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 ORIGINALIST SCHOLARS EVAN D. BERNICK AND JED H. SHUGERMAN AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are scholars of constitutional law who interpret Constitutional provisions according to their original public meaning. They have written on the Reconstruction Era generally and the birthright citizenship question specifically.

Evan D. Bernick is an Associate Professor of Law at Northern Illinois University College of Law. He has co-authored a book on the originalist interpretation of the Fourteenth Amendment, closely studying the ratification debates. *See* Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* (Harvard 2021). He has also written on birthright citizenship in both academic and popular publications. *See, e.g.*, Evan D. Bernick, Paul Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 101 Cornell L. Rev. Online 101 (2025); Ilya Somin, *Compendium of Evan Bernick Guest-blogging Posts on Birthright Citizenship*, The Volokh Conspiracy, Reason (Apr. 5, 2025), https://shorturl.at/Gutf2.

Jed Handelsman Shugerman is Professor of Law and Harry Elwood Warren Scholar at Boston University. His expertise on the Reconstruction era is demonstrated in his book *The People's Courts: Pursuing Judicial Independence in America* (Harvard 2012) and his article *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service Authors*, 66 Stan. L. Rev. 121 (2014). This brief

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[1] No counsel for a party authored this brief in any part, and no person or entity besides *amici* or their counsel made any monetary contribution to fund the brief's preparation or submission.

incorporates his findings from *An Originalist Case for Birthright Citizenship: The Inclusion of "Temporary Sojourners" and of Chinese and Roma*, 77 UC L. J. (forthcoming) (Feb. 2, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5278199.

SUMMARY OF ARGUMENT

For nearly all of the first 235 years under the Constitution, the citizenship of every child born in the United States to alien parents, with immaterial exceptions, was a given. Then, in 2025, the Trump administration changed course. Even though the Fourteenth Amendment makes no mention of limiting birthright citizenship to the children of domiciled parents, the Government now claims that is what "subject to the jurisdiction thereof" has always meant. While the Government and its *amici* admit that the common law recognized the citizenship of children of transient aliens, their remaining "survey of history range[s] from the constitutionally irrelevant" (*e.g.*, safe-conducts in medieval England and the law of nations in the 1890s) "to the plainly incorrect" (*e.g.*, a rule that would have treated the children of freed slaves as aliens). *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 226 (2022). Their approach is not originalist, and their conclusion is not correct.

First, two originalist principles of interpretation are essential to weighing the evidence: that the Citizenship Clause has the same meaning it had at adoption, and that the ordinary meaning communicated to the ratifying public by its words—not the private intent of drafters—controls. The Government's post-ratification evidence, beginning 15 years after the drafting of the Fourteenth Amendment, cannot amend its

original text. Nor can a private letter change its public meaning.

Second, applying those principles, the balance of evidence is clear. The ordinary meaning of "jurisdiction" at ratification was the power to govern. Because transient and unlawful aliens present here are governed by the United States, they are "subject to the jurisdiction" of the United States, and their children born here are citizens as a result.

Third, preratification evidence supports that meaning. The Constitution's use of "citizen" tracked in relevant part the common-law meaning of "subject." Even a child born in England to an alien owing "momentary and fleeting" allegiance while traveling through England to commit treason was a subject. Congress and early American courts continued to apply that logic, and the leading antebellum case held that children of transient aliens are citizens.

Fourth, the debates on the Civil Rights Act of 1866 and the Fourteenth Amendment offer little support for the Government's reading. To the contrary, members of Congress asked if the children of "temporary sojourners," the Roma people (pejoratively called "Gypsies" at the time), and Chinese immigrants (whose status implicated the category of "illegal" immigration) would be citizens—and for each, the answer was yes.

Last, the Government's logic would have made aliens out of the children of slaves, many of whom entered "unlawfully" by virtue of being trafficked here after a federal ban. And it would resurrect the allegiance-without-protection rationale of *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), which the Fourteenth Amendment forever repudiated. That cannot be correct. The Court should affirm.

ARGUMENT

I. Public meaning originalism offers methods for weighing textual evidence.

The predominant method of originalist Constitutional interpretation is public meaning originalism. *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 436 (2023). Two of its interpretative principles provide a roadmap for weighing textual evidence of the Citizenship Clause's meaning.

A. Public meaning, not private intent

First, public meaning originalism seeks "the most plausible meaning of the words of the Constitution to the society that adopted it". Hon. Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties (June 14, 1986), in *Original Meaning Jurisprudence: A Sourcebook* 103 (U.S. Dep't of Justice ed. 1987). The public meaning "excludes secret or technical meanings that would not have been known to ordinary citizens". *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

Private letters or notes flunk that test twice. *See Ramos v. Louisiana*, 590 U.S. 83, 98 & n.40 (2020) (discounting private correspondence from James Madison). They speak to the state of mind of one person, not a legislating majority. *Cf. United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it".). And they cannot give fair notice. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) ("Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on

the basis of the law as it is written and promulgated."). That's all before the authenticity problems that arise from an interpretive method that would incentivize "discovering" scraps of paper with talismanic power to change the Constitution's meaning.

But that is what the Government does here by relying on (at 24) a letter from Senator Lyman Trumbull to President Andrew Johnson about the meaning of the Civil Rights Act of 1866 ("1866 Act"), the precursor to the Fourteenth Amendment. The letter apparently was forgotten by legal scholars for 144 years until a law student unearthed it and attributed it to Trumbull. *See* Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 Yale L.J. 1351, 1353 n.9 (2010). Trumbull reportedly writes that the 1866 Act "declares 'all persons' born of parents domiciled in the United States, except untaxed Indians, to be citizens of the United States." *Id.* at 1352-53 (quotation omitted).

Reading a parental domicile requirement into the Fourteenth Amendment from this letter abandons originalism in several ways. To start with, a domicile requirement "seems not to have been expressed [by Trumbull] publicly in debate over the Act, nor shared by other members of Congress", as the law student who found the letter later admitted. Mark Shawhan, *"By Virtue of Being Born Here": Birthright Citizenship and the Civil Rights Act of 1866*, 15 Harv. Latino L. Rev. 201, 219-220 n.123 (2012). Maybe Trumbull downplayed the Act's scope because he feared Johnson would veto it, which then happened. *See* Andrew Johnson, *Veto Message on Civil Rights Legislation* (Mar. 27, 1866), *available at*: https://bit.ly/4dPdnOa ("This provision comprehends the Chinese . . . the people called

gypsies, as well as the entire race designated as blacks. . . . Every individual of these races born in the United States is by the bill made a citizen of the United States."). Congress overrode that veto despite those objections. *See* Barnett & Bernick, *supra*, at 124. Rather than attempting to read runes or minds, originalists start by reading the operative text.

B. Contemporaneous meaning, not post hoc meaning

Second, the Constitution's words mean today what "they were understood to [mean] when the people adopted them". *Heller*, 554 U.S. at 634-35. As a consequence, "when it comes to interpreting the Constitution, not all history is created equal." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34 (2022). "[F]or an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law." *United States v. Rahimi*, 602 U.S. 680, 737-38 (2024) (Barrett, J., concurring). Generally, the closer in time the evidence of meaning is to ratification, the more weight the evidence deserves.

Two notes of caution are in order. First, it's not ancient or obsolete history that counts before ratification. A "long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice." *Bruen*, 597 U.S. at 35. Second, the Court should "guard against giving postenactment history more weight than it can rightly bear." *Id.* And "to the extent later history contradicts what the text says, the text controls." *Id.* at 36. Only when "the text is vague and the pre-ratification history is elusive or inconclusive" does post-ratification evidence become

"especially important." *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring). As shown below, the text is clear and the relevant pre-ratification history stacks conclusively against the Government's view.

Faithful originalists would reject the Government's argument "that the late-19th and early-20th century . . . tradition serves as evidence of the original meaning of the" Citizenship Clause. *Vidal v. Elster*, 602 U.S. 286, 323 (2024) (Barrett, J., concurring). The Government's sources of executive practice and commentary (at 25-28, 31) start in 1881—15 years after the debates on the 1866 Act and Fourteenth Amendment. Ironically, the Government invokes (at 43) the rule against anachronistic textual meaning as a reason to discount the executive practice and commentary of the past century. But it can't have it both ways.

The post-ratification sources from the Government's bullet-pointed list (at 26-28) do not persuade. Some appear in Justice Fuller's dissent in *United States v. Wong Kim Ark*, 169 U.S. 649, 718, 719, 722, 727, 731 (1898) (citing Wharton, Miller, and Hall). Some explain that a child born to transient aliens would not be a citizen if the *child* imminently left the country. But that can be understood as a rule of expatriation, not of birthright citizenship. *See* Samuel F. Miller, *Lectures on the Constitution of the United States* 279 (1891) (child "which goes out of the country with its father" is not a citizen); Henry Campbell Black, *Handbook of American Constitutional Law* 458-459 (1895) (similar); Boyd Winchester, *Citizenship in Its International Relation*, 31 Am. L. Rev. 504, 504 (1897) (similar).

The Government gives another bullet point (at 26) to Alexander Porter Morse, whose work on citizenship

was part of "overlapping white-superiority projects," another of which was defending segregation in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Sam Erman & Nathan Perl-Rosenthal, Jus Soli *Nation to* Jus Soli *Evasion: International Lawyers for White Supremacy and the Road through* Wong Kim Ark, 3 J. Am. Const. Hist. 615, 619, 635 (2025). Rather than look for what the Citizenship Clause meant to white supremacists in the 1880s, the Court should start with the common meaning of the words at ratification.

II. The ordinary meaning of "jurisdiction" was governance by sovereign legal authority.

The Fourteenth Amendment's Citizenship Clause provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States". It does not say that only persons born in the United States to domiciled parents are citizens.

The common meaning of "subject to the jurisdiction thereof" in 1868 was simply that a person could be governed directly by the sovereign's laws. *See* Noah Webster, *A Dictionary of the English Language* 732 (1865) (defining "jurisdiction" as the "[p]ower of governing or legislating; the right of making or enforcing laws; the power or right of exercising authority"); J.J.S. Wharton, *Law Lexicon, or Dictionary of Jurisprudence* 408 (Edward Hopper ed., 2d Am. ed. 1860) (defining "jurisdiction" as "legal authority; extent of power"), *cited at* Pet. Br. 29. As with courts, jurisdiction was closely linked to territory. *See* 1 John Bouvier, *A Law Dictionary* 683 (11th ed. 1862) (defining jurisdiction as a judge's power to hear cases within his "tract of land or district").

"Citizen," too, had an ordinary meaning at the time: generally, one became a citizen by birth within territory governed by the sovereign or by naturalization, without parental qualifiers. *See* Webster, *supra*, at 234 (providing a U.S.-specific definition of "citizen" as "any native born or naturalized person . . . who is entitled to full protection" of private rights); Bouvier, *supra*, at 231 (defining "citizen" to include "all white persons born in the United States"); Alexander M. Burrill, *A Law Dictionary and Glossary* 293 (2d ed. 1860) (similar). The Citizenship Clause expanded the common meaning of "citizen" by ending race-based citizenship: it "forever closed the door on *Dred Scott*". *United States v. Vaello-Madero*, 596 U.S. 159, 174-75 (2022) (Thomas, J., concurring) (cleaned up). But it didn't contract the meaning with new exceptions to birthright citizenship.

The Government's only period dictionary (at 29) ties allegiance to birth within the sovereign's authority in the next sentence that the Government omits, defining "allegiance" to mean "either natural . . . where one is a subject born, or has been naturalized, or local and temporary, during a residence". Wharton, *supra*, at 40. To be born "within the allegiance of the sovereign" was to be "born within the dominions" of the sovereign, and allegiance was automatically "due from all natural born subjects to their sovereign". *Id.* at 509 (defining "natural born subjects" and "natural allegiance"). No state of mind or pledge of allegiance was necessary to be born a subject.

III. Preratification evidence supports citizenship for the children of transient and even criminal aliens.

These dictionary definitions drew from the common law of birthright subjecthood. When the Court assesses historical practice, it looks "primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions." *Kahler v. Kansas*, 589 U.S. 271, 279 (2020); *see also Dobbs*, 597 U.S. at 242 (citing *id.*). Here, the Government concedes that children of transient aliens born in the United Kingdom were subjects. Pet. Br. 40. Authorities from Dyer to Blackstone make that meaning clear.

A. The relevant common-law tradition

Calvin's Case, as reported by Edward Coke, then Chief Justice of the Court of Common Pleas, is the "leading case" at common law, *Wong Kim Ark*, 169 U.S. at 656—and one the Government does not mention. *See Calvin v. Smith (Calvin's Case)*, 77 Eng. Rep. 377, 7 Co. Rep. 1a (K.B. 1608).[2] But the rule that nearly "all persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of[,] the king" predates *Calvin's Case*. 9 W.S. Holdsworth, *A History of English Law* 75 (1926).

Sir James Dyer, Coke's predecessor as Chief Justice, reported several sixteenth century cases on the subject. In concluding that a child born out of wedlock

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[2] *Available at*: https://amesfoundation.law.harvard.edu/lhsemelh/materials/CalvinsCase.pdf (last accessed Feb. 26, 2026).

in Tournai (in present-day Belgium) while under English occupation could own English land, the Queen's Bench analogized to French parents who "come here into England, stay here, and have issue a son; in this case, by his being born here, he is a liege-man, although his father and mother were aliens." 2 James Dyer, *Reports of Cases in the Reigns of Hen. VIII, Edw. VI, Q. Mary & Q. Eliz.* 224a-b (John Vaillant ed. 1794); *see also* Benjamin Keener, Essay, Calvin's Case *and Birthright Citizenship*, 174 U. Pa. L. Rev. Online 17, 25 & n.37 (Nov. 14, 2025).

By contrast, in *Story's Case*, 2 Dy. 300b (Q.B. 1571), a defendant argued that he was "not a subject" of Queen Elizabeth but had allegiance to King Philip of Spain and so could not be tried for treason. *Id.* The report described Story as "notoriously known to be born in England . . . and by this a subject and liegeman of the realm" owing allegiance to the Queen. *Id.* As expatriation was then unknown in England, his birth there made him a subject amenable to judgment. That logic extended to the case of a French alien charged with treason. *See Shirley's Case*, 2 Dy. 144a (Q.B. 1557). The report noted that "the indictment was *against the duty of his allegiance*, when he was not a subject of the realm; but this is of no signification". *Id.* at 145a (emphasis in original). Because England and France were at peace, "to levy war with other English rebels was sufficient treason". *Id.* By contrast, if England and France were at war, "he should not be arraigned, but ransomed." *Id.*

Coke picked up this distinction in *Calvin's Case*, which considered whether a child born in Scotland, after James VI assumed the English throne as James I, was an alien unable to inherit real property. *See* Evan

D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 Geo. L.J. 1, 23-24 (2021). Fourteen justices—"all the King's Bench and Common Pleas justices as well as the Lord Chancellor and barons of the Exchequer"[3]—heard the case, and "all but two" concluded that the child was a natural-born subject who could inherit because he was born within the allegiance of the English Crown.[4] Coke's report called allegiance "an incident inseparable to every subject: for as soon as he is born he owe[s] by birth-right [allegiance] and obedience to his Sovereign." 7 Co. Rep. at 4b. Coke compared the child born in Tournai while "under the obedience of Henry the Eighth" with "an issue born within this realm by aliens"—both were natural subjects. *Id.* at 22b.[5] So the child in *Calvin's Case*, born on land controlled by the English king, had been "naturalized by procreation and birth-right" to subjecthood. *Id.* at 14b; *see also id.* at 27b (natural subjecthood is "due and vested by birthright").

This birthright subjecthood was not limited to the children of domiciled aliens; it extended to the children of aliens whose allegiance was "but momentary and uncertain". *Id.* at 6a. Coke reported "three incidents"

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[3] Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case (1608), 9 Yale L.J. & Humans. 73, 82 (1997).

[4] Bernick, *Antisubjugation*, 110 Geo. L.J. at 23.

[5] To the extent that private papers discern public meaning (and generally they cannot), Coke connected the rationale of subjecthood for the "bastard born at Tournai" to that of an "an issue born in England," for "whoever is born upon the king's land is the king's subject, and whoever is [present] upon any part of the land, even if he is an alien, owes obedience to the king". 6 *Reports from the Notebooks of Edward Coke* 1437 (John Baker ed. 2025).

that together make a subject at birth: "1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth" excluded rule over that dominion by another sovereign. *Id.* at 18a. A child born to transient alien parents in England met that test: they were born "within the King's dominion" when no other sovereign ruled England, and their parents owed temporary allegiance to the King while there. Coke cited the Frenchman from *Shirley's Case* as one example; he was "in amity with the King" and came to England before joining in treason. *Id.* at 6a. Shirley could be prosecuted for treason because he owed "local obedience, that is, so long as he was within the King's protection; which 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.*[6]

Coke's report recognized two exceptions to this rule: ambassadors, whose children were subjects of their home countries under a legal fiction related to diplomatic immunity, and the children born to enemy aliens in occupied English lands. *Id.* at 18a-b. The latter exception applied during a formal time of war declared by the King, for the power to make war belonged "only and wholly to the King, and not to the subject". *Calvin's Case*, 7 Co. Rep. at 25b; *but see* Keener, *supra*

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[6] The report by Lord Chancellor Ellesmere put it likewise: "And he that is born in any of the king's dominions, and under the king's obedience . . . cannot be a stranger or alien to the king". 2 *A Complete Collection of State Trials* 679 (Thomas Bayly Howell ed. 1816).

at 36-37 (discussing "levying war" in lieu of declaration).

The Government's *amici* misread *Perkin Warbeck's Case*, which relates to that latter exception. There, a pretender to the English throne invaded England and was "taken in war" and tried by court martial instead of at common law—unlike the Frenchman tried for treason in *Shirley's Case*. *Calvin's Case*, 7 Co. Rep. at 6b; *contra* Sen. Cruz Br. 6-7. It was not the illegality of Warbeck's actions that distinguished him from Shirley, but that Warbeck landed in England with a militia, raised an army of 8,000, and sieged Exeter. *See* Hannes Kleineke, *Unrest in the West: The Perkin Warbeck Conspiracy*, History of Parliament Blog! (Nov. 23, 2024), *available at*: https://shorturl.at/HsGj8. If *amici* were correct, by contrast, Shirley's treachery should have meant no trial. These cases make clear that only war can defeat amity.

The founding generation knew this tradition through Blackstone, who wrote: "The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such." 1 William Blackstone, *Commentaries* *354, *361-62 (1765); *see also* 1 Timothy Cunningham, *A New and Complete Law Dictionary*, at "Alien" (2d ed. 1771) ("If an alien comes into *England*, and has issue two sons, those two sons are *indigenae* [native], subjects born, because born within the realm."). For the native born, there was "an implied, original, and virtual allegiance, owing [f]rom every subject to his sovereign, antecedently to any express promise". Blackstone, 1 *Commentaries* at *356-57; *see also id.* at *358 (describing the allegiance-for-protection bargain of

subjecthood as "an implied contract"). Blackstone defined natural-born subjects as those "born within the dominions of the crown of England, that is, within . . . the allegiance of the king" and aliens as those "born out of it". *Id.* at *354. Blackstone also endorsed the notion of temporary allegiance, which lasted "for so long" as the alien "continues within the king's dominion". *Id.* at *358.

1. The irrelevant medieval history

This was the common-law understanding from Dyer to Blackstone. Professor Wurman's study of English letters of "safe conduct," by contrast, considers a period too old for constitutional relevance, one that he traces to the 12th century but concedes declined by the 14th. Wurman Br. 11. A "short-lived, 14th-century English practice" is categorically less probative than Coke and Blackstone. *Bruen*, 597 U.S. at 35.

"Safe conduct" was not synonymous with "amity" anyway. Coke mentions that even an enemy alien may come "into the realm by the King's safe conduct". *Calvin's Case*, 7 Co. Rep. at 18a. Safe-conducts were either "expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war" or "general[ly] implied" for those "in amity, league, or truce". 4 Blackstone, *Commentaries* *68 (1769). Matthew Hale dispelled any continuing relevance for safe conduct letters outside wartime, discussing aliens who came "with the queen's protection," which did not change anything because "every foreigner living publicly and trading here is under the king's protection" by the Magna Carta. 1 Matthew Hale, *The History of the Pleas of the Crown* 93 (1736). The Continental Congress shared that understanding, explaining in a 1781 resolution that "safe conducts" were "expressly

granted under the authority of Congress to the subjects of a foreign power in time of war" but those "in amity, league or truce with the United States" are "under a general implied safe conduct". 21 *Journals of the Continental Congress*, *1774-1789*, at 1136 (Gaillard Hunt ed. 1912).

Far from undermining birthright citizenship, safe-conducts are consistent with Coke's wartime exception. In a war, those aliens owed the English king no allegiance, but safe-conducts could change that by extending to enemy aliens the king's temporary protection, in exchange for which they owed temporary allegiance to England. Safe-conducts aren't analogues for modern immigration status, but even if they were, in the United States in 1789, an "implied" safe-conduct "would have covered every citizen or subject of a European state since the United States was not then at war." Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute* 106 Colum. L. Rev. 830, 837 (2006), *cited at* Wurman Br. 14.

B. Early American practice

While some claim that independence changed birthright citizenship (*see, e.g.*, Claremont Br. 17-18), the common-law understanding "was the law of the colonies, and became the law of each and all of the states when the Declaration of Independence was made, and continued so until the establishment of the constitution of the United States", which kept it. 2 James Kent, *Commentaries* 38-39 n.a (6th ed. 1848); *see generally* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 410-16, 437-41 (2020).

1. Colonial era

The Declaration of Rights and Grievances adopted by the Stamp Act Congress explained that the colonists owed "the same allegiance to the Crown of Great-Britain, that is owing from his subjects born within the realm" of Great Britain. *Resolutions of the Continental Congress* (Oct. 19, 1765), *available at*: https://shorturl.at/lSCZx. On the eve of independence, the Continental Congress redefined that allegiance away from the King and toward colonial law, while keeping the general concepts intact:

> That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto[.]

5 *Journals of the Continental Congress* 475 (June 24, 1776).

2. Declaration of Independence

The text of the Declaration itself refutes the suggestion that it departed from the common law to create a parental domicile requirement. *Contra* Claremont Br. 17-18. It criticized George III for limiting the colonial population by "obstructing the Laws for Naturalization of Foreigners". *The Declaration of Independence* (1776). It would make little sense to suppose in this context that the Constitution silently sought to make citizenship harder to come by. That inference

was also rejected by the earliest American court to consider it, which followed the "operative" common-law definition of "aliens" as those born outside the Crown's allegiance to parents who were not English subjects, favorably citing *Calvin's Case*. *Martin v. Brown*, 7 N.J.L. 305, 335-36 (N.J. 1799). Birth *within* the Crown's allegiance—even to parents who were *not* English subjects—*would* make a subject.

3. Constitution in 1789

The Constitution uses "Citizen" throughout. *See, e.g.*, art. I, §§ 2-3; art. II, § 1 ("natural born Citizen"); art. III, § 2; art. IV, § 2. "The term *citizen*, was used in the constitution as a word, the meaning of which was already established and well understood." *Lynch v. Clarke*, 1 Sand. Ch. 583, 656 (N.Y. Ch. 1844). "Natural born," in particular, signaled a continuation of "natural-born subjecthood": the Framers, if not the public, "knew that in English law 'natural born' had a core meaning of birth within sovereign territory". Michael D. Ramsey, *The Original Meaning of "Natural Born"*, 20 U. Pa. J. Const'l L. 199, 245 (2017); *see also Lynch*, 1 Sand. Ch. at 656 ("The only standard which then existed, *of a natural born citizen*, was the rule of the common law, and no different standard has been adopted since." (emphasis in original)).

4. Early statutes

The Constitution also gives Congress the power to create a "uniform Rule of Naturalization". Art. I, § 8, cl. 4. Congress first did so in 1790, providing that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens" unless their fathers had never been U.S. residents. An Act to Establish an Uniform Rule of Naturalization, 1

Stat. 103, 104 (1790) (repealed 1795). If the Government's *amici* were correct that "the citizenship of the child followed the citizenship of his parents", Epstein Br. 13, there would be no need for a statute granting citizenship to children of American citizens. But in the first session of Congress, James Madison called it "an established maxim that birth is a criterion of allegiance", which "derives its force sometimes from place, and sometimes from parentage; but in general, place is the most certain criterion", and place "is what applies in the United States". 1 *Annals of Congress* 404 (1st Sess. 1789) (Joseph Gales ed., 1834).

5. Antebellum cases and commentary

The Court's early cases presupposed citizenship at birth within the United States and that aliens here owe a temporary allegiance to the country, showing that the common-law foundation continued to apply after the Constitution was ratified. *See, e.g.*, *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812) ("When private individuals of one nation spread themselves through another" they "owe temporary and local allegiance" and are "amenable to the jurisdiction of the country."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 119-120 (1804) (being "born within the United States" makes one a citizen and aliens owe "local and temporary allegiance" to countries they enter).

The Government's *amici* try to limit *Gardner v. Ward*, 2 Mass. 236 n.a (1805), as a rule of merely English law because the person at issue was born in Massachusetts in 1747 and "was therefore a British subject" at birth. Claremont Br. 13; *see* Epstein Br. 21, 24-25. But that court was deciding whether he was a U.S. citizen despite leaving the States during the Revolution. Far from rejecting the common law, the court

thought the question was "governed altogether by" it. 2 Mass. at 236 n.a. Justice Sewall's lead opinion considered it "established, with a few exceptions not requiring our present notice, that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born", and that "[b]y this circumstance of his birth, he is subjected to the duty of allegiance" and entitled to "citizenship." *Id.* Justice Sewall traced this "right of citizenship in the native soil" to *Calvin's Case* as "reported by Lord Coke." *Id.* Only later "laws and decrees" in Massachusetts could change that, and the court found none that did. *Id.*

Gardner itself appears in a footnote to *Kilham v. Ward*, a case from the next term that the Government and its *amici* ignore. In *Kilham*, the court reaffirmed that understanding in concluding that a man born in Massachusetts was an American citizen: "The doctrine of the common law is, that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance" is owed to the "sovereign of the territory where the person owing the allegiance was born." 2 Mass. at 264-65 (1806).

The Government instead relies on Justice Story's "reasonable qualification" (at 22) to what he called "public law" to deny birthright citizenship to the children of transient aliens. To begin with, Justice Story recognized the governing rule: "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 v. Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 164 (1830) (Story, J., dis-

senting) (emphasis added). The Government's quotations of this language (at 22, 33) omit the italicized words, which show that even temporary allegiance suffices for the children of transient or criminal aliens to be born subjects. Justice Story's *Commentaries*—which concerned the choice of law between nations, the "public law"—again acknowledged that those "born in a country" "are generally deemed citizens and subjects of that country." *Commentaries on the Conflict of Laws, Foreign and Domestic* § 48 (1834). And in private practice, Story—who apparently argued *Kilham*—contended that "every person born within a realm owes allegiance to the sovereign thereof", which was "fully stated and approved in" *Calvin's Case*. 2 Mass. at 262. Nowhere did Justice Story find that the common law that passed in relevant part to the United States was abrogated to require parental domicile for birthright citizenship.

The leading antebellum case found that Justice Story's qualifications "were certainly unknown to the common law in England, and as established in the United States." *See Lynch*, 1 Sand. Ch. at 678. The Government and its *amici* give New York's Court of Chancery short shrift as "merely a state trial court". Claremont Br. 14; *see also* Pet. Br. 41; Wurman Br. 19-20. But New York's Chancery Court of yesteryear, like Delaware's today, "was one of the pre-eminent courts in the United States."[7]

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[7] *New York Court of Chancery, 1683-1846*, Hist. Soc'y of the N.Y. Courts, https://history.nycourts.gov/court/court-chancery/ (last accessed Feb. 26, 2026); *see also* Bernick, Gowder & Kreis, *supra*, at 111-112 (collecting antebellum sources citing *Lynch*).

In *Lynch*, the Court of Chancery held that a woman "born in this state, of alien parents, during their temporary sojourn" was a citizen. 1 Sand. Ch. at 638. There was "no doubt, but that by the law of the United States, every 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. Besides being widely cited, *Lynch* is persuasive for its original public meaning methodology. The opinion appealed to the "universality of the public sentiment" as "part of the historical evidence" of the law, showing "the strength and depth of the common law principle" and confirming "that the adoption of the Federal Constitution wrought no change in that principle." *Id.* at 664. As for the citizenship of children of transient aliens, "the general understanding of the legal profession, and the universal impression of the public mind . . . is that birth in this country, does of itself constitute citizenship." *Id.* at 663. For "[n]o one asks [a voter] whether his parents were citizens or were foreigners. It is enough that *he was born* here, whatever were the *status* of his parents." *Id.* at 664 (emphasis in original).

As shown above, *Lynch* was not the only antebellum authority to identify this background principle (*contra* Epstein Br. 25-26), but there were more besides:

- "The children of aliens, born in this state, are considered as natural born subjects". 1 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 163, 167 (1795).

- "[E]very person born within the United States . . . whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution". William Rawle, *A View of the Constitution of the United States of America* 86 (2d ed. 1829).
- "Before our Revolution all free persons born within the dominions of the king of Great Britain . . . were native born British subjects—those born out of his allegiance were aliens", and so "all free persons born within the State are born citizens of the State." *State v. Manuel*, 20 N.C. 144, 151 (1838).
- "Natives are all persons born within the jurisdiction and allegiance of the United [S]tates . . . . This is the rule of the common law, without any 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." 2 Kent, *Commentaries* 38-39 n.a.
- "Here is the Great Charter of every human being drawing vital breath upon this soil, whatever may be his condition, and whoever may be his parents. He . . . may be of Caucasian, Jewish, Indian, or Ethiopian race,—he may be of French, German, English, or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear . . . . He is one of the children of the State". Sen. Charles Sumner, *Equality Before the Law* (1849), *reprinted in* 3 *Charles Sumner: His Complete Works* 65-66 (1900).

- "The child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." Horace Binney, *The Alienigenae of the United States under the Present Naturalization Laws* 22 n.* (2d ed. 1853), *quoted in Wong Kim Ark*, 169 U.S. at 665.
- "And as no person born within the jurisdiction can avoid this allegiance. . . . But with th[e] exception [of Tribes], every person born within our territorial limits owes this allegiance, and is constituted a citizen, as an inevitable consequence of his birth". *Op. of the Justices of Supreme Judicial Court*, 44 Me. 505, 1857 Me. LEXIS 151, at *123-24 (1857) (op. of Davis, J.).
- "[A] free white person born in this country, of foreign parents, is a citizen of the United States." 9 Op. Att'y Gen. 373, 374 (July 18, 1859) (Black citing *Lynch*).
- "I am quite clear in the opinion that children born in the United States of alien parents, who have never been naturalized, are native-born citizens of the United States". *Citizenship of Children Born in the United States of Alien Parents*, 10 Op. Att'y Gen. 328 (Sept. 1, 1862) (Bates).

- "All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors . . . and slaves". *United States v. Rhodes*, 27 F. Cas. 785, 789 (Cir. Ct. D. Ky. 1866) (Swayne, J.).

6. Newspapers

Still more public evidence that the common-law rule survived comes from the press. In 1854, *The New York Times* published a letter from Secretary of State William Marcy answering questions about Presidential eligibility. The questions distinguished between a child born "of alien parents, who had not, at the time of his birth, declared their intentions to become citizens of the United States" and the child of parents who had—was either a citizen? William L. Marcy, *Native Sons of Alien Parents*, N.Y. Times 3 (Mar. 20, 1854), *available at*: https://www.nytimes.com/1854/03/20/archives/native-sons-of-alien-parents.html. Marcy rejected that dichotomy, answering "that every person born in the United States must be considered a citizen, notwithstanding one or both of his parents may have been alien at the time of his birth." *Id.* Marcy defined the rule "in conformity with the English Common Law, which law is generally acknowledged in this country". *Id.*

Professor Wurman cites a later letter to the *Times*, but admits that this was promptly rebutted by another

letter. *See* Wurman Br. 24 & n.9. The response[8] duplicated a discussion of Blackstone, Kent, and *Lynch* that appeared in *Lyndon v. Danville*, 28 Vt. 809, 816 (1856), another sign that common-law birthright citizenship remained in public awareness.

IV. The drafting and ratification debates recognized citizenship for children of transient aliens and those unlawfully present.

Repeated statements make clear that members of Congress understood and explained to the public that the 1866 Act and Fourteenth Amendment meant citizenship for children born here of transient or unlawfully present aliens.

A. The Civil Rights Act of 1866

The Reconstruction Congress first drafted and passed the Civil Rights Act of 1866 as it started drafting the Fourteenth Amendment. The 1866 Act used the phrase "not subject to a foreign power," rather than the Fourteenth Amendment's phrase, "subject to the jurisdiction thereof." *Compare* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866), *codified as amended* at 42 U.S.C. §§ 1981-1982 *with* U.S. Const. amend. XIV, § 1. But it was clear that children of transient aliens born in the United States were "not subject to a foreign power." Senator Cowan asked whether Senator Trumbull's proposed language "will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?" *Cong. Globe*, 39th Cong., 1st

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

Sess. 498 (1866). Trumbull replied that it "undoubtedly" would, adding that "the child of an Asiatic is just as much a citizen as the child of a European." *Id.*; *see also* Shugerman, *An Originalist Case*, *supra*, at 25; Ramsey, *Originalism*, *supra* at 453. As explained below, it was a widespread stereotype that many of these immigrants were transient.

B. The debates cited salient anti-immigration laws and transient aliens.

The Government claims (at 29) that there was "little occasion to discuss children of illegal aliens" when Congress turned to the text of the Fourteenth Amendment because federal immigration laws came later. That is doubly incorrect.

First, the concept of "unlawful immigrant" did exist in the 1850s-1860s, most saliently in the legal and political movement against Chinese immigrants and in England's historical exclusions against the Roma people. These "exchanges in 1866 occurred *after* California, Oregon, and the territory of Washington had established anti-Chinese restrictions" creating an unlawful status for Chinese immigrants and "*after* the federal government had criminalized the 'Coolie trade' as an anti-Chinese immigration measure." Shugerman, *An Originalist Case*, *supra*, at 26; *see also* Charles J. McClain, *Chinese Immigrants in the California Supreme Court: The Earliest Civil Cases*, 19 Cal. L. Hist. 73, 96 (2024). Throughout the 1850s and 1860s, Americans portrayed Chinese immigrants as "Coolies," a racist slur implying indentured servitude and allegiance to a Chinese master.

Second, the debates on the Fourteenth Amendment included discussion about these restrictions. With the Citizenship Clause on the floor, Cowan asked if "the

child of the Chinese immigrant in California" or "the child of a Gypsy born in Pennsylvania" were citizens. *Cong. Globe*, 39th Cong., 1st Sess. 2890. Cowan warned that the amendment would let Chinese immigrants "overrun" California and "will double or treble the population". *Id.* at 2891. Cowan also noted California's attempts "to forbid the entrance into her territory" of Chinese immigrants. *Id.* Cowan claimed Roma "wander in gangs" and "have no homes, pretend to own no land, live nowhere, settle as trespassers where ever they go, and whose sole merit is a universal swindle". *Id.*

Senator Conness responded that as for "the children begotten of Chinese parents in California . . . it is proposed to declare that they shall be citizens." *Id.* Linking the amendment to "the proposition contained in the civil rights bill," Conness confirmed that Congress had already declared "that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States". *Id.* He claimed that Chinese persons in California were itinerant and would "return invariably" to China. *Id.* Conness also recognized the restrictive statutes California had enacted to limit Chinese immigration—and while he noted that state courts had held some of them unconstitutional (and referred to the Commerce Clause), the exchange indicated that questions about immigration restrictions were already salient. *See id.* at 2892. No Senator rose to agree with Cowan or dispute what Conness said, and there were no further changes to the Citizenship Clause's language. *See* Shugerman, *An Originalist Case*, *supra*, at 25; Ramsey, *Originalism*, *supra*, at 447-48

Both Cowan and Conness claimed that certain groups of aliens were itinerant and discussed efforts by California to prohibit the entry of Chinese nationals. The categories of transient and unlawful aliens were both discussed, and as both sides recognized, the final text of the Fourteenth Amendment made their children citizens.

C. The Government cherry-picks

For the most part, the Government avoids the 1866 Congressional debates, citing (at 23-24) just two statements: from Representative James Wilson and from Senator Benjamin Wade's draft of the Fourteenth Amendment. Already "an exercise in looking over a crowd and picking out your friends", *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (cleaned up), each example is flawed.

Wilson favorably cited *Manuel*, Blackstone, and Kent in support of the common-law rule, "which claims as a subject every person born within the jurisdiction of the Crown". *Cong. Globe*, 39th Cong., 1st Sess. 1116-17. That principle "applies to this country as well as to England", Wilson said. *Id.* at 1116. As shown above, there was no exception to birthright citizenship at common law for children of "temporary sojourners", whatever Wilson thought. *Contra* Wurman Br. 29; *cf. Gamble v. United States*, 587 U.S. 678, 699 (2019) (Constitution does not codify "a common-law right that existed in legend, not case law").

The Government also overreads Senator Wade's abandoned draft of the Fourteenth Amendment, which had no citizenship clause. In response to the draft, Senator Fessenden asked, "Suppose a person is born here of parents from abroad temporarily in this coun-

try." *Cong. Globe*, 39th Cong., 1st Sess. 2769. Wade responded that his colleague "says a person may be born here and not be a citizen"—but Wade recognized only a narrow exception: "the case of the children of foreign ministers" in the United States under a "fiction of law". *Id.* This "could hardly be applicable to more than two or three or four persons; and it would be best not to alter the law for that case." *Id.* "It would make no difference in the result" to word around that category, Wade said. *Id.* It's difficult to see how the Citizenship Clause reversed that answer. And if there were any conflicting inferences to be drawn from the record, they would just show why "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Heller*, 554 U.S. at 590.

Whatever weight those two statements deserve, others support the broader interpretation. *See, e.g.*, *Cong. Globe*, 39th Cong., 1st Sess. 1757 (Sen. Trumbull: "[E]ven the infant child of a foreigner born in this land is a citizen of the United States long before his father."); *id.* at 1832 (Rep. Lawrence (citing *Lynch*)); *id.* at 2893 (Sen. Johnson: "I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.").

V. The letter and spirit of citizenship mutually reinforce the public meaning.

The plain meaning at the time of ratification, the Reconstruction debates, and the common law history all demonstrate that children of transient aliens or unlawful entrants are citizens. The broader context is uncontested: to repudiate *Dred Scott* and end race-based

citizenship. But under the Government's test, many children of slaves would not have been citizens. The Government's interpretation defies not just the letter of the Fourteenth Amendment, but its spirit—its original, publicly known function.

The trafficking of slaves into the United States was outlawed in 1808. *See* An Act to Prohibit the Importation of Slaves, 2 Stat. 426, § 1 (1807). Yet thousands more were unlawfully taken here afterward. *See* J. David Hacker, *From '20. and odd' to 10 million: The Growth of the Slave Population in the United States*, 41 Slavery & Abolition 840, 846 (2020); *see generally* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation,* 54 U.C. Davis L. Rev. 2215 (2021). They were, through no fault of their own, unlawfully present in the United States, and presumably many wished to return home. But by the Government's logic, that would mean their children weren't citizens by default. The Fourteenth Amendment would have recreated a racial caste where one could be "a citizen to obey, and an alien to demand protection." William Yates, *Rights of Colored Men to Suffrage, Citizenship and Trial by Jury* 37 (Philadelphia: Merrihew & Gunn 1838) (cleaned up). That can't be right.

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After centuries recognizing birthright citizenship for the children of aliens, the Government fashions a new rule from a letter in a box and the same recycled citations that the Court rejected in *Wong Kim Ark*. There's nothing originalist about that. In all but the narrowest brightline exceptions, our Constitution and laws have always recognized that when the children of aliens are born here, each of them is one of us.

CONCLUSION

For all these reasons, the Court should affirm.

Respectfully submitted,

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