101 Notre Dame L. Rev. (forthcoming 2026); Randy E. Barnett & Ilan Wurman, *Opinion, Trump Might Have a Case on Birthright Citizenship*, N.Y. Times (Feb. 15, 2025); Ilan Wurman, *Jurisdiction and Citizenship*, 49 Harv. J.L. & Pub. Pol'y 315 (2026).

contended that the constitutional language of “jurisdiction” is at least ambiguous, and if a rule is ambiguous then courts may consider the “consequences” of alternative formulations of the rule in determining how to resolve the ambiguities.⁵⁰

But the original meaning is still the meaning, and a legal regime of immigration restrictions creates a new factual situation into which the original meaning of the constitutional text must be integrated—not ignored.⁵¹ Pursuing any work-arounds the unambiguous original meaning “necessarily injects considerable uncertainty and subjectivity into the interpretive process.”⁵²

A. The foreign allegiance rule is not substantiated by history and tradition.

One revisionist view turns on a question of what “allegiance” to the United States was required of parents within its territory by the “subject to the jurisdiction thereof.” John Eastman, an advisor to President Trump, has argued that “subject to the

⁵⁰ Randy E. Barnett & Ilan Wurman, *Birthright Citizenship: A Reply to Critics*, Reason: The Volokh Conspiracy (Feb. 18, 2025), <https://tinyurl.com/58tnyt2>.

⁵¹ Ramsey, *supra* note 3, at 459-460 (“Counterarguments depend either on adding words to the Clause’s text or interpreting the text to mean something it did not mean in the nineteenth century.”).

⁵² *Id.* at 471; see also *id.* at 473 (Though accidental outcomes of original meaning “raise a substantial challenge in justifying the adoption of original meaning as the modern constitutional rule,” “originalism’s willingness to enforce accidental outcomes rests on formalist rule of law values of stability, foreseeability, and objectivity” that are well worth the challenge.).

jurisdiction” thereof requires what he calls “complete” jurisdiction and excludes those who owe allegiance to a foreign sovereign.⁵³

Under this view, foreign nationals, though present within the territory of the United States, owe allegiance to their foreign sovereign unless and until they renounce that allegiance and naturalize into American citizenship, and as a consequence are not within the full and complete jurisdiction of the United States. See *Wong Kim Ark*, 169 U.S. at 708-711, 720-721 (Fuller, C.J., dissenting) (discarding American common law because of the British commitment to perpetual allegiance).

Reconstruction congressional debate over “full and complete jurisdiction” centered not on foreign nationals but on Indian tribes.⁵⁴ There were questions whether American Indians were under the jurisdiction

⁵³ John C. Eastman, *The Significance of ‘Domicile’ in Wong Kim Ark*, 22 *Chapman L. Rev.* 301, 303 (2019). See also Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 *Tex. Rev. L. & Pol.* 135 (2020). Eastman points out a softer version of this theory that would distinguish foreign nationals who have domiciled in the United States and made it their “permanent home,” effectively entering into the American political community, from those who are temporarily sojourning in the United States. Eastman, *Significance of ‘Domicile,’* *supra*, at 305. See also Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull’s Conception of Citizenship*, 119 *Yale L.J.* 1351 (2010).

⁵⁴ Cong. Globe, 39th Cong., 1st Sess. 2895 (May 30, 1866) (Sen. Jacob Howard); *id.* at 2893 (Sen. Lyman Trumbull stating “subject to the jurisdiction” means “[n]ot owing allegiance to anybody else”); *id.* at 2892 (Sen. James Doolittle concerned that “subject to the jurisdiction” would erroneously include Indians); *id.* at 2893 (Sen. William Fessenden concerned with same).

of the United States. Sen. Reverdy Johnson thought it problematic to suggest that Indians within the territory of the U.S. were beyond U.S. jurisdiction.⁵⁵ But Senator Trumbull settled on the understanding that Indians were not under U.S. jurisdiction nor did they owe local allegiance to the U.S. because “we do not pretend to exercise any civil or criminal jurisdiction” over tribal lands as foreign nations.⁵⁶ They were not like a community of recently immigrated Germans, for example, but rather treated through diplomatic relations.⁵⁷

Thus, under the common law view, even if Indians were foreigners—the land is doing the important work. The Reconstruction Congress was not concerned with whether foreign nations had some claim over the allegiances of native-born Americans. They were concerned with whether “Indian country” was governed by American law. In grappling with that problem, they encapsulated the traditional common-law rule.

The revisionist account attempts to convert this rule about sovereign territory into a rule about personal allegiance. Eastman asserts that “mere birth on U.S. soil” is not sufficient to meet the constitutional prerequisites for birthright citizenship, for the

⁵⁵ Cong. Globe, 39th Cong., 1st Sess. 2893 (May 30, 1866).

⁵⁶ *Id.* at 2894; see also *id.* at 2895 (Sen. Howard agreeing with Sen. Trumbull).

⁵⁷ See Cong. Globe, 39th Cong., 1st Sess. 2893 (May 30, 1866).

important question is whether a child could be claimed as a “citizen or subject of the parents’ home country.”⁵⁸

But the existence of a foreign allegiance does not remove someone within U.S. territory from its jurisdiction. Adjoining a “no foreign allegiance” rule to the Fourteenth Amendment both mischaracterizes the debate surrounding the drafting of the amendment and misunderstands the common-law rule of birthright citizenship that the Amendment embodied. The legal language of “subject to the jurisdiction” had never excluded the possibility of dual allegiances and had never required the renunciation of foreign allegiances. Those who owed foreign allegiances were routinely made subject to the jurisdiction of British and American law by virtue of their presence in the country, and that tie was sufficient to determine the nativity of children foreign nationals might produce.⁵⁹

B. Parental obedience likewise fails as the standard for birthright citizenship.

A second strand of revisionist argument would focus our attention less on parental allegiance than on parental obedience. A fully consent-based theory of citizenship would require the mutual consent of the individual who seeks to join a community and of the community that individual is seeking to join, rather than “feudalistic” notions of allegiance arising from

⁵⁸ John C. Eastman, *Legal Mem. No. 18, From Feudalism to Consent: Rethinking Birthright Citizenship* 2, Heritage Found. (Mar. 30, 2006), <https://tinyurl.com/2rkm6edr>.

⁵⁹ Ramsey, *supra* note 3, at 460 (“As noted above, there is little basis for adding the word ‘exclusive’ to the Citizenship Clause.”).

blood or soil.⁶⁰ Under this view, renouncing foreign allegiances and domiciling in the United States might be necessary conditions for foreign nationals to seek admittance into the American community, but they are insufficient unless the American community likewise positively consents to having them. But this likewise cannot be harmonized with longstanding American common law.

The earlier wave of this revisionist theory holds the door open to Congress to create mechanisms by which the community might welcome new arrivals through naturalization processes,⁶¹ but the recent wave emphasizes that a lack of consent on the part of the community has already been expressed by the existence of restrictive immigration laws. In this view, there can be no “mutual consent” for illegal aliens of various stripes because their presence demonstrates they do not recognize the obligation of obedience to laws. Spinning the language of the opinion of Attorney General Bates, this theory purports that U.S. jurisdiction does not extend to aliens who do not “come in amity,” give “no obedience or allegiance to the country when they entered,” and thus are analogous to “an invading army.”⁶² Quite literally, on this theory, an unauthorized alien could be murdered in the streets of an American city and properly speaking there should be no legal repercussions. Such an

⁶⁰ Schuck & Smith, *supra* note 50, at 1, 5-6.

⁶¹ Eastman, *From Feudalism to Consent*, *supra* note 58, at 8.

⁶² Barnett & Wurman, *Trump Might Have a Case on Birthright Citizenship*, *supra* note 50.

individual is functionally in “the state of nature”⁶³ and not “subject to the jurisdiction of the United States.”

But the idea of requiring amity or obedience to immigration laws cannot do the work that Barnett and Wurman want it to do. Though Sir Edward Coke in *Calvin’s Case* did observe that aliens with local allegiance owe obedience, 7 Co. Rep. at 5b, Coke’s *Institutes* noted that whether an alien “be in amity or not” was determined only by the alien’s foreign sovereign, for example, by “a proclamation of war.”⁶⁴ The leading English treatise on the law of aliens in the early nineteenth century supports that only the foreign sovereign can take its citizens out of local allegiance to the country of their residence.⁶⁵ St.

⁶³ *Ibid.*

⁶⁴ Whittington, *By Birth Alone*, *supra* note 4, at 515-516. Notably, “a proclamation prohibiting commerce” did not have a similar legal effect on an alien and did not “disable” them from personal actions in the courts. *Ibid.* And “the cover and protection of the king of England” extends to aliens whose original countries proclaim war on the country of their residence after they move there assuming they “continu[e] the owning of his former local allegiance.” 1 Matthew Hale, *Historia Placitorum Coronae* 60 (Phila., Robert H. Small 1847).

⁶⁵ Hansard, *supra* note 21, at 100 (“An alien enemy is one whose sovereign is at enmity with the Crown[.]”). See also Chitty, *supra* note 21, at 108; Blackstone, *supra* note 11, at 372-373 (“When I mention these rights of an alien, I must be understood of alien-friends only, or such whose countries are in peace with ours; for alien-enemies have no rights, no privileges, unless by the king’s special favour, during the time of war.”); Wooddesson & Williams, *supra* note 21, at 219 (“But an alien enemy, who comes here by letters of safe conduct, or resides here by the king’s license, may maintain an action” in the courts); 1 Herbert Broom, *Commentaries on the Laws of England* 450 (1869) (“These rights however can be exercised by alien friends only, or such whose

George Tucker in his American edition of Blackstone likewise pointed out that “an alien, whose nation is in amity with England,” is “clearly and indisputably entitled to the full protection of the laws in every matter that respects his personal liberty, his personal security, and his personal property.”⁶⁶ Aliens could generally even be tried by the sovereign of their residence for treason like natural-born subjects because they “benefit of the king’s protection” and “owe[] a local allegiance,” in contrast to “an alien enemy come into this kingdom hostilely to invade it” who would “be dealt with as an enemy, but not as a traitor, because he violates no trust nor alligance.”⁶⁷ Thus, whether aliens are “in amity” is a question of international relations, not personal obedience to local immigration laws.

The United States government does not treat unauthorized aliens as if they do not owe local obedience to the municipal law and are not subject to the jurisdiction of the United States. Local authorities do not regard pockets of undocumented immigrants as the equivalent of a sovereign tribe requiring a treaty or an invading army requiring martial law. The result of being subject to American jurisdiction might well be that the unlawful entrant might find herself detained and deported, but that is a signal that American laws apply to her while in American territory. So long as

countries are at peace with ours; for alien enemies have no rights, no privileges, unless by the special favour of the sovereign during the time of war.”), <https://tinyurl.com/42t6u6ux>.

⁶⁶ Tucker, *supra* note 18, pt. 2 at 98 (eds. app.) (emphasis omitted).

⁶⁷ Hale, *supra* note 65, at 58-59.

that unauthorized immigrant remains within the United States, she is expected to subject herself to the ordinary governing authority of American law. While in the territory, she is subject to American jurisdiction even if she were not invited into the country in the first place.

So true for the parents, even more true for the children. A sovereign duty to protect an infant arises from mere presence within a sovereign's governing authority. The sovereign assumes the duty to protect infants within its jurisdiction without waiting for the infant to enter into any compact with mutual consent. If a newborn infant an hour removed from its mother's womb were left at a fire station, the state would not ask for the immigration status of the parent before protecting the child. If a neighbor reported that a newborn infant was being neglected or abused in the house next door, the state would not require the parent's immigration status before extending protection to the child. If a mother were to die in childbirth, the state would not question the immigration status of the mother before undertaking protection for the child. The child in these circumstances is within the jurisdiction of the United States regardless of the immigration status of the parent, and because the child is within the jurisdiction of the United States the government owes the child a duty of protection. That is the natural duty of a sovereign in actual possession of a territory. Under the common law embodied in the Fourteenth Amendment, the correlative to a state fulfilling that duty is birthright citizenship.

Thus, this revisionist view reverses the common-law understanding of the alien implicitly pledging allegiance and the sovereign pledging protection.⁶⁸ Coke is clear about the order of the exchange: when an alien comes, he comes within the sovereign's protection and "therefore * * * he oweth unto the [sovereign] a local obedience or ligeance, for that the one (as it hath been said) draweth the other." *Calvin's Case*, 7 Co. Rep. at 5b. This order must obviously be true for infants. *Id.* at 25a (because infants can be neither *amicus* or *inimicus*, he is only *subditus* and thus "is no stranger born"). "[I]t is truly said that *protection trahit subjectionem, et subiectio protectionem,*" which is why "ligeance doth not begin by the oath." *Id.* at 4b. That is how immigration has worked in this country since the beginning—and is concentered by the Fourteenth Amendment.

CONCLUSION

Children born under the protection of American law are citizens by virtue of the Fourteenth Amendment, as they are citizens by virtue of the longstanding common-law principles that the Fourteenth Amendment recognized and declared. The traditional rule of birthright citizenship is not ambiguous as applied to modern-day questions and need not be reconceptualized. Though the modern regime of general immigration restrictions creates a new context within which traditional principles need to be applied, it does not alter or amend the traditional principles enshrined in the Fourteenth Amendment.

⁶⁸ Barnett & Wurman, *Birthright Citizenship: A Reply to Critics*, supra note 51 ("If anything came first, allegiance did").

That constitutional provision locks-in the liberty-enhancing rule that current political majorities cannot exclude undesirable populations from their birthright as citizens. Construing children born of unauthorized aliens as outside the jurisdiction of the United States would undo that achievement and reopen the door for political manipulation of the qualifications of birthright citizenship that the Reconstruction Congress closed for good.

Respectfully submitted,

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